1956 *Present :* T. S. Fernando, J.

G. VERONICA, Appellant, *and* W. A. N. PERERA (S. I. Police), Respondent

S. C. 586—M. C. Gampaha, 28,273

Excise Ordinance (Cap. 42)—Section 51 (2)—Order of confiscation thereunder—Quantum of evidence to justify such order.

A vehicle in which an excisable article was transported is liable to be confiscated under section 51 (2) of the Excise Ordinance if there is evidence of circumstances showing that the owner was aware of the purpose for which the car was being used and acquiesced in its use for that purpose. The failure of the owner to give evidence explaining such circumstances would raise a very strong presumption of guilt against him.

APPEAL from an order of the Magistrate's Court, Gampaha.

E. A. G. de Silva, for the party noticed-appellant.

B. E. de Silva, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 21, 1956. T. S. FERNANDO, J.—

On January 19, 1956, the complainant sub-inspector of Police charged four persons (1) Edwin, (2) Jayasena, (3) Ekmon and (4) Thomas *alias* Darlin in the Magistrate's Court of Gampaha in case No. 28,273 with the

unlawful possession and transport of an excisable article, to wit, 192 drams of fermented toddy, the equivalent of four gallons. Upon the 1st accused Edwin and the 3rd accused Ekmon pleading guilty to the charges, the complainant withdrew the charges against the 2nd and 4th accused, and they were therefore discharged.

At the time of the detection of the offences referred to above, the toddy was being transported in motor car No. X 4635. The complainant on January 20, 1956, moved in the Magistrate's Court that notice be issued on the appellant, who is the registered owner of the car, to show cause why the car should not be confiscated under the provisions of section 51 (2) of the Excise Ordinance. After notice had been served on her, the appellant appeared in court on January 30, 1956, and stated that she had cause to show. On the same day she was allowed to remove the car which was then in the court's custody on her furnishing security to enable her to have the car licensed for purposes of hiring. It is not clear why she was permitted to get the car so licensed before the question of confiscation was determined. On February 27, 1956, the appellant appeared in court and " gave an undertaking to sell the car and produce proof of sale in court ". It is not clear why such an undertaking was demanded or given.

This same car was again seized on February 28, 1956, while it was transporting fermented toddy. On this occasion there were in it 8½ gallons of toddy and it was being driven by a man called Abraham. On March 26, 1956, the Magistrate issued a notice also on Thomas *alias* Darlin, the discharged 4th accused in case No. 28,273, and husband of the appellant, to show cause why the car should not be confiscated. This step appears to have been taken by the Magistrate on the basis that Thomas *alias* Darlin is the reputed owner of the car.

The driver Abraham was prosecuted in case No. 28,940 on a charge of unlawful transport of toddy and he pleaded guilty to the charge. When the appellant and her husband appeared in court to show cause against the proposed order of confiscation of the car, they were represented by counsel, and the Police led evidence on May 2, 1956, relating to the circumstances in which the car came to be seized on January 17th and again on February 28th. It was established that the husband of the appellant was in the car when it was seized on January 17th at the time it was carrying 4 gallons of toddy. The Police also called at the inquiry Abraham, the driver of the car on February 28th, who stated that it was the appellant's husband who put the 8½ gallons of toddy in the car. He stated further that a conversation took place at the house of the appellant, in the presence of the appellant, in the course of which the appellant's husband and he discussed the arrangements in regard to the transport of the toddy.

At the conclusion of this evidence, the learned Magistrate again called upon the appellant and her husband to show cause why the car should not be confiscated. Counsel on their behalf stated to court that they were not giving evidence nor calling any witnesses on their behalf. The learned Magistrate, holding that there is evidence that both the appellant

and her husband are the owners of the car, made order on May 10, 1956, confiscating the car. The appellant has appealed against this order. Her husband not being the legal or registered owner of the car has, logically enough, not taken any step to prefer an appeal.

On behalf of the appellant, counsel appearing before me has contended that the learned Magistrate has irregularly admitted evidence relating to the facts surrounding the seizure of the car on the second occasion, viz., on February 28, 1956. There would have been some force in this contention had not the learned Magistrate called upon the appellant to show cause after the evidence relating to the second seizure had been elicited in her presence. Her counsel cross-examined both witnesses who gave evidence of the facts surrounding the second seizure, and if, as is now contended, she came to court on May 2nd, 1956, only to meet a charge that she was implicated in the offence committed on January 17, 1956, and was unprepared to meet the additional charge, she could have applied for a postponement to enable her to meet this additional charge. She did not make any such application and I am not prepared to say she had no notice of the further allegation especially as she must have known that the car released to her on a certain undertaking had again been seized by the Police on February 28th when it was transporting toddy.

It has also been contended that, although the appellant is the registered owner, the Police have not been able to establish that she was in any way implicated in the offence of unlawful transport of toddy either on January 17 or on February 28, 1956. I was referred in this connection to the judgment of Schneider J. in *Sinnetamby v. Ramalingam* [1]. While this judgment lays down the correct test to be employed in making an order of confiscation under section 51 (2) of the Excise Ordinance, I would like to refer to the following observations of Lyall-Grant J. in the unreported case of *Dissanayake v. Velupillai Sanmugam et al* [2], which appear to be peculiarly appropriate to the case now before me :—

> " The real question, as pointed out by Schneider J. in *Sinnetamby v. Ramalingam*, is whether the owner was a willing party to the offence, whether he knew that his car was being used for this purpose and acquiesced in its use . . . . It was argued that there is no direct evidence against the owner, but in cases of this sort, it is possible for very strong presumptions to arise which can only be defeated by a clear and candid statement. "

Even if the facts surrounding each of the seizures of this car are considered separately, it will be difficult to resist the conclusion that the appellant was aware of the purpose for which the car was being used each day and acquiesced in its use for that purpose. We find that on January 17th the appellant's husband was in the car of which the appellant is the registered owner at a time when it was unlawfully transporting toddy. If her husband was transporting toddy without her knowledge or was using the car for a purpose of his own after obtaining it from her for use

[1] *(1924) 26 N. L. R. 371.*
[2] *(1930) S. C. No. 213—P. C. Mullaitivu 10,714—S. C. Minutes of May 16, 1930.*

for some other purpose, what difficulty lay in her way in testifying to that effect in court ? Her failure to give any evidence suggesting that she was innocent of any unlawful purpose for which her car was being used entitles one to presume that she could not truthfully say so. Even if the learned Magistrate had not before him evidence relating to the circumstances of the second seizure, I am not prepared to say that a confiscation of the car would have been unjustified. In regard to the seizure on February 28th, the learned Magistrate has after careful scrutiny accepted the evidence of the driver Abraham. It follows from an acceptance of this evidence that not only was toddy being transported in the car on that day at the instance of the husband of the appellant, but that such transporting was with the knowledge and acquiescence of the appellant herself. In these circumstances there is no good reason for this Court to interfere with the order of confiscation that has been made and I dismiss the appeal.

Appeal dismissed.