

1934

Present : Akbar J.

LA HARPE *v.* BEEBEE.

710—P. C. Galle, 1,732.

Opium—Unlawful possession—Distinction between having and possessing—Ordinance No. 5 of 1910, ss. 5 and 8—Penal Code, s. 289.

Under section 5 of the Opium Ordinance, there is a distinction drawn between the act of "having" and of "keeping" in possession, and it is only the latter offence that is penalized under section 8.

Where a person is found guilty of having opium in his possession, the offence is punishable under section 289 of the Penal Code.

A PPEAL from a conviction by the Police Magistrate of Galle.

H. V. Perera (with him *Kariapper*), for appellant.

Wendt, C.C., for respondent.

Cur. adv. vult.

February 16, 1934. AKBAR J.—

Mr. Perera has pressed this appeal on a question of law on which I think he is entitled to succeed.

The accused in this case was charged with unlawful possession of 2 ounces and 126 grains of opium without a licence on the day in question and convicted under section 5 of Ordinance No. 5 of 1910, punishable under section 8 of the same Ordinance.

The evidence as accepted by the Magistrate was that when the police raided she was seen to run towards the kitchen, and, in the very act of throwing something, her hand was held by a police sergeant; and she had in her hand at that time a tin containing 14 packets of opium. Another packet of opium was found in a bed under a pillow. From the Police Inspector's evidence it is clear that this accused is a married woman and that she was living with her husband and mother in the house and that the Inspector could not say whose room it was where the opium was found. So that the learned Magistrate was right in excluding from his consideration the packet of opium which was found under the pillow. We are therefore left with this one bit of evidence, namely, that accused was found with 14 packets of opium which must be something less than the total opium found and which aggregated in all to 2 ounces and 126 grains when she was arrested by the sergeant.

The point of law stated by Mr. Perera was that under the Opium Ordinance—section 5—there is a clear distinction made between mere having and keeping in one's possession, and that under the penal section 8 only the keeping in possession was penalized. Therefore, if an accused person is guilty of the offence of having in one's possession he or she cannot be convicted under section 8 and punished under section 8, but can only be punished under section 289 of the Penal Code. This is not a new interpretation put on these two sections by Mr. Perera for the first time, because he took the same point in the case of *King v. Ambalavanar*¹ in

¹ (1922) 4 C. L. R. 115.

which the same distinction was given effect to by the Chief Justice. He held there that there are two definite sets of offences with which section 5 deals, and that the offence under section 8 of the Ordinance was the offence of keeping in one's possession and that having in one's possession meant only a brief and temporary possession, and that if the facts proved that possession was brief and temporary, the offence was that of having the opium and not keeping in one's possession. In that case the Chief Justice altered the conviction from one under section 8 to one under section 289 of the Penal Code, and sentenced the accused to a fine of Rs. 100. This case has been recently followed by my brother Poyser in S. C. Nos. 444-447, P. C. Jaffna, No. 19,867 (*S. C. Minutes of January 19, 1934*). In that case the evidence was held to amount to only a brief and temporary act and the conviction was altered to one under section 289 of the Penal Code.

Mr. Wendt, Crown Counsel, admits that he has nothing to say against the law as stated in these two cases. I am therefore left now with the consideration of the evidence in this case.

As I have stated before, the accused is a married woman, and although the witnesses for the prosecution say that they saw her seated in the verandah with something in her hand they are not prepared to say that it was this identical tin which was afterwards found in her hand when she ran to the back of the kitchen and which she attempted to throw. The learned Magistrate seems to infer that it is the same tin and he has drawn this inference because the police led, what I consider to be, unfair evidence in this case, namely, that the Inspector had received information that accused was carrying on a sale of opium and that acting on that information he had purchased two packets from her on two successive days and that he was not prepared to disclose the name of the informant. Evidence of this kind is bound to prejudice a Magistrate's mind, and I am surprised that an Inspector of the standing of Mr. de la Harpe led such evidence and I hope he will not lead such evidence again. I am also surprised that the Magistrate referred to his evidence in two or three places in his judgment, and referred also to the further fact that a marked 10-cent coin was found among the production seized in this case, suggesting that this woman had carried on sales previously. It is perhaps owing to this hearsay evidence that he has drawn the inference that the something found in the woman's hand when she was seated in the verandah was necessarily the tin of opium which was found in her hand when she ran to the back of the kitchen. As I said, the evidence does not prove this.

Thus, I am left with these facts—that this woman, as soon as the police came there, closed the front door and ran towards the back of the kitchen and was trying to throw something which was found by the police to be 14 packets of opium. From this, one cannot definitely and positively draw the inference that this trading in opium was a business carried on by the woman herself. If anything, it points to an effort—a natural effort on the part of the wife—to save her husband by trying to do away with evidence that might incriminate him. If so, it was only a brief and temporary possession, and, therefore, the offence will be, according to the authorities I have quoted, “having in her possession the 14 packets of

opium" and not that of keeping in her possession. The conviction will have to be altered to one under section 289 of the Penal Code, and the fine reduced from Rs. 1,000 to one of Rs. 100 or in default one month's rigorous imprisonment.

I may add that the Magistrate seems to think that the penalty prescribed under section 8 of the Opium Ordinance is a penalty of Rs. 1,000 for every ounce. This, of course, is entirely wrong.

The appeal is dismissed subject to this variation in the sentence.

Sentence varied.

