

The plaintiffs' cause of action arose on her death and not earlier. During the lifetime of the limited owner the possession of Gajadhar Prasad or his transferees could not be adverse to the reversioners so as to destroy their contingent rights. This point has been recently settled by a Full Bench of this Court which we are bound to follow: *Bankey Lal v. Raghunath Suhai* (1).

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The result is that this appeal is dismissed with costs.

REVISIONAL CRIMINAL

Before Mr. Justice Young

EMPEROR *v.* MAHMUD ALI KHAN*

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March, 7

Search-witness—Should himself be searched first—Constables and others raiding a house and finding illicit liquor, opium and ammunition—Evidence liable to be discounted by failure to have themselves searched—Indian Penal Code, section 71—Limit of punishment for offence made up of several offences—United Provinces Excise Act (Local Act IV of 1910), section 60, clauses (a), (b) and (f).

On receipt of information that illicit liquor was being manufactured in a certain house, the police conducted a raid upon the house. Implements for manufacturing liquor and liquor in various stages of manufacture were found; also, about one ounce of crude opium and six revolver cartridges were found. No search of the constables and the search-witnesses had been carried out before entering the house. The owner of the house was convicted, and separately sentenced, under section 60(a) of the U. P. Excise Act, section 60(b) and (j) of the same Act, section 9(c) of the Opium Act, and section 19 of the Arms Act.

Held that the fact that a search of the constables and of the search-witnesses had not been carried out before entering the house was enough to throw doubt upon that part of the case which related to the discovery of the opium and the cartridges, which were of such small quantity and bulk that it would be a simple matter for any one to take them into the

*Criminal Revision No. 816 of 1932, from an order of Gauri Prasad, Sessions Judge of Farrukhabad, dated the 5th of September, 1932.

(1) (1928) J. L. R., 51 All., 188.

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house. The rule as to such search ought never to be neglected. Where an informer, as in these cases under the Excise Act, obtains a substantial reward for information leading to a conviction, there is a very great temptation for him, acting in conjunction with the police constables, to plant in the house of a suspected person excisable articles in order that he may obtain the reward. Every one engaged in a raid of this sort must be searched to see that there is no excisable article upon him, and failure to carry out this rule must give to the defence a very strong argument against conviction.

Held, also, that when a man was found guilty of the major offence of illicitly manufacturing excisable articles, it was unreasonable that he should also be severely punished for keeping in his possession materials for manufacturing those articles and for possessing such articles. The one offence included all the others; and having regard to section 71 of the Indian Penal Code, a sentence under section 60(b) of the Excise Act should be passed and the separate sentences under section 60(a) and (f) should be set aside.

Mr. N. A. *Sherwani*, for the applicant.

The Assistant Government Advocate (*Dr. M. Waliullah*), for the Crown.

YOUNG, J. :—This is an application in revision from the decision of the learned Sessions Judge of Farrukhabad. The applicant, Mahmud Ali Khan, was charged under section 60(a), (b) and (f) of the U. P. Excise Act, section 9(c) of the Opium Act, section 19 of the Arms Act and section 332 of the Indian Penal Code before a Magistrate of the first class. He was found guilty by the learned Magistrate and sentenced to one year's rigorous imprisonment and a fine of Rs.500 under section 60(a) of the Excise Act and one year's rigorous imprisonment and a fine of Rs.500 under section 60(b) and (f) of the same Act. Under section 9(c) of the Opium Act he was sentenced to one year's rigorous imprisonment and a fine of Rs.100. Under section 19 of the Arms Act he was sentenced to one year's rigorous imprisonment. Under section 332 of the Indian Penal Code he was sentenced to four months' rigorous imprisonment; the sentences to run consecutively, making a

total in all of four years and four months' rigorous imprisonment, and the fines amounted in all to Rs.1,100.

The police of Farrukhabad obtained information that Mahmud Ali Khan was manufacturing in his house, on the outskirts of Farrukhabad, illicit liquor. The Deputy Superintendent of Police and the Joint Magistrate conducted a raid upon the house of Mahmud Ali Khan. They went there in the morning at 8 o'clock with fifty constables. The house was surrounded, and the entrance door being locked, a constable was detailed to scale the wall of the compound and get into the house. The constable did so and was heard shouting that he was being beaten. Another constable was sent in to assist. One of the constables then opened the door. The Deputy Superintendent and the other constables rushed in. It is alleged that Mahmud Ali Khan was found in the room and when he saw the Deputy Superintendent of Police and the other constables rush in, he attempted to assault the Deputy Superintendent of Police with a *lathi*. The Deputy Superintendent of Police used a pistol. The bullet fortunately struck the *lathi* and Mahmud Ali Khan surrendered. A large amount of implements for manufacturing liquor, and pots and earthen jars containing liquor in its various stages of manufacture were found. A well in the house was searched and some liquor was found hidden in it. In a steel box a packet containing 2 tolas, that is, rather less than 1 ounce, of crude opium was discovered, and hanging on the wall was a coat in the pocket of which six 450 revolver cartridges were discovered.

I am satisfied that Mahmud Ali Khan and his brothers, who are not before me, were engaged in manufacturing liquor illicitly on a fairly large scale. A large amount of silver coins of small denomination were discovered in the house. These obviously had been obtained from customers for the liquor. There can be no question of Mahmud Ali Khan's guilt with regard to the charges under the Excise Act.

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With regard to the charge under the Opium Act I am in doubt. It has been admitted by the police and the Magistrate that the search of the constables and the search-witnesses was not carried out before entering the house. The rule as to this ought never to be neglected. Where an informer, as in these cases under the Excise Act, obtains a substantial reward for information leading to a conviction, there is a very great temptation for him, acting in conjunction with the police constables, to plant in the house of a suspected person excisable articles in order that he may obtain the reward. It is for these reasons, among others, that the rule has been laid down that every one engaged in a raid of this sort must be searched to see that there is no excisable article upon him. Failure to carry out this rule must give to the defence a very strong argument against conviction. It is also in the interest of the public that this necessary rule should be strictly complied with. In this case the amount of opium found in the house was of a very small quantity. Further, the six cartridges which were discovered in the jacket hanging upon the wall would not take up much room. It would be a simple matter for any one to take this small quantity of material into the house. With regard to the cartridges, it is also noteworthy that the raid was conducted suddenly and without giving Mahmud Ali Khan any time to get rid of incriminating articles. No revolver was discovered in the house. It is true that it is said that an empty cardboard box which originally contained cartridges was found in a steel box. Still it is impossible to be absolutely certain, under the circumstances, that that might not have been placed there. I do not say that the police did in fact plant these articles in the house, but the fact that the ordinary search was not carried out is enough to throw doubt upon this part of the case. In any event, the possession of 1 ounce of crude opium is by itself not a serious offence. Three tolas of Government manufactured opium may be purchased by any one

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in the bazar, and I have no doubt that in any bazar crude opium, though illegal, may be purchased also.

With regard to the assault alleged, the learned Magistrate who tried the case appeared to have been in some doubt as to the attack upon the Deputy Superintendent of Police. The Deputy Superintendent of Police may have thought that Mahmud Ali Khan intended to attack him. The roof of the house was low and in the room it was almost impossible to use a *lathi*. Further, it is extremely unlikely that after Mahmud Ali Khan had already seen two constables, on seeing the Deputy Superintendent of Police and a mass of constables he would have attacked the Deputy Superintendent of Police. With regard to the assault upon the two constables it is noteworthy that their injuries were slight, consisting of bruises on the inside of the elbow and one abrasion on the outside of the arm. The bruises on the inside of the elbow were much more likely to have been caused in scaling the wall than by a *lathi* blow. But on the evidence of the constables themselves I am satisfied that some form of resistance was shown by Mahmud Ali Khan which amounted to an assault.

The result is that I set aside the conviction and sentence under the Opium Act and the Arms Act. With regard to the Excise Act the courts below, I think, have gone astray. It seems to me unreasonable, when a man is found guilty of the major offence of illicitly manufacturing excisable articles, that he should also be severely punished for keeping in his possession materials for manufacturing those articles and for possessing them. The one offence includes all the others. Further, section 71 of the Indian Penal Code provides for this. It is there laid down that "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided"; and also "Where

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several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences." The separate sentences under section 60(b) and (f) combined of the Excise Act must therefore go. With regard to the conviction under section 60(b) it will stand. The sentences under section 60(a) and (f) will be set aside. With regard to the sentence under section 60(b) it appears to me that for a first offence one year's rigorous imprisonment is too much. The illicit manufacture of liquor is primarily an offence against the revenue. It is not like being in possession of or selling cocaine. In the case of a first conviction I consider that a sentence of six months' rigorous imprisonment and a fine of Rs.500 is sufficient punishment under the circumstances. I therefore set aside the sentence of one year's rigorous imprisonment and substitute therefor a sentence of six months' rigorous imprisonment. The fine of Rs.500 will stand. In default of payment of the fine Mahmud Ali Khan will undergo further rigorous imprisonment for three months. For the assault the sentence of four months' rigorous imprisonment is set aside and a sentence of two months substituted; the sentence to run concurrently with the sentence under section 60(b) of the Excise Act. The application in revision is otherwise rejected.

Before Mr. Justice Young

EMPEROR v. SUDESHARA*

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March, 9

Criminal prosecution—Dispute of a civil nature—Using the criminal courts for enforcing a civil claim—Indian Penal Code, section 420—Cheating—Jurisdiction—Civil and criminal courts.

The complainant had pawned certain ornaments with the accused, Mst. Sudeshara; he alleged that he repaid the money

*Criminal Revision No. 12 of 1933, from an order of W. Y. Madeley, Sessions Judge of Benares, dated the 9th of November, 1932.