

case under Order XLI, rule 23, Civil Procedure Code, for disposal in accordance with law. Court-fee on appeal shall be refunded and other costs shall be costs in the cause.

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ROOP CHAND
v.
SARDAR KHAN.

A. N. C.

*Appeal accepted,
Case remanded.*

APPELLATE CRIMINAL.

*Before Sir Shadi Lal, Chief Justice and Mr. Justice
Agha Haidar.*

DULA SINGH AND ANOTHER, Appellants

versus

THE CROWN, Respondent.

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*Feb. 15.***Criminal Appeal No. 397 of 1927.**

*Explosive Substances Act, VI of 1908, sections 4, 5:
Bombs found in joint family house—possession—presump-
tion—rebuttal of—“unlawfully and maliciously”—mean-
ing of—possession with knowledge—necessary.*

Two bombs were found in the ceiling of a thatched shed situate in the courtyard of a residential house. The house belonged to a joint family composed of D. and his nephews S. and C. and several other persons—D. and S. were both convicted of offences under section 4 of the Explosive Substances Act—D. as head of the family and S. as senior member present at the time of the recovery. Admittedly D. was not at the house at the time of recovery and had been absent from the village for two days.

Held, that the word “unlawfully” in section 4 of the Act signifies “not for a lawful object”, and the word “maliciously” means and implies an intention to do an act, which is wrongful, to the detriment of another person.

Mogul Steamship Co., Ltd., v. McGregor (1), per Bowen L. J., referred to.

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Held also, that the mere fact that an article is found in a house belonging to a joint family does not *per se* render every member of the family liable for its possession; and where, as in this case, the article is found in a portion of the house, not in the exclusive possession of any particular member, but used by, or accessible to, all the members of the family, there is no presumption that it is in the possession or control of any person other than the head of the family.

Queen-Empress v. Sangam Lal (1), followed.

Held further, that although D. as head of the family must be *prima facie* presumed to be in possession, this presumption was rebuttable and in the absence of any evidence to the contrary had been sufficiently rebutted by the fact of his absence at the time of recovery and for two days previously from the village.

Held further, that possession to be punishable under the criminal law must be possession with knowledge, and neither knowledge nor intention as to the use of an object can be imputed to a person who is not conscious of its existence.

Appeal from the order of C. M. G. Ogilvie, Esquire, District Magistrate, Lahore, convicting the appellants.

BRIJ LAL, for Appellants.

R. C. SONI, for GOVERNMENT ADVOCATE, for Respondent.

JUDGMENT.

SHADI LAL C.J.

SIR SHADI LAL C. J.—On the 9th of January, 1927, two bombs were found in the ceiling of a thatched shed situate in the courtyard of a residential house. The house belonged to a joint family composed of Dula Singh, his nephew Sohan Singh, another nephew Chanan Singh, aged about twenty years and several other persons, male as well as female. Two members

of the family, namely, Dula Singh and Sohan Singh, have been convicted under section 4 of the Explosive Substances Act, VI of 1908, and have been sentenced to suffer rigorous imprisonment for seven years and five years, respectively.

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It is common ground that Dula Singh was not in the house at the time of the recovery of the bombs and had been absent from the village for two days. His conviction rests on the sole ground that, as he was the head of the family to which the shed in question belonged, he must be deemed to be in possession of the bombs concealed in it. His nephew Sohan Singh has been found guilty, because he was the senior male member of the family present at the time of the recovery of the bombs and should, therefore, be held to be in actual possession of them.

These are the undisputed facts of the case, and the question arises whether they can sustain the conviction of the prisoners. The fourth section of the Explosive Substances Act punishes a person "who unlawfully and maliciously * * * has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or to cause serious injury to property in British India * * *". The expression 'unlawfully' signifies 'not for a lawful object', and the term 'maliciously' means and implies an intention to do an act, which is wrongful, to the detriment of another person; per Bowen L. J. in *Mogul Steamship Co., Limited v. McGregor*, (1).

The vital point requiring determination is whether the prisoners can be held to be in possession of the bombs found in a shed belonging to the joint family. The law on the subject of the liability of the

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members of a joint family for an article found in the house of the family in an unsatisfactory state, and it is not easy to reconcile the judicial cases on the subject. Some propositions, founded as they are upon common sense, do not, however, admit of any doubt. It may be stated at the outset that the law does not require that the incriminating article must be in the manual possession of the accused. A thing is in the possession of a person, if it is in his power or under his control. It is at the same time clear that the mere fact that an article is found in a house belonging to the joint family does not, *per se*, render every member of the family liable for its possession. If it is found in a portion of the house, of which one member has the exclusive use, the presumption, which might be rebutted, is that that member alone and none else is liable for it. The difficulty arises when the portion of the house, where the article is found, is not in the exclusive possession of any particular member, but is used by, or accessible to, all the members of the family. In such a case the rule, as enunciated in *Queen Empress v. Sangam Lal* (1), and followed in several other judgments, is to the effect that there is no presumption that the article is in the possession or control of any person other than the house-master or the head of the family. But it is open to the prosecution to prove that the possession was with some other member of the family, and that member would then be liable to account for it.

Now, there is not a scintilla of evidence on the record that Sohan Singh was in possession of the bombs or was aware of their existence in the shed. The mere circumstance that he happened to be the

(1) (1893) I. L. R. 15 All. 129.

senior member of the family at the time of the recovery does not justify the inference that he must be regarded to be in possession of every article hidden in the residential house or in a shed attached thereto. There is nothing but suspicion to connect him with the commission of the crime, and it is obvious that suspicion, however plausible, can never be a substitute for proof.

As against Dula Singh, we have only the fact that he was the head of the joint family which owned the shed in question, and as such he is, *prima facie*, presumed to be in possession of the articles found in the family building. But it is only a presumption which can be rebutted by direct or circumstantial evidence. As stated above, Dula Singh was not in the house at the time of the recovery of the bombs and had been absent from it for two days. Is there anything improbable in the suggestion that the bombs were brought into the place during his absence, and that he never knew that they were concealed in the ceiling.

Neither the Explosive Substances Act nor any other Indian Statute defines the expression "possession", but section 27, Indian Penal Code, shows that the Indian Law does not recognise the distinction which the English law makes between "possession" and "custody". In the English law, a moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. The word "custody" means such a relation towards the thing as would constitute possession if the person having custody had it on his own account—

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Stephen's Digest of the Criminal Law, Seventh Edition, page 298. Whether the possession is that of the owner or of another person, it is clear that the person, who is said to possess the thing, must have knowledge of the existence of that thing. In other words, possession to be punishable under the criminal law must be possession with knowledge.

Not only does the term "possession" imply knowledge, but the expression "maliciously" as used in section 4, connotes intention. But neither knowledge nor intention as to the use to be made of an object can be imputed to a person who is not conscious of its existence.

For the aforesaid reasons I hold that there is absolutely no evidence on the record to prove possession or control such as would warrant the conviction of the prisoners under section 4 of the Explosive Substances Act, or even under section 5, which punishes a person who *knowingly* has in his possession or under his control any explosive substance under the circumstances specified therein. I accordingly allow the appeal and setting aside the conviction and the sentences direct that the appellants be released forthwith.

AGHA HAIDAR J.

AGHA HAIDER, J.—I agree.

N. F. E.

Appeal accepted.