

1913.

Present: Pereira J.

ABEYGOONESEKERA v. SWARIS APPU.

222—P. C. Negombo, 18,945.

“Excise officer”—Ordinance No. 8 of 1912—Punishment.

An officer or other person appointed or invested with powers under section 7 of the Excise Ordinance, No. 8 of 1912, is an excise officer in terms of the interpretation clause of the Ordinance, however limited his powers may be, and it is competent to such an officer or person to institute a prosecution under section 43.

It is improper to give effect to a mere conjecture that a fine if imposed will be paid by some person other than the accused, who is interested in the defence, and on that footing to impose a fine. (in addition to imprisonment) that otherwise would not have been imposed. The punishment by way of fine should be commensurate with the nature of the offence and the circumstances of the individual offender.

THE facts appear from the judgment.

Aserappa, for the accused, appellant.—The Magistrate had no jurisdiction to entertain the complaint, as the prosecution was not initiated by an excise officer as provided by section 49 of Ordinance No. 8 of 1912. The object of the section being to restrict prosecutions, the term “excise officer” in section 49 should be taken to

¹ (1902) 5 N. L. R. 322, see p. 325.

mean a person who has been appointed to perform excise duties only, and has been invested with full power to report offences punishable under section 43, and not that large class of persons who would be included under that term if it is taken as applying to any person holding powers, however limited under the Ordinance, and who have been appointed to perform certain defined acts and duties only under the provisions of section 7 of the Ordinance. If it were intended to give all such persons power to prosecute in cases falling under section 43, it is not quite intelligible why, in making the appointments under section 7 in Excise Notification No. 1, published in the *Gazette* of December 13, 1913, officers of the Police Force not below the rank of sergeant are vested with power to perform the acts and duties mentioned in sections 34 and 45 (a) only. The only possible and legitimate inference from this distinction is that the complaint must be by an excise officer vested with power to act under that section.

If it were competent for a station house officer to institute such a prosecution, it would be quite as much within the power of every peon of the Excise Department to prosecute in such cases without the sanction or even the knowledge of his superior officers, and the protection which the Legislature intended to afford to the public by restricting indiscriminate prosecutions will be seriously curtailed.

The Magistrate imposed the heavy fine as he thought that the fine would be paid by the renter. There is nothing to justify such an assumption.

Garvin, Acting S.-G., for the respondent.—The object of section 43 is to prevent prosecutions by persons other than officers, and not to restrict prosecutions by those who fall into the class of excise officers as defined by section 3 of the Ordinance.

Cur. adv. vult.

April 24, 1913. PEREIRA J.—

This is a prosecution under section 43 of the Excise Ordinance, No. 8 of 1912. It has been instituted by a gentleman who describes himself as a station house officer, and objection has been taken that under section 49 of the Ordinance a prosecution under section 43 can only be instituted by an excise officer, and that the complainant is not such an officer. Now, by Proclamation of December 5, 1912, appearing in the *Government Gazette* of December 13, 1912, officers of the police force not below the rank of sergeant have been appointed to perform duties under sections 34 and 45 (a) of the Ordinance. This appointment is made under section 7 of the Ordinance, and "excise officer" as used in the Ordinance is defined thereby to mean, *inter alia*, any officer or other person appointed or invested with powers under section 7. It has been argued that the powers of persons appointed under section 7 may be very limited (and in

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the present instance they are limited), and that section 49 contemplates an excise officer with plenary powers. I see nothing in the Ordinance to justify that contention. True, the duties of a station house officer are by the terms of his appointment limited to duties under sections 34 and 45 (a), but he is none the less an "excise officer" in terms of the interpretation placed by the Ordinance on that expression.

On the facts of the case I see no reason to think that the Magistrate's verdict is wrong, but the Magistrate imposes a heavy fine, because he says it is unlikely the fine will come from the accused's pocket. He insinuates that the renter is "at the back of the defence," and that he will pay the fine. This, I think, is a vicious principle to act upon in regulating the punishment to be awarded in a case. The punishment must fit the offence, having regard not only to the nature of the offence, but the circumstances of the individual offender. In view of either of these matters a fine of Rs. 250, in addition to one month's rigorous imprisonment, would appear to be excessive. All that the accused is proved to have done is to have sold a glass of arrack to a wayfarer. I retain the sentence of imprisonment, but remit the fine.

Affirmed; fine remitted.