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*Present:* Schneider J.

SOYSA *v.* DAVITH SINGHO *et al.*

*315—P. C. Hatton, 4,362.*

*Produce—Protection Ordinance—Possessing of tea leaf—Satisfactory explanation—Ordinance No. 38 of 1917, s. 4.*

The accused sent two bags of tea by his servant to a boutique to be weighed and delivered to an intending purchaser, when they were seized by a Police Constable and taken to the Police Station, where they were claimed by the accused. The accused was then charged under section 4 of the Protection of Produce Ordinance, No. 38 of 1917, the material part of which is as follows:—

> Whenever any one is found in possession of any produce under such circumstances that there is reason to suspect that the same is not honestly in his possession, and he is unable to give to the Court before whom he is tried a satisfactory account of his possession thereof, such person shall be guilty of an offence . . . .

*Held*, that the tea was in the possession of the accused within the meaning of the section.

Section 4 of the Ordinance throws upon the person who is found in possession of produce the onus of giving a satisfactory account of his possession, only where such person is found in possession "under such circumstances that there is reason to suspect that the produce is not honestly in his possession."

APPEAL from a conviction by the Police Magistrate of Hatton.

*Hayley, K.C.* (with him *Swan*), for appellant.

August 25, 1927. SCHNEIDER J.—

Upon a previous appeal in this case this Court quashed all the proceedings and directed a new trial. When the same Magistrate was about to commence this new trial the Proctor for the accused

requested him to send the case for trial before another Judge as the Magistrate had already formed an opinion on the facts at the first trial. The Magistrate would not entertain this request, but tried the case. On reading his judgment it is abundantly clear that he has proceeded largely upon the impression left on his mind by the evidence produced at the previous trial. He refers to that evidence, and also to his previous judgment and the reasons given by him in that judgment. After the new trial he found the accused guilty and imposed the same sentence as before. The fact that the previous proceedings had been quashed because of the omission to frame a proper charge is no justification for importing into the new trial the evidence, or the effect of the evidence, produced at the previous trial. It would have been very much more satisfactory if the learned Magistrate had acceded to the request made to him and had sent the case for trial before another Judge. The charge is laid under section 4 of the Protection of Produce Ordinance, No. 38 of 1917. The relevant part of that section is the following:

> " Whenever anyone is found in possession of any tea leaf in a manufactured state under such circumstances that there is reason to suspect that the same is not honestly in his possession, and he is unable to give to the Court before whom he is tried a satisfactory account of his possession thereof, such person shall be guilty of an offence and shall be liable on summary conviction before a Police Magistrate to imprisonment or to a fine."

The material evidence might be summarized as follows: A Police Constable received information that two bags of tea would be brought to the Goods Shed at Hatton. The goods not arriving there he went into the town in search of " the tea." He found two bags of tea opposite the boutique of Kavanar and a person stitching one of the bags. One Juwanis Appu who was there told him he had brought the tea from the accused's boutique to be weighed in Kavanar's boutique and to be sold to one Meera Saibo. One of the bags had a label on it addressed " R. M. Cader Saibo, Kurunegala." The Constable took the bags to the Police Station, together with Juwanis Appu and Cader Meera Saibo, whom he found a little later. The accused then came to the Police Station and claimed the tea. On being weighed it was ascertained that one of the bags contained 140 lb. and the other 54 lb. of manufactured tea. The accused produced a receipt dated December 25, 1925, signed by one Muttiahpillai to the effect that 103 lb. of " B. O. P." and 230 lb. " dust " were sold to one Davith Singho Muttiahpillai, in his evidence admitted granting the receipt but stated that the date " 1923 " had been altered to " 1925 " and that it was in 1923 he had sold the tea. The Constable admits that the " bags were quite exposed to the public " and were found

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about a quarter of a mile from the Police Station. Kavanar's boutique, he admitted, adjoined the high road. Juwanis Appu says that the accused, who is a boutique-keeper, deals largely in tea; that even at the time he was giving evidence there were about 1,000 lb. of tea in the accused's boutique. He says that the accused produced three receipts (not one as alleged by the Police) for the tea, but that the Police accepted only one of these receipts. The learned Magistrate has disbelieved this evidence, proceeding upon what had transpired at the previous trial. As that evidence formed no part of the evidence in this case he should not have used the evidence at the previous trial unless that evidence was expressly introduced as the evidence upon this trial also. Cader Meera Saibo says that the accused showed him the tea in his boutique when he offered to sell it to him at a particular price, and that on the next day he was told by Juwanis Appu that the tea was at Kavanar's boutique, and he went there, when the Police appeared on the scene and sized the tea.

The accused has appealed once again from his conviction. Mr. Hayley, who appeared for him, submitted that the prosecution failed to prove that the accused was "found in possession" of the tea in question, and also if the accused be held to have been found in possession that it was not under such circumstances that there was reason to suspect that the tea was not honestly in his possession. He submitted that the tea was found not in the possession of the accused but in that of Juwanis Appu, and that it was only in a constructive sense that the accused could be said to have been in possession of the tea. The tea had left the possession of the accused and had passed into the possession of Juwanis Appu in order that it might be weighed and delivered to the purchaser Cader Saibo. The Police Constable therefore did not find the accused in possession, but Juwanis Appu. Mr. Hayley could cite no local decisions in which the words "found in possession" in section 4 of the Ordinance had been construed or considered, but he cited two decisions of the English Courts as likely to be of assistance in interpreting the words "anyone found in possession" in section 4. These decisions are *Simmons v. Millingan*[1] and *The Queen v. Dennis*.[2] In the former of these cases the words "found committing an offence" in a Statute were interpreted as intended to apply to the case of persons who are taken *flagrante delicto*, and that it was not sufficient to show that a person has committed an offence though but a little while before. In the latter case L. who had purchased and taken delivery of walnuts which he subsequently found to be unfit for the food of man and had taken and handed them to a Sanitary Inspector to be dealt with by him was held not to have been found in possession

[1] *15 (N. S.) L. J. R. C. P. 102.* [2] *63 L. J. M. C. 153.*

of the walnuts within the meaning of a Statute. It would appear that neither of these cases is in point nor of any assistance to support his contention that the possession of the tea when it was found by the Constable was not with the accused but with Juwanis Appu. Mr. Hayley cited *Banda v. Haramanis*[1] in which the principle that "possession to be criminal must be actual and exclusive, for criminal liability does not attach to constructive possession" was approved and adopted. Applying that principle in regard to possession in this case, in my opinion it must be held that the accused was in possession of the tea. His possession was exclusive. It was conscious. Upon his own statement Juwanis Appu was his servant, employed for the purpose of seeing that the tea was weighed and delivered to the purchaser. The removal of the tea for that purpose from his boutique to the place where it was to be weighed was not a removal of the tea from his possession. It continued to be in his possession unless delivery were made to the purchaser. Supposing the tea in question had been found in the shop or boutique of the accused at a time when the accused himself was not present in the shop but Juwanis Appu was in charge as the salesman or assistant of the accused, it could not be reasonably said in those circumstances that the possession of the tea was not with the accused but with Juwanis Appu. I am therefore unable to sustain that part of Mr. Hayley's argument that the tea, when found by the Constable, was not in the possession of the accused. I hold that it was. But I think the prosecution fails for another reason. The section under which the prosecution was instituted throws upon the person who is found in possession the onus of giving a satisfactory account of his possession to the Court before whom he is tried only where the person is found in possession "under such circumstances that there is reason to suspect that the produce is not honestly in his possession." There is no evidence in this case that there had been a theft of tea anywhere. There is no evidence what the information was which induced the Police Constable to watch for the arrival of two bags of tea at the Railway Station. The circumstances for suspecting that the tea was not honestly in the possession of the accused at the time the tea was found by the Police Constable must therefore be looked for in the other evidence in the case. I am unable to see that there were any such circumstances. The tea was being weighed publicly in a boutique adjoining the high road at about 11 A.M., an hour when such business is usually transacted, with notice to the intending purchaser, and probably in the presence of persons employed in the boutique of Kavanar. The accused does ordinarily deal in tea. All those are circumstances which clearly do not give rise for any suspicion that the tea was not honestly in the possession

[1] *(1919) 21 N. L. R. 141.*

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of the accused. That being so, the section does not oblige the accused to give the Court a satisfactory account of his possession of the tea. The evidence in the case does undoubtedly show that the account given by the accused of how he came by the tea is by no means satisfactory. But that could not justify the conviction of the accused in this case. I would, therefore, set aside the conviction and acquit the accused.

*Set aside.*