

1929

BLACKMORE,
E. W.
v.BLACKMORE,
NORA AND
ANOTHER.RUTLEDGE,
C.J., MAUNG
BA AND
BROWN, JJ.

the right to make the condoned offences a ground for divorce revives; to constitute revival of the condoned offences, the offending spouse need not, however, be guilty of offences of the same character as that condoned; any misconduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied."

We agree that in the present case the desertion was a sufficient ground for making the previous allegation of adultery a ground for divorce. Neither of these adulterers has been joined as co-respondents in the case, but with regard to the offence in Mandalay, it is clear that the name of the adulterer is unknown to the petitioner, and cannot be found out by him. That being so, the petitioner has a good ground for being excused by the Court under section 11 of the Act from naming this adulterer.

There is no suggestion of collusion in this case and we think the decree for divorce is justified. We accordingly confirm the decree.

APPELLATE CRIMINAL.

Before Mr. Justice Heald.

KING-EMPEROR

v.

NGA PO SEIK.*

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May 3.

Burma Excise Act (Burma Act V of 1917), ss. 30 (a), 37—'Country, liquor' a generic term—Importance of distinguishing different kinds of country liquor—Quantities allowed without license, different—Guilty knowledge or belief essential for conviction under s. 37—Illegal conviction under s. 30 cannot be altered to conviction under s. 37.

* Criminal Revision No. 389A of 1929 being a review of the order of the Township Magistrate of Myanaung in Criminal Regular Trial No. 114 of 1928.

"Country liquor" is a generic term which can be equally applied to *tari*, country spirit, and country fermented liquor. In Excise cases it is necessary to distinguish between these different kinds of country liquor and to specify which particular kind is involved in the case, as the quantities of each of these different kinds of alcoholic liquor which may be possessed without a license differ.

There can be no conviction under s. 30 (a) of the Excise Act for mere possession of less than one quart of country spirit. In order to establish an offence under s. 37 of the Act it is necessary to aver and prove that the accused was in possession knowing or having reason to believe that the spirit was unlawfully manufactured. Guilty knowledge or belief is an essential ingredient of the offence. An illegal conviction under s. 30 (a) cannot be altered to a conviction under s. 37 where the accused was not called upon to answer a charge under that section.

HEALD, J.—In this case, the accused has been convicted of an offence under section 30 (a) of the Burma Excise Act for the possession of half a quart of "country liquor" and an empty bottle with the smell of "country liquor."

"Country liquor" is a generic term which can be equally applied to *tari*, country spirit, and country alcoholic liquor other than spirit, *i.e.*, country fermented liquor. In Excise cases, it is always necessary to distinguish between these different kinds of country liquor and specify which particular kind is involved in the case, as the quantities of each of these different kinds of alcoholic liquor which may be possessed without a license differ, *vide* Excise Department Notification No. 61, dated the 14th June 1928, reproduced as item 261 of the correction pamphlet to the Burma Excise Manual.

In this case the accused admitted possession of the liquor seized and pleaded that he had kept it for the purpose of a propitiatory offering to the *Nats* according to the Karen custom. As almost invariably country spirit is used for this purpose, the liquor involved in this case may be presumed to have been of that variety.

But whether the liquor involved was actually country spirit or country alcoholic liquor other than spirit, the

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quantity seized which was less than one quart, was within the limits for possession prescribed for either of those kinds of liquor in the Excise Department Notification mentioned above. Hence no conviction under section 30 (a) of the Excise Act could be had in respect of it.

But if the accused was in possession knowing or having reason to believe that the liquor was obtained from an illicit source, he would thereby commit an offence under section 37 of the Act. In order to establish an offence under section 37 it is necessary that the guilty knowledge or belief, which is an essential ingredient of the offence should be included in the particulars of the offence stated to the accused and proved at the trial. On this point the Magistrate is referred to paragraph 783A, Burma Courts Manual, added by item 19 of Circular No. 5. This guilty knowledge or belief was not, however, alleged in the particulars of the offence stated to the accused, nor proved at the trial in this case. The conviction under section 30 (a) was obviously illegal. It cannot be altered to a conviction under section 37 as the accused was not called upon to answer a charge under that section. The conviction and sentence are therefore set aside and the fine paid must be refunded to the accused.