

CRIMINAL REVISION.*Before Sanderson C. J., and Walmsley J.*

MOHAMMED KAZI

v.

EMPEROR.*

1916

July 25.

*Rescue from lawful custody—Lawful apprehension, resistance to—Opium—
Person selling article as opium which turns out not to be the same—
Arrest and detention of such person—Legality of arrest—Escape from
such arrest—Opium Act (I of 1878) s. 15, Penal Code (Act XLV of
1860), ss. 224 and 225.*

Where a person purports to sell an article as opium which afterwards turns out not to be the same and he is arrested but escapes with the aid of others:—

Held, that his arrest and detention are lawful under s. 15 of the Opium Act (I of 1878), and that his conviction under s. 224 and that of the others under s. 225 of the Penal Code are legal.

It is an offence for a person to escape from custody, after he has been lawfully arrested on a charge of having committed an offence, although he may not be convicted of such latter offence.

Deo Sahay Lal v. Queen-Empress (1) approved.

ON the 5th January last the excise authorities, suspecting the first petitioner Mohammed Kazi to be an illicit opium-dealer, arranged with some persons to purchase some opium from him. They went to his house and he sold them some balls of a black substance representing the same to be opium. An excise officer present, thereupon, arrested him and was taking him to the excise *sampan* when the officer and his party were attacked by a body of men armed with *lathis*, including the petitioners other than Mohammed Kazi, and the latter was forcibly rescued.

* Criminal Revision, No. 515 of 1916, against the order of J. C. Twidell, Sessions Judge of Chittagong, dated April 15, 1916.

(1) (1900) I. L. R. 28 Calc. 253.

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Mohammed Kazi was placed on trial under s. 9 of the Opium Act and convicted, but the High Court on revision set aside the conviction on the ground that the article sold by him was not in fact opium within the meaning of the Act, though it contained a small percentage of the same (1).

The petitioners were then tried by the Sub-divisional Officer of Cox's Bazar, Chittagong, all under s. 147 of the Penal Code, and in addition Mohammed Kazi under s. 224 of the Code, and the rest under s. 225. On the 27th March, 1916, the Magistrate acquitted one of the petitioners and convicted and sentenced Mohammed Kazi under s. 224 of the Penal Code to one year's rigorous imprisonment. The others were convicted under ss. 147 and 225 of the Penal Code, four of them being sentenced, under s. 147 only, to one year's and the last to six months' rigorous imprisonment. They appealed to the Sessions Judge of Chittagong who, by his order dated the 15th April 1916, maintained the convictions and sentences. The petitioners thereupon moved the High Court and obtained the present Rule.

Mr. S. R. Das (with him *Babu Chandra Sekhar Sen*), for the petitioners. Mohammed Kazi was not at the time of his arrest "charged" with any offence by the excise officer. The word "charged" in s. 224 of the Penal Code refers to a formal charge. Under s. 15 of the Opium Act the officer can only detain and search a suspect, but has no power to arrest him unless opium is in fact found in his possession. The arrest was, therefore, unlawful and his conviction under s. 224 of the Penal Code bad: *Deo Sahay Lal v. Queen-Empress* (2).

(1) (1916) 20 C. W. N. 1206.

(2) (1900) I. L. R. 28 Cal. 25 .

The Offg. Deputy Legal Remembrancer (Mr. Camell), for the Crown. No formal charge is necessary. An accusation of an offence at the time of the arrest is sufficient. Mohammed Kazi represented the balls to be opium and cannot now turn round and say they were not such.

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SANDERSON C. J. In this case the first accused, Mohammed Kazi, was charged with an offence under section 224 of the Indian Penal Code, that is to say, with intentionally offering resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged, or escaping from any custody in which he is lawfully detained for any such offence; and the other accused were charged with an offence under section 225, that is to say, with intentionally offering resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescuing any other person from any custody in which that person is lawfully detained for an offence. All of them were also charged under section 147 of the Indian Penal Code, the common object alleged being to rescue Mohammed Kazi from lawful custody.

Now, the facts of the case may shortly be recapitulated as follows. The accused, Mohammed Kazi, was suspected of being in possession of opium contrary to the Opium Act; and certain persons were put forward by the excise officer as apparent purchasers of opium from the accused No. 1, Mohammed Kazi, and in pursuance of such apparent purchase, certain balls of black substance changed hands. Thereupon, the first accused, Mohammed Kazi, was arrested by the excise officer. On the way to the place where the *sampan* was moored, the excise officer and the others, who were with him, were attacked by a body of men who were carrying *lathis*, and that body of men included

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the accused other than Mohammed Kazi. The result was that the accused No. 1 was rescued by force.

A case was then made against the first accused, Mohammed Kazi, under section 9 of the Opium Act, alleging that he was unlawfully in possession of opium. He was convicted. On revision by this Court, that conviction was set aside on the ground that the substance which Mohammed Kazi purported to sell to those persons, who were put forward by the Excise officer, was not in fact opium; the black substance which was sold did contain a very small percentage of opium; but we came to the conclusion that what he had sold and had been in possession of was not in fact opium within the meaning of the Act, and consequently the conviction against Mohammed Kazi under section 9 of the Act was set aside(1).

What he had really been doing, as far as I can understand the facts, was that he was attempting to pass off this black substance as opium, purporting to sell it to the persons who were put forward by the excise officer as the apparent purchasers.

Then the present charge came to be investigated. The charge against the first accused was under section 224 and against the other accused under section 225 and against all of them under section 147.

A point was then taken that Mohammed Kazi, not having committed any offence under section 9 of the Opium Act, was not in lawful custody at the time of his rescue.

Now, the excise officer was acting under section 15 of the Opium Act. That section provides, first of all, that any officer of the said department "may seize, in any open place or in transit, any opium or other thing which he has reason to believe to be liable to confiscation under section 11 or any other law for

(1) (1916) 20 C. W. N. 1206.

the time being in force relating to opium," and "detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and, if such person has opium in his possession, arrest him and any other persons in his company." It was the latter portion of the section under which the excise officer acted, namely, "if such person has opium in his possession, arrest him and any other persons in his company." Mohammed Kazi had purported to sell what he alleged was opium: and, consequently, the excise officer arrested him acting under section 15 of the Opium Act. If the substance had in fact been opium, Mohammed Kazi would have been guilty of an offence under section 9 of the Act, and there could be no doubt whatsoever about the legality of the excise officer's act in arresting him. How then can Mohammed Kazi, being himself responsible for his arrest by alleging that the substance which he was selling was opium, turn round and say that his arrest was illegal, alleging that what he was selling was not opium, although at the time he made the sale he passed it off as opium. To give effect to such an argument would lead to a conclusion which is ridiculous. Consequently, we are of opinion that the arrest was legal and that Mohammed Kazi was in lawful custody at the time of the rescue.

In support of this conclusion I may refer to the case of *Deo Sahay Lal v. Queen-Empress* (1) (the passage being at 255), where Mr. Justice Pratt, and Mr. Justice Brett, said "having regard to the context" (they are dealing with section 224), "we think that the words 'for any such offence' must mean 'for any offence with which he is charged or of which he has been convicted.'" So that it would be an offence for a

(1) (1900) I. L. R. 28 Calc. 253, 255.

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man to escape from custody after he had been lawfully arrested on a charge of having committed an offence, although he may not be convicted of such latter offence.”

For these reasons, I am of opinion that the first accused was in lawful custody, he was lawfully detained and when he effected his escape he committed an offence under section 224.

It follows from this that the other accused who rescued the first accused from the abovementioned lawful custody were guilty of an offence under section 225. The learned Judge in concluding his judgment said this: “The evidence shows that Mohammed Kazi, after escaping from the hold of two excise peons, joined in beating the excise men. The other appellants were members of an unlawful assembly with the common object of rescuing Mohammed Kazi from lawful custody and joined in inflicting injuries on members of the excise party in order to effect and to safeguard his escape. The convictions are, therefore, within the scope of sections 224, 225 and 147 of the Indian Penal Code. The attack was of a dangerous nature and shows that the perpetrators have little regard for law and order. The sentences are not too severe.” I entirely agree with this summary of the learned Judge.

For these reasons, I think that this Rule should be discharged.

WALMSLEY J. I agree.

E. H. M.

Rule discharged.

[TO END VOL. XLIII.]
