

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

KING-EMPEROR

v.

AUNG SHAN AND OTHERS.*

1928

Nov. 15.

Excise Act (Burma Act V of 1917), ss. 5 (1), 30 (a) and (b)—Prosecution for possession or sale of tari in Upper Burma—Area excluded from operation of the Act except within five miles of a licensed tari shop.

By a Financial Department Notification, tari is exempted from all the provisions of the Excise Act throughout Upper Burma, except in places within five miles of a licensed tari shop. Therefore except within such limits neither the possession nor the sale of tari in Upper Burma is an offence.

CARR, J.—Two of these cases were tried by the Township Magistrate, Salin, and in them the accused, were convicted of illicit possession of tari. The third case was tried by the Additional Magistrate of Pwinbyu, and in it the accused was convicted of illicit sale of tari. This case was carelessly tried and the evidence was inadequate.

In all three cases there is the serious defect that no offence has been either proved or admitted. By paragraph 1 (4) of Financial Department Notification No. 72, dated 18th September, 1917 (1), tari is exempted from all provisions of the Excise Act throughout Upper Burma, except in places within five miles of a licensed tari shop. It follows that except within such limits neither the possession nor the sale of tari is an offence. To prove an offence it is necessary to show that the place of possession or sale is within five miles of a licensed tari shop. No attempt was made to prove this in any of the three cases, nor was it in any of them stated in the particulars of the

* Criminal Revision Nos. 1031A, 1033A and 1037A of 1928.

(1) Page 33, Burma Excise Manual.

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offence to which the accused was required to plead. All the convictions are therefore bad.

I set aside the convictions and sentences in all three cases and direct that each of the accused persons be acquitted and that the fine paid by him be refunded to him.

PRIVY COUNCIL.

J.C.*
 1928
 Nov. 30.

MA NGWE NAING (*Plaintiff*)
 v.
 MAUNG THA MAUNG (*Defendant*).

(On appeal from the High Court at Rangoon.)

Limitation—Conveyance by Burman to daughter—Purported partition on re-marriage—Suit by daughter for possession—Plea of fraud on creditors rejected on facts—Possession of father on behalf of daughter.

In 1904 a Burman executed on his remarriage a deed of partition by which he purported to convey to his daughter, the only child of his first marriage and then eight years of age, immovable property as her one-quarter share of the joint property of that marriage, and he appointed his own mother to take care of it. He remained in possession, but contributed to the support of his daughter, who resided with her maternal grandmother. At the time of the conveyance the father was considerably indebted, and his creditors finding that they could not attach the property settled with him upon easy terms. In 1915 the father promised his daughter and her maternal uncle that the property would be restored to her. In 1925 the daughter sued for possession. The father pleaded that the conveyance was in fraud of his creditors, and that the suit was barred by limitation.

Held, that upon the whole facts the father had failed to discharge the burden, which was heavily upon him, of proving that the conveyance was in fraud of his creditors, and not a genuine conveyance of his daughter's share, possibly liberally calculated; and that consequently his possession was not adverse to his daughter, but on her behalf. Having regard to this finding of fact it was not necessary to consider whether it was fictitious and fraudulent, upon which question decisions in India appeared to be in conflict.

Judgment of the High Court reversed.

Appeal (No. 153 of 1927) from a decree of the High Court (June 1, 1926) reversing a decree of the District Judge of Tharrawaddy (July 2, 1925).

* PRESENT :—LORD PHILLIMORE, LORD ATKIN AND SIR LANCELOT SANDERSON.