1945 *Present:* **Howard C.J.**

EXCISE INSPECTOR, KANDY, Appellant *and* PUNCHI-MAHATMAYA, Respondent.

1,053—M. C. Kandy, 34,976.

Joint charge against two persons—Unlawful possession of arrack—No evidence of guilty knowledge against one—Joinder of accused—Exclusive possession.

The first and second accused, the driver and the conductor of a bus, were jointly charged with the unlawful possession of seven bottles of arrack.

The evidence established that under the driver's seat was a box, which contained three bottles of arrack and under the seat occupied by the conductor were four bottles wrapped in a bag and that the latter was seen pushing the parcel containing the bottles under the seat.

Held, that there was no misjoinder of charges and that the fact that the evidence failed to establish guilty knowledge against the first accused did not make the joinder of the accused in one trial bad.

Held further, that the evidence established actual and exclusive possession by the second accused.

APPEAL against an acquittal by the Magistrae of Kandy.

E. H. T. Gunasekera, C.C., for the complainant, appellant.

G. E. Chitty for the accused, respondent.

Cur. adv. vult.

January 31, 1945. HOWARD C.J.—

This is an appeal with the sanction of the Attorney-General from an order of the Magistrate at Kandy, acquitting the respondent on a charge of having on June 20, 1944, committed an offence punishable under section 43 (*a*) of the Excise Ordinance in that he, together with another person the first accused in the case, had in their possession without a permit an excisable article, namely, 24 drams of arrack, in breach of section 16 of the said Ordinance. The prosecution established the following facts:—

(*a*) The two accused were the only occupants of a bus which was halted at a bus stand in Kandy, the first accused the driver being seated in the driving seat and the respondent the conductor in a seat immediately behid it.

(*b*) A party of Excise Officers on approaching the bus in a car saw the respondent trying to push something under the seat.

(*c*) The Excise Officers got out of the car and found under the respondent's seat four bottles of arrack wrapped in a mat bag. Under the driver's seat in a box were found three bottles of arrack. The bottles contained 8 drams each and were sealed with Government warehouse seals.

At the close of the case for the prosecution, the Magistrate after hearing argument held that the respondent, the second accused, knew that the parcel under his seat contained arrack, but there was no evidence to prove that the first accused knew the contents of this parcel. He Further held that the first accused should have been separately charged with the possession of three bottles of arrack and the respondent with four bottles of arrack and that there had been a misjoinder of charges. He therefore acquitted the accused. The complainant has appealed aganist the acquittal of the respondent, the second accused.

Section 184 of the Criminal Procedure Code is worded as follows:—

> "When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the Court thinks fit; and the provisions contained in the former part of this chapter shall apply to all such charges."

The respondent and the first accused were accused of jointly being in unlawful possession of seven bottles of arrack. The evidence, according to the Magistrate, failed to establish the guilty knowledge of the first accused. This fact, however, does not make the joinder of the two accused in one charge bad. The section deals with three matters, accusation, charge and trial. It says nothing about verdict. In this connection I would

refer to the case of *Babulal Choukhani v. King Emperor* [1]. In my opinion the Magistrate was wrong in holding there was a misjoinder of charges. If he had come to the conclusion that there was no evidence against the first accused, he should have discharged him and considered the case made against the respondent, the second accused.

Counsel for the respondent has put forward the further contention that, even if the Magistrate was wrong in holding that there was a misjoinder of charges, there was no evidence to establish that the respondent was in exclusive possession of the four bottles of arrack under the seat. It is suggested that the parcel may have been left by a passenger who left the bus when it stopped or possibly put there by a passenger boarding the bus after it had stopped. The appeal being from a finding of "not guilty" it is urged that it can only be allowed if it is manifest that there has been a miscarriage of justice. With regard to the question as to whether the prosecution have established the sole and exclusive possession of the respondent, I have been referred to the cases of *Excise Inspector v. Marikar* [2], *Khan v. Kanapathy and four others* [3], *and Wijemanne v. Sinnathamby* [4]. In *Wijemanne v. Sinnathamby*, opium was found under the pillow of the bed occupied by the accused. There was, however, nothing in the conduct of the accused, either before or after the discovery of the opium, to indicate that he knew it was there. In the present case the respondent was seen pushing the parcel containing the four bottles of arrack under the seat. In *Khan v. Kanapathy* (*supra*) stolen property, consisting of the carcases of five goats and one live goat, were found in a car in which seven persons were travelling. There was no evidence to show that any one or more of the accused put the stolen property in the car or was responsible for it being found there. In these circumstances it was held that the prosecution had not discharged the onus which lay on it to prove that one or more of the five accused were in actual exclusive possession of the stolen property. In *Excise Inspector v. Marikar* (*supra*) the accused was charged with unlawful possession of ganja which was found under a low platform in the verandah of his boutique. At the time of the discovery there were in the boutique about 6 or 7 people including salesmen. Moreover 3 or 4 salesmen ate and slept in the boutique. It was held that there was no proof of actual and exclusive possession by the accused.

I think the various cases cited can be differentiated from the facts of the present case. The case put forward by the Crown has established actual and exclusive possession by the respondent. In these circumstances there has been a manifest miscarriage of justice. I need hardly say that the respondent must be afforded an opportunity of giving evidence and calling witnesses. I set aside the order of acquittal and direct that the case be remitted to the Magistrate so that he may call upon the respondent for his defence.

Order set aside; case remitted to the Magistrate.

[1] *39 Cr. Law Journal 1928, p. 452.*
[2] *8 Times of Ceylon 65.*
[3] *9 C. L. W. 21.*
[4] *9 C. L. W. 165.*