

proceed on the view that the decree against Amulya was not binding on him, and to take action in his own name to vindicate the equity of redemption as he has now done.

Their Lordships accordingly will humbly advise His Majesty that the appeal be allowed, that the decision of the High Court be reversed, and that of the Subordinate Judge restored—the appellant to have his costs in the Courts in India and of this appeal.

Solicitors for appellant: *W. W. Box & Co.*

Solicitors for respondents: *Ranken Ford & Chester**

A. M. T.

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KALA CHAND
BANERJEE
v.
JAGANNATH
MARWARI.

CRIMINAL REVISION.

Before Suhrawardy and Mitter JJ.

HARBHANJAN SAO

v.

EMPEROR.*

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Jan. 27.

Search by Excise Officer—Legality of the search—Confession to an excise officer—Admissibility of the confession—Bengal Excise Act (V of 1909), Chapter IX—Criminal Procedure Code (Act V of 1898), ss. 1, 5, 102 and 103—Evidence Act (I of 1872), s. 25.

Sections 102 and 103 of the Criminal Procedure Code do not apply to searches under the Bengal Excise Act, which are governed by Chapter IX of the Act.

An excise officer is not a "police officer" within s. 25 of the Evidence Act, and a confession made to him is not within its purview.

Ah Foong v. Emperor (1), followed.

* Criminal Revision No. 1220 of 1926, against the order of A. Z. Khan, Additional Chief Presidency Magistrate, Calcutta, dated Dec. 8, 1926.

(1) (1918) I. L. R. 46 Calc. 411.

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The petitioner was tried by Mr. A. Z. Khan, Additional Chief Presidency Magistrate, and convicted under section 46 of the Bengal Excise Act (V of 1909), and sentenced to three months' rigorous imprisonment and a fine of Rs. 100 on 8th December, 1926.

It appeared that on the 28th September, 1926, an Excise sub-inspector raided the premises 57/2, Baburam Ghose's Lane, where the petitioner was residing, and found some bottles of French liquor in the *baitakhana*, three packets of cocaine on a *machan* adjoining the kitchen, and some more packets of the same in a room upstairs. The sub-inspector took with him three search witnesses, when he went to the abovementioned house, two of whom were examined as witnesses. They signed the search list. The petitioner then made a confessional statement. At the trial one of the search witnesses deposed that he had witnessed the search only of the *baitakhana* where no excisable articles were found, while the other stated that no room was searched in his presence.

The petitioner's case was that he had removed to the premises the same day and knew nothing of the cocaine found, and that the confession was induced by the threat of the sub-inspector to take his wife to the *thana*.

Babu Mirtyunjay Chatterjee (with *Babu Basanta Kumar Mukerjee*), for the petitioner. The search was not conducted in accordance with the provisions of the Code. The conviction cannot be supported on the evidence of the search witnesses. The confession was induced by a threat of taking the petitioner's wife to the *thana*.

Babu Santosh Kumar Pal, for the Crown. The method of searches under the Excise Act is provided

for in Chapter IX, and the Code does not apply. The confession was admissible. Refers to *Ah Foong v. Emperor* (1).

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SUHRAWARDY AND MITTER JJ. This Rule has been obtained on three grounds, two of which relate to the legality of the search made by the Excise officer, and the third to the reception in evidence of an alleged confession made by the accused petitioner. The case for the prosecution is that the petitioner lived in premises No. 57/2, Baburam Ghose's Lane. On receipt of certain information, the Excise sub-inspector raided the house and found in two rooms excisable articles, such as French liquor and cocaine. He held the search in the presence of three witnesses two of whom have been examined in the case. These witnesses deny that they were present during the whole search, or that certain articles said to have been found in the different places were found in those places in their presence. The learned Presidency Magistrate has suspected the veracity of these witnesses and has convicted the petitioner for an offence under section 46 of the Bengal Excise Act (V of 1909), and sentenced him to three months' rigorous imprisonment. The Magistrate in his *Explanation* has submitted that he did not rely either upon the search or upon the confession of the petitioner, but the articles were found in the premises which were for the time being in possession of the petitioner, and under section 47 of the Excise Act the petitioner, having failed to account for such possession, he was convicted as aforesaid. Now with regard to the grounds upon which this Rule has been issued. As to the search not having been in accordance with sections 102 and 103 of the Criminal Procedure Code it is contended on behalf of the Crown that these

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sections do not apply to the search made under the Excise Act. We think that there is a great deal of force in this contention. Section (1), clause (2) of the Criminal Procedure Code says that nothing in the Code shall affect any special or local law now in force, or any special jurisdiction or power conferred. Section 5 (2) says all offences under any other law (other than the Penal Code) shall be investigated, inquired into, tried or otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring int., etc. In view of these provisions, if we find that there is a special provision in the Excise Act relating to search made under the Act, it is clear that the provisions of sections 102 and 103 do not apply to searches under the Excise Act. In the first place, the search under the Excise Act can be made by persons other than police officers. Chapter IX of the Excise Act details the powers of different persons to make the search. It enables an officer or person empowered under the Excise Act to inspect and search any person or any vessel, vehicle, etc., in which he may reasonably suspect any excisable articles to be. Then, again, the Collector or any excise officer may institute a search without a warrant in emergent cases, and for that purpose enter or search any place by day or night, and may seize anything found therein which he has reason to believe to be liable to confiscation under the Act. There is nothing in this section to show that the search must be made under the provisions of the Criminal Procedure Code. Section 16 of the Opium Act (I of 1878) expressly says that a search made under section 14 or section 15 of that Act shall be made in accordance with the provisions of

the Criminal Procedure Code. The absence of any such provision in the Excise Act lends great support to the argument that it was not the intention of the Legislature to extend the special provisions relating to search under the Criminal Procedure Code to searches held under the Excise Act. But it is usual that the Excise officers making searches under the Act try to observe the procedure laid down in the Criminal Procedure Code to secure evidence, and in this case the Excise officer took with him three witnesses to witness the search. Now, if these witnesses in Court deny that they saw the entire search, the mere fact of such denial does not matter if the Magistrate believes that it was properly held. Two witnesses have been examined in the case. They signed the search list in which it is mentioned as to what articles were found in which places. In Court they denied that they saw these articles having been discovered in the places mentioned in the list. The Magistrate has the right to disbelieve the witnesses and to hold that there was a search in which those articles were found. In his statement the petitioner said that he came into the house at 12 noon, the search having been held at 2-30 P. M. on that day. He did not know how the liquor and the cocaine came to be there. The Magistrate, on a review of the evidence, has found, and we think correctly found, that the story that the petitioner came on that day is false, and that he was there for some time before the date of the search. Having found this the only conclusion arrived at by him is that the petitioner was in possession of the articles found in the house, and he having failed to account for such possession was liable to conviction.

Now, with regard to the other point, namely, that the confession of the petitioner was wrongly admitted

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in evidence, the petitioner in his statement says that he made the confession under the threat by the Excise officer that if he did not say to whom the things belonged, his wife would be dragged to the police station. One of the search witnesses supports him in this statement. The Magistrate in his *Explanation* has said that he attached no value to the alleged confession, and it appears from his judgment that he has not even referred to it when discussing the evidence for the prosecution. It seems that when the Excise officer was examined he spoke of this statement by the accused to him, and it was rightly admitted in evidence because, as has been held in the case of *Ah Foong v. Emperor* (1), an Excise officer is not a police officer, and, therefore, section 25 of the Evidence Act does not apply; and it was admitted in evidence before any evidence was given or statement made about the alleged threat. So the Magistrate was not wrong in admitting the confession in evidence, and he was right in not considering it in coming to his conclusion.

All the grounds having failed, this rule must be discharged. The petitioner will surrender to his bail and serve out the remainder of the sentence.

E. H. M.

Rule discharged.

(1) (1918) I. L. R. 46 Calc. 411.