1961 *Present :* **Gunasekara, J.**

EMANIS SINGHO and another, Appellants, *and* INSPECTOR OF POLICE, DOMPE, Respondent

S. C. 395–396 of 1961—M. C. Gampaha, 60931/B

Criminal trespass—An ingredient of the offence—Framing of proper charge—Penal Code, s. 433.

Sentence—Conviction of accused—Order of conditional discharge—Illegality—Criminal Procedure Code, s. 325 (1).

The offence of criminal trespass can be committed by a person only in respect of property in the occupation (not merely possession) of another. The charge of criminal trespass would itself be defective if it contains no averment that the property was in the occupation of a person.

An order of conditional discharge under section 325 (1) of the Criminal Procedure Code cannot be made in a case where the accused is convicted of an offence.

APPEAL from a judgment of the Magistrate's Court, Gampaha.

Frederick W. Obeyesekere, for the Accused-Appellants.

P. Nagulesvaram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 14, 1961. GUNASEKARA, J.—

The two appellants were tried before the Magistrate's Court of Gampaha on charges of criminal trespass and mischief, alleged to have been committed on the 22nd November 1960. After the magistrate had heard the evidence for the prosecution and the defence he made the following order on the 16th March 1961 :

"I find the accused guilty on both counts and convict them. Reasons and sentence on 21/3."

On the 21st March, instead of passing sentence, he made the following order :

" Under Section 325 (2) both accused bound over for 1 year in Rs. 200/200.

Under Section 325 (3) each accused to pay compensation of Rs. 10/- to complainant Savariel Singho within one month from today. "

The section referred to in the latter order is section 325 of the Criminal Procedure Code. The magistrate's court had no power to make an order under subsection (2) of this section, for such an order can be made only where a person " has been convicted on indictment ". If the magistrate's reference to subsection (2) is a mistake for subsection (1), what he intended to do under this subsection was to discharge the appellants conditionally on their entering into recognizances to be of good behaviour and to appear for conviction and sentence when called on at any time during a period of one year. But it was not open to him to make such an order, for he had already convicted the appellants, and the orders that a court may make under subsection (1) are orders that it may make " without proceeding to conviction ". Whether the order purports to be made under one subsection or the other, it is not a final order, being a conditional discharge, and is therefore not appealable. As it appeared to be an obviously erroneous order, however, I considered the case in the exercise of the powers of revision vested in this court.

The charge of criminal trespass relates to a piece of land, about $\frac{3}{4}$ acre in extent, that was allotted to one Ago Nona on the 1st February 1956 by the final decree in a partition action. The subject of the action was a land of about $5\frac{1}{4}$ acres. It was partitioned into 5 lots, of which lots 2 and 3 (which adjoin each other) were allotted to the appellants, lot 4 (which adjoins lot 3) to Ago Nona and lot 5 (which adjoins lot 4) to one Savariel and his wife Rosalin. While the action was pending Ago Nona had conveyed to Savariel, on the 6th October 1954, whatever rights she might become entitled to under that decree. On the 12th December 1956 Savariel transferred to one Mai Singho his right, title and interest in an extent of $\frac{1}{4}$ acre out of lot 4. He claims that he was in possession of the rest of lot 4 from the time of the final decree in the partition action until the day in question, the 22nd November 1960.

On that day, according to the case for the prosecution, Savariel and three others went to lot 4 and were planting coconuts there, when the two appellants arrived, the 1st accused appellant armed with a sword and the 2nd with a kitchen knife, and uprooted and threw away some 20 coconut plants. Evidence to this effect was given by Savariel and a man named Jacolis, who is said to have been one of those who helped him in the planting. Savariel complained to the police. A police sergeant who visited the land on the next day to investigate the complaint said in evidence that he found about 20 coconut plants uprooted and scattered about the land. Savariel estimated the resulting damage at Rs. 25.

The 1st accused appellant, who was the only witness called for the defence, denied that any such incident as was alleged by the prosecution occurred on the 22nd November or that there were any uprooted coconut plants on the land when the police came there on the next day.

It was common ground between the prosecution and the defence that the appellants had prevented Savariel from planting coconuts on this land on the 4th November 1960 and from picking coconuts there on the 6th November, and that on each of these occasions he complained to the police. Savariel admitted under cross-examination that after an inquiry into these complaints, at which the appellants produced some deeds and claimed to be the owners of the land and to be in possession of it, the police advised him to establish his title in a civil action. Thereafter he interviewed the local member of Parliament at the latter's office and told him what had happened. He then made a third complaint to the police. They held an inquiry on the 20th November and instructed him to plant the land on the 22nd.

It was suggested on behalf of the defence that before the police held an inquiry on the 20th November the member of Parliament had, to Savariel's knowledge, communicated with the police ; but this suggestion was denied by Savariel.

The 1st accused appellant claimed that Ago Nona's title to lot 4 had devolved on him and that he was in possession of that lot. He produced two deeds, executed on the 5th December 1958 and the 12th May 1959, by which certain persons who were said to be Ago Nona's heirs conveyed their interests in this lot to one Wijeratne, and he stated that he had subsequently obtained a transfer of those interests, but he did not produce the deed by which this transfer was made. Nor was there evidence of any acts of possession done by him. Quite clearly there was no evidence before the magistrate that could support this accused's claim of title. His assertion that he was in possession of the land was also unsupported by any evidence.

The learned magistrate states that he accepts the evidence of the prosecution witnesses that from the time of the final decree in the partition action Savariel was in possession of lot 4. But apart from a vague statement by Jacolis to the effect that he was " the person looking after the land ", there is no evidence that Savariel was in possession of this lot. He has asserted that he was in possession of it, and the assertion is repeated by the village headman, but there is no evidence of any specific acts of possession that could prove this assertion.

While the learned magistrate has arrived at a finding that Savariel was in possession of lot 4 he has failed to address his mind to the question whether it had been proved that Savariel (or anyone else) was in occupation of it at the material time. The offence of criminal trespass can be committed by any person only in respect of property in the occupation of another. The charge of criminal trespass is itself defective in that

it contains no averment that the property was in the occupation of any person. It only alleges that the appellants did " commit criminal trespass by entering into the land called Namaluwatta at Helumahara with intent to commit an offence, to wit, mischief, and thereby committed an offence punishable under section 433 of the Penal Code ". I set aside the conviction of the appellants on this count.

I see no reason to interfere with the magistrate's finding that the appellants committed the offence of mischief with which they were charged or with his decision to make an order under section 325 of the Criminal Procedure Code in respect of that offence. I therefore set aside the conviction of the appellants on the count of mischief and substitute for it an order in terms of section 325(1) of the Criminal Procedure Code discharging the appellants conditionally on their entering into recognizances, each in a sum of Rs. 200 with a surety, to be of good behaviour, and to appear for conviction and sentence when called on at any time during a period of one year.

Appeal mainly allowed.