CRIMINAL REVISION.

Before Mr. Justice Mackney.

1936

Mar. 3.

KING-EMPEROR *v.* KONG KWI.*

Opium Act (I of 1878), s. 9 (a)—Dangerous Drugs Act (II of 1930), ss. 2 (i) (ii), 4, 40, Sch. II—Rule 1 (IV) and Rule 11 of the rules under the Opium Act—Direction 3 of the Opium Directions—Possession of beinsi—*Washings from opium pipes of person lawfully possessed of opium—Prepared opium mixed with water—Possession not an offence.*

The original definition of the word "opium" in the Opium Act, 1878, has been altered by s. 40 and Schedule II of the Dangerous Drugs Act of 1930. In the Rules and Directions made under the Opium Act "Opium water" (beinsi) would now mean a mixture of water with capsules of the poppy, or a mixture of such with neutral materials. Where a person is lawfully possessed of opium for his own consumption and collects the washings of his own opium pipes, such are the dross or residue from his own opium, *i.e.*, prepared opium, and although mixed with water, the possession thereof is not an offence under the Act.

Tun Byu (Assistant Government Advocate) for the Crown.

No appearance for the respondent.

MACKNEY, J.—Kong Kwi has been convicted under section 9 (*a*) of the Opium Act of being found in possession of 35 tolas of *beinsi* (opium water), in contravention of Direction 3 of the Opium Directions.

Direction 3 of the Opium Directions referred to is to be found at page 42 of the Burma Opium Manual and it reads:

"The term 'defined opium' is stated in Rule 1 (iv) to include *beinsi* in course of preparation, but not to include any other admixture of opium water, and by Rule 6 a person who is permitted to possess defined opium may manufacture *beinsi* from such opium. So soon as the preparation of the *beinsi* is completed the possession of any opium water or other opium refuse remaining

* Criminal Revision No. 45A of 1936 from the order of the Headquarters Magistrate of Toungoo in Criminal Trial No. 88 of 1935.

from the manufacture becomes illegal and all such refuse must be destroyed at once."

Rule 11 of the Rules under the Opium Act permits the possession of defined opium [*i.e.*, *vide* Rule 1 (iv) crude opium, *beinsi* or *pyaungchi*—refuse—but not opium mixed with water] not exceeding three tolas in weight in certain circumstances, provided, among other matters,

"that, except in excluded areas, no person other than a registered smoker shall possess *beinsi*, *beinchi* or *pyaungchi* or any other preparation of either."

Presumably, as opium water is not mentioned in this rule, it is stated in Direction 3 referred to that its possession is illegal.

Now, throughout the rules the word "opium" is stated to have the meaning assigned to it in the Opium Act of 1878. The original definition of "opium" in that Act was as follows:

"'Opium' includes also poppy-heads, preparations or admixtures of opium and intoxicating drugs prepared from the poppy;"

But now under section 40 and Schedule II of the Dangerous Drugs Act of 1930, this definition has been altered and "opium" now means:

"(i) the capsules of the poppy;
(ii) the spontaneously coagulated juice of such capsules which has not been submitted to any manipulations other than those necessary for packing and transport; and
(iii) any mixture, with or without neutral materials, of any of the above forms of opium."

That being so, the only meaning which can be attached to the words "opium water" in the Rules and Directions made under the Opium Act is a mixture of water with capsules of the poppy or with

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the juice of such capsules of the poppy, or a mixture of such with neutral materials. The opium water in the present case is stated by Kong Kwi to have been collected from the washings of opium pipes, and this contention is not contradicted by the prosecution evidence. In such a case it is clearly not such opium water as comes under the rules under the Opium Act. It is merely the dross or other residue remaining after opium is smoked and is, therefore, prepared opium within the definition under the Dangerous Drugs Act, s. 2 (*f*) (ii). It is prepared opium mixed with water. Now, under section 4 of the Act a person who is lawfully possessed of opium for his own consumption may possess prepared opium prepared therefrom; so that unless it can be shown that this residue was taken from pipes in which opium not lawfully possessed by Kong Kwi was smoked, we must take it that it was dross or residue from his own opium and, therefore, he has committed no offence in respect of the possession thereof.

In *King-Emperor* v. *Ah Kim* (1), it was pointed out that the second proviso to Rule 11 of the Rules under the Opium Act, to which I have referred above, is now *ultra vires* as not being within the rule-making power of the Local Government under section 5 of the Act of 1878 in view of the change in the definition of "opium" effected by section 40 and the Second Schedule to the Dangerous Drugs Act. In the present case, however, as Kong Kwi is a registered smoker we are not concerned with this point.

For these reasons the finding and sentence of the Headquarters Magistrate of Toungoo in his

(1) (1933) I.L.R. 11 Ran. 436.

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Criminal Regular Trial No. 88 of 1935, in which he found Kong Kwi guilty of an offence under section 9 (*a*) of the Opium Act and sentenced him to pay a fine of Rs. 10, in default to suffer one week's rigorous imprisonment, are set aside, Kong Kwi is acquitted and the fine, if paid by him, shall be refunded to him.

APPELLATE CIVIL.

Before Mr. Justice Dunkley.

1936

Mar. 11.

S.P.L.S. CHETTYAR FIRM
v.
MA PU.*

Burmese customary law—Husband with two wives—House built on payin *land with* lettetpwa *funds—House becomes* payin—Quicquid plantatur solo, solo cedit—*Share of two wives jointly in* lettetpwa *property of both marriages—Death of first wife—Second wife's share in property acquired during first marriage and in property acquired during second marriage.*

The appellant firm obtained against S a Burmese Buddhist and his children by his first wife a mortgage decree over four houses and their sites. Two of these houses with their sites were acquired by S during coverture with his first wife and prior to his marriage with his second wife, the respondent. The houses were, however, dismantled and rebuilt after the second marriage. The two other houses with their sites were acquired subsequent to the second marriage. The first wife had died before the suit, and now the respondent claimed that the mortgaged properties were *lettetpwa* properties of her marriage with S and that she had a half share therein which was not affected by the firm's decree.

Held, that where a house is built on *payin* land with *lettetpwa* funds the house becomes *payin*. The more valuable part of the property was the site and the maxim *quicquid plantatur solo, solo cedit* applied.

Ma San Shwe v. *Valliapya Chetty*, 10 B.L.R. 49—*referred to.*

Held, therefore, that the sites acquired before the respondent's marriage with S and the houses thereon were the *lettetpwa* of the first marriage of S and the respondent's share therein was one-sixth.

Held further that the share of the respondent in the sites and houses acquired after her marriage was one-quarter. The share of two wives jointly

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* Civil Second Appeal No. 261 of 1935 from the judgment of the District Court of Pyapôn in Civil Appeal No. 29 of 1935.