

as to the form of the information) to convict the defendant unless he proved that he did not commit the offence with which he was charged; and, if the question was, whether the magistrate's decision that the defendant had not proved that he had not committed the offence could be supported, it would be impossible to set aside the conviction. But the question was, whether the conviction should be amended, which it must be if there be evidence to prove some offence. The meaning of "provided there be evidence to prove some offence under this Act," in sec. 101, is not as clear as the corresponding words in sec. 1124 of the Criminal Code; but the intention of the two sections is the same; and "the conclusion must depend on whether there is, in the opinion of the Court (not the magistrate), evidence to support the amended conviction." *Rex v. Newton* (1920), ante 249, 250; and see, to the same effect, *Rex v. Leduc* (1918), 43 O.L.R. 290, 293.

Section 88 does not say, as is sometimes assumed, that the defendant shall be presumed to be guilty until he proves his innocence; but that, upon proof of the finding of the liquor, he *may* be convicted unless he proves his innocence. See *Rex v. Lemaire* (1920), ante 295.

The provisions of sec. 88 are to be invoked in a case in which it is fair and reasonable to invoke them; and a case like this—in which a man, living in a small house, in a place near to the border of a country in which whisky at present commands a high price, has had, but has not now, a store much in excess of that which most persons living in similar places, but more remote from a regular market, would probably lay in for their own individual use—is a case in which to invoke them.

The learned Judge then considered the evidence, not overlooking the right of the accused to the benefit of the doubt (*Rex v. McKay* (1919), 46 O.L.R. 125). That right entitles him, in a case in which the onus is upon him, to be acquitted if the story which he tells is convincing, even if there remains some little doubt in the mind of the Court as to whether that story is really true. The learned Judge, while recognising that the story of the defendant might possibly be true, was not so far convinced of its truth that he ought—by way of giving the defendant the benefit of the doubt—to say that it should be accepted.

The learned Judge was not convicting the defendant upon suspicion. The defendant had put himself in a position in which, having regard to sec. 88, it was impossible to hold that the onus of proof did not rest upon him, and he had not discharged that onus.

Sec. 101 must, therefore, be applied, the conviction amended, and the motion dismissed.