1961 *Present :* **Weerasooriya, J.**

KIRIYA *et al.*, Appellants, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 638–639—M. C. Anuradhapura, 22817

Excise offence—Scope of power of police officer to search without a warrant—Excise Ordinance (Cap. 42), ss. 34(1), 37—Police Ordinance (Cap. 43), s. 69—Criminal Procedure Code, ss. 121 (2), 124.

While the effect of section 37 of the Excise Ordinance may be to confer on any police officer investigating an offence under the Excise Ordinance the powers conferred on an officer in charge of a police station by sections 121 (2) and 124 of the Criminal Procedure Code in the investigation of a cognizable offence, such powers cannot be exercised except where there is reasonable or probable cause for doing so.

Accordingly, where a police officer enters a house without a search warrant and removes articles, without a reasonable or probable ground of suspicion that an offence under the Excise Ordinance has been committed, resistance to him does not constitute an offence of obstruction of a public servant in the discharge of his duties.

APPEAL from a judgment of the Magistrate's Court, Anuradhapura.

Colvin R. de Silva, with *Prins Rajasooriya*, for accused-appellants.

J. A. D. de Silva, Crown Counsel, for Attorney-General.

Cur. adv. vult.

August 21, 1961. WEERASOORIYA, J.—

The two accused-appellants have filed these appeals against their convictions on certain charges arising out of an incident which took place in the house of the 2nd accused-appellant on the 16th September, 1960.

According to the case for the prosecution, when Police Constable Nallathamby was out on patrol duty with Police Constable Gunadasa, he received information that the 2nd accused was in possession of an unlicensed gun. The informant, one Seneviratne, and the two constables then proceeded to the house of the 2nd accused. There they met the 3rd accused, who stated that the 2nd accused and his wife, the 5th accused, had gone to Horawapotana. The only other persons in the house were the 6th and 7th accused, a daughter-in-law and daughter, respectively, of the 2nd accused.

The search of the house, which Constable Nallathamby decided to make despite the absence of the 2nd accused, and to which the 3rd, 6th or 7th accused raised no objection, did not, however, result in the

discovery of any gun. In one of the rooms searched there were about fifteen bottles on a rack. and Constable Nallathamby said that from the smell and taste he was able to identify the contents of four of them as unlawfully manufactured arrack. These four bottles he took with him. Three other bottles, which, though empty, he said were smelling " of the same stuff ", he gave in charge of Constable Gunadasa, and both of them came on to the verandah. At this stage the 1st accused, who is the Velvidane of the area, was seen approaching the house of the 2nd accused. Constable Nallathamby requested his help towards a further search of the house, which the 1st accused declined to give, remarking that the Police should have got in touch with him before they came to the 2nd accused's house. The 1st accused then went away, but returned five minutes later with a crowd of about ten others among whom were the 2nd, 4th and 5th accused. The 2nd accused asked the two constables by whose authority they had entered his house, and he abused them and threatened to kill them. The 5th accused was armed with an iron rod. She too joined in the abuse and threats. The bottles were then snatched from the constables by others in the crowd. Constable Nallathamby said that he told the 2nd accused that some of the bottles contained unlawfully manufactured arrack and asked him to come to the Police Station. The 2nd accused then went into the room from where the bottles were taken and came out with a gun for which, it was later ascertained, he had a licence. Pointing the gun at the two constables the 2nd accused, along with the others, confined them in a corner of the verandah where they were forced to remain until some time later, on information given at the Police Station by Seneviratne, a police party came and rescued them.

On these facts which the prosecution set out to establish, no less than sixteen charges were preferred against each of the 1st to the 7th accused at the trial, fourteen of which, including charges of unlawful assembly, were based on the allegation of obstruction caused to Constables Nallathamby and Gunadasa in the discharge of their public functions. Seven of the fourteen charges related to the obstruction of Constable Nallathamby, while seven other charges alleged the commission of the same offences in respect of the obstruction of Constable Gunadasa. The remaining two charges were of wrongful confinement of Nallathamby and Gunadasa respectively.

On the 16th November, 1960, a report in terms of section 148 (1) (*b*) of the Criminal Procedure Code containing these sixteen charges was filed in Court ; and on the 28th December, 1960, the Magistrate, after recording in a very condensed form the evidence of Constable Nallathamby, decided to assume jurisdiction under section 152 (3) of the Criminal Procedure Code as he was satisfied that no complicated points of law or facts arose in the case. This conclusion he appears to have arrived at regardless of the formidable array of charges set out in the report. After a lengthy trial all the accused except the 6th were found guilty on charges 1, 3 and 5–9 as set out in the charge sheet. The 1st and

2nd accused were sentenced to terms of imprisonment. The 3rd, 4th, 5th and 7th accused, who have not appealed, were each ordered to enter into a bond to be of good behaviour and to pay Rs. 25 as Crown costs.

As stated earlier, fourteen of the charges were based on the alleged obstruction of either Constable Nallathamby or Constable Gunadasa in the discharge of his public functions. These public functions are specified in the charges as " apprehending an accused and productions in an excisable offence ". The reference to an accused whose apprehension was obstructed could be to no other than the 2nd accused. There is not a word of evidence, however, that either of the constables intended or attempted to take the 2nd accused into custody. The only evidence which has any bearing on this point is the following evidence of Constable Nallathamby : " I asked the 2nd accused to go to the Police Station as I had detected some bottles of U. M. A. in his house. The 2nd accused said that he could not allow us to go away." This evidence is, in my opinion, quite inadequate to sustain the allegation that any obstruction was caused to the police officers in the apprehension of the 2nd accused.

As regards the allegation of obstruction caused to them in " apprehending . . . . productions in an excisable offence ", this would appear to refer to the forcible removal of the seven bottles from their custody. The evidence of Constables Nallathamby and Gunadasa, which the Magistrate accepted, establishes that the bottles were snatched from their hands by some of the accused and others in the crowd. The question that arises is whether the constables were acting within the law when they took the bottles into their custody in the first instance. Their action in removing these articles from the 2nd accused's house without a warrant cannot for a moment be countenanced in the absence of any express legal provision conferring power to do so. Neither section 34 (1) of the Excise Ordinance (Cap. 42) nor section 69 of the Police Ordinance (Cap. 43) confers such a power. Section 37 of the Excise Ordinance provides that the provisions of the Criminal Procedure Code relating *inter alia* to the investigation of offences shall be applicable to action taken in that respect under the Excise Ordinance. Section 121 (2) of the Criminal Procedure Code empowers an officer in charge of a police station, in the investigation of a cognizable offence, to take such measures as may be necessary for the discovery and arrest of the offender. The power conferred by section 121 (2) would, by implication, include a power to take into custody any article which furnishes evidence of the commission of the offence which is the subject of investigation. See also section 124 of the Criminal Procedure Code. While the effect of section 37 of the Excise Ordinance may be to confer on any police officer investigating an offence under the Excise Ordinance, the powers conferred on an officer in charge of a police station by sections 121 (2) and 124 of the Criminal Procedure Code in the investigation of a cognizable offence, it is clear that such powers cannot be exercised except where there is reasonable or probable cause for doing so.

According to Constable Nallathamby, he decided to take the seven bottles into his custody as he identified unlawfully manufactured arrack in four of them and also as the other three bottles, though empty, smelt "of the same stuff". The only qualification claimed by him for his purported ability to identify unlawfully manufactured arrack is that during his sixteen years of service in the police force he had "detected over ten cases of unlawfully manufactured liquor". What he meant by the use of the word "detected" in that context is by no means clear. I do not see how on this vague statement he can be regarded as in any way competent to express an opinion that the bottles contained unlawfully manufactured arrack.

It is to be noted that according to Sub-Inspector Navaratnarajah, when he learnt that the two constables were confined in the house of the 2nd accused and he went there with a police party, Constable Nallathamby complained that in the course of a search of the 2nd accused's house in order to check up on information regarding an unlicensed gun, "he recovered some unlawfully manufactured distilled spirits and that he was obstructed". Even on the 28th December, 1960, when the Magistrate recorded evidence in order to decide whether he should assume jurisdiction to try the case summarily, the position of Constable Nallathamby continued to be that the four bottles contained unlawfully distilled spirits. But after the trial commenced on the 29th March, 1961, the contents seem to have undergone a change, for Constable Nallathamby, in giving evidence on that day, described them as unlawfully manufactured arrack. Even a bottle referred to in the list of productions in the report to Court filed on 16th November, 1960, as containing unlawfully distilled spirits became, when produced in evidence as P6, a bottle of unlawfully manufactured arrack which Sub-Inspector Samarasingne said he found in the rear compound of the 2nd accused's house.

Unlawfully manufactured arrack is, no doubt, a species of unlawfully distilled spirits. Nevertheless, I am unable to regard this change in the description of the contents of the bottles as of no significance. It must have been obvious to those in charge of the prosecution that had the trial proceeded on the basis that the bottles contained unlawfully distilled spirits, the case against the accused was as good as lost without a report from a competent scientific expert as to the precise nature of those spirits. Hence it became necessary for Constable Nallathamby to fill the breach by stating that the bottles contained unlawfully manufactured arrack. No explanation has been offered as to why, if on first contact with the four bottles he identified unlawfully manufactured arrack in them, the contents were not so described originally. Nor has any explanation been given as to why, during the several months that elapsed between the 16th September, 1960, and the 29th March, 1961, when the trial commenced, the bottle P6 was not sent to the Government Analyst's Department for a report as to its contents.

The learned Magistrate has failed to consider the vital question whether the action of Constables Nallathamby and Gunadasa, in attempting to remove the bottles from the house of the 2nd accused, was lawful or not, or even Constable Nallathamby's competence to identify the contents of four of the bottles as unlawfully manufactured arrack. The bare statement in the judgment that the Magistrate accepted the evidence of the two constables is, therefore, of little assistance to this Court. The evidence relating to the finding of four bottles of unlawfully manufactured arrack in the 2nd accused's house is so unconvincing that, in my opinion, it cannot safely be acted upon as constituting a reasonable or probable ground of suspicion that an offence under the Excise Ordinance had been committed which called for investigation by Constable Nallathamby. In the result, the prosecution has failed to show that he and Constable Gunadasa were acting lawfully when they attempted to remove the bottles from the house of the 2nd accused, or that any obstruction caused to them in their attempt to do so was with intent to prevent or deter them from discharging their duties as public servants. Charges 1, 3 and 5–9, in respect of which all the accused except the 6th accused were found guilty have, therefore, not been established.

Charges 7 and 8 allege that in prosecution of the common object of the unlawful assembly the offences of wrongful confinement of Constables Nallathamby and Gunadasa, respectively, were committed by one or more members of the unlawful assembly. Learned Crown Counsel submitted that even on the view that the two constables were not acting within the law in attempting to remove the bottles from the house of the 2nd accused, the evidence disclosed the commission by the appellants of the offences of wrongful confinement of the constables, and that they should be convicted of those offences. I do not think that there is any clear evidence implicating the 1st accused in the commission of those offences. As against the 2nd accused, however, there is specific evidence that he took a leading part in the confinement of the two constables. Even if the unwarranted behaviour of the two constables gave rise to a limited right of private defence of property, in the exercise of which the 2nd accused may claim to have acted, there can be no doubt that the confinement of the constables went far beyond the needs of the situation. There is evidence, therefore, on which he could have been convicted of the offences of having wrongfully confined them. But these same offences were set out in charges 13 and 14, and the 2nd accused was acquitted of them by the Magistrate. No appeal having been filed against the verdict of acquittal, I do not think that I have the power at the hearing of the present appeal to reverse that verdict, which is what I should virtually be doing even if I purported to convict the 2nd accused, under charges 7 and 8, of the minor offences (in relation to the offences set out in those charges) of wrongful confinement of Constables Nallathamby and Gunadasa.

The appeals of the 1st and 2nd accused are allowed. Their convictions and sentences are set aside and they are acquitted. Acting in revision I set aside the orders calling upon each of the 3rd, 4th, 5th and 7th

accused to enter into a bond to be of good behaviour and to pay a sum of Rs. 25 as Crown costs, and I acquit those accused as well. Any bond already entered into in terms of the Magistrate's order will be declared cancelled, and the sum of Rs. 25 if paid will be refunded.

Appeals allowed.