

from shares in a corporation liable to taxation under s. 11 (3)¹; and they argue that it follows that in the case of a shareholder who is exempt from taxation, either because his income is below the minimum figure for taxation or because of some express provision (as in the plaintiff's case), the shareholder must be regarded as having been taxed to the extent of the deduction made from his dividends by the corporation; and consequently that he is entitled to a refund under s. 22² of the Ordinance.

Such a refund would no doubt be in accordance with the procedure in force under the English Income Tax Acts and Rules, but no provisions for refund in such a case are to be found in the Income Tax Ordinance of this Colony.

As this Court has held in *Greening v. Morris, Hedstrom Limited*, a corporation paying tax under s. 11 (3) is not the agent of its shareholders but is itself the taxpayer. It cannot be said either that the tax paid by the corporation was, in the words of s. 22, illegally assessed and collected, or that the deductions from the plaintiffs, dividends were illegally made; and there is no provision in the Ordinance whereby a shareholder can obtain refund of an amount which has not been collected from him by revenue but has been deducted under s. 3 (1) (c).

The action must therefore be dismissed.

The effect of this judgment, read, with the judgment in *Greening v. Morris Hedstrom Limited*, must be to bear harshly upon persons of small income. To take an obvious example: it would appear to have been the intention of the legislature in framing s. 11 (1) that a widow with an income not exceeding £150 a year should enjoy her income free from taxation whatever might be the source from which such income was derived. In the absence, however, of any provision whereby a taxpayer can recover from revenue a sum deducted under s. 3 (1) (c), if the widow's income is derived from preference shares in a Company, she receives it less a deduction of 25 per cent which she cannot recover.

It can hardly be supposed that such was the intention, and there appears to be a strong case for amending legislation.

DEORAJ SINGH *ats.* POLICE.

[Appellate Jurisdiction (Corrie, C.J.) August 26, 1944.]

Liquor Ordinance 1932—s. 64B¹—supplying liquor for consumption elsewhere than on the premises where it is supplied—liquor supplied on a public road—whether an offence within the section—Summary Jurisdiction Procedure Ordinance, 1876—s. 15²—District Commissioner fails to compel attendance of witnesses after application by defence—no affidavit that witness material and unwilling—whether prosecutor has any duty to produce witness for the defence.

Appellant had supplied liquor to a member of the United States Naval Forces when in uniform. The supplying took place on a public road. At the hearing, when appellant was convicted, counsel for the defence

¹ S. 11—(1) of the amended Ordinance.

² Now s. 26 of Cap. 152. Revised Edition Vol. II page 1670.

applied to the District Commissioner for subpoenas to compel attendance of two persons the defence desired to call as witnesses but the District Commissioner held that he was unable to do so.

HELD.—(1) The supply of liquor to a member of the United States Forces on a public road is an offence under s. 64B of the Liquor Ordinance.¹

(2) Appellant having failed to proceed in accordance with s. 15 of the Summary Jurisdiction Procedure Ordinance² there was no failure of duty on the part of the District Commissioner in not taking steps to compel attendance of the persons required by the defence.

(3) It is no part of the duty of the prosecution to produce witnesses for the defence.

[**EDITORIAL NOTE.**—See the Criminal Procedure Code (Cap. 4) ss. 132, 134 as to compelling attendance of witnesses.]

APPEAL AGAINST CONVICTION. The facts and arguments appear from the judgment.

P. Rice for the appellant.

A. G. Forbes for the respondent.

CORRIE, C.J.—This is an appeal against the judgment of the District Commissioner for the Central District whereby the appellant was convicted of having, on the 15th September, 1943, unlawfully supplied liquor to a member of the United States Naval Forces when in uniform, in contravention of s. 64B of the Liquor Ordinance 1932, as amended by the Defence (Amendment) (No. 11) Regulations, 1940, and the Defence (Amendment) (No. 31) Regulations, 1942. The appellant was sentenced to one month's imprisonment with hard labour and to pay a fine of £50, or in default, to serve a further term of two months' imprisonment.

The first ground of appeal is that the conviction is bad in law.

S. 64B of the Liquor Ordinance as amended is in the following terms :—

“ 64B. Any person who gives or supplies any liquor to, or acts
“ as agent for the purchase of any liquor for, any member of any
“ of His Majesty's Naval, Military or Air Forces, or any member
“ of the Naval, Military or Air Forces of any allied Foreign State,
“ when in uniform, for consumption elsewhere than on the premises
“ where it is given, supplied or purchased, shall be guilty of an
“ offence and shall be liable to imprisonment for six months or to
“ a fine of £100 or to both such imprisonment and fine.”

The evidence of the witnesses for the prosecution is that liquor was supplied by the appellant on the public road, and the argument for the appellant is that the public road certainly is not 'premises' within the meaning of the section, and hence that no offence was committed.

I am satisfied, however, that such is not the meaning of the section. I hold that any person who supplies liquor to a member of the forces when in uniform, except upon premises and for consumption upon these premises, commits an offence under the section.

¹ *Rep. Vide Liquor Ordinance, 1946 s. 67.*

² *Rep. Vide Editorial Note.*

The next ground of appeal is that, after proper application in that behalf had been made to the Court by appellant's counsel, the Court wrongly held that it was unable to compel the attendance of certain witnesses referred to in the record of the proceedings as "the Commanding Officer of the sailors unit who are giving evidence and sailor Swistowich and the Provost-Marshal"; and that, in consequence, the defence was seriously prejudiced.

As regards the Commanding Officer and the Provost-Marshal, the appellant's counsel states that they were to be called to prove that the witnesses for the prosecution, Teaton and Durian, were not technically members of the United States Forces, being at the time in the employment of the United States Maritime Commission.

It must be noted, however, that Teaton, in giving evidence, described himself as "member of U.S. Naval Forces" and Durian described himself as "Seaman 1st Class U.S. Navy". It is clear that they were in uniform, as they are referred to throughout the evidence as "the sailors", and no question was put to either of them suggesting that he was not a member of the United States Naval Forces. In these circumstances, the appellant cannot now say that he has been seriously prejudiced, or prejudiced in any way, by the non-appearance before the Court of the Commanding Officer or the Provost-Marshal.

The appellant's reason for asking that Swistowich be heard as a witness was that, according to counsel's instruction, Swistowich would give evidence contradicting Teaton and Durian.

A member of the United States Forces stands, as regards liability to give evidence in the Courts of this Colony, in the same position as a member of His Majesty's Forces, and his attendance for the purposes of giving evidence is ordinarily obtained in the same manner, namely, by applying to the Naval or Military Officer under whose command he is serving. But there is nothing to prevent a District Commissioner from issuing a summons if he should see fit to do so. Before, however, a District Commissioner can be called upon to issue a summons, the provisions of s. 15 of the Summary Jurisdiction Procedure Ordinance 1876¹ must be observed. That section provides that:—

"If oath according to the Form 6 in the Schedule hereto be made before a District Commissioner or Justice of the Peace that material evidence can be given by or is in the possession of any person who will not voluntarily attend to do so or will not voluntarily produce the same it shall be lawful for such District Commissioner or Justice of the Peace to issue a summons according to the Form 7 in the Schedule hereto to such person requiring his attendance or requiring him to bring and produce for the purpose of evidence all documents and writings in his possession or power."

The appellant's counsel did not see fit to proceed in accordance with s. 15, and it follows that there was no failure of duty on the part of the District Commissioner.

The final ground of appeal is that the police prosecutor refused to assist the defence in obtaining the attendance of the abovenamed witnesses.

¹ *Rep. Vide Criminal Procedure Code, Cap. 4, ss. 132, 134.*

Clearly, it is no part of the duty of the prosecution to produce witnesses for the defence, and there is no substance in this ground of appeal. Actually, the appellant's solicitor had applied to the Military Police to obtain the attendance of these witnesses, and at the hearing on the 8th July, Sergeant Gudrence of the Military Police attended and gave evidence that Swistowich was sick and unable to attend. The hearing was adjourned for the defence to produce further evidence, and at the adjourned hearing appellant's counsel informed the Court that Swistowich had been advised through the Military Police to attend but had not appeared. It was open to him then to proceed under s. 15 of the Summary Jurisdiction Procedure Ordinance, but no further step was taken with regard to obtaining the attendance of this witness.

The appeal is dismissed.

BECHU *ats.* POLICE.

[Appellate Jurisdiction (Corrie, C.J.) September 9, 1944.]

Supplying liquor to members of armed forces—whether soldier to whom liquor was supplied is an accomplice whose evidence requires corroboration.

Appellant was convicted of an offence contrary to Regulation 68—(1) of the "Defence (Liquor) Regulations 1943¹ which was as follows:—

"68—(1) Any person who gives or supplies any liquor to, or
 "acts as agent for the procurement of any liquor for, any member
 "of any of His Majesty's Naval, Military or Air Forces, or any
 "member of any of the Naval, Military or Air Forces of any allied
 "foreign state, when in uniform except for consumption on the
 "premises where it is given, supplied or purchased, shall be guilty
 "of an offence and shall be liable to imprisonment for any period
 "not exceeding six months, or to a fine, not exceeding one hundred
 "pounds, or to both such imprisonment and fine."

The evidence for the prosecution was that appellant obtained a "lift" from a United States Army truck travelling from Lautoka to Ba and that on the way he arranged to sell a quantity of liquor to the truck driver—one Private Dziadus. The truck accordingly pulled up at appellant's house and appellant brought out a quantity of liquor. He had just placed the liquor in the truck when a party of police came to the scene. Private Dziadus was called as a witness for the prosecution.

HELD.—The soldier to whom liquor is supplied is not an accomplice in the offence of supplying liquor to a member of the forces.

[**EDITORIAL NOTE.**—See *Subhaiya Pillai ats. Police* [1946] 3 Fiji L.R.— for a similar case which was distinguished from the case here decided].

Cases referred to:—

Jenks v. Turpin [1884] 13 Q.B.D., 505; 53 L.J. M.C. 161; 50 L.T. 808; 15 Cox C.C. 486; 25 Dig. 424.

¹ *Rep. Vide Liquor Ordinance, 1946, s. 67.*