

1939

*Present : Wijeyewardene J.*MARIMUTTU *v.* DISSANAYAKE.535—*M. C. Chavakachcheri, 16,616.*

*Excise Ordinance—Obstruction to Excise Inspector's search—Excise article liable to confiscation—No evidence of reason to suspect possession—Fatal irregularity—Excise Ordinance, No. 8 of 1912, s. 34, Cap. 42.*

On a charge of voluntarily obstructing an Excise Inspector in searching the accused for carrying an excisable article liable to confiscation, the absence of any evidence to the effect that the Inspector had cause to suspect that there was an excisable article on the person of the accused is fatal to the prosecution.

The right of private defence is not open to an accused person charged with assaulting the Excise Inspector in such circumstances unless there was reasonable apprehension of death or grievous hurt.

*Van Cuylenburg v. Fernando* (32 N. L. R. 45) followed.

In a charge of insult under section 484 of the Penal Code the insulting words must be set out and there must be proof that the accused intended or knew that the abuse was likely to provoke the complainant to commit a breach of the peace.

**A** PPEAL from a conviction by the Magistrate of Chavakachcheri.

*S. Nadesan*, for accused, appellant.

*D. Janszé, C.C.*, for respondent.

*Cur. adv. vult.*

October 16, 1939. WIJEYWARDENE J.—

The accused-appellant was charged on the following counts punishable under sections 344, 183, 314, and 484 of the Penal Code:—

- (a) Assaulting or using criminal force to Excise Inspector De Mel in the execution of his duties as a Public Servant.
- (b) Voluntarily obstructing Excise Inspector De Mel in the discharge of his public functions.
- (c) Voluntarily causing hurt to Excise Inspector De Mel.
- (d) Voluntarily insulting Excise Inspector De Mel and thereby giving provocation to him intending or knowing it to be likely that such provocation will cause him to break the public peace.

The Magistrate convicted the accused on all the counts and passed on each count a sentence of six months' rigorous imprisonment, but ordered that the sentences should run concurrently. The learned Magistrate has overlooked the fact that the maximum term of imprisonment under section 183 of the Penal Code is three months.

According to the prosecution the Excise Inspector who was in uniform was on duty at Elephant Pass when he saw the accused travelling in an

omnibus from Jaffna towards Trincomalee. The Inspector stopped the vehicle, and all the passengers about 15 in number got down. The Inspector and his guards then proceeded to search the passengers before searching the vehicle. The accused alone "did not allow (the Inspector) to search him for any excisable article". The accused pushed the Inspector away abusing him in foul language and when the Inspector held him by the hand, the accused struck him on the face. The accused then tried to get into the omnibus and go away when the Inspector "held him and told him that he was under arrest for obstruction and assault". The accused attempted to strike the Inspector again but the latter warded off the blow and struck the accused on his face. No excisable article was in fact found on the person of the accused or any of the other passengers or in the vehicle itself.

The accused denied that he assaulted or abused the Inspector and stated that he was the victim of an unprovoked assault by the Inspector, who, he alleged, was displeased with him owing to an earlier Excise case.

In appeal, the Counsel for the accused contended that on the evidence for the prosecution the search of the accused was illegal and he should not therefore be convicted on the first three counts. Under section 34 of the Excise Ordinance (*vide* Legislative Enactments, Volume 1, Chapter 42) an Excise Inspector "may search any person whom he has reasonable cause to suspect, carries any excisable or other article which he has reason to believe to be liable to confiscation under the Excise Ordinance or any other law relating to Excise revenue". In the present case the Inspector has stated in express terms that he searched the accused for an excisable article. Now an excisable article is defined in the Ordinance to mean and include "any liquor defined as by the Ordinance". The liquor for which a search was made must have been arrack or toddy and it is difficult, in the absence of any evidence on the point, to appreciate the reasons which led the Excise Inspector to search the person of the accused for bottles of arrack and toddy. The Inspector has not stated or even suggested in his evidence that he had cause to suspect that there was an excisable article on the person of the accused. I hold that the search of the accused by the Inspector was unlawful and that the accused cannot be convicted on the second count for voluntarily obstructing a public servant in the discharge of his public functions.

With regard to the first count the only defence open to the accused is that he acted in the exercise of the right of private defence. Such a plea has to be considered, however, in the light of section 92 of the Penal Code which enacts: "There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law".

The Excise Inspector was in uniform. Nothing that was done by the Inspector when he began to search the accused could have caused him any apprehension of death or grievous hurt. The accused himself did not question the Inspector whether the Inspector had any reasonable suspicion that he carried any excisable article. It appears to have been

taken for granted at the time and even in the Police Court that the Inspector acted lawfully in searching the passengers. In view of these facts I do not think the accused was justified in assaulting the Inspector.

There are certain *dicta* in the judgments of Burnside C.J. and Clarence J. in *Canthapillai Odyiar v. Murugesu*<sup>1</sup> which support the view that a person charged with assaulting a public servant in circumstances similar to those arising in the present case cannot plead the right of private defence. The same view has been taken by Akbar J. in *Van Cuylenburg v. Fernando*<sup>2</sup>. In that case a constable stopped an omnibus for committing an offence under the Motor Car Ordinance. After taking down the number of the vehicle, the constable insisted on taking the omnibus to the Police Station, got on to the front seat and asked the driver to drive it to the Police Station. The driver did not drive to the Police Station but took the omnibus to some other place and pulled the constable off his seat. Akbar J. held that the constable acted wrongfully in insisting on the vehicle being driven to the Police Station but held that it was not open to the driver to plead the right of private defence and convicted the driver under section 343 of the Ceylon Penal Code.

With regard to the fourth count I am not prepared to hold that a case has been made against the accused. I do not think the accused intended or knew that the abuse was likely to provoke the Excise Inspector to commit a breach of the peace. (Vide *Sub-Inspector of Police v. Wijesekera*<sup>3</sup>). Moreover the charge against the accused did not set out the insulting words.

I acquit the accused on the second and fourth counts. I alter the conviction on the first count to a conviction under section 343 of the Penal Code and sentence him to one month's rigorous imprisonment. I affirm the conviction on the third count and sentence the accused to two weeks' rigorous imprisonment to run concurrently with the sentence of one month's rigorous imprisonment.

*Varied.*

