1950 *Present :* **Nagalingam J.**

DAVID APPUHAMY, Appellant, *and* WEERASOORIYA (Excise Inspector), Respondent

S. C. 1104—M. C. Matale, 15,611

Excise Ordinance—Charge of possessing excisable article—Evidence of entry into dwelling house—Onus *on prosecution to prove that such entry was lawful—Cap. 42, Section 36.*

The accused was convicted of possessing an excisable article, namely, fermented toddy in excess of the prescribed quantity. The Excise Inspector did not give evidence of any facts showing that his entry into the dwelling house of the accused was lawful.

Held, that in the absence of positive evidence that the search by the Excise Inspector was lawful, the conviction could not be sustained.

APPEAL from a judgment of the Magistrate's Court, Matale.

T. B. Dissanayake, for accused appellant.

A. C. M. Ameer, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 30, 1950. NAGALINGAM J.—

The 2nd accused appeals from his conviction for having possessed an excisable article, namely, fermented toddy in excess of the prescribed quantity ; he has been sentenced to a term of three months' rigorous imprisonment. Several points were urged at the hearing of the appeal but as one of the points is decisive I shall deal with that only. The point is that the conviction is based upon evidence which has been obtained illegally.

The Excise Inspector did not give evidence of any facts showing that his entry into the dwelling house of the accused person was lawful. Under cross-examination he admitted that he did not obtain a warrant. No further evidence was given by the Excise Inspector suggesting that he had complied with any provision of the law which would have enabled him to have made a search without having in his possession a warrant.

The question whether evidence should be placed before a Court establishing that the search was lawful came up for consideration before a Bench of two Judges in the case of *Zilwa v. Simmo*[1]. In that case too, there was no evidence one way or the other as to the making of the record by an Excise Inspector as required by section 36 of the Excise Ordinance. The accused in that case was acquitted on the sole ground that there was no evidence of the legality of the entry into the premises of the accused. Pereira J. observed as follows:

> " It is that record (under section 36) that vests in an Excise Officer the authority to search. Until he makes it he has no more authority in that direction than any ordinary individual. I think that in every case of search by an Excise Inspector compliance by him with the requirements of section 36 should be affirmatively established by him by evidence. "

This case, then, is an authority for two propositions, (1) that there must be positive evidence placed before the Court that the search by the Excise Officer was lawful, and (2) in the absence of such evidence the conviction cannot be sustained. I have not been referred to any case in which this view has been doubted or dissented from.

The question, then, arises; how is it that no attempt is in fact made in Excise cases now to justify the lawfulness of the entry upon premises for the purpose of making search. I think the answer to that is furnished by the case of *Bandarawela v. Carolis Appu*[2] where the view was taken that evidence obtained as a result of illegal entry into premises was legally admissible and could form the foundation for basing a conviction. Once this principle was accepted, then it became immaterial whether there was evidence of the lawfulness of the entry or not.

In the case of *Andiris v. Wanasinghe, Excise Inspector*[3] I have had occasion to consider whether a conviction could properly be based upon evidence illegally obtained, and I have ventured to express the view that such a conviction cannot be upheld. If the true position is that evidence

[1] *(1914) 17 N. L. R. 473.*

[2] *(1926) 27 N. L. R. 401.*

[3] *(1950) 52 N. L. R. 83.*

illegally obtained cannot be availed of by the prosecution, then it follows that the authority of the two-Judge case already referred to remains unimpaired.

In this view of the matter, the evidence led against the appellant consisting entirely of facts gleaned as a result of a search not shown to be lawful cannot form the basis of a conviction. I therefore set aside the conviction and acquit the accused. I find that the 1st accused has also been convicted upon similar evidence and, acting in revision, I set aside the conviction of the 1st accused as well.

Appeal allowed.