

1937

Present : Keuneman A.J.

IMBULDENIYA *v.* ROMANIS APPUHAMY.

826—*P. C. Matale, 21,149.*

Unlawful possession of toddy—Seizure of toddy—Failure to seal at place of seizure—Irregularity not fatal—Proved circumstances to overcome suggestion of defence.

In a charge of unlawful possession of an exciseable article, the failure to seal the article immediately after its seizure is not a fatal irregularity, provided there are proved circumstances in the case which sufficiently overcome the suggestion that the exciseable article was introduced by some person between the seizure and the sealing.

A PPEAL from a conviction by the Police Magistrate of Matale.

B. H. Aluwihare, for accused, appellant.

Kariapper, C.C., for respondent.

December 10, 1937. KEUNEMAN A.J.—

The accused was charged with and convicted for possessing an exciseable article, to wit, 32 drams of fermented toddy, *i.e.*, 16 drams in excess of the prescribed quantity without a permit from the proper authority in breach of section 16 of the Excise Ordinance, No. 8 of 1912, read with Excise Notification No. 264, published in the *Government Gazette* No. 3,060 of June 22, 1934, which offence is made punishable under section 43 (a) of the Excise Ordinance (No. 8 of 1912).

The evidence disclosed that a Police party consisting of an Inspector, a Sergeant, and a Constable, who were on other official business, happened to see a number of persons running away, and two men crouching behind a tree. The party went up and saw the accused pouring fermented toddy from the big pot P 1, produced, on to the ground. Another pot empty but smelling of toddy was also found. The Inspector arrested the accused, and took charge of pots. This occurred at Suduganga estate.

The Inspector with the Sergeant and the accused went to the Excise Station in the Inspector's car. It was found that the pot P 1 was too big to be placed in the Inspector's car, so the Constable returned in another car with P 1 and the other pot. The Inspector and the Constable said that the two cars followed each other immediately, but the Sergeant's impression was that one car had got out of sight of the other for a short time, although he said the Constable's car was close behind. At the Excise Station the toddy in P 1 was measured and it was found that there were 32 drams of toddy. The pots were thereafter sealed. The measurement and sealing was done in the presence of the accused.

It was contended for the accused that the failure to seal the pots immediately after the seizure was a fatal objection to the conviction in this case. Counsel for the appellant relied on the judgment of Lyall-Grant J. in the case of *Holsinger v. Joseph*¹, which followed an earlier unreported Judgment of Jayewardene J. The head note of the case reads: "It was the duty of the Excise Inspector to have the tin sealed in the presence of the accused immediately after seizure". It does not however appear in the Judgments themselves that this was laid down as a rule of law. This was regarded as a weighty circumstance entitling the accused to take objection that the exciseable article might have been introduced between the time of the seizure and of the sealing. In later cases, *Almeida v. Fernando*², and *Bandaranaike v. Ismail*³, Lyall-Grant J. himself said in this connection, "The question of sealing may be important but this again depends on circumstances in each case". It has been held in other cases that there is no inflexible rule that exciseable articles should be sealed immediately after seizure, although delay in sealing and informalities in the search may diminish the weight of the evidence regarding possession. It was also held that "it seems desirable that articles found should be sealed, wherever practicable, immediately after search, in the presence of the accused, and before removal to the Police

¹ 31 N. L. R. 250.

² 31 N. L. R. 331.

³ 7 Times L. R. 91.

Station"—vide *Prins v. Sabaratnam*¹, and *Kupasamy v. Cader Saibo*². In this case the evidence was that the arrest was made not by Excise Officers but by Police officers. It was by chance that the Police party discovered the pot in question, while they were out on other business. It was hardly likely that the Police party had the necessary material for sealing at the spot, or themselves had fermented toddy which they could have introduced into the pot. The interval of time from the arrest at the spot to the sealing at the Excise Station did not appear to be long, and that time was spent in travelling by car with a Constable in charge of the pot. The fermented toddy was measured at the Excise Station in the presence of the accused. In the circumstances I think the suggestion that the fermented toddy was introduced by some person into the pot between the seizure and the sealing was sufficiently overcome.

I dismiss the appeal.

Affirmed.

