

APPELLATE CRIMINAL.

Before Sir Grimwood Mears, Knight, Chief Justice,
and Mr. Justice Young.

EMPEROR *v.* ISMAIL AND OTHERS.*

1929
February, 18.

Act (Local) No. IV of 1910 (U. P. Excise Act), sections 60(a) and 71—"Possession"—House occupied by several persons—Nature of occupation—"Actual offender"—Exemption from imprisonment.

Under section 60(a) of the U. P. Excise Act, IV of 1910, ownership of the house is not an essential element, but the nature of the occupation of the house is often a circumstance of great importance in estimating whether the particular accused was in possession of the excisable article.

Cocaine was found in a *degchi*, into which it had been recently thrown, in a house in which two brothers and a cousin, who carried on a common business, lived together. All three were in the room when the cocaine was found, and all of them tried to account for its presence by the false allegation that they saw a constable throw it into the *degchi*. Held that each of the three persons came within section 60(a), as being in possession of the cocaine.

The proviso in section 71 of the Act does not in any way modify the effect of section 60(a), which provides that a person in possession of cocaine may be punished with imprisonment which may extend to two years. The proviso as to punishment by fine applies only to that person who is able to show that he is the employer or principal, that he did not personally commit the act complained of and that he took all due and reasonable precaution to prevent the commission of such act by the employee or agent.

Abdul Rahman v. Emperor (1), distinguished.

* Criminal Appeal No. 986 of 1928, by the Local Government, from an order of Rup Kishan Agha, Additional Sessions Judge of Allahabad, dated the 24th of August, 1928.

(1) (1928) 26 A. I. J., 414.

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The Government Advocate (Mr. *U. S. Bajpai*), for the Crown.

Mr. *G. K. Shinde*, for the respondents.

MEARS, C. J., and YOUNG, J. :—This is an appeal by the Local Government against the acquittal by the Sessions Judge of Allahabad of Ismail and Ishaq, sons of Husain Bakhsh, and Abdul Razzak, son of Abdul Ghafur, on a charge under section 60 (a) of Act IV of 1910, Excise Act.

Ismail and Ishaq are brothers and Abdul Razzak is their cousin. The three men had been living together for a considerable time in a house at Gulab Bari, and carrying on business together. On the 2nd of April, 1928, their house was raided by the police and 10 small and one large packet of cocaine hydrochlorate were found in a room in which they were all present. The cocaine was enclosed in paper, and the packets were found partly submerged in water, having been thrown into a *degechi* a few moments before their discovery, as was evidenced by the fact that the cocaine which had come in contact with water had not dissolved. The only explanation given at the moment was a general statement that the cocaine must have been planted there.

Before arriving at the house Mr. Measures, Superintendent of Police, had his party searched as also the search witnesses, and was himself searched. Later when the Magistrate was examining the premises in the presence of the three accused, they set up a story that they saw a constable, who entered with others by another door, throw the packets of cocaine into the *degechi*. Apart from the difficulty of this feat, there is the significant circumstance that they did not at once denounce the constable in the presence of Mr. Measures, when each of them had seen him do it with their own eyes. The search was concluded without this most important circumstance ever having been mentioned to Mr. Measures.

or anybody. The only inference we can draw is that it never happened but was an invention thought out afterwards.

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Section 60 runs as follows: "Whoever, in contravention of this Act, (a) possesses any excisable article shall be punished, if the offence is committed in respect of cocaine, with imprisonment which may extend to two years or with fine or with both."

Section 71 must also be considered in this connection:—"In every prosecution under section 60, it shall be presumed, until the contrary is proved, that the accused person has committed an offence punishable under that section in respect of any excisable article for the possession of which he is unable to account satisfactorily."

There is a further point about section 71, which we will touch on in due course.

Therefore, the prosecution had to prove under section 60 (a) that these three men were in possession of the cocaine. We must consider the circumstances and their conduct. As we have already said, they are closely related. They have been living together for some time. They carry on the common business. Not one of the three ever disassociated himself from the others in any respect. All were in the room at the moment of the raid. One or some of them undoubtedly threw the paper packets into the *degchi*. They set up a common defence, which was that each of them had seen a constable himself throw the packets into the *degchi*. We think that these facts when taken together are sufficient to bring each of these three men within section 60 (a) as being in possession of the excisable article. They have entirely failed to discharge the obligation cast upon them by section 71 of accounting satisfactorily for its possession.

In both of the lower courts a good deal of discussion turned upon the question of the ownership of the house.

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Under section 60 (a) ownership of the house is not an essential element, but the nature of the occupation of the house might and often is a circumstance of very great importance in estimating whether the particular accused in any given case possesses the excisable article, and indeed it has had great weight in this case. A simple illustration will show the importance of the matter. If the police, having raided a room, found three people in it, and at the bottom of a drawer wrapped away in cloth found a packet of cocaine, the fact that two only of the three men lived in that room whilst the third was merely a casual visitor, would be a matter well worthy of consideration. The probability is that the place where the cocaine was found would tell seriously against the two occupiers of the room, and would tell considerably in favour of the visitor. We have come to the conclusion that the prosecution have made out their case, and that each of these three men was what is described in section 71 as the "actual offender", that is the person in possession of an excisable article, for the possession of which he was unable to account satisfactorily.

It has been urged upon us that the learned Magistrate would have passed a sentence of imprisonment upon each of the three men had he not felt himself bound by the decision in the case of *Abdul Rahman v. Emperor* (1). That case apparently proceeded on the basis of the man being the owner of the house. This case proceeds upon the actual possession by the accused, and we have no doubt that the Magistrate could have passed a sentence of imprisonment had he thought fit to do so. There is in section 71 a proviso that no person other than the actual offender shall be punished with imprisonment except in default of payment of fine. We are of opinion that that proviso in section 71 does not in any way modify the effect of section 60 (a), which provides that a

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person in possession of cocaine may be punished with imprisonment which may extend to two years. The latter part of section 71 recognizes a set of circumstances which not infrequently arise where the owner of a business, which is hemmed in with statutory restrictions, has necessarily to carry on that business by means of managers, assistants and agents. An assistant may commit an act in direct violation of, say for instance, the licensing laws, of which the proprietor may be wholly ignorant. The assistant in such instance is the "actual offender". No difficulty should arise in the construction of this section, because the court can ask itself on each occasion whether it is dealing with a man who is the actual offender, or a man who sets up the defence that he himself had no knowledge of any wrong-doing, and that such wrong-doing (if committed) was committed by some person in his employ or acting on his behalf, and that he himself had taken all due and reasonable precaution to prevent the commission of such offence.

The proviso as to punishment by fine applies in our opinion only to that person who is able to show that he is the employer or principal, that he did not personally commit the act complained of, and that he took all due and reasonable precaution to prevent the commission of such act. The actual offender is of course the person who commits the particular breach of the law.

Whilst we have no doubt that we could inflict upon each of these three accused the punishment of imprisonment, we, however, think the fines imposed by Mr. Azimuddin Khan a sufficient penalty. We set aside the order of Mr. Rup Kishen Agha of the 24th of August, 1928, and restore the convictions and sentences of Mr. M. Azimuddin Khan of the 11th of June, 1928. The accused will therefore each pay Rs. 100 as fine, and in default of fine will each undergo rigorous imprisonment for three months.