1946 *Present :* **Dias J.**

PERERA, Appellant, *and* **BENEDICT** (Inspector of Police), Respondent.

794—M. C. Colombo, 16,563.

*Sale of foreign liquor—"Sale" includes any transfer other than by way of gift—*Traditio longa manu *sufficient where article transferred is bulky or heavy—Plea of purchase for private use—Burden of proof—Excise Ordinance (Cap. 42), ss. 2, 17 (d), 43 (g).*

Where the accused was charged with having sold twelve cases of foreign liquor (brandy) without a licence from the proper authority in breach of section 43 (*g*) of the Excise Ordinance—

Held, that the word "sale" in section 2 of the Excise Ordinance has not the same meaning it has in the Sale of Goods Ordinance and includes any transfer otherwise than by way of gift. Where owing to the weight or bulk of the article sold actual delivery is difficult there would be sufficient proof of a transfer if there is evidence that the transferor placed the thing before the transferee with the object of transferring the possession.

Held further, that where, in a prosecution for sale of foreign liquor, the accused pleads the benefit of section 17 (*d*) of the Excise Ordinance the burden is on him, once the prosecution has established sale, to prove that the liquor which he had procured was "for his private use".

APPEAL against a conviction from the Magistrate's Court, Colombo.

N. Nadarajah, K.C. (with him *P. Navaratnarajah*), for the second accused, appellant.

J. G. T. Weeraratne, C.C., for the Crown.

Cur. adv. vult.

November 12, 1946. DIAS J.—

The facts of this case are not in dispute. Inspector Benedict of the Criminal Investigation Department received information which caused him to suspect that the first accused was in possession of stolen liquor. He therefore sent Peon Wilson on February 21, 1946, to a certain place in Darley road to investigate the truth of his information. Wilson met the first accused who admitted that he had certain cases of brandy for sale. He agreed to sell them, but as there was another man in the business, he requested Wilson to see him again on the following day. Wilson reported these facts to Mr. Benedict. Accordingly on February 22, 1946, Wilson again saw the first accused and arranged to take delivery of the brandy at 9 A.M. that day at the Indian Press in Sea street. Wilson thereafter met the first accused and this appellant at the Indian Press when the first accused showed him sample bottles of the brandy. Wilson requested them to wait saying that his principal would turn up shortly. Mr. Benedict and Sergeant Abeyewardene then met both accused. The first accused again produced the samples and informed Benedict of the price of the cases of brandy. The appellant, who was present, added that there were twelve cases in all and Benedict agreed to purchase the lot, and requested that the twelve cases should be brought to the Indian Press for delivery. The appellant agreed and the

Inspector and his party left. On their return to the Indian Press half an hour later, they found that the dozen cases had been brought as agreed. The Inspector having examined the cases, issued his private cheque for a sum of Rs. 3,850 which was the price agreed on. As soon as the appellant took charge of the cheque, Sergeant Abeyewardene disclosed his identity, took back the cheque, seized the cases of brandy and arrested the two accused.

From the report submitted by Inspector Benedict to the Magistrate it is clear that the authorities were uncertain as to what precise charge should be framed against the accused, because the Inspector says that the cases of brandy are " suspected to be stolen property ". It is, therefore, manifest that the accused were not arrested for an illegal sale, but for being in possession of stolen property. Subsequently, the Police filed a plaint charging both accused with having sold brandy on February 22, 1946, without a licence from the proper authority in breach of section 43 (*g*) of the Excise Ordinance (Chap. 42).

The Magistrate acquitted the first accused and convicted this appellant who was fined Rs. 1,000 or in default to undergo six weeks' rigorous imprisonment. From that conviction and sentence the second accused appeals.

Two points were submitted on his behalf. It was argued in the first place that the evidence does not prove " a sale ", and in the second place, even if a sale has been proved, that under section 17 (*d*) of the Ordinance, as it is lawful to sell foreign liquor which the seller has legally procured for his private use, the appellant is cleared from liability.

In regard to the first submission, Mr. Nadarajah argues that the evidence clearly shows that the Inspector had no intention whatever of purchasing the cases of brandy ; that there never was any *consensus ad idem* between the buyer and seller, the whole thing being a mere ruse or trap, and that the charge of selling was an afterthought when it was discovered that a more serious charge could not be formulated against the appellant. He submits that the evidence does not prove a " sale " of this brandy.

The only authority cited for the Crown is *Pakiampillai v. Merry*[1], where the word " sale " was defined for the purposes of the Control of Prices Ordinance, 1939. No assistance can be derived from such cases in construing the Excise Ordinance where the word " sale " has been given a special statutory definition which has been explained in a series of decisions which were not cited at the argument of this appeal.

The word " sale " in the Excise Ordinance has not the same meaning this word has in the Sale of Goods Ordinance[2]. For the purposes of the Excise Ordinance, the words " sale " or " selling " are defined to include any *transfer* otherwise than by way of gift.—Section 2. The authorities show that where there is a transfer of an excisable article from A to B, the burden of proof is on A to prove that the transfer was by way of gift. If he fails to do so, the transfer is " a sale " within the meaning of the Excise Ordinance—See *Lockhart v. Fernando*[3], and *Hunter v. Romiel*[4] In the recent case of *Mendis Appuhamy v. Attapattu*[5] Soertsz J. pointed

[1] *(1942) 44 N. L. R. 142.*
[2] Chapter 70.
[3] *(1925) 27 N. L. R. 229.*
[4] *(1936) 18 C. L. Rec. 174.*
[5] *(1944) 45 N. L. R. 296.*

out that the word " transfer " in relation to movable property is *commonly* understood as meaning that there was a handing or giving over of the thing by one person to another, *i.e.*, an actual physical handing over of a movable.

The solution of the problem which arises in this case is to be found in the answer to the question whether the prosecution has established beyond reasonable doubt that there was on this occasion " a transfer " of this brandy from the appellant to the Inspector. If not, there can be no " sale ". It may be that the conduct of the appellant may amount to an attempt to " sell " ; but counsel are agreed that an attempt to commit an excise offence is punishable neither under the Excise Ordinance nor under section 490 of the Penal Code—*Kachcheri Mudaliyar v. Mohamadu*[1].

Obviously, it was an impossibility for the appellant physically to hand over twelve cases of brandy to the Inspector. The word " transfer ", however, has other meanings besides its common meaning of the actual physical handing over of a movable. If the transferor places the thing before the transferee with the object of transferring the possession, this amounts to a transfer (*longa manu traditio*). In this case the deposit of the subject matter in the presence and at the disposition of the transferee takes the place of physical prehension, and *longa manu traditio* constitutes one of the forms of fictitious as distinguished from actual delivery. It is most appropriate to transactions where, owing to the weight or the bulk of the article concerned, actual delivery is difficult. A resort to it in respect of portable movables would need some very special explanation. Indeed, it is obvious that, as in all cases where mental attitude is not clearly evidenced by physical dealing, the principle of *traditio longa manu* must be cautiously applied [2].

What are the facts ? The Inspector and the appellant agreed on the price, and the twelve cases were brought from their place of deposit to the Indian Press at the request of the buyer. The goods were examined. The sale was agreed on and the price was paid by cheque. Having regard to all the circumstances, I am of opinion that there was a " transfer" of the cases of brandy from the appellant to the Inspector. The mental attitude of the parties is clearly evidenced by what was said and done. The goods were too bulky and too heavy for actual physical handing over, The transferor therefore brought the cases from where they were stored and placed them before the transferee who, after the price was paid, would become the owner and be free to remove them. The fact that the Inspector's actions were a mere ruse may be relevant on the question whether a sale under the Sale of Goods Act took place. It is irrelevant on the question whether under section 2 of the Excise Ordinance there was or was not " a transfer " of the goods from the appellant to the Inspector.

There being a " transfer " of these cases from the appellant to the Inspector, and it being obvious that this was not a donation by him to the Inspector, the transaction is a " sale " within the meaning of section 2 of the Excise Ordinance. The first submission therefore fails.

[1] *(1920) 21 N. L.R . 369 Div. Bench.*
[2] *2 Maasdorp (6th ed.) pp. 23-24 . 2 Burge (1838 ed.) p. 694 : 1 Nathan p. 364.*

It is next argued that the prosecution, having conceded that the appellant had lawfully purchased these twelve cases of brandy—as evidenced by the receipt or invoice which was found in his possession—it is not an offence for the appellant to sell foreign liquor to the Inspector. "Foreign liquor" includes "all liquor other than 'country liquor'". "Country liquor" means liquor manufactured in Ceylon. Obviously, brandy is not manufactured in this Island. Therefore this brandy was "foreign liquor". Section 17 (*d*) of the Ordinance (as amended by section 4 of Ordinance No. 25 of 1938) provides that "nothing in this section applies to the sale of any foreign liquor legally procured by any person *for his private use* and sold by him or by auction on his behalf, or on behalf of his representative in interest upon his quitting a station or after his decease." I agree with Crown Counsel that this sub-section is in the nature of an exception to the criminal liability created by the main section. Therefore, once the prosecution has established beyond reasonable doubt that the accused "sold" an excisable article without a licence, the burden shifts to the appellant to prove either by a preponderance of probability or by a balance of evidence that the foreign liquor which he had procured was "for his private use". That the appellant lawfully procured this brandy is not disputed by the Crown; but it is contended that it was not obtained "for his private use" but with the object of selling it at a higher or "black market price". On this point the Magistrate, who saw the appellant give evidence, has decided against him.

The appellant stated that he had purchased fifteen cases for an "At Home" he gave after a wedding. He had made a grave miscalculation because only three cases were consumed by his guests. He, therefore, told the first accused that he was prepared to sell the remaining twelve cases "below cost". If that story is true or creates reasonable doubts of the truth of the case for the prosecution, the appellant is entitled to be acquitted. In my opinion, the Magistrate was justified in rejecting that story. An "At Home" which caused the appellant to believe that fifteen cases of brandy, besides other drinks, would be necessary to entertain his guests must have been a function on a very large scale. The appellant has not stated whose wedding it was that was being honoured with this "At Home". As the Magistrate points out, there should have been available at least one of the guests who attended the function and who would say approximately how many were present and that brandy was served to them. It also appears to be highly improbable that there should have been such a gross miscalculation leading to a surplus of no less than a dozen cases of brandy at a ceremony where other intoxicants besides brandy must surely have been served.

Who is the philanthropist who having twelve cases of brandy on his hands would sell them "below cost"? The Magistrate has come to the conclusion that this liquor was purchased for no other purpose than for a resale at great profit. With that view I am in agreement. I, therefore, hold that the sale having been established, the appellant has failed to bring himself within the provisions of section 17 (*d*) and his defence fails.

I affirm the conviction and sentence which is not severe when it is realized that the appellant is a black marketeer who was detected in the act. The appeal is dismissed.

Appeal dismissed.