

1948

Present : Basnayake J.

APPUSINGHO *et al.*, Appellants, and VAN BUREN (Excise Inspector), Respondent.

S. C. 911-914—M. C. Chilaw, 33,861.

Penal Code, sections 183, 220A, 344—Obstruction to Public Servant—Arrest without warrant—Record of grounds of belief—Condition precedent—Poisons, Opium and Dangerous Drugs Ordinance, section 75.

An Excise officer has no power to arrest a person who commits an offence under the Poisons, Opium and Dangerous Drugs Ordinance unless he either has a warrant or makes the record specified by section 75 (2) of that Ordinance. An arrest otherwise made is illegal and resistance to it is not an offence.

A PPEAL from a judgment of the Magistrate, Chilaw.

G. E. Chitty, with *Cecil Wijeratne*, for the accused, appellants.

V. T. Thamotheram, *Crown Counsel*, for the Attorney-General.

Cur. adv. vult.

March 24, 1948. BASNAYAKE J.—

The four accused-appellants were tried and convicted of offences punishable under sections 183, 220A and 344 of the Penal Code. The first and fourth appellants were each fined Rs. 50 under section 220A, the second and third appellants were each fined Rs. 25 in respect of the offence punishable under section 183 and Rs. 25 in respect of the offence punishable under section 344.

It appears from the evidence of Excise Inspector Van Buren that on March 11, 1947, at about midday he arrested the fourth appellant, who runs a bicycle repairing business, on a charge of selling ganja, and took him to the adjoining premises as he intended to search it. There he met the third appellant, whom he searched, but found nothing on him. The first and second appellants arrived while the Excise guards who accompanied the Excise Inspector were searching the house. Meanwhile the Excise Inspector had sealed the ganja he found in the possession of the fourth appellant, and when he asked him to place his thumb impression on the sealed packet the first, second and third appellants told him not to do so, whereupon the fourth appellant refused to place his thumb impression. Next the Excise Inspector asked the fourth appellant to sign a bail bond. Again the other three appellants forbade him to sign it, and he refused to sign. He was then asked to accompany the Excise Inspector to the Police Station. He took him by his hand and was leading him towards his car, when the first appellant seized him by his waist and pulled him away, saying he would not allow the fourth appellant to be taken away. The second and third appellants gripped the Excise Inspector's hands and released his hold on the fourth appellant, who was himself doing all he could to release himself. Having freed the fourth appellant the first, second and third appellants were taking him to a room of the house, when three of the guards attempted to prevent it. The

appellants then appealed for help to the bystanders of whom there were about fifty. They then rushed in to their aid. The Inspector and his guards withdrew fearing that if they persisted in their efforts to take the fourth appellant away the crowd might turn against them, and they left the scene and lodged a complaint at the Marawila Police Station.

The Excise Inspector's evidence was not challenged nor was the evidence of the Excise Guard David. The appellants did not give evidence or call any witnesses. It is submitted by counsel for the appellants that the Excise Inspector had no power to arrest the fourth appellant and hence the appellants have not committed the offences alleged against them. I am of opinion that the counsel's submission is entitled to succeed. The powers of search and arrest in regard to offences relating to dangerous drugs are to be found in section 75 of the Poisons, Opium and Dangerous Drugs Ordinance (hereinafter referred to as the Ordinance). Under that provision an Excise Inspector has ordinarily no power to search any premises or arrest any person committing any offence thereunder except under the authority of a search warrant given under sub-section (1). But where a search warrant cannot be obtained under sub-section (1) without affording the offender an opportunity of escape or of concealing evidence of the offence, he may after recording the grounds of his belief, and at any time within the next twelve hours, exercise all or any of the powers conferred on him by that sub-section. In the present case there was neither a search warrant under section 75 (1) of the Ordinance nor did the Excise Inspector make the record prescribed by section 75 (2). That record is a condition precedent to a search or arrest without a warrant, and a search or arrest made without that record is illegal.

I shall now consider each of the offences alleged against the appellants in their order. The first charge is that they did voluntarily obstruct a public servant, to wit, H. L. Van Buren, Excise Inspector, in the discharge of his public functions and thereby committed an offence punishable under section 183 of the Penal Code. The appellants are clearly not guilty of this offence as Excise Inspector Van Buren's action was illegal. A public servant who does an illegal act cannot be said to be discharging his public functions in doing that act. The second charge is that the first three appellants did use criminal force on Excise Inspector Van Buren, a public servant, in the execution of his duty as such public servant in apprehending the fourth appellant and thereby committed an offence under section 344 of the Penal Code. As I observed earlier, the Excise Inspector was not lawfully executing his duty as a public servant in apprehending the fourth appellant, and the act of the first three appellants does not therefore fall within the ambit of the section under which they are charged.

The last charge is that the first three appellants did intentionally rescue the fourth from the lawful custody of H. L. Van Buren, Excise Inspector, and thereby committed an offence punishable under section 220A of the Penal Code. The allegation in the charge that the fourth appellant was in lawful custody is ill-founded. He was

under unlawful arrest, and the first three appellants cannot be punished under section 220A, for that section penalises only the act of rescuing from lawful custody. I do not propose to discuss the other submissions of learned counsel as it is unnecessary to do so. It appears from the reasons of the learned Magistrate that the Excise Inspector relied on section 34 of the Excise Ordinance. That section applies only to offences punishable under sections 43 and 44 of the Excise Ordinance and is of no avail in regard to offences under the Ordinance relating to dangerous drugs.

It is not inappropriate to repeat the words of Lord Simonds in the case of *Christie and another v. Leachinsky*¹. “. . . it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful”. Again at page 576 he says “My Lords, the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other. This case will have served a useful purpose if it enables your Lordships once more to proclaim that a man is not to be deprived of his liberty except in due course and process of law”. The liberty of the subject is equally prized here as in England and the words I have quoted from the judgment of the House of Lords may serve to impress on officers such as the Excise Inspector in this case that a citizen should not be deprived of his liberty except in due course and process of law. Requirements such as are prescribed by section 75 (2) of this Ordinance should be meticulously observed.

The convictions are quashed and the appellants are acquitted.

Accused acquitted.