CRIMINAL REVISION.

Before Mr. Justice Mosely.

THE KING *v.* MI NGE SO.*

1939

Oct. 12.

Excisable article—Possession of larger quantity than allowed by law—Proof of possession required—No presumptions against accused—Proof of knowledge or belief of accused—Summons case—Nature of complaint or summons—Conviction for any offence triable as summons offence—Evidence Act, s. 114—Burma Excise Act, ss. 30 (a), 37, 44.

In prosecutions under s. 30 (*a*) of the Burma Excise Act where the charge is one of possession of a larger quantity of an excisable article than is allowed under the Act, it is necessary to prove such possession, and there is no room or need for any presumption under s. 44 of the Act. In prosecutions for possession of an excisable article under s. 37 it is necessary either to prove that the accused person knew or had reason to believe that the excisable article was unlawfully manufactured, or to set up circumstances from which a presumption of such knowledge or belief may be made. When such circumstances have been shown such a presumption could ordinarily be drawn under the general provisions of s. 114 of the Evidence Act, but s. 44 of the Burma Excise Act may be of useful application in rarer cases.

King-Emperor v. *Po Seik*, I.L.R. 7 Ran. 316, referred to.

In a summons case the accused can be convicted of any offence triable as a summons offence which, from the facts proved, he appears to have committed, whatever the nature of the complaint or summons may be.

Dasarath Rai v. *Emperor*, I.L.R. 36 Cal. 869; *Kalidass* v. *Mohendra*, 12 W.R. Cr. 40; *Muddoossodun Sha* v. *Hari Dass*, 22 W.R. Cr. 40, referred to.

MOSELY, J.—In a summary trial the Magistrate convicted the respondent of possession of a still for manufacturing country spirit, and of yeast balls, an offence under section 30 (*d*) of the Excise Act, and also of possession of two quarts of *seinye*, which he thought was an offence under section 30 (*a*) of that Act.

In revision the learned Sessions Judge asks for a ruling whether possession of less than four quarts of *seinye* is punishable under section 30 (*a*) in Toungoo District. Under Financial Department Notification

* Criminal Revision No. 456B of 1939 from the order of the Township Magistrate of Pyu in Summary Trial No. 85 of 1939.

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No. 77 of 18th September 1917 possession of four reputed quart bottles of *seinye* (country alcoholic liquor) is allowable in that district.

The respondent was fined Rs. 20 under section 30 (*d*) and Rs. 5 under section 30 (*a*). The learned Sessions Judge has recommended that the conviction under section 30 (*a*) be set aside and the fine, Rs. 5, refunded.

Paragraph 913 of the Burma Courts Manual and *King-Emperor* v. *Nga Po Seik* (1) should be referred to on the subject.

Po Seik's case was one where the accused was charged with possession of half a quart of country liquor only, and not also of materials for its manufacture. No offence punishable under section 30 (*a*) of the Excise Act could have been committed as that quantity is within the limits for possession prescribed, and no presumption could be drawn under section 44 of the Act. Nor could the accused have been convicted under section 37 of the Act. There was evidently nothing adduced in evidence to show that the accused knew or had reason to believe the liquor to have been unlawfully manufactured, and the circumstances of the case did not allow any presumption such as is described in section 114 of the Evidence Act to be drawn as to such knowledge or belief. Section 44 of the Excise Act, which is stronger in its terms than section 114 of the Evidence Act, would only apply if the accused had been charged under section 37 of the Excise Act.

I would however, with respect remark that the provisions of section 246 of the Criminal Procedure Code appear to have been overlooked in *Po Seik*'s case when it was observed that the reason why a conviction under section 37 of the Act could not be had was

(1) (1929) I.L.R. 7 Ran. 316.

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because the guilty knowlege or belief which was a necessary ingredient of the offence was not included in the particulars of the offence stated to the accused, and because the accused was not called upon to answer a charge under section 37.

In the present case the procedure prescribed for summons cases had to be followed [section 262 (1), Criminal Procedure Code].

In a summons case the accused can be convicted of any offence triable as a summons offence which, from the facts proved, he appears to have committed, whatever the nature of the complaint or summons.

As was well said in *Dasarath Rai* v. *Emperor* (1)

"on a plain construction of section 246 the magistrate is not bound when he thinks that another offence" (*i.e.*, one other than that stated in the particulars stated to the accused under section 242) " has been proved to reopen the trial and follow the procedure of sections 243 and 244. Such a view would necessitate a rehearing of all the evidence in the same trial, and is clearly opposed to the manifest intention of the legislature."

See also *Muddoosoodun Sha* v. *Hari Dass* (2) and *Kalidass* v. *Mohendra* (3).

In this case, the presumption arose from the possession of materials for manufacture that the accused knew the *seinye* possessed by her to have been obtained illicitly, and she was, therefore, guilty of an offence under section 37 of the Excise Act, and should have been convicted under section 37, instead of section 30 (*a*).

I would note that section 44 of the Act which says that in prosecutions under section 30, section 37, and some other sections the Court may presume until the contrary is proved, that the accused person has committed an offence under the section under which he is

(1) (1909) I.L.R. 36 Cal. 869. (2) 22 W.R. Cr. 40.
(3) 12 W.R. Cr. 40.

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charged in respect of excisable articles and materials for the possession of which he is unable to account satisfactorily does not appear to have any application to the common case under section 30 (*a*) where the charge is one of possession of a larger quantity of an excisable article than is allowed under the Act. In prosecutions under section 30 (*a*) it is necessary to prove such possession, and there is no room or need for any presumption. In prosecutions for possession of an excisable article under s. 37 it is necessary either to prove that the accused person knew or had reason to believe that the excisable article was unlawfully manufactured, or to set up circumstances from which a presumption of such knowledge or belief may be presumed, such as the simultaneous finding of a part of still in the possession of the accused person, or the impossibility of obtaining the article from a licit source. Such a presumption could ordinarily be drawn under the general provisions of section 114 of the Evidence Act, but section 44 of the Excise Act may be of useful application and allow the presumption to be drawn in rarer cases such as where the still was not seized at the same time as the liquor, or had not been used for some time, or was found at some little distance from the premises where the liquor was found.

Let the proceedings be returned with these remarks.