

CRIMINAL REVISION

Before Mookerjee and Beachcroft, JJ.

KALI CHARAN MUKHERJEE

v

EMPEROR.*

1913

Sep. 1

Cocaine—Possession of illicit cocaine—Mere possession of bill of lading and invoice relating to illicit cocaine seized in the Custom House—Attempting to import such cocaine into Bengal—alteration, on the same facts, of conviction of being in possession to one of attempting to import—Bengal Excise Act (Ben. V of 1909) ss. 2 (12), 46(a), 52 and 61—Criminal Procedure Code (Act V of 1898) ss. 236, 237.

The doctrine of constructive possession must be very cautiously applied, especially in the domain of criminal jurisprudence.

The mere possession of a bill of lading and an invoice covering goods lying undelivered in the Custom House, by a person who is not the consignee, does not amount to possession of such goods within the meaning of the Bengal Excise Act.

Kashi Nath Bania v. Emperor (1) and Ashruf Ali v. Emperor (2) distinguished.

Where the accused was found in possession of a bill of lading and an invoice relating to six bales of old wearing apparel which contained, to his knowledge, a large quantity of contraband cocaine purporting to be consigned to R. P. by a firm in London, and he made over the documents to a firm of shipping agents for clearance, from the Custom House and failed to produce the alleged consignee for whom he professed to be acting, or to give any clue about him :

Held, that the conviction of being in possession of such cocaine, under ss. 46 (a) and 52 of the Bengal Excise Act, was not sustainable, but that the accused should having regard to ss. 236 and 237 of the Criminal Procedure Code, be convicted, on the same facts, of attempting to import the cocaine into Bengal under s. 61 read with ss. 46 (a) and 2 (12) of the Act.

* Criminal Revision, No. 949 of 1913, against the order of D. Swinhoe, Chief Presidency Magistrate, Calcutta, dated June 18, 1913.

(1) (1905) I. L. R. 32 Calc. 557.

(2) (1909) I. L. R. 36 Calc. 1016.

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THE petitioner was tried by the Chief Presidency Magistrate and convicted of importing and being in possession of illicit cocaine under ss. 46(a) and 52 of the Bengal Excise Act (Ben. V of 1909), and sentenced to three months' rigorous imprisonment under the former section.

On the 14th January 1913, the petitioner made over a bill of lading and an invoice relating to certain goods on board the steamer "Borneo" to Cox & Co., shipping agents in Calcutta. The invoice described the goods covered by it as six bales of old wearing apparel shipped by C. Porter & Co. of London to Rasu Prasad at Darjeeling, containing 900 jackets worth £ 33 5s. The memorandum of goods in the bill of lading stated them to be six packages of old wearing apparel marked "*R. P. Darjeeling via Calcutta, Nos. 479—484*" and purported to bear the endorsements of "C. Porter & Co." and "Rasu Prasad." The petitioners, on delivering the above documents to Cox & Co., paid them Rs. 30 on account of clearing charges. The goods arrived in Calcutta by S.S. "Borneo" on the 23rd January. On the same day a Custom Officer having noticed five bundles each containing two packets of cocaine, near or among the bales seized them in the Custom House before clearance. On examination, 731 packets of cocaine, weighing 491 ounces and worth at least Rs. 10,000, were found concealed in the bales. Later, on the same day, the petitioner went to the office of Cox & Co. to take delivery and was taken to the Custom House. He there denied knowledge of the contents of the bales, and professed to be merely acting on behalf of Rasu Prasad from whom he had, he alleged, received the documents for the purpose of clearing the goods and taking delivery in the course of his business as a clearing sircar. He offered to point out Rasu Prasad, and a Custom

Officer accompanied him, but he failed to do so, and was made over to the police. It appeared that during the search of the premises No. 97 Mechua Bazar Street, alleged to have been the residence of Rasu Prasad, a telegram purporting to be sent from London, dated 6th February 1913, which reached Darjeeling the next day, was found, the contents of which were as follows:

“Rasu Prasad. Jubilee Sanitarium, Darjeeling. Borneo shipment, error Reship—Porter.”

At the trial the petitioner failed to produce Rasu Prasad or to furnish any clue as to the latter's whereabouts or even to give any satisfactory evidence of the existence of such an individual either at Calcutta or Darjeeling, and the Chief Presidency Magistrate, accordingly, found that the story of Rasu Prasad was a myth, and convicted and sentenced him, as stated above, on the 18th June 1913.

Mr. Jackson (with him *Babu Manmatha Nath Mukerjee* and *Babu Jogesh Chandra Bose*), for the petitioner. The conviction under s. 46 (a) of the Bengal Excise Act of importing the cocaine in question cannot be sustained, as one Booth has been tried and convicted by the Chief Presidency Magistrate of being the importer of this particular consignment of cocaine. The petitioner can only, if at all, be possibly brought under s. 52 of the Act. But mere presentation of an invoice and bill of lading covering goods which were then on the high seas, does not amount to possession of the latter within the Bengal Excise Act.

Mr. Pugh (with him *Babu Jatindra Mohan Ghose*), for the Crown. The possession of a bill of lading and an invoice is possession of the goods covered by them: see *Kashi Nath Bania v. Emperor* (1) and *Ashruf Ali v. Emperor* (2).

Cur. adv. vult.

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MOOKERJEE AND BEACHCROFT, JJ. The petitioner, Kali Charan Mukherjee, was charged before the Chief Presidency Magistrate of Calcutta with the commission of offences under sections 46 and 52 of the Bengal Excise Act, 1909. He was convicted under both these sections, and sentenced to rigorous imprisonment for three months under section 46.

The facts which have been indisputably established by the evidence may be briefly stated. On the 14th January 1913, the petitioner made over a bill of lading and invoice to a firm of shipping agents in this city known as Cox & Co. The invoice, on the face of it, referred to goods described as six bales of old wearing apparel shipped by C. Porter & Co. of London to Rasu Prasad at Darjeeling in India; the goods were described as nine hundred jackets worth £33 5s. The bill of lading, on the face of it, described the goods as six packages of old wearing apparel marked "R. P. at Darjeeling *via* Calcutta." On the back of the bill of lading were endorsements which purported to be by C. Porter & Co. and Rasu Prasad. The petitioner, when he made over the invoice and bill of lading to Cox & Co., paid to the firm Rs. 30, on account of clearing charges. On the 23rd January, while the goods were under clearance from S. S. "Borneo", a Customs Preventive Officer, who was on board, noticed five packets of cocaine, each of which contained two phials, near or among the bales of old clothes. This aroused his suspicion, and he thereupon seized all the six bales, which, upon examination, were found to contain 731 packets of cocaine weighing 491 ounces and worth, it is said, at least Rs. 10,000. On that very day, the petitioner, with a view to take delivery, presented himself at the office of Cox & Co., who had meanwhile been apprised of what had happened; he attempted to

make off and was thereupon taken by one of the assistants of the firm to the Custom House. There he protested that he was not aware of the contents of the bales and had arranged to have them cleared at the request and on behalf of Rasu Prasad. He promised to point out to the Custom Superintendent the man Rasu Prasad for whom he said he was acting. The petitioner then took one of the Custom Officers in a carriage from place to place for about two hours in the streets of Calcutta, but was not able to point out either Rasu Prasad or his place of residence. He was then made over to the police and prosecuted with the result already stated. The Chief Presidency Magistrate has held that the story of Rasu Prasad is an invention. In support of this view, he has relied upon the circumstance that though the accused was given every opportunity by the Custom Officers and by the Court to produce Rasu Prasad, he had not done so, and that, on the other hand, he had not been able to furnish any clue to the whereabouts of Rasu Prasad or even to give any satisfactory evidence of the existence of such an individual either at Calcutta or at Darjeeling. Much reliance, however, has been placed in this Court on a telegram to the following effect discovered at a search of premises No. 97 Mechua Bazar Street which is alleged to have been occupied by Rasu Prasad: "Rasu Prasad, Jubilee Sanitarium, Darjeeling. Borneo shipment. Error, re-ship—Porter."

This telegram appears to have been despatched from London on the 6th February 1913, and was received at Darjeeling on the day following. It has been argued, with some plausibility, on the strength of this telegram, that the goods had been shipped by mistake, and that as soon as the mistake was discovered by the exporters, they cabled to the importer to re-ship the

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goods. In our opinion, reliance cannot be placed on the genuineness of this telegram, and it is unquestionably within the bounds of possibility that, if the cocaine was sought to be imported into this country in contravention of law, as soon as the discovery had been made on the 23rd January, the importer, whoever he might be, might cable to the exporters in London, using pre-arranged Code words, to send a message of this description; it is by no means difficult to adopt such a method deliberately with a view to create evidence. The whole of the evidence has been placed before us, and we have allowed the learned counsel for the petitioner to do so in a revision case, because the matter, in our opinion, requires very careful scrutiny.

The facts unquestionably established may be thus summarised. The petitioner was in possession of an invoice and bill of lading, which purported to cover old wearing apparel exported by Porter & Co. of London to Rasu Prasad at Darjeeling. This bill of lading, with endorsements by Porter & Co. and Rasu Prasad, were made over by the accused to Cox & Co., in order that the goods might be cleared and passed through the Custom House. The goods were found to contain a large quantity of cocaine, which, there can be no room for reasonable doubt, was sought to be illicitly exported in contravention of the provisions of the Excise Act. The accused, when apprised of the discovery, professed to be acting on behalf of Rasu Prasad. He was given every opportunity to produce Rasu Prasad or to give information about him. He has completely failed to give any clue about Rasu Prasad, the alleged importer, although his case is that he had met Rasu Prasad at Darjeeling and had on previous occasions cleared consignments on his account. From these circumstances, the Magistrate

has drawn the inference that Rasu Prasad is a myth, and has held that the accused was in possession of the cocaine within the meaning of clause (a) of section 46 as also of section 52 of the Bengal Excise Act. We are not prepared to hold that the accused was in "possession" of the cocaine. On behalf of the Crown, reliance has been placed upon the cases of *Kashi Nath Bania v. Emperor* (1) and *Ashruf Ali v. Emperor* (2) in support of the view that the accused was in possession of the cocaine. The cases mentioned are, in our opinion, distinguishable. In the first of these cases, it was held that possession of a railway receipt, by the production of which the consignee might have obtained delivery and physical possession of the consignment, was "possession" within the meaning of section 9 clause (c) of the Opium Act, 1878. It was pointed out by the learned Judges that by the possession of the railway receipt, the consignee had dominion or control over the parcel in the sense that he could have passed the right to take delivery thereof to any other person, in other words, that possession need not be actual or physical but might be potential. In the later case, this view was questioned, though reluctantly followed, and it was pointed out that the decision overlooked the distinction between possession and right to possession. It is not necessary for our present purpose to examine the decisions in the two cases mentioned, but we may observe that the doctrine of constructive possession must be very cautiously applied, specially in the department of criminal jurisprudence. In the case before us, it cannot be said that the accused had dominion or control over the goods, unless he was the real consignee, which he is not proved to have been. We cannot hold that every person who might have possession of the bill of lading

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was in possession of the cocaine within the meaning of the Bengal Excise Act, irrespective of all other circumstances; if this view were not maintained, Cox & Co., and all their assistants who had handled the bill of lading, might be deemed to be in possession of the cocaine. In this view, the conviction of the petitioner under sections 46 and 52 of the Bengal Excise Act cannot be supported. We are clearly of opinion, however, that this is a case to which the provisions of sections 236 and 237 of the Criminal Procedure Code are applicable. On the evidence, there is no doubt as to the facts, although it may be doubtful what precise offence the accused has committed on the facts alleged. He may consequently be convicted of the offence which he is shown to have committed, although he was not charged with it. In this case, there is no room for controversy that an attempt has been made by the accused to import cocaine, that is, to bring cocaine into Bengal in contravention of the provisions of the Bengal Excise Act. We feel no doubt whatever upon the evidence that he was aware of the character of the contents of the bales he had undertaken to clear and pass through the Custom House. Consequently, he is liable to be convicted of the offence of attempting to import cocaine in contravention of the Bengal Excise Act, and to be punished under section 61 read with section 46 clause (a) and section 2 clause (12). We convict him accordingly and set aside the conviction as made by the Magistrate. There is no question that the sentence is appropriate. The accused must surrender and serve out the remainder of the term of sentence as imposed by the Magistrate.

E. H. M.

Rule discharged.