Present : Jayewardene A.J.

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THE KING *v.* DON MARTIN.

62—D. C. (Crim.) Colombo, 6,811.

Penal Code, s. 450—Being found in an enclosure belonging to another person—Failure to give a satisfactory account of himself—Failure to account for his presence there—Appeal filed—Accused entitled to be released on bail—Criminal Procedure Code, s. 34 .

Accused was charged under section 450 of the Penal Code with being found in an enclosure of another person, and failing to give a satisfactory account of himself. The District Judge found that accused had failed to account for his presence in the enclosure, and convicted him.

Held, that the conviction was bad.

" The words of the section are not ' fails to give a satisfactory or lawful excuse for his presence,' but ' fails to give a satisfactory account of himself.' What the accused has to prove on a charge of this kind is who he is, and what he is, where he resides, and such other facts personal to himself. These words ' giving a satisfactory account of himself ' would apply appropriately to persons wandering about the country without any visible means of subsistence and unknown in the places where they are found. Such persons should, if the facts justify it, be charged under the first part of the section of being found in a building or enclosure for an unlawful purpose."

To constitute an offence under section 450 actual apprehension on the premises is not necessary. It is sufficient if a person is discovered on the premises but is apprehended after he has quitted the premises.

THE facts appear from the judgment.

J. S. Jayawardene (with him *J. E. M. Obeyesekera*), for the appellant.

Dias, C.C., for the respondent.

August 22, 1923. JAYEWARDENE A.J.—

In this case the accused appellant has been convicted of an offence under section 450 of the Ceylon Penal Code, and sentenced to undergo eighteen months' rigorous imprisonment and to two years' police supervision, being an habitual criminal. The charge against him was that he was found in an enclosure, to wit, the premises of one S. Abeydeera, and failed to give a satisfactory account of himself. The learned District Judge accepted the evidence for the prosecution,

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and found that the accused had been seen in Abeydeera's garden, which was enclosed by a barbed wire fence, on the night of April 29 last, and that he had failed to account for his presence on Mr. Abeydeera's land. In my opinion this conviction cannot be sustained. Section 450, which has been amended by Ordinance No. 16 of 1898, section 16, by the addition of the words " of either description " after the word " imprisonment," is a reproduction of section 4, clause 6, of the Vagrants Ordinance, No. 4 of 1841. The Ordinance of 1841 was based on the English Vagrancy Act of 1824 (5 Geo. IV., c. 38), and sections 3 and 4 of the English Act have been taken over with certain alterations and form sections 3 and 4 of the local Vagrants Ordinance of 1841. The English Act (section 4) declared *inter alia*—

(A) " Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon not having any visible means of subsistence and not giving a good account of himself ; and

(B) " Every person being found in or upon any dwelling house, warehouse, coach house, stable or outhouse, or in any enclosed yard, garden, or area for any unlawful purpose " ;

shall be deemed a rogue and a vagabond, within the true intent and meaning of the Act. (A), with certain variations to suit local conditions, forms section 3 (4) of our Ordinance, and (B), also with similar variations, formed the repealed section 4 (6), but the local Legislature had added the words " or not giving a satisfactory account of himself." (B), so altered and with some verbal modifications, now forms the subject-matter of section 450 of the Penal Code. This section contains two offences : (1) being found in or upon any building or enclosure for any unlawful purpose ; and (2) being so found, fails to give a satisfactory account of himself. It is of the latter offence that the accused has been convicted. As alleged in the indictment, the prosecution has to prove two things : First, that the accused was found in a building or enclosure ; and second, that he failed to give a satisfactory account of himself. Accepting for the moment the learned Judge's findings on the facts, the prosecution has proved that the accused was discovered in an enclosure, that is, Abeydeera's enclosed garden. The question arises, Has the prosecution also proved that the accused failed to give a satisfactory account of himself ? The learned Judge says that the accused has failed to account for his presence on Abeydeera's land. Is that sufficient ? It must be noted that the words of the section are not " fails to give a satisfactory or lawful excuse for his presence," but " fails to give a satisfactory account of himself." In my opinion what the accused has to prove on a charge of this kind is who he is, and what he is, where he resides, and such other

facts personal to himself. These words "giving a satisfactory account of himself" would apply appropriately to persons wandering about the country without any visible means of subsistence and unknown in the places where they are found. It can have no application to persons having a fixed abode, visible means of subsistence, and well known to the persons on whose premises they were found. Such persons should, if the facts justify it, be charged under the first part of the section of being found in a building or enclosure for an unlawful purpose. In fact, I find on reference to the police report, that the accused was charged with being found in an enclosed garden with intent to commit an offence, viz., theft, that is, for an unlawful purpose. But the indictment is based on a charge he was never called upon to answer in the lower Court.

The English Act uses the words "not giving any good account of himself" only in connection with persons wandering abroad, and lodging in barns, deserted buildings, &c., and not having any visible means of subsistence. There a man may be properly called upon to explain: Who he is? and What he is? Such an explanation would be very appropriate in cases of that kind. Our law has, however, gone further and created a new offence, but I hold that such an offence cannot be said to have been committed by a person who is not a wanderer, has visible means of subsistence, and has a known place of residence.

The learned Judge has convicted the accused of failing to satisfactorily account for his presence in Abeydeera's enclosure, but that is not an offence under section 450. The accused is not called upon to account for his presence, he has only to give an account of himself. The evidence for the prosecution shows who he is, and where he resides—about one hundred yards from Abeydeera's house. He was well known to Abeydeera, and one of his servants has given evidence against the accused in another case. Even the police did not think that the accused could not give a satisfactory account of himself, as their charge against him was that he was found in the enclosure for an unlawful purpose. I think that the evidence for the prosecution itself affords a satisfactory account of the accused.

It was also contended for the accused that to bring him under the section he should have been arrested in the building or enclosure where he was found, and there and then called upon to give an account of himself. In the present case the accused went away after he had been seen or "found" and was not arrested till seven days after. I do not think this contention is sound. It has been held in the construction of the clause of the English Act which I have marked (B) above, and from which the local section has been borrowed, that the accused must be discovered upon the premises, but that actual apprehension upon the premises is not necessary (*Moran v. Jones*[1]).

[1] *(1911) 104 L. T. 921.*

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Lord Alverstone C.J. there said—

> " In my opinion the words ' found in or upon any dwelling house, warehouse, coach house, stable or outhouse, or in any enclosed yard, garden, or area for any unlawful purpose ' ought not to be construed too strictly, and if a charge had been made against the defendants under that section on the night of the 11th (that is, the day on which they were alleged to have been found in the house), or on the next day, the fact that they were not arrested until late the following afternoon would not in my judgment prevent the Magistrates from convicting him."

Bray and Bankes JJ. said—

> " In order to be found upon the premises a person must be upon those premises, and the offence therefore consists in being upon premises for an unlawful purpose and being found there. It is not, in my opinion, sufficient for a person to be upon the premises for an unlawful purpose, unless he was also found there. What constitutes a finding within the meaning of the section ? The simplest case would be a case of apprehension upon the premises. Actual apprehension upon the premises is, however, in my opinion, not necessary to constitute the offence. I think that there may be many cases in which a person is found upon the premises within the meaning of the section, although he is not apprehended until he has quitted the premises. To constitute the offence, a person must, in my opinion, be discovered upon the premises doing the acts or things which of themselves constitute the unlawful purpose."

Even on the merits, I am inclined to suspect the truth of the charge. Abeydeera himself did not see the accused. His servants say they saw him. There has been some unpleasantness between the servants of Abeydeera and the accused. It appears that the patrol constables came to the spot soon afterwards, and the servants reported the facts to them, but they have not been called. They ought to have been called to corroborate the servants and to state what steps, if any, they took on the receipt of the information. This is the sort of case which requires prompt and expeditious action. Abeydeera did not give any information to the police till the following morning when he wrote a letter, P 1, giving the name of the accused, but he did not there state that his servants had seen the accused. It would be unsafe to act upon the evidence called for the prosecution.

I set aside the conviction and direct the acquittal of the accused.

There is one other matter I wish to refer to. I find that after the petition of appeal was filed the proctor for the accused made an application for bail. This application was refused by the District Judge on the ground that the accused was an habitual criminal.

In making this order the learned District Judge has evidently overlooked the provisions of section 341 of the Criminal Procedure Code by which a Court is bound to make an order for the release on bail of every convicted person who prefers an appeal. Habitual criminals are not excluded from the privilege granted by this section.

[NOTE.—*See Kurup v. Landa, etc., later.*]

Set aside.