

1930.

*Present: Jayewardene A.J.*FERNANDO *v.* ANDRAYAS.

321—P. C. Galle, 39,164.

*Decoy—Excise Ordinance—Charge of selling arrack without a licence—
Uncorroborated testimony of decoy.*

In a charge of selling arrack without a licence it would not be safe to convict on the uncorroborated testimony of a decoy.

A PPEAL from a conviction by the Police Magistrate of Galle.

Abeyewardene, for accused, appellant.

Crossette Thambiah, C.C., for Crown, respondent.

June 4, 1930. JAYEWARDENE A.J.—

The accused was charged with selling arrack without a licence and convicted, and sentenced to pay a fine of Rs. 250, and also to undergo six weeks' imprisonment. The evidence for the prosecution consists of that of the excise inspector and Harmanis, a decoy. As regards the actual sale there is only the evidence of the decoy. He states that the inspector gave him a rupee-note at the Excise Station and told him to go to the accused's house at China Garden and to drink arrack. He says that he went as ordered and bought Re. 1 worth of arrack and had two drinks, giving the money to the accused. The excise party rushed in and seized the accused. The accused was searched and Rs. 2.38 was found, including the rupee given by the inspector. He says that the inspector found three bottles of arrack in the room adjoining the one in which he was. The inspector states that he searched Harmanis before sending him on this errand and handed him a rupee-note, No. H/56 18593, and told him to go to accused's house and to keep on drinking till the inspector arrived. He went along with four excise guards by car, stopped his car opposite accused's house, and rushed into the house. He saw Harmanis in the first room, and accused rushed to the second room, and he caught the accused there. He found Rs. 2.38 in his waist, including the rupee sent by him. He found an unopened bottle and a bottle with two drams near a packing case. The excise guard, Baby Singho, found an empty bottle smelling of arrack.

In his defence the accused stated that he was leaning against a street lamp-post when the inspector came in a car and arrested him and took him to Magalla Excise Station. He denied that the inspector came inside his house at all. He says that this excise inspector raided his house unsuccessfully in August, 1929, and he petitioned against the inspector, and inspector had threatened to

come again. The accused called two witnesses, D. W. Waidyaratne, who is a superintendent of school works, Galle, says that he saw the accused leaning against a lamp-post and talking to some one. This witness went about 100 feet and noticed the glare of a car light and got on to a side. He looked back as the car did not appear to move. The car passed him and he heard a man crying out that he had been done an injustice. The accused came to him that very night at about 10.30 P.M. and told him what had happened and wanted him to give evidence. He says that about five minutes elapsed between his noticing the glare of the car lamp and the car passing him. W. Goonetilleke is a retired police sergeant. He says that he saw the accused leaning against a lamp-post and talking to a man when a car came and halted and the excise party got down and held the accused and took him to the car. He says that they did not go inside the accused's house. The learned Magistrate does not think that Goonetilleke is speaking the truth but he seems to accept the evidence of Waidyaratne. There is no reason to disbelieve this witness, apparently a person of some status and respectability. The Magistrate attempts to reconcile the evidence of this witness with the statements of the inspector and Harmanis. He says that probably the accused after serving the drinks went towards the road to see if any suspicious persons were about, and seeing the inspector's car coming he rushed into the room to conceal the bottles. He thinks that Waidyaratne saw the accused leaning against the post when he was "thus watching on the road after the drink was served." In the first place I fail to see what there was to watch after the drinks were sold. It would have been safer to conceal the bottles at once, rather than to come out to the street to watch. To my mind the statements of the inspector and Harmanis on the one side and Waidyaratne on the other are irreconcilable. Harmanis says that the accused went inside the house with the money and the arrack was brought from the adjoining room, and that the accused wanted to rush away when the excise party rushed in. There was no hint in his evidence that the accused at any time left the house and was leaning against a lamp-post talking to some one as stated by Waidyaratne. The inspector says that he stopped his car opposite the accused's house and rushed inside the house. He saw Harmanis in the first room, and accused rushed to the second room, apparently from the first room, where Harmanis was, and he caught the accused there. There is no suggestion that the accused rushed into his house from the street. The inspector and his guards would probably by the car lights have seen the accused rush in from the street, if he did so. The accused gave evidence and was cross-examined, but was asked no question to suggest that he was in the street when the car arrived.

The inspector says that he handed this rupee-note to Harmanis, but he does not say that he made any note of its numbers. He

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1930 seems merely to rely on his memory. The case has to rest entirely
JAYEWAR- on the evidence of the decoy. A person should not be convicted
DENE A.J. on the uncorroborated testimony of a decoy (*Caldera v. Pedrick* ¹).
Fernando v. As in that case, the bottles smelling of arrack, and the one with two
Andrayas drams, and the unopened bottle may have been easily introduced
even if they were found in accused's house. There are several
elements of doubt in this case and it would be unsafe to convict
the accused.

I set aside the conviction and acquit the accused.

Set aside.

