1960 *Present :* **Basnayake, C.J., H. N. G. Fernando, J., and Sinnetamby, J.**

WADOOD, Appellant, *and* FERNANDO (Chief Preventive Officer), Respondent

S. C. 530—M. C. Avissawella, 32341

Excise Ordinance (Cap. 42)—Section 55—" Medical practitioner "—Applicability of expression to an indigenous medical practitioner—Indigenous Medicine Ordinance, No. 17 of 1941, s. 8—Medical Ordinance, ss. 32, 35, 68.

An indigenous medical practitioner who is not registered as a medical practitioner under the Medical Ordinance is not a " medical practitioner " within the ambit of that expression in section 55 of the Excise Ordinance.

Wadood v. Cooray (1956) 58 N. L. R. 234, overruled.

APPEAL from a judgment of the Magistrate's Court, Avissawella. This appeal was referred to a Bench of three Judges under section 48A of the Courts Ordinance.

Colvin R. de Silva, with *M. L. de Silva* and *A. C. M. Uvais*, for Accused-Appellant.

Ananda Pereira, Senior Crown Counsel, with *V. S. A. Pullenayegum*, Crown Counsel, for Attorney-General.

Cur. adv. vult.

April 8, 1960. BASNAYAKE, C.J.—

The question for decision on this appeal is whether a registered indigenous medical practitioner is a " medical practitioner " within the meaning of that expression in section 55 of the Excise Ordinance. This appeal first came up for hearing before my brother Sinnetamby, but as there was a conflict between the case of *Wadood v. Cooray*[1] on the one side and the cases of *Kone v. Illukkumbura*[2] and *Bulathsinhala v. Fernando*[3] on the other, he reserved the question under section 48 of the Courts Ordinance for the decision of more than one Judge of this Court and I made order under section 48A constituting the present bench for the hearing of the matter.

The appellant Ahamed Jalal Hadjiar Abdul Wadood is an indigenous medical practitioner registered in the Medical Register of Practitioners of Indigenous Medicine under section 8 of Ordinance No. 17 of 1941 and is described in the certificate of registration as an Ayurveda Waidya. He is not a medical practitioner registered under the Medical Ordinance. The charge against him is that he was in possession of an excisable article, popularly known as " Top ", which has been unlawfully manufactured, and that he thereby committed an offence under section 44 of the Excise Ordinance. It is not disputed that the liquid in the bottles found in the appellant's house came within the ambit of the expression " excisable article ", but it is claimed that it is a bona fide medicated article, belonging to the class of Ayurvedic medicines called Arishtayas, meant to be sold for medicinal purposes. In support of that claim a book of Ayurvedic prescriptions has been produced to show that the liquid is an Arishtaya called Dhraksharishtaya. The appellant stated that the alcohol found in the liquid though not one of the ingredients in the prescription was added as a preservative. The appellant claimed the benefit of the exception in section 55 of the Excise Ordinance. That section declares that " nothing in the foregoing provisions of this Ordinance applies to the import, manufacture, possession, sale, or supply of any bona fide medicated article for medicinal purposes by medical practitioners, chemists, druggists, pharmacists, apothecaries or keepers of dispensaries ". It is therefore not an offence for a " medical practitioner " to possess without a licence for medicinal purposes a bona fide medicated article which comes within the ambit of the expression " excisable article " as defined in the Excise Ordinance. Now, who is

[1] *(1956) 58 N. L. R. 234.* [2] *(1956) 58 N. L. R. 377.*
[3] *(1958) 60 N. L. R. 428.*

a medical practitioner ? That expression is defined in section 68 of the Medical Ordinance thus : " medical practitioner means a person registered as a medical practitioner under this Ordinance ". The persons entitled to be registered as medical practitioners under that Ordinance are described in section 32 which provides :

" (1) No person shall be registered as a medical practitioner unless he is of good character, and either—

(*a*) is registered or qualified to be registered under the Medical Acts ; or

(*b*) holds a diploma in medicine and surgery issued by the College Council. "

The appellant does not claim that he is entitled to be registered under the Medical Ordinance ; but he claims that by reason of his being an Ayurveda Waidya he comes within the ambit of the expression " medical practitioner " in section 55 of the Excise Ordinance. The expression " medical practitioner " in the Excise Ordinance has been the subject of interpretation in the case of *Amerasekera v. Lebbe*[1]. The majority of the bench of three Judges in that case held that a Vedarala was not a medical practitioner within the meaning of that expression in the Excise Ordinance. Any doubt or difficulty that may have existed at the time of the decision of that case has been set at rest by section 35 of the Medical Ordinance which was enacted in 1927. That section provides :

" In any written law, whether passed or made *before* or *after* the commencement of this Ordinance, the words ' legally qualified medical practitioner ' or ' duly qualified medical practitioner ' or ' registered medical practitioner ' or any words importing a person recognized by law as a practitioner in medicine or surgery shall be construed as meaning a medical practitioner registered under this Ordinance ".

Although the corresponding enactment in force at the time of the decision of *Amerasekera's* case (*supra*) contained a section (s. 9) which had the same effect, it was not couched in such clear and unmistakable language as section 35. Therefore the expression " medical practitioner " in the Excise Ordinance can only mean a medical practitioner registered under the Medical Ordinance.

An indigenous medical practitioner who is not registered as a medical practitioner under the Medical Ordinance is therefore not a " medical practitioner " within the ambit of that expression in section 55 of the Excise Ordinance. The case of *Wadood v. Cooray* (*supra*) has therefore been wrongly decided. We approve the decisions in *Kone v. Illukkumbura* (*supra*) and *Bulathsinhala v. Fernando* (*supra*). The appellant has been sentenced to pay a fine of Rs. 600 and in default to undergo six months' rigorous imprisonment.

It was urged on his behalf that in view of the fact that in *Wadood v. Cooray* (*supra*) this very appellant was acquitted in appeal on a similar charge, the punishment imposed by the learned Magistrate should be

[1] *(1914) 17 N. L. R. 321.*

mitigated as the appellant acted thereafter in the honest belief that it was not an offence to manufacture Arishtayas and sell them to his patients. We think that this submission is not without merit. We accordingly reduce the fine from Rs. 600 to a nominal sum of Rs. 5, in default seven days' simple imprisonment.

Subject to the variation in the sentence the appeal is dismissed.

H. N. G. FERNANDO, J.—I agree.

SINNETAMBY, J.—

Having listened to further and fuller argument on the subject and having considered the judgment of my brother T. S. Fernando, J. in *Bulathsinghala v. Fernando*[1], I agree that the opinion expressed in *Wadood v. Cooray*[2] is untenable. I am now of the view that the authoritative nature of the decision by the Divisional Bench in *Amerasekera v. Lebbe*[3] has not been affected by the enactment of the Indigenous Medical Ordinance, No. 17 of 1941.

I accordingly agree with my Lord the Chief Justice that the term " medical practitioner " as used in Section 55 of the Excise Ordinance must be restricted to persons registered under the Medical Ordinance.

Appeal mainly dismissed.