APPELLATE CRIMINAL.

Before Mr. Justice Maung Ba.

1928
Dec. 3.

SHWE KYO AND OTHERS
v.
KING-EMPEROR.*

Opium Act (I of 1878), s. 9—Possession of opium—Knowledge of possession essential for conviction.

To convict a person of illegal possession of opium, it is necessary to show that he has knowledge of his possession. A person who is unaware that opium has been placed in his custody cannot be so convicted.

Queen-Empress v. Chit Aung, (1872-92) S.J. 573—*followed.*

MAUNG BA, J.—Five persons were convicted of illegal possession of opium under section 9 (*c*) of the Opium Act and sentenced to various terms of imprisonment. In the case of two of them, a sentence of fine was added.

The facts, as held proved by the prosecution, were briefly as follows :—

U Ko Ko, Court Prosecuting Officer of the First Additional Magistrate's Court, Rangoon, acting on information, went and waited in front of Kamayut Police-station with two witnesses, Maung Kya Nyun and Maung Po Hmyin, at about 10 a.m. on the 30th September, 1928. A Dodge Car, No. RA8423, was then seen coming from Rangoon, and he stopped the car and made a search. He found a ball of opium in each pocket of the waterproof coat, which was folded. The waterproof coat was in the pit in front of the rear seat. The appellant, Ba Kyin, was driving the car, and the appellant, Maung Han, sat next to him. The appellant, Swee Kyo, the appellant, Chan Mya, and one Lwang, were seated on the rear seat.

* Criminal Appeals Nos. 1432, 1439 and 1450 of 1928 against the order of the First Additional Magistrate of Rangoon in Criminal Trial No. 505 of 1928.

1923

SHWE KYO AND OTHERS v. KING-EMPEROR.

MAUNG BA, J

The two balls of opium weighed 58 ticals, and Ko Ko states that the opium balls were effectively concealed in the pockets of the waterproof.

The rain-coat fitted Lwang, and Lwang admitted that it belonged to him, but he pleaded that he did not know to whom the exhibit opium belonged. All the four appellants also denied knowledge of the opium.

The driver, Maung Ba Kyin, stated that, as the two Chinamen told his friend, Maung Han, that they wanted to go to Hmawbi, he was taking them there.

Chan Mya, the Burman, who was one of the three seated on the back seat, said that he was in the car because his friend, Ba Kyin, invited him in.

Swee Kyo, who is 55, said that, while he was at a teashop, Lwang came in a car and invited him for a drive, so he got in and did not know anything about the opium.

Lwang, who is 22 and who has not appealed, as already pointed out, denied knowledge of the opium, though he admitted to be the owner of the waterproof.

The car was not a taxi, and the record does not disclose who the owner was.

Among the appellants, only Swee Kyo examined two witnesses to support his defence. The learned Magistrate rejected their evidence and convicted all the five persons, holding that the three Burmans were helping the two Chinamen in removing the opium out of Rangoon.

The law laid down by Mr. Fulton in *Queen-Empress v. Chit Aung* (1), is still good law. The term "possession" implies knowledge on the part of the alleged possessor, and before an accused person

(1) (1872-92) Selected Judgments 573.

is required to account for opium there must be proof that such opium has been in his possession or under his control. Mr. Fulton quoted the following remarks of Mr. Justice Cave in *The Queen* v. *Ashwell* (1). His Lordship said :—

> "If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not the possession of that of the existence of which he is unaware. A man cannot, without his consent, be made to incur the responsibilities towards the real owner which arise from the simple possession of a chattel without further title, and if a chattel has, without his knowledge, been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel and has assented to the possession of it."

The question is whether the four occupants of the car, besides Lwang in whose waterproof the opium balls were concealed, could be said to have knowledge of the existence of the opium. Has there been any proof that such opium was in their possession or under their control ? It might be that Lwang was the owner of the opium, and that the others were simply helping him in taking it out of Rangoon, or it might be that Lwang concealed the existence of the opium from the knowledge of the other occupants and simply took them with him to avert suspicion.

In the absence of circumstances from which it could be conclusively inferred that the four appellants had knowledge of the presence of the opium, and

(1) 16 Q.B.D. 190.

1928

SHWE KYO AND OTHERS v. KING-EMPEROR.

MAUNG BA, J.

that such opium was under their control, it would not be safe to punish them on mere suspicion.

I am constrained to hold that the case against these four appellants is not free from reasonable doubt. They are accordingly acquitted. Bail bonds are cancelled.

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

1928

Dec. 12.

KING-EMPEROR
v.
MAUNG BA WIN AND OTHERS.*

Burma Vaccination Law Amendment Act (I of 1909), ss. 4, 13—Vaccination Act (XIII of 1880), ss. 9, 17, 18, 22—Prosecution of parent for refusal to vaccinate his child, illegal under the local Act—Parent entitled to notice, explanation, and order of a magistrate under the provisions of the Vaccination Act.

It is illegal to prosecute a person under the provisions of s. 13 of the Burma Vaccination Law Amendment Act of 1909 for his refusal to allow his children to be vaccinated. That section is only applicable to a person who refuses to be vaccinated himself. S. 4 is the only provision in the Act under which the vaccination of a child can be ordered if the child is under six months of age and has been exposed to infection. To enforce vaccination of a child over six months the provisions of ss. 9, 17, 18 and 22 of the Vaccination Act, 1880, must be observed. Under those sections a parent is to be given notice to attend at a specified time and place with his child for vaccination and if he fails to do so, the superintendent of vaccination must report the matter to a duly appointed magistrate who has to summon the parent for an explanation. If the explanation is unsatisfactory the magistrate can order him to have his child vaccinated and on his failure to do so, he can be prosecuted.

CARR, J.—One judgment will suffice to dispose of Criminal Revisions Nos. 1160A to 1177A inclusive. They are concerned, respectively, with Criminal Regular Trials Nos. 128, 134, 135, 129, 133, 130, 132, 148, 149, 150, 153, 155 and 157 of the First Additional Magistrate, Moulmeingyun, and Nos. 75, 76, 84, 85 and 86 of the Second Additional Magistrate, Moulmeingyun.

---

* Criminal Revisions Nos. 1160A to 1177A, against the orders of the First and Second Additional Magistrates of Moulmeingyun.