## APPELLATE CRIMINAL.

*Before Mr. Justice Baguley.*

1929
Aug. 5.

MAUNG SAN MYIN
*v.*
KING-EMPEROR.*

*Excise officer not a police officer—Admission made to excise officer admissible in evidence—Opium Act (I of 1878) ss. 14, 15, 16.—Search and seizure of opium, difference between—Seizure in transit—Conviction for illegal possession of object, although search illegal.*

An Excise officer has powers of arrest, search, granting bail, etc., under the Burma Excise Act V of 1917, but he is not a police officer. So an admission made to an excise officer is admissible in evidence.

*V. R. Venkataraman* v. *King-Emperor*, U.B.R. (1907-09) 1—*overruled.*

Under the provisions of ss. 14, 15 and 16 of the Opium Act, searches of opium are required to be in accordance with the rules for searches under the Criminal Procedure Code, but seizures of opium in transit do not come under those rules.

Although a search made in a person's house may be illegal rendering the person who made such search liable to be sued for damages, still if some property is actually found during the search whose possession constitutes an offence, then the person in unlawful possession is liable to be convicted.

*Mi Hauk* v. *King-Emperor*, 4 L.B.R. 121—*referred to.*

*Ma Hkway* v. *King-Emperor*, 4 B.L.J. 2—*dissented from.*

BAGULEY, J.—The applicant has been convicted under section 9 (*c*) of the Opium Act by the Subdivisional Magistrate, Amarapura, and his appeal having been dismissed by the Additional Sessions Judge, Mandalay, he now comes to this Court in revision. The case against him is that certain excise officers having received information that he had opium to dispose of, arranged by means of emissaries to buy the opium from him through a dummy purchaser. The first attempt to arrange a meeting between the accused and the dummy purchaser

* Criminal Revision No. 100B of 1929 (at Mandalay) from the order of the Subdivisional Magistrate of Amarapura in Criminal Trial No. 14 of 1929.

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proved abortive. The next night the dummy purchaser was sent out in a car to wait near the Myitnge railway bridge, excise officers remained in hiding close by, and it was arranged that as soon as events proceeded far enough to warrant a rush, the lights of the car were to be switched on. The two emissaries were sent off to bring the accused to the spot with the opium. After waiting for some time one of these men came to the car with the accused, and purchaser asked whether he had a sample of the opium with him. This was produced and the purchaser said he would pay and told the driver to switch on his lights. On the lights being switched on the two excise inspectors who were in hiding close by rushed up, a sub-inspector of excise who had been standing close to the car disclosed himself, and the accused was arrested. On asking him where the opium was he stated that it was in a boat in the river close by; so the Inspectors went down to the boat. As they arrived a man who was in the boat threw four tins overboard and followed them into the river himself and got away. The tins were recovered from the water and found to contain opium. In the boat were found a gun and a cartridge-belt belonging to the accused; and it is said that when arrested the accused said that he had brought evil on himself as he had intended it to others, having intended to sell the opium first and then arrest the purchaser.

The evidence in support of the case, as I have pointed out above, consists of the statements of the two excise inspectors, the statement of the ward headman whom they took with them as a witness, the statements of the two emissaries who were sent out to bring the accused with the opium to the spot, and the statement of Maung Su, the taxi owner.

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[His Lordship after discussing the evidence of the Crown and the defence continued as follows]:—

It has been argued that an admission made to an excise officer is not admissible: for this there is direct authority in *V. R. Venkataraman* v. *King-Emperor* (1). This ruling was quoted to the trying Magistrate, but as against that he referred to two Indian cases, viz., *Crown* v. *Wazir Singh* (2) and *Ah Foon* v. *King-Emperor* (3). Had the trying Magistrate looked into the Acts a little more closely he would have seen that excise officers are now appointed under the Burma Excise Act V of 1917. The judgment in *Venkataraman's* case was delivered in 1898 and then the present Act was not in force. In those days all excise officers were sworn in as police officers because the old Act did not give them the necessary powers of arrest, search, granting bail and so on. The Act of 1917 gives all these powers direct to the excise officer as excise officer, and they are no longer police officers. Their position appears to have been assimilated to the position of excise officers of Bengal. Therefore, *Venkataraman's* case must be regarded as out of date and no longer binding.

Another point which has been argued is that the search did not comply with the provisions of section 103, Criminal Procedure Code, and therefore, the accused must be acquitted. This argument is really entirely beside the point. Section 16 of the Opium Act says that all searches under section 14 or section 15 shall be in accordance with the provisions of the Code of Criminal Procedure. Section 14 refers to searches in a building, vessel or enclosed place: I do not regard a dugout as a vessel from this point of

(1) U.B.R. (1907-09), p. 1. (2) P.R.Cri. 1918, No. 3.
(3) 46 Cal. 411.

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view, and it is quite clear that these things when searched are intended to be regarded as more or less for the time being fixtures. If they have no locale, it is impossible to get witnesses from the locality. Section 15 has two clauses : the first refers to *seizures* in any open place or in transit ; the second refers to *searches* of persons. There was no search in the present case. It is true that the form applicable to searches was utilized ; but according to the facts as given by the prosecution it was a case of a seizure of opium in transit, and section 16 of the Opium Act does not say that seizures of opium in transit must be made in accordance with the rules for searches under the Code of Criminal Procedure. The 1st witness Mr. Lynam, Excise Inspector, answered his question in cross-examination more or less correctly ; he says that section 103 in his opinion would only apply to searches made inside houses and dwelling places. His senior officer, Mr. Paul, is not quite so correct. It is however quite manifest that when the article to be seized is on the move and has no locale it may be impossible to get witnesses of the locality to witness its seizure.

It is not necessary for the decision of this case, therefore, to decide whether a person can be convicted on the result of a search which did not comply with section 103, Criminal Procedure Code.

There are divergent rulings on the point. In *Mi Hauk* v. *King-Emperor* (1), it was held by Hartnoll, J. (following *Queen-Empress* v. *Taw Aung*—*P.L.J.B.* 367), that persons who make a search illegally render themselves liable to be sued for damages for this illegal action, but that this illegal action does not affect the question whether the person whose house was illegally searched has committed an offence if property is

(1) (1907) 4 L.B.R. 121.

actually found during the search whose possession constitutes an offence. On the other hand, there is an unofficially reported ruling of the High Court *Ma Htway* v. *King-Emperor* (1) in which Young, J. (who argued in *Mi Hauk's* case for the Crown before Hartnoll, J.), held that because a search did not comply with the provisions of section 103, Criminal Procedure, Code, the conviction must be set aside. It must be noted, however, that in this case there was no appearance on behalf of the Crown and the judgment itself is an exceedingly short one. My own opinion is that Hartnoll, J.'s ruling is correct. There seems to be no officially reported ruling of this High Court on the point.

I hold that the seizure of the opium was regular, and that the admission by the accused when arrested was admissible.

There is another point to which I would call the attention of the trying Magistrate. The accused when called on his defence devoted a good deal of time to discrediting the two excise spies, Maung Pyant and Ba San. Several witnesses were called to depose to the bad character of these two men; some said that they do not work and some say they eat opium, keep prostitutes and so on. All this evidence is entirely irrelevant and should never have been allowed by the trying Magistrate. If he will refer to the Evidence Act, sections 146 to 153, he will see how witnesses are allowed to be tested for their veracity. Section 146 relates to cross-examination: it is permissible under instructions to cross-examine a witness as to his lack of work, his habits of consuming opium or his livings on the profits of a brothel; but when those questions have been put, the examining counse has got to take the answers, and the examination of

(1) 4 B.L.J. 2.

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further witnesses to disprove his answers is not allowed, save as shown in section 153. The credit of witnesses may be impeached also under section 155, but section 155 does not allow evidence of a witness' general bad character to be brought in. An attempt was also made to discredit some of the other witnesses, by filing on May 23 the evidence given by these witnesses in another case. The last witness for the defence had his evidence recorded on April 30, and it is quite contrary to the Evidence Act to try to impeach a witness by means of contradictory statements made unless the contradictory statement is put to him in cross-examination, and these copies of depositions should not have been accepted by the Magistrate, but I find them filed as exhibits.

I would also note one other point. As I have stated, the main defence of the accused is that the excise party went to arrest somebody else and having allowed that person to escape they turned round and accused him of being the owner of the opium. Mr. Lynam stated that, whereas the actual seizure was made on February 21, he had his information on January 5 and had duly reported his action in connection with that information in his official diaries, and he offered to produce his diaries. At this point the Magistrate makes a note " U Ko Ko Gyi (accused's advocate) objected to the admission of the diary extracts in evidence as irrelevant and that is all that is on the record about the diaries." The Magistrate should either have definitely admitted them or rejected them and not have left the matter undecided, merely noting that the defence objected. No grounds are given why these extracts from the diaries should have been irrelevant, and of course, it is impossible to say without seeing them whether they were or were not; but the defence is that the case was got

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up against the accused on February 18, and it would certainly appear in the highest degree relevant to show that the excise department were working the case up against this particular man for more than a month previously.

I see no reason to interfere in revision and therefore dismiss this application.

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## APPELLATE CIVIL.

*Before Mr. Justice Brown.*

MAUNG KYI AND OTHERS.
*v.*
MA SHWE BAW.*

1929

Aug. 7.

*Mahomedan Law of marriage—Proposal and acceptance in presence of Mahomedan witnesses essential for validity of marriage—Proof of marriage—Presumption as to marriage by cohabitation and acknowledgment of children as legal.*

According to Mahomedan Law, it is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting. No religious ceremony is essential.

In the absence of such direct proof, marriage between a husband and wife can be presumed from a long course of cohabitation and living together as husband and wife and from acknowledgment of the children as the legal children.

*Aklemannessa Bibi* v. *Mahomed Hatem*, 31 Cal. 849; *Habibur Rahman* v. *Altaf Ali*, 48 I. A. 114; *Imambandi* v. *Mutsaddi*, 45 Cal. 878; *Khajah Hidayut Collah* v. *Rai Jan Khanum*, M. I. A. Vol. 3, 295—*referred to.*

*E Maung* for the appellants.

*Rafi* for the respondent.

BROWN, J.—The main question in issue in these appeals is whether the appellant Ma Chit May was legally married to Dawood, the deceased.

* Special Civil Second Appeals Nos. 85, 86, 87 of 1927 from the judgments of the District Court of Thayetmyo in Civil Appeals Nos. 77, 78, 79 of 1928.