

Present: De Sampayo J.

1919

JAYAWARDENE v. FERNANDO.

651—P. C. Kalutara, 50,632.

Licensed distillery opened by a balapukaraya during absence of licensee—Admission of unregistered servant into distillery—Is licensee responsible?—Are bottles vessels?—Excise rules, July 7, 1916—Excise Ordinance, ss. 45 and 50.

Accused, a licensed distiller locked up the distillery, put the key in a drawer of a table in his house, left his village. At night one Pedro, registered servant of the accused, who was as well a *balapukaraya*, got the keys from the accused's mother and admitted into the distillery a person who was not a registered servant. The accused was charged for breach of rules Nos. 21 and 22 published in the *Gazette* (July 7, 1916).

Held, that as the act was done during the accused's absence and without his knowledge and authority, he cannot be said to have "wilfully" contravened the rule, and that he was not in the circumstances of the case responsible for the act of Pedro.

Query, whether glass bottles are "vessels" within the meaning of the term in rule 6 of the Excise rules (July 7, 1916).

THE facts appear from the judgment.

Bawa, K.C. (with *Canakarathne*), for accused, appellant.

Dias, C.C., for respondent.

October 22, 1919. DE SAMPAYO J.—

In my opinion the conviction in this case cannot be supported. The accused is a licensed distiller, and he has been charged on two counts for breach of certain rules framed under the Excise Ordinance. The first charge is that he admitted into the distillery, without the permission of the Superintendent of Excise, one Justina Fernando, who was not a registered servant, and employed her for the transport of arrack, in breach of rules Nos. 21 and 22 published in the *Government Gazette* of July 7, 1916. The facts are that the accused had on the day in question left his house and village with his wife and did not return till the next day. Before going away he locked up the distillery and put the key in the drawer of a table in his house, which was left in charge of his mother. At night, during his absence, one Pedro Fernando, a registered servant of the accused, as well as a *balapukaraya* (that is to say, a man who brings his own toddy into a distillery and gets it distilled there), got the keys from the accused's mother, opened the distillery, and admitted into it the woman Justina Fernando, who was subsequently

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detected in the act of going away from the distillery with two pots of arrack. The question is whether the accused can be held to be guilty of a breach of the rules above mentioned. It is section 45 (b) of the Excise Ordinance that declares breaches of rules to be offences, but it has the limitation that the person to be charged should have "wilfully" contravened the rules. When the act complained of in this case was done during the accused's absence and without his knowledge and authority, he cannot be said to have "wilfully" contravened the rule. The Police Magistrate has, however, held that the accused is responsible for the act of his servant Pedro Fernando. He probably had in view the provision of section 50 of the Ordinance, which enacts—

"The holder of a license, permit, or pass under this Ordinance shall be punishable, as well as the actual offender, for any offence under section 43 or section 44 or section 45 committed by any person in his employ and acting on his behalf as if he had himself committed the offence, unless he shall establish that all due and reasonable precautions were exercised by him to prevent the commission of such offence."

Now, Pedro Fernando was no doubt in the accused's employ, but there is no proof that he acted on the accused's behalf or within the scope of his employment. On the contrary, the circumstances indicate that he was not acting on behalf of his master. Being a *balapukaraya* he apparently admitted Justina Fernando into the store on his own account and responsibility. Moreover, I think the accused must be regarded as having exercised all reasonable precautions to prevent the commission of the offence by his servants, for when leaving the village he locked up the distillery and left the keys in a safe place in his house, and Pedro Fernando must be taken to have obtained the keys in contravention of the accused's intentions. Either of these grounds is sufficient to exempt the accused from liability. With regard to the first ground, see *Jayewardene v. Charles de Silva*;¹ also *Uttam Chand v. Emperor*,² which is a decision on similar provisions in the Bengal Excise Act.

The second charge against the accused is that he kept within the distillery certain vessels which were not numbered, and had not their capacity marked on them in oil paint as required by rule 6 published in the *Government Gazette* of July 7, 1916. The vessels in question were glass bottles, two of which are described as dispensary bottles, and the remaining two are ordinary bottles. Each of them contained some arrack. Rule 6 is concerned with a description of a building to be used for the purpose of a distillery and with its arrangement, and the last sentence is "All vessels in a distillery shall be numbered, and their capacities clearly and correctly marked on them in oil paint in English by the licensee."

¹ (1916) 19 N. L. R. 218.² L. R. 39. Cal. 344.

I doubt whether glass bottles are here contemplated. I am inclined to think that by "vessels" are meant such vessels as are ordinarily used in the course of distilling or for storing arrack and are capable of being marked with oil paint. If glass bottles are to be effectively marked, they must surely be marked with some material other than oil paint. However this may be, it has not been proved that these bottles were "vessels in the distillery." They were, no doubt, found there when the Inspectors entered, after they saw Justina Fernando removing some arrack. The accused denies that these bottles were kept by him in the distillery, and he repudiates them, and there is nothing to show that he was responsible for their being in the distillery. The reasonable conclusion is that these were bottles which Pedro Fernando had procured to remove arrack secretly with the assistance of Justina Fernando. The Inspector's evidence supports this conclusion, for he said that the floor of the storeroom was moist with arrack, indicating that the bottles had just been filled hastily. I think that the charge in respect of these bottles has not been established.

The conviction is set aside.

Set aside.

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