REVISIONAL CRIMINAL.

1913
September, 25.

Before Mr. Justice Ryves.

EMPEROR *v.* SAYEED AHMAD *

Act (Local) No. IV of 1910 *(United Provinces Excise Act), section* 60—*Unlawful possession of excisable article—Search warrant—Act No X of* 1873 *(Indian Oaths Act), section* 13—*Presumption that oath was duly administered.*

An excise inspector searched the house of a person suspected to be in illicit possession of an excisable article, namely cocaine, and cocaine was found in the house.

Held that the subsequent conviction of the person in possession of the said house was not rendered illegal by the fact that the excise inspector had not previously obtained a search warrant.

Emperor v. *Allahdad Khan* (1) and *Emperor* v. *Hargobind* (2) referred to.

Held also, that it is a reasonable presumption that an oath has been duly administered to a witness appearing before a court although the record of the court may contain no reference to that fact.

THIS was a reference from the Sessions Judge of Saharanpur recommending that the conviction of and sentence upon one Sayeed Ahmad, who had been convicted by a Magistrate of the first class, of an offence under section 60 of the United Provinces Excise Act, 1913, and sentenced to a fine of Rs. 30, should be set aside. The facts of the case and the reasons for the learned Sessions Judge's recommendation are set forth in the order of the High Court.

The applicant was not represented.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

RYVES, J.—This is a reference by the learned Sessions Judge of Saharanpur recommending that the conviction of Sayeed Ahmad under section 60 of the Excise Act be set aside. Sayeed Ahmad and Amir Ahmad were tried together under the same section. Both were convicted. Amir Ahmad was sentenced to rigorous imprisonment for three weeks and to a fine of Rs. 1,000 and Sayeed Ahmad was fined Rs. 30 only. Amir Ahmad appealed and the learned Sessions Judge accepted his appeal and acquitted him. His judgement in that case forms part of the record in this reference and I have examined it carefully. I am, however, not concerned with the case of Amir Ahmad. One reason for

* Criminal Reference No. 856 of 1913.

(1) (1913) 11 A. L. J., 442 : I.L.R., 35 All., 353. (2) (1912) I.L.R., 35 All., 1.

1913

EMPEROR v. SAYEED AHMAD.

acquitting him was that the learned Sessions Judge was of opinion that the cocaine which was admittedly found on his premises was found in a place where it could easily have been planted and that there was evidence to show that certain enemies of Amir Ahmad might well have so planted it. The only reason why I refer to that judgement at all is because many of the points taken in this reference have been dealt with more elaborately in that case. The first ground taken by the learned Judge is that the search was illegal in that the Excise Inspector, although he had full opportunity of getting a search warrant, did not do so. I do not think that the absence of a search warrant affects the legality of the trial. This point was raised very recently in the case of *King Emperor* v. *Allahdad Khan* (1). In that case also there was no search warrant, nevertheless the Magistrate convicted the accused. On appeal the Additional Sessions Judge held that the search was illegal and that the absence of a search warrant was fatal to the case for the prosecution. He therefore acquitted the accused. Against this order of acquittal the Local Government appealed. The Bench which heard the appeal did not decide this point and the head-note to the case of *King-Emperor* v. *Allahdad Khan* is in this particular wrong. In the course of their judgement the learned Judges say that they would have some hesitation in holding that the search was legal. They do not say that the search was illegal and in the concluding words of the judgement they add "we think that it was the intention of the Legislature that in a case under section 63, where it is necessary to search a house, a search warrant should be obtained beforehand." But it will be noted that in spite of this observation this Court held the order of acquittal was wrong and the conviction of the accused was maintained. In another portion of his order of reference the learned Sessions Judge says "the question is whether in the absence of a warrant the whole search is not illegal and null and void and no conviction is legally sustainable as in analogous cases under the Gambling Act." The case just quoted is an authority for the proposition that whether the search was legal or not the conviction of the accused depended, not on the legality of the search, but on the fact that cocaine was found illegally in his

(1) (1913) 11 A. L. J., 442; I.L.R., 35 All., 358.

possession. I do not understand what the learned Sessions Judge means by the latter portion of the sentence quoted above. There is no analogy that I can see, between the Excise Act and the Gambling Act. In any case, a conviction under the Gambling Act is by no means necessarily invalid even if the search of the premises is made without a proper warrant. If a search under the Gambling Act is made illegally the only result is that certain presumptions which can be drawn under the Act, if the search was made in accordance with a properly obtained warrant, do not arise. If authority is wanted see *Emperor* v. *Hargobind* (1).

The next point taken by the learned Judge is that the record does not show that any witness was examined on oath and the trial was therefore apparently illegal. Again I cannot follow the learned Sessions Judge. The trial was held by the late Mr. Clement Wright, a Magistrate of the first class. It appears from the judgement in the other case that on this occasion and apparently on this occasion for the first time, Mr. Wright recorded the evidence with his own hand and did not have it recorded in the vernacular as is the usual practice. It is true that the record does not show that an oath was administered to any of the witnesses, but I am not aware of any provision of law which requires a court examining a witness to record the fact that an oath was administered. At any rate, I do not think that the proper conclusion for the Sessions Judge to arrive at, because no note was made that an oath was administered to each witness, was that the whole trial was illegal. I may point out that in the case of Amir Ahmad, his counsel begged the court not to dispose of the appeal on that point. No suggestion was made, apparently, either in the grounds of appeal or otherwise, by any body, that as a matter of fact no oath was administered. I think the reasonable presumption would be, in the absence of any suggestion to the contrary, that proper procedure was followed. The learned Sessions Judge might have examined Mr. Wright before coming to the conclusion at which he arrived. He says that he did think of doing so, but thought it was impossible for Mr. Wright to remember whether an oath was administered in any particular case. But the learned Sessions Judge has pointed out that on this particular case Mr. Wright adopted an

(1) (1912) I. L. R., 35 All., 1.

1913

EMPEROR v. SAYEED AHMAD.

unusual procedure. He might therefore very well have been able to remember whether or not he administered an oath to each witness. Having regard to the care with which he seems to have tried the case, I do not think it at all likely that he, a magistrate of the first class, would omit to administer the oath before recording a witness's deposition. I would also refer the learned Judge to section 13 of the Indian Oaths Act.

The third ground is that the finding of the small packet of cocaine is most suspicious. This is a question of fact, and after examining the record carefully I am not in agreement with the learned Sessions Judge.

The fourth ground taken is that the search was not conducted in accordance with law. This is based on the finding that one of the search witnesses remained outside the shop while the other stood at the threshold while the search was being conducted. I see nothing improper in this, having regard to section 103 of the Code of Criminal Procedure. The shop apparently was quite a small one and I have no doubt that the witnesses could see perfectly well what was going on, in fact perhaps better than if they had gone inside. In my opinion the trial was properly conducted and the conclusion arrived at by the Magistrate was right. I decline to interfere. Let the record be returned.

Record returned.

1913
October, 24.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

NAND RAM (DEFENDANT) *v.* CHOTE LAL AND ANOTHER (PLAINTIFFS).*

Act (Local) No. I of 1900 *(United Provinces Municipalities Act), section* 187 (1)(*h*)—*Municipal election—Rules framed by the Local Government for regulation of elections—Validity of rules—Petition against successful candidate—Appeal.*

Held (1) that the provisions of section 187 of the United Provinces Municipalities Act which gave power to the Local Government to make rules "generally for regulating all elections under the Act," were wide enough to include rules for the filing and decision of election petitions; and (2) that no

* Second Appeal No. 242 of 1913, from a decree of F. S. Tabor, District Judge of Shahjahanpur, dated the 13th of February 1913, confirming a decree of Priya Nath Ghose, Munsif of Shahjahanpur, dated the 16th of September, 1912.