1930

Present: Lyall Grant J.

EXCISE INSPECTOR *v.* PONNADURAI

211-213—P.C. Mullaittivu, 10,744.

Excise Ordinance—Unlawful possession of arrack—Illegal transportation—Offences in respect of the same act—Legality of conviction—Ordinance No. 8 of 1912, s. 50.

A person may be convicted of the offences of unlawful possession and unlawful transport of arrack in respect of the same act.

[1] *78 L. T 647.* [2] *88 L. T. 592.*

APPEAL from a conviction by the Police Magistrate of Mullaittivu.

Subramaniam, for appellant in No. 211.
Charavanamuttu, for appellant in No. 212.
Gnanaprakasam (with *Tyagarajah*), for appellant in No. 213.
Crossette Thambiah, *C.C.*, for the Crown.

May 26, 1930. LYALL GRANT J.—

This is an appeal by three accused against convictions for (1) possessing an illegal quantity of arrack without a permit in breach of section 16 of the Excise Ordinance, and (2) with transporting the same illegal quantity of arrack without a permit in breach of section 12 of the same Ordinance. There is also an appeal by the owner of a motor car against an order of confiscation of the car made in connection with these proceedings.

The first accused pleaded guilty to the offence with which he was charged in the Police Court and was fined Rs. 500 on each court. The second and third accused pleaded not guilty, but were convicted on each count and fined the same amount. The owner of the car was called upon to show cause why his car should not be confiscated and an order of forfeiture was made, but as an alternative he was given the opportunity of paying a sum of Rs. 500.

The facts of the case as related by the prosecution are that, on information received, the excise inspector went down to Mankulam with a fairly strong force and in the early morning they saw the car they were waiting for coming in the direction of Jaffna. They obstructed the road, stopped the car, and on searching it they found seven bags containing arrack in sealed bottles, that is to say, 197 bottles of arrack in the back part of the car.

The second accused was driving, the third accused was sitting by his side, and the first accused was lying on the bags of arrack.

The first accused having pleaded guilty, the question really arises whether the second and third accused can be convicted either of possession or of transportation. The further question arises: "If they are convicted of possession can they be also convicted of transportation and *vice versâ* ?"

The learned Magistrate took the view that although the first accused pleaded guilty, the statements made by the second and third accused are such as are inadequate to discharge the burden cast on them by section 50 of the Excise Ordinance. He says their demeanour in the witness box was very unsatisfactory. Section 50 of the Excise Ordinance provides that in prosecutions under section 43 which deals with transportation and possession of excisable articles it shall be presumed, until the contrary is proved, that the accused person has committed an

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offence under that section in respect of the excisable articles for the possession of which, or for his conduct in that connection is such, he is unable to account for satisfactorily. I take this to mean that where three people are travelling at night in a car with a large quantity of arrack the burden is cast upon each of them to explain his conduct in regard to that arrack, and unless he does so to the satisfaction of the Court he may be presumed to have committed the offence with which he is charged, whether that offence be possession or transportation. In cases where the point to be decided is conscious possession of an article, much must necessarily turn on the facts of each particular case. One case cited was where a packet of ganja was found concealed in the roof of a bullock cart and it was held that the people travelling in the bullock cart could not be held to have guilty knowledge of its presence.

The Magistrate in the present case, however, has considered these points and has come to the conclusion that the second and third accused have failed to discharge the obligation put upon them by the Ordinance. They went into the witness box and proceeded to tell entirely inconsistent stories.

The second accused, who was driving the car at the time it was stopped, and who was therefore *prima facie* responsible for the transportation of the arrack, said that he got into the car at Anuradhapura, that he had gone there two weeks before to look for a job, that he met the first accused in a boutique at Anuradhapura at 9 or 9.30 on the night in question. He tells a story of the bursting of what he originally called an exhaust pipe, but which he corrected afterwards to the radiator hose pipe. The third accused says that he travelled in the car from Colombo, leaving Colombo at 5 or 5.30 P.M. and reaching Anuradhapura at 1¹ A.M. in the morning, thereupon at once contradicting the story of the second accused. In cross-examination he says that he met both the first and second accused in Colombo together and that they brought the gunny bags with the arrack at Puttalam.

The learned Magistrate gives the accused the full benefit of the rules of evidence in regard to evidence of co-accused. In fact, it seems to me that he goes beyond what is necessary because he says he omits their evidence as it tells against each other. Another fact to be noted is that the third accused was called by the second accused as his witness, and on the authority of the Full Bench case of *Rex v. Ukku Banda*,[1] I see no reason why the statements of the third accused should not be accepted as against the second accused; regard being given to any motive which would induce the third accused to make false statements. There is, however, no apparent reason why the third accused should contradict the

[1] *24 N. L. R. 327.*

second accused on the point in question. It would be much more to his own advantage to corroborate him.

It is significant that the statements which are most damaging to the second accused are not statements which were elicited by the third accused's own counsel, but are statements made in cross-examination.

I do not think it is possible that any of the three men in the car that night were ignorant of the load which the car was carrying. The story of the second accused is uncorroborated and is contradicted where it might have been corroborated. The third accused's story practically gives him away. It is impossible to believe that it is the story of an innocent man.

In view of the provisions of section 50, which throws the burden of proving innocence upon the accused, I think that the Magistrate was perfectly correct in holding that they had failed to discharge this burden.

In regard to the argument that if they were convicted of the offence of illegal transportation the accused could not also be convicted of the offence of illegal possession or *vice versâ*, I think these two offences are entirely different. It was argued that transportation involved possession and therefore the provisions of section 67 of the Penal Code would apply.

I do not think, however, that this is a case where section 67 applies. For the possession of arrack a permit is required ; a separate permit is required for its transportation; and in order to transport arrack it is necessary to have these two permits. It is quite possible therefore that a person who was legally in possession of arrack might be convicted of illegally transporting it. Curiously enough the point does not appear to have previously arisen, but I am not prepared to say that a person cannot be convicted on each of these counts in respect of the same act.

In regard to the sentences, they are undoubtedly severe, but as it has been often said, in revenue offences of this nature where the profits of successful defiance of the law are great, it is necessary that, when an offence is discovered, the penalty should be a severe one.

It must also be remembered that the enforcement of laws of this description involves a heavy expenditure to Government.

In regard to the appeal of the owner of the car against the fine in lieu of forfeiture, the real question as pointed out by Schneider J. in *Sinnetamby v. Ramalingam*,[1] 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. The learned Magistrate was not impressed by the evidence given by the owner, or for that matter, with the evidence given by the first accused in regard to the matter.

[1] *26 N. L. R. 371.*

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The owner's story is that the first accused was a car repairer. He admits that he was his brother-in-law, that he has sent the car to him for repairs a couple of days before and that he had without his knowledge used it for this purpose.

This story is completely disbelieved by the Magistrate, who also disbelieves a further statement by the owner that the car was used for duties in the supervision of temple lands.

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.

The statements of the owner appear to the Magistrate to be anything but candid, and I must say that I have formed precisely the same opinion. If the excise superintendent is to be believed, this car had on three previous occasions been stopped on suspicion of illicit transportation of liquor. The owner, however, positively states that it had never been stopped. Again, the first accused, according to the excise inspector, said that he was the salaried driver of his brother-in-law's car, and that he took the car to Colombo at his brother-in-law's request. The story now told by both the owner and his brother-in-law, Sanmugam, is that the latter was not the driver, but the two did not agree in detail, as Sanmugam, the first accused, says that he had repaired the car before, a fact which is denied by the owner.

It is not explained why the car licence was taken out in Sanmugam's name. It is obvious, however, reading the evidence of the car owner, that it is a tissue of prevarications.

I see no reason to disagree from the view taken by the learned Magistrate. There is ample evidence upon which he was entitled to make his order, and this appeal is also dismissed.

Appeal dismissed.

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