APPELLATE CRIMINAL.

Before Mr. Justice Baguley.

CHWA HUM HTIVE AND ANOTHER *v.* KING-EMPEROR.*

1932
D. c. 6.

Search, irregularity in—Discovery of forbidden articles—Conviction—Criminal Procedure Code (Act V of 1898), s. 103.

If a search was irregular the fact that certain articles were found could nevertheless be proved, and if the possession of such articles was illegal a conviction could follow.

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

Ma Htway v. *King-Emperor*, 4 B.L.T. 2—*disapproved.*

King-Emperor v. *Nga Po Min*, I.L.R. 10 Ran. 511 ; *Maung San Myin* v. *King-Emperor*, I.L.R. 7 Ran. 771 ; *Solai Naik* v. *Emperor*, I.L.R. 34 Mad. 349—*referred to.*

Williams for the appellants.

Lambert (Assistant Government Advocate) for the Crown.

BAGULEY, J.—The two appellants have been convicted of possession of opium and cocaine under ss. 9 (*a*) of the Opium Act and 14 (*a*) of the Dangerous Drugs Act.

The case for the Crown is that on a search being made in the upper floor of the house where they lived opium and cocaine were found in various places, some in a drawer which was opened by a key which was in the possession of the second appellant, who is the wife of the first appellant.

Three points have been taken up in arguing the appeal : the first point is that as the search was irregular no conviction can be based on the possession of any property alleged to have been found during the

* Criminal Appeal No. 3366 of 1932 from the order of the Western Subdivisional Magistrate of Rangoon in Criminal Trial No. 167 of 1932.

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search ; the second is that the finding of this property in the possession of the appellants has not been proved ; and the third is that as the second appellant is the wife of the first appellant she cannot be convicted of joint possession of the articles found together with her husband.

I will first deal with the irregularities in the search and the results which must be held to flow from such irregularities. There is at present no definite ruling of this Court on the point. In *Mi Hauk* v. *King-Emperor* (1), a case of the late Chief Court of Lower Burma, Hartnoll J. held that if a search was irregular the fact that certain articles were found could nevertheless be proved, and if the possession of such articles was illegal a conviction could follow. Without reference to this case Young J., in *Ma Htway* v. *King-Emperor* (2), held that when a search contravened the provisions of s. 103, Criminal Procedure Code, a conviction could not be based upon possession of opium on such search. In *Maung San Myin* v. *King-Emperor* (3), I had occasion to touch on this point and referred to these two cases, and although I expressed my opinion that *Mi Hauk's* case was correctly decided, I had no occasion to come to a definite decision on the point because I held in the case before me that the search was regular. Now the point has got to be decided. I see no reason to change the opinion which I held when *Maung San Myin's* case was decided. In *Solai Naik* v. *Emperor* (4) a Full Bench of the Madras High Court held that if the search was irregular nevertheless the fact of the finding of articles could be proved by other evidence, and in *King-Emperor* v. *Nga Po Min* (5), the undesirability of

(1) (1907) 4 L.B.R 121.
(2) 4 B.L.T. 2.
(3) (1929) I.L.R. 7 Ran. 771.
(4) (1910) I.L.R. 34 Mad. 349.
(5) (1932) I.L.R. 10 Ran. 511.

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giving too much weight to technical points in the trial of a criminal case was emphasized, by his Lordship the Chief Justice, when those technicalities can in no way cause a failure of justice, and it must be remembered that the acquittal of a guilty accused is just as much a miscarriage of justice as the conviction of an innocent person. If the appellants were in possession of the opium and cocaine, the subject-matter of the present case, it would be a lamentable failure of justice if they were to be held entitled to an acquittal merely because the Excise Inspector wrote the names of the search witnesses in the search list, instead of the search witnesses signing their own names. It is admitted in the present case that there were irregularities in connection with the search, but, nevertheless, if the fact that these articles were found in the possession of the appellants is proved their conviction must follow.

His Lordship then proceeded to consider the case on the merits, and dismissed the appeal.

APPELLATE CIVIL.

Before Mr. Justice Das.

1932

Dec. 14.

SUNA MEAH

v.

S. A. S. PILLAI AND OTHERS.*

Mahomedan Law—Gift—Delivery of possession—Minor donee—Delivery to guardian—Exception—Grandfather's gift to grandson.

According to Mahomedan law, to make a valid gift it is necessary to make over possession of the property to the donee. If the donee is a minor then possession must be made over to a person who is the natural guardian of the minor. The only exception to the rule as to delivery of possession is in the case of a gift to a minor by his father or other guardian. It cannot be extended to a gift by the grandfather to his minor grandson if his father is alive and is

* Civil Special Second Appeals Nos. 63 and 64 of 1932 from the judgments of the District Court of Myaungmya in Civil Appeals Nos, 86 and 85 of 1931.