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Even so, his application is admittedly 4 days beyond time. He has filed an affidavit swearing that he was intending to leave for Allahabad on the 24th of May, 1932, with the intention of filing an application, when he suddenly fell ill with a very high temperature, which at times made him delirious, with the result that he was absolutely confined to bed for 3 or 4 days. He further swears that on the 26th of May he sent his brother-in-law to Allahabad with all the necessary papers and the latter presented himself before the counsel on the morning of the 27th of May, but was informed that limitation had expired on the previous day and that an application under section 5 of the Limitation Act together with an affidavit would be necessary. Accordingly his brother-in-law returned and informed him of the facts and then he came to Allahabad and filed an affidavit. A counter-affidavit has been filed denying the allegation that he was ill. But the counter-affidavit is in very vague terms, only stating that the deponent had inquired from neighbours and had come to know that the applicant was not very ill. In our opinion this vague denial cannot be held to outweigh the positive testimony of the applicant and we hold that he was ill, as stated, and this constitutes sufficient ground for us to condone the delay of 4 days.

We accordingly condone the delay and direct that the application be treated as filed within time.

## REVISIONAL CRIMINAL

*Before Sir Shah Muhammad Sulaiman, Chief Justice,  
and Mr. Justice King*

EMPEROR v. PARMAI AND OTHERS\*

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*November, 17* U. P. Excise Act (Local Act IV of 1910), section 60(f)—*Implements of illicit distillation of liquor found in a house occupied by three relatives—Possession.*

\*Criminal Revision No. 339 of 1933, from an order of S. M. Mir, Sessions Judge of Pilibhit, dated the 26th of April, 1933.

Various implements of illicit distillation of liquor were found in two rooms of a house occupied by two brothers and the son of one of them, all of whom lived together, though it was alleged by the defence that the house belonged to another brother and that the brothers were separate. The articles found were so bulky and numerous, and bore such evidence of recent use, that any one occupying the house would be cognizant of their presence, purpose and use. It was held that in these circumstances all the three accused persons were rightly deemed to be in possession of the articles in question and as keeping and using them, and were rightly convicted of an offence under section 60(f) of the U. P. Excise Act. *Emperor v. Kaul Ahir* (1), distinguished; *Emperor v. Sikhdar* (2), referred to.

Mr. G. S. Pathak, for the applicant.

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

SULAIMAN, C. J., and KING, J.:—This is an application in revision against a conviction of three persons, Parmai, Durga and Ram Prasad, under section 60(f) of the United Provinces Excise Act.

The facts found are as follows. A certain constable obtained information on the 10th of January, 1933, that illicit distillation of liquor was being conducted in the house of the accused. He informed the officer in charge of the kotwali who proceeded with the Excise Inspector to search the house. The result of the search was that a hearth of bricks full of ash, with a drum full of wash on it, a pitcher with a hole and a pipe with earth plaster on the hole and ends of the pipe, a pitcher smelling of liquor, a wet pitcher, a pitcher with a hole used as a still head, three canisters full of wash, three bottles, one of which smelt of liquor and another containing a few drops apparently of liquor, were found. These articles were found in two *kothries*, one of which is alleged to be occupied by Parmai and his son Ram Prasad and the other occupied by Durga. These three persons were present at the search or arrived during the search.

(1) (1932) I.L.R., 55 All., 112. (2) (1931) I.L.R., 54 All., 411.

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The defence was that the articles were found in a house which belonged to Sita Ram, the brother of Parmat and Durga, and that the brothers had separated. The Magistrate and the learned Additional Sessions Judge have concurred in finding that the incriminating articles were found in the house occupied by the accused. The court below observes: "The appellants are closely related. They have been living together in the house and were present at the time of the raid." It also goes on to say that the appellants were undoubtedly in possession of the house from which the articles were recovered, and further that it is proved beyond doubt that the articles were found in the house of the appellants and from their possession.

It has been argued that possession of the incriminating articles has not been brought home to any one of the three accused. The finding is that the articles were jointly in their possession and it is argued that this is not enough to justify their conviction under section 60(f) of the Excise Act.

Section 60(f) is very widely worded. It renders punishable any person who, in contravention of the Act or of any rule made under the Act or of any license, "uses, keeps or has in his possession any materials, still, utensils, implement or apparatus whatsoever, for the purpose of manufacturing any excisable article other than *tari*." It is quite clear that the things found were used for the illicit distillation of liquor other than *tari* and that the illicit distillation was being conducted in the *kothries* occupied by the three accused persons. The articles found were of such a nature that they obviously could not escape the notice of the occupants. The pitchers, canisters, the drum of wash, etc., were large articles which any one merely entering the *kothries* would be bound to see. Moreover, the distillation of liquor is accompanied by a characteristic smell which also could not escape notice. It may safely be

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inferred therefore that any person who occupied the *kothries* from which the articles were recovered certainly knew that the articles were there. In our opinion it can also be further safely inferred that all three of the appellants were in possession of those articles and were using or keeping them. The state in which the articles were found gave a clear indication that distillation had very recently been practised. Considering that Parmai and Durga are brothers and are both adults and that Ram Prasad, the son of Parmai, is also an adult, being about 30 years of age, we think it can safely be inferred that all three of the accused were in possession of the articles and were using or keeping them. On this finding the conviction of each of the applicants is fully justified.

The Magistrate relied on a ruling in *Emperor v. Sikhdar* (1). In that case an unlicensed gun had been found in a house and the learned Judge held that the finding of an unlicensed gun in the house would raise a presumption against all the adult male members that it was in their possession and control and they might one and all be tried on that charge. It would be for these persons to show that they were not in possession of the gun in question and it was open to the police to prosecute one or all of the adult male members for an offence of this nature. Undoubtedly that ruling did support the view taken by the Magistrate that all three of the accused could be convicted of being in possession of the articles found in their *kothries*. It has been pointed out to us by the learned advocate for the applicants that this ruling in *Sikhdar's* case (1) has been dissented from in a subsequent decision by a Division Bench of this Court, namely *Emperor v. Kaul Ahir* (2). That was a case where in the course of the search of a house two loaded cartridges were found in a corn bin in the house among ghee, butter and other articles. The head of the family was convicted on the ground

(1) (1931) I.L.R., 54 All., 411.

(2) (1932) I.L.R., 55 All., 112.

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that he was responsible for the articles recovered from his house, and the ruling in the case of *Emperor v. Sikhdar* (1) was referred to in support of his conviction. The learned Judges observed that they were unable to accept the view set forth in that ruling, namely, that all the adult male members of a Hindu joint family could be presumed to be in possession of an unlicensed gun found in their house. The learned Judges held that in such cases it is necessary to prove not only the presence of the articles in the house but the possession of some particular person over those articles in order to justify a conviction. They went on to point out that, on the facts of that case, the cartridges might have been dropped by some sportsman, picked up by a child and handed over to the child's mother and it is the women of the house and not the men who look after the grain bin and the ghee, butter and such other articles. On that view the head of the family might not even have been aware of the presence of the cartridges in the house, and they therefore acquitted him. We cannot take any exception to the finding of the learned Judges in that case but we think it was unnecessary for them to dissent from the view expressed in *Sikhdar's* case (1), because the cases were easily distinguishable upon the facts. In the case of *Kaul Ahir* (2), the incriminating articles were merely two loaded cartridges which were found hidden away in a corn bin. In such circumstances it is quite obvious that the head of the family might not have been aware of the presence of these cartridges in his house. In the case of an unlicensed gun the position is different. It is not very likely that so large an article as a gun could be kept in a house without the knowledge of the managing member of the family. It may be that the gun was not even hidden away. The case of *Kaul Ahir* (2) is also easily distinguishable from the facts of the case before us because in the present case the articles found were such that

(1) (1931) I.L.R., 54 All., 411.

(2) (1932) I.L.R., 55 All., 112.

they must have been within the knowledge of any one occupying the *kothri*, and the articles were being used by persons occupying the *kothri*.

We do not wish to lay down any general proposition of law, but on the facts of this case we think there can be no doubt but that all three of the accused persons were in possession of the articles in question, and were also keeping and using them, and therefore they have been rightly convicted under section 60(f) of the Excise Act.

It has been urged that the sentences of 9 months' rigorous imprisonment each and fines of Rs.15 each are excessive in the case of first convictions. Undoubtedly the sentences are severe and would not ordinarily be passed in the case of a first conviction, but the Magistrate has stated that illicit distillation is rampant in that district and for that reason he considered it necessary to pass a deterrent sentence. We do not feel called upon to interfere with the sentences of the two senior members of the family but we think that Ram Prasad is less responsible than his father for the illicit distillation, although he no doubt took an active part in the distillation. We accordingly reduce the sentence passed upon Ram Prasad to one of six months' rigorous imprisonment and set aside the sentence of fine passed upon him.

Before Sir Shah Muhammad Sulaiman, Chief Justice,  
and Mr. Justice King

EMPEROR *v.* DASRATH RAI AND OTHERS\*

*Criminal Procedure Code, sections 16, 350A—Bench of Honorary Magistrates—Bench of three, with quorum of two—Case tried, and accused convicted, by all three—Absence of one Magistrate on one day during trial—Irregularity—Failure of justice—Criminal Procedure Code, section 537.*

Three Honorary Magistrates constituted a Bench, two forming a quorum. In the course of a trial before all the three, on one particular day one of them was absent; and some

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