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Husain Khan v. *Amar Chand Paul* (1). With that decision we entirely agree.

We accordingly allow these appeals, set aside the orders of the learned Subordinate Judge, dated the 6th of August, 1930 and the 28th of October, 1930 and dismiss the application for execution with costs in both courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice E. M. Nanavutty.

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April. 27.

WILAYAT HUSAIN (ACCUSED-APPLICANT) *v.* KING-EMPEROR (COMPLAINANT-OPPOSITE PARTY).*

United Provinces Excise Act (IV of 1910), section 60A and 60(a)—Cocaine found in a house—No direct evidence to prove that accused was owner or occupier of that house—Circumstantial evidence of no evidentiary value—Conviction of accused on inferences from circumstantial evidence of no value, if justified—Cocaine in large quantities found in the boxes in the courtyard of a house—Accused found near the cocaine unable to explain their presence there—Conviction under section 60(a), if justified—Criminal Procedure Code (Act V of 1898), section 539B—Local inspection in absence of parties—Judge making no separate record of inspection, effect of—Provisions of section 539B of the Code of Criminal Procedure, whether imperative.

Held, that the words of section 60A of the United Provinces Excise Act (IV of 1910) imply a single person in a controlling position over the premises which is indicated by the use of the word "permits" later on in the section. It is only a person made out to be the occupier of or as having the use of a building so as to be in a position to prevent, if he so liked, the illicit sale of cocaine in that building who is liable under section 60A for permitting the building under his use and control to be used for the commission of an offence under the Excise Act.

*Criminal Revision No. 46 of 1931, against the order of L. S. White, Sessions Judge of Lucknow, dated the 14th of March, 1931.

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Where the water connection installed by the accused has not been proved to be in connection with the use of that portion of the building in which cocaine is found and there is absence of any proof connecting the installation of the water pipe by the accused with the use or occupation of the house, no court can, from the mere fact of the installation of the water connection, legitimately draw the inference that the accused was a person having the use of that house for the purpose of the illicit sale of cocaine.

Where large quantity of cocaine in a number of tin boxes placed in a row is found in the courtyard of a house and the accused are found near the place from where cocaine is recovered and they are unable to explain how they came to be there and how the cocaine happened to be found placed in a row there, the conclusion is inevitable that the accused were either in possession of the cocaine as purchasers of it or that they were found in possession of the cocaine trying to sell it on behalf of themselves or of some other person and the court is, under those circumstances, justified in coming to the conclusion that the accused were in possession of the illicit cocaine and in convicting them under section 60(*a*) of the United Provinces Excise Act.

Local inspections must be held sparingly and where the Sessions Judge when he went to make a local inspection did not see to it that the accused or their counsel were present when he made the inspection and did not make a separate record concerning the inspection he made and the facts that he found which would be helpful to him in appreciating the evidence given at the trial he did not comply with the provisions of section 539B of the Code of Criminal Procedure which were imperative.

Ram Sahai Singh v. *Dwarka Singh* (1), referred to.

Dr. *J. N. Misra* and Messrs. *R. F. Bahadurji*, *S. S. Chaudhri* and *Shankar Sahai*, for the applicant.

The Government Advocate (Mr. *H. K. Ghose*), for the Crown.

NANAVUTTY, J. :—These are three connected applications for revision arising out of an appellate judgment of the learned Sessions Judge of Lucknow upholding the conviction and sentence passed upon the applicant Wilayat Husain for an offence under section 60A of the United Provinces Excise Act, and the

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convictions and sentences passed upon the applicants Raza Husain and Abdul Rahman for an offence under section 60*a* of the United Provinces Excise Act.

The facts out of which these applications for revision have arisen are briefly as follows:—

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A raid was made by the C. I. D. Excise Inspector accompanied by other officers upon the house of Wilayat Husain on the night of the 23rd of July, 1930. In a portion of the raided building which is not a residential house, and which is marked on the sketch of the locality as house No. 1 by the lower appellate court, in a courtyard close to the shrine of Syed Nasir-uddin Shah (*Dalan mutasil mazar dari par rakhi hoi ek dibya*, etc.) were found, a number of small tin boxes or *dibyas* containing cocaine spread out on a carpet or *darri* and three men, namely Raza Husain, and his servant Abdul Rahman and Jan Ali, and a woman were found in this *dalan* or courtyard at the time of the raid. The woman somehow managed to escape arrest but the three men Raza Husain, Abdul Rahman and Jan Ali were caught. Of these three men Raza Husain and Abdul Rahman are two of the applicants before me. A recovery list (exhibit 1) was prepared by the Excise Inspector in the presence of Raza Husain (*bamaujudgi* Raza Husain) and others. It is significant to note that this recovery list (exhibit 1) does not state that the cocaine was found in the possession of Raza Husain or of anybody else, but merely that it was found in a place from where it was suspected that it used to be sold. The Excise Inspector after preparing the search list (exhibit 1) and taking possession of the cocaine and cash found in the building submitted a report on the 25th of July, 1930 to the District Magistrate praying for a warrant of arrest against Wilayat Husain, who was to be charged under sections 14 and 15 of Act II of 1930 (The Dangerous Drugs Act of 1930). The Excise

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Inspector desired that Raza Husain and Musammat Tabko should be prosecuted under section 14 of the same Act and Abdul Rahman and Jan Ali under section 21 also of the same Act, that is to say for abetment of offences under sections 14 and 15 of the Act. The Deputy Magistrate, Mr. Sharafat Ullah Khan, on the 10th of October, 1930 framed charges under section 60(*a*), section 60(*i*) and section 60A of the United Provinces Excise Act (IV of 1910) against all four accused persons Wilayat Husain, Raza Husain, Abdul Rahman and Jan Ali. He convicted all the accused of an offence under section 60(*a*) of Act IV of 1910. He acquitted Raza Husain, Abdul Rahman and Jan Ali of an offence under section 60(*i*) of Act IV of 1910 but convicted Wilayat Husain of an offence under section 60(*i*) of the United Provinces Excise Act. He also found all four accused guilty of an offence under section 60A of Act IV of 1910 and he further bound them all over to be of good behaviour under section 60B of the same Act for a period of three years.

In appeal the learned Sessions Judge set aside the convictions and sentences passed upon Wilayat Husain under sections 60(*a*) and 60(*i*) of the United Provinces Excise Act, but upheld his conviction and sentence under section 60A of the Act. He further set aside the conviction and sentence of Jan Ali on all three charges and acquitted him. He also set aside the conviction and sentence passed upon Raza Husain and Abdul Rahman for offences under section 60A of Act IV of 1910, but maintained their conviction and sentence under section 60(*a*) of the Act.

In revision it has been strenuously argued before me that there is no evidence at all to support the conviction of any of these applicants for the offence of which they have been convicted. I will first take up the case of Wilayat Husain who has been convicted under section 60A of the United Provinces Excise Act.

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It has been found as a fact by the lower appellate court that Wilayat Husain was not the owner of the building (marked house No. 1 in the sketch) in which the cocaine was found and that it was not strictly speaking in his occupation even. The learned Sessions Judge has, however, surmised that in view of Wilayat Husain's close connection by marriage with the real owners of the house in which the cocaine was found it was quite probable that he had the use of this house also. This however is not, to my mind, a legitimate mode of reasoning. No evidence has been adduced by the prosecution to prove that this surmise of the learned Sessions Judge is a fact. The alleged use of the house of Wilayat Husain is a concrete fact which is capable of direct proof and it cannot be legitimately deduced from the mere fact that he happens to be a relation of the real owners of the house who are the heirs of one Mariam Bibi. In the second place, the learned Sessions Judge had drawn an inference adverse to the applicant Wilayat Husain from the fact that he had a water connection installed in the courtyard of house No. 1. The mere fact that Wilayat Husain had installed such a water connection in the courtyard of house No. 1 would not prove that he was using house No. 1 as his residential house or *makan maskuna*. It is in evidence that Wilayat Husain lives on the first floor of house No. 2 shown in the plan. House No. 1 consists of only a tomb and a *dalan* or courtyard. The place occupied by the tomb of a saint can hardly be utilized for any secular purpose such as that of a dwelling house. It is established from the evidence on the record that nobody lives in house No. 1, and the prosecution evidence, including that of the City Kotwal, proves that this portion of the house marked No. 1 is a shrine wherein is found the tomb of a Muhammadan saint Syed Nasir Uddin Shah who is connected with the wellknown saint Syed Salar Mahsud Ghazi of Bahraich. This portion of the building marked

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as house No. 1 originally belonged to one Hyder Husain and on his death it came to his daughter Mariam Bibi and now it is in the possession of her heirs. The water connection installed in the courtyard of house No. 1 by Wilayat Husain for his own convenience would not prove that house No. 1 was in his occupation or user. In fact the learned Sessions Judge himself in another part of his judgment writes in connection with section 60A of Act IV of 1910 that "the words to my mind imply a single person in a controlling position over the premises which is indicated by the use of the word 'permits' later on in the section." I entirely agree with the learned Sessions Judge as far as his interpretation of the words of section 60A of the Excise Act goes, but I regret I cannot accept his contention that the mere installation of a water tap or some water connection in the courtyard of house No. 1 would be tantamount *per se* to the use by Wilayat Husain of the building marked No. 1 in which the cocaine was found. The applicant's concern was with the water tap and not with the courtyard in which the water connection was installed and it is moreover in evidence that the *dalan* or courtyard of the building marked No. 1 in the sketch is not for residential purposes but is a mausoleum or shrine of a saint where any member of the public can come at any hour of the day or night to make votive offerings at the tomb or to sing *qavvali* songs, for the door leading to the tomb of the saint is always kept open. Such a place cannot be said to be in the use or occupation of any one. The water connection installed by the applicant Wilayat Husain has not been proved to be in connection with the use of that portion of the building marked No. 1 in which the cocaine was found; and in the absence of any proof connecting the installation of the water pipe by Wilayat Husain with the use or occupation of house No. 1, no court can legitimately draw the inference

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that the applicant Wilayat Husain was a person having the use of this house for the purposes of illicit sale of cocaine from the mere fact of the installation of the water connection. This installation of the water connection in the courtyard of house No. 1 is, therefore, not in my opinion a piece of circumstantial evidence incriminating Wilayat Husain and making him out to be an occupier or a person having the use of house No. 1 so as to be in a position to prevent, if he so liked, the illicit sale of cocaine in that building. It is only such a person who is liable under section 60A of Act IV of 1910 for permitting the building under his use and control to be used for the commission of an offence under the Excise Act.

The next piece of circumstantial evidence upon which the learned Sessions Judge relies is that the plan exhibit 9 shows that a portion of the house which corresponds to the house marked No. 1 in the sketch is shown in the plan (exhibit 9) as the house of Wilayat Husain, and this plan (exhibit 9) was filed by Wilayat Husain along with his application to the Municipal Board of Lucknow for permission to erect a pucca building thereon. This plan (exhibit 9) is not legally proved, but, assuming that it was filed by Wilayat Husain, I find that it does not advance the case for the Crown in any way, for it is proved on the record and found by the learned Sessions Judge that this house marked No. 1 does not belong to the applicant Wilayat Husain, and a mere mistake in the plan (exhibit 9) wrongly describing this house No. 1 as belonging to Wilayat Husain will not make the latter out to be the owner or occupier of this house or a person having the use of this house. Wilayat Husain was not asked to explain the plan (exhibit 9) and as the plan was not drawn up by him, he cannot be held responsible for any slight inaccuracy there may be in it nor can any inference adverse to him be

legitimately drawn from the mis-description of the house in the plan exhibit 9.

The next piece of circumstantial evidence from which an adverse inference has been drawn by the learned Sessions Judge against the applicant Wilayat Husain is that the door of house No. 2 was found closed at the time when the Judge went to make his local inspection and this door which was marked "Y" in the sketch by the Judge apparently always remained closed, and so it was inferred that the passage from house No. 2 into the lane was through house No. 1 and that, therefore, the applicant Wilayat Husain was to be deemed to have the use of the building marked House No. 1 in the sketch. It is a matter for regret that the learned Sessions Judge when he went to make a local inspection of the house of the accused did not see to it that the accused or their counsel were present at the time when he made the inspection. He also did not comply with the imperative provisions of section 539B of the Code of Criminal Procedure. There is no separate record made by the learned Sessions Judge concerning the inspection he made of the locality and the facts that he found which would be helpful to him in appreciating the evidence given at the trial. It was held by the Patna High Court in a case reported in *Ram Sahai Singh* v. *Dwarka Singh* (1) that a local inspection must be held sparingly, and the danger of such local inspection is intensified when one or both of the parties are absent at the time of the local inspection. But, apart from these irregularities, it is clear that the learned Sessions Judge has drawn a wrong inference from the mere fact that the door of house No. 2 happened to be closed at the time when he went to make his inspection. The learned counsel of the applicant Raza Husain has argued before me that Raza Husain

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and Wilayat Husain had shut the door of house No. 2 because they had to come to court to hear judgment on the day when the learned Sessions Judge happened to make the local inspection without their knowledge. This explanation seems to me on the face of it satisfactory and in the absence of any evidence to the contrary the conclusion drawn by the learned Sessions Judge from the fact of his finding the door of house No. 2 closed that Wilayat Husain was using the building marked No. 1 is not legitimate.

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I have thus shown above that all the circumstantial evidence from which the learned Sessions Judge has drawn the inference that the applicant Wilayat Husain was the person who had the use of the house marked No. 1 in the sketch has really no evidentiary value, and, as the learned Sessions Judge has held that there is no direct evidence to prove that Wilayat Husain was the owner or occupier of the house or a person who had the use of the place marked exhibit 1 in the sketch, I must therefore hold that there is no evidence at all to justify the conviction of the applicant Wilayat Husain under section 60A of the United Provinces Excise Act. I therefore am compelled, in the absence of any evidence on the record, to allow this application for revision filed by Wilayat Husain and to set aside his conviction and sentence under section 60A of the United Provinces Excise Act and to acquit him of that offence.

I turn next to consider the case of the other two applicants Raza Husain and Abdul Rahman. These persons have been convicted of an offence under section 60(*a*) of Act IV of 1910. The learned Sessions Judge has held that there is no evidence on the record to prove that the cocaine found in the house No. 1 was definitely in the possession of any of those persons found in that building, since it was not in the physical possession of any one of them. He has however argued that in such matters it was necessary to look

into the circumstances in which the cocaine was found and that in the present case it was found spread out for sale, and Raza Husain and Abdul Rahman and others were found sitting in the verandah close to it, and from this fact a reasonable conclusion might legitimately be drawn that they were all in possession of the cocaine. The learned Government Advocate has argued that under section 71 of the United Provinces Excise Act the presumption should be raised against these applicants Raza Husain and Abdul Rahman, and that it was for them to account in a satisfactory manner how they came to be in possession of the cocaine. The same presumption has also been laid down in section 32 of the Imperial Act No. 2 of 1930. The evidence on the record fully proves that a large quantity of cocaine in a number of tin boxes placed in a row was found in the courtyard close to the tomb of the saint and these persons were found to be near the place from where the cocaine was recovered. The learned Sessions Judge has held it proved that the cocaine found was exposed for sale in house No. 1. The applicants Raza Husain and Abdul Rahman have not explained how they came to be there and how the cocaine happened to be found placed in a row. The only conclusion that can be drawn from the facts proved is that either these applicants came there to purchase the cocaine or that they were there to sell the cocaine which was found in front of them. From the facts found, the conclusion is inevitable that the applicants Raza Husain and Abdul Rahman were either in possession of the cocaine as purchasers of it or that they were found in possession of the cocaine trying to sell it on behalf of themselves or of some other person. Neither applicant has explained how the cocaine came to be found in the house marked No. 1 or how they happened to be found sitting or standing close to the place where tin boxes containing cocaine were spread out in a row. Under these

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circumstances I hold that the learned Sessions Judge was justified in coming to the conclusion that these applicants were in possession of the illicit cocaine. The other legal pleas in connection with section 539B and section 256 of the Code of Criminal Procedure which have been argued before me do not really affect the question of the guilt of the applicants, and, although the procedure adopted by the trying Magistrate as well as by the learned Sessions Judge is open to objection, yet it has not in my opinion prejudiced any of the applicants in their trial on the merits, nor has it in my opinion occasioned a failure of justice. For the reasons given above I dismiss the applications for revision filed by Raza Husain and Abdul Rahman and uphold their convictions and sentences under section 60(*a*) of the United Provinces Excise Act.

In the result I allow the application of Wilayat Husain, set aside the conviction and sentence passed upon him under section 60A of the United Provinces Excise Act and acquit him of that offence. Wilayat Husain is on bail. His bail bond is discharged. The order under section 60B of Act No. IV of 1910 is also set aside and the bond executed thereunder by Wilayat Husain is cancelled. I dismiss the applications of Raza Husain and Abdul Rahman and confirm their convictions and sentences for an offence under section 60(*a*) of the United Provinces Excise Act.