

1938

Present : **Hearne J.**SAMARASINGHE *v.* BANDA.121—*P. C. Kandy, 57,295.*

*Excise Ordinance—Unlawful manufacture of fermented toddy—Breach of condition of licence—Burden of proof—Ordinance No. 8 of 1912, s. 50.*

The second accused, the holder of a sweet toddy licence, was charged along with his tapper the first accused with having (a) unlawfully manufactured fermented toddy, and (b) with a breach of the condition of his licence.

It was established that fermented toddy had been found in a vessel attached to the tree which the second accused was authorized to tap and that no anti-ferment had been used. The first accused was acquitted.

*Held*, that the burden was upon the second accused under section 50 of the Excise Ordinance to show that he had taken precautions to prevent the toddy from fermenting.

**A** PPEAL from an acquittal by the Police Magistrate of Kandy.

*E. H. T. Gunasekera, C.C.*, for complainant, appellant.

*Cur. adv. vult.*

April 12, 1938. HEARNE J.—

The second accused was the holder of a sweet toddy licence and he was charged along with his tapper the first accused with having committed—

- (a) the offence of unlawfully manufacturing fermented toddy, and
- (b) with breach of the condition No. 5 of his licence.

The conditions reads :—

“Fermentation in any degree whatsoever, of all unfermented toddy manufactured or drawn under this licence shall be effectually and permanently prevented”.

The first accused set up the defence of an *alibi* and was acquitted. Counsel for the second accused thereupon invited the Magistrate to acquit the second accused as well, which the Magistrate did, for the reason as he states that a case arises against the licence owner only after his agent has been convicted. In his opinion, therefore, it would appear that the mere fact of the acquittal of the first accused entitled the second accused also to an acquittal. This is in my opinion an erroneous view of the law. It was established that fermented toddy had been found in a vessel attached to the kitul tree which the second accused was authorized to tap for sweet

toddy ; that no anti-ferment had been used, and that the second accused was present when the fermented toddy was found on the tree. No attempt was made by the second accused to account for his possession of toddy or his conduct in connection with it. He offered no proof that he took any steps to comply with condition No. 5 of his licence. In these circumstances, the Magistrate in my opinion should have convicted the second accused even if the first accused for other reasons was entitled to be acquitted.

In the unreported case S. C. No. 490, P. C. Kandy, 55,287, two accused were charged with the manufacture of fermented toddy. The second accused was acquitted, while in regard to the first the evidence was to the effect that toddy was found on a kitul tree belonging to him and his possession was proved, and the sole question to which this Court held the trial Judge should have addressed himself was, whether the accused under section 50 of the Ordinance had accounted satisfactorily for his possession or his conduct in connection with it. As this case concerns the alleged offences of manufacturing fermented toddy and of committing a breach of the condition of the licence I would refer to the case S. C. No. 87, P. C. Gampola, 23,451, in which it was held that it was incumbent upon an accused person in circumstances similar to the circumstances in this case to show that he had taken precautions to prevent the toddy from fermenting.

I will allow the appeal and direct that this case be sent back to the Magistrate for the purpose of recording convictions against the second accused on the two charges before the Court and thereafter to pass sentence.

*Set aside.*

