

1934
BAJI LAL
v.
TOTA RAM

the rent in good faith to the lambardar, did not raise a "question of proprietary right" within the meaning of section 243.

In our opinion, the District Judge and the learned single Judge of this Court have taken a correct view that no second appeal lay to the District Judge and we accordingly dismiss the appeal with costs.

APPELLATE CRIMINAL

Before Mr. Justice Thom and Mr. Justice Collister

EMPEROR v. BACHCHA*

1934
April, 18

Criminal Procedure Code, section 510—Chemical Examiner's report—Whether he must be called as a witness—Cocaine smuggling case—Criminal Procedure Code, sections 103, 165—Irregularities in search by police officer without a search-warrant.

Although cases may arise—particularly in a matter of arsenic poisoning—in which it may be necessary in the interests of justice that the Chemical Examiner be called and examined as a witness, the general proposition that the Chemical Examiner must be called in all cases in which a chemical analysis has been made and in which the result of such analysis is a determining factor in the case is not sound. *Emperor v. Habbu* (1), disapproved.

So, where in a cocaine smuggling case the Chemical Examiner's report showed that the substance found on the accused contained more than 3 per cent. of cocaine admixed with novocaine, and the admission of this report was not objected to, nor was any request made on behalf of the accused that the Chemical Examiner be sent for and put into the witness-box, it was held that the conviction was sound, although the Chemical Examiner was not called as a witness.

Where the memorandum recorded under section 165 of the Criminal Procedure Code by a police officer prior to making a search stated that information had been received of the possession of illicit liquor and apparatus for making it by the accused, and therefore he was going to search his person, but in his statement in court the police officer stated that he had received

*Criminal Appeal No. 124 of 1934, by the Local Government, from an order of F. A. Khan, Sessions Judge of Fatchpur, dated the 20th of November, 1933.

information about the smuggling of cocaine by the accused, and in the search cocaine alone was found, it was *held* that the irregularity in procedure did not necessarily vitiate the conviction.

Where only one search witness, and not two as required by section 103 of the Criminal Procedure Code, was taken along by a police officer in order to make a search, it was *held* that the irregularity did not necessarily vitiate the conviction.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Dr. *M. Nasim*, for the accused.

THOM and COLLISTER, JJ.:—This is an appeal on behalf of the Local Government against the acquittal of one Bachcha on a charge under section 14 of the Dangerous Drugs Act (Act No. II of 1930).

The case for the prosecution was that the Excise Inspector, Munshi Abdul Ghaffar Khan, received certain information on the 4th November, 1933, in consequence of which he took some police officials and a resident of Fatehpur named Muhammad Zaki with him to mile 23 on the road which goes from Fatehpur to Cawnpore. The accused came along with certain other persons on an ekka and the Excise Inspector and the police officers stopped the ekka and searched it and also searched the person of the accused. On the seat of the ekka they found a packet containing a certain substance and on the person of the accused they found a match box containing a similar substance. They took possession of the packet and the match box and these were subsequently sent to the Chemical Examiner, whose report shows that the substance in the packet and also in the match box contained more than 3 per cent. of cocaine admixed with novocaine.

The accused admitted that the packet was found in the ekka, but he denied that he had any concern with it. He denied that the match box was recovered from his possession. He pleaded enmity with the Excise Inspector, but has made no attempt to prove it. He examined the ekka driver and two other witnesses in support of his statement that nothing was found on his person.

1934

 EMPEROR
v.
 BACHCHA

1934

EMPEROR
v.
BACHCHA

The trial court convicted Bachcha under section 14 of the Act and sentenced him to four months' rigorous imprisonment. The Sessions Judge of Fatehpur agreed with the trial court on facts, but has acquitted the accused on the ground that the Chemical Examiner had not been called and examined as a witness to depose to the contents of the packet and match box. The Sessions Judge considered himself bound by the remarks of YOUNG, J., in a case which recently came before this Court, *Emperor v. Happu* (1).

The case in question was a case of murder by arsenic; and we agree that cases may arise—particularly in a matter of arsenic poisoning—in which it may be necessary in the interests of justice that the Chemical Examiner be called and examined as a witness and be subjected to cross-examination. But we do not accept the proposition that the Chemical Examiner must be called in all cases in which a chemical analysis has been made and in which the result of such analysis is a determining factor in the case. Under section 510 of the Criminal Procedure Code the report of the Chemical Examiner is admissible in evidence, and in this case neither the accused nor his counsel objected to the admission of the Chemical Examiner's report, and they did not request that the Chemical Examiner be sent for and put into the witness-box. Nor was it pleaded that the substance in the packet and in the match box was not in fact cocaine. In our opinion the report of the Chemical Examiner in the present case establishes the fact that the substance which was taken possession of by the Excise Inspector contains more than 3 per cent. of cocaine admixed with novocaine.

It is argued before us by counsel for the accused that the Excise Inspector violated the provisions of sections 165 and 163 of the Criminal Procedure Code read with section 25 of the Dangerous Drugs Act.

(1) (1933) I.L.R., 56 All., 228.

1934

EMPEROR
v.
BACHCHA

Section 165 of the Criminal Procedure Code lays down that the searching officer should first record in writing the grounds of his belief (as regards the suspected article) and should specify in such writing as far as possible the thing for which the search is to be made. The Excise Inspector states that he received information that cocaine was being smuggled from Cawnpore and he says that Ex. D is his memorandum and that he recorded in it the information which he had received. Ex. D read as follows: "Information is received this moment that Bachcha, son of Madar Baksh of village Chote Bazar, Bindki, has got illicit liquor and apparatus in his house and as there is no time to secure a warrant without affording an opportunity to dispose of it, I am therefore going to search his person forthwith." It will be seen that there is no mention in that memorandum of the smuggling of cocaine from Cawnpore and it is clearly at variance with what the Excise Inspector has stated in court. But not a single question was put to the Excise Inspector in cross-examination to obtain from him an explanation of this discrepancy. It was clearly the duty of counsel for the defence to put this to the Excise Inspector and ask him if he was able to explain it. It is possible that he might have been in a position to do so. The words "I am therefore going to search his person" show that the Excise Inspector had grounds for making a personal search apart from a house search. In any case the alleged irregularity in procedure would not necessarily vitiate the conviction.

Section 103 of the Criminal Procedure Code provides that before making a search, the officer about to make it shall call two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search. The search in the present case was made on the metalled road and nowhere near a town, and so it was obviously impossible to obtain as witnesses any persons from the immediate vicinity. What the Excise Inspector did was to take a physician

1934
EMPEROR
v.
BACHCHA

named Muhammad Zaki from Fatehpur. We think that in the light of section 103 he ought to have taken some other person in addition to Muhammad Zaki; but an irregularity of this sort can be no bar to the conviction if we are satisfied that the cocaine was in fact found in the possession of the accused. The accused has entirely failed to prove any enmity between himself and the Excise Inspector and nothing whatever has been shown against the credibility of Muhammad Zaki. His evidence and the evidence of the Excise Inspector and Head Constable Kamta Prasad satisfy us that the packet and the match box containing cocaine were recovered in the manner alleged and the accused is, therefore, liable to conviction.

The result of our findings is that we allow this appeal and set aside the order of acquittal. We convict Bachcha under section 14 of the Dangerous Drugs Act and we sentence him to be rigorously imprisoned for four months. If Bachcha is on bail he must surrender to his bail and serve out his sentence.

MATRIMONIAL JURISDICTION

Before Mr. Justice Young

NUGENT (PETITIONER) v. NUGENT (RESPONDENT)*

1934
April, 20

Divorce—Practice—Cross-petitions by husband and wife—Adultery of both parties—Husband's misconduct conducing to wife's adultery—Granting of wife's petition—Discretion of court—Costs.

Where, upon cross-petitions for divorce by the wife and the husband, it appeared that both the husband and the wife were guilty of adultery, but that the husband's continued misconduct and cruel behaviour had at length led to the wife's adultery, it was held that, following the practice in the English courts in such matters, the court could exercise its discretion in favour of the wife's petition, notwithstanding her adultery, where the wilful neglect or misconduct of the husband caused or conduced to that adultery and where, further, there was complete candour and disclosure on the petitioner's part. Accordingly the wife's

*Matrimonial Suit No. 3 of 1934.