

THE ATTORNEY – GENERAL
v.
CHANDRAN AND ANOTHER

COURT OF APPEAL,
WIJEYARATNE, J.
C. A. No. 753/79 (M.C.) – M. C. COLOMBO 368123.
JULY 5, 12 AND 13, 1990.

Criminal Law – House trespass by erstwhile tenants – S. 434 of Penal Code – Occupation.

Where a husband and a wife who are the tenants of certain premises, owing to marital disharmony, decide to vacate the premises and they remove all their belongings and hand over the keys by way of symbolic delivery of possession to the landlord's agent, it is clear by the conduct of parties that there is a cancellation of the lease by mutual agreement of the parties. Therefore the tenancy comes to an end. They are no longer tenants.

If they re-enter the premises they do so as trespassers without any lawful right and can be convicted of house trespass under section 434 of the Penal Code.

"Criminal trespass" as defined in section 427 of the Penal Code is a component of the offence of house trespass set out in section 434.

As to whether a person is in "occupation" within the meaning of section 427 of the Penal Code depends on the facts and circumstances of each case.

When the landlord's agent, after he was handed the keys by the erstwhile tenants, verified that no one was in occupation and took charge of the premises, it can be said that he came into "occupation" of the premises within the meaning of section 427 though he was not physically residing there.

The word "occupation" does not by any means imply residence.

Cases referred to:

- (1) *The King v. Selvanayagam* 51 NLR 470
- (2) *Chitravelu v. S. I. Police, Kantalai* 61 NLR 39
- (3) *Nandohamy v. Walloopillai* 61 NLR 429
- (4) *Fernando v. Holloway* 60 NLR 90
- (5) *Abeyewardena v. Rev. Siri Nivasa* 57 NLR 531
- (6) *Ukku Singho v. Andiris Silva* 11 *Times of Ceylon Law Reports* 143
- (7) *The Attorney-General v. Deonis* (1909) 1 *Weerakoon's Reports* 13
- (8) *Speldewinde v. Ward* 6 NLR 317
- (9) *Silva v. Silva* 10 C. L. Rec. 107
- (10) *Chandrasekera v. Jayanathan, S. I. Police* 68 CLW 66
- (11) *Nandoris v. Inspector of Police, Warakapola* 77 NLR 304

APPEAL from order of acquittal of the Magistrate of Colombo.

C. Prematilleke, S. C. for Attorney-General.

Accused- Respondents absent and unrepresented.

Cur. adv. vult.

July 31, 1990

WIJEYARATNE, J.

In this case the 1st and 2nd accused-respondents (who are wife and husband respectively) were charged with committing house trespass between 15.9.1975 and 21.9.1975 by entering into premises No. 50/3, Siripa Road, Narahenpita, Colombo 5, the dwelling of Jeevananda Silva, with intent to annoy him, an offence punishable under section 434 of the Penal Code.

According to the evidence, these premises had belonged to the late G.P.J. Kurukulasuriya and they were in charge of Jeevananda Silva, who was the duly appointed caretaker. M.B. Jayasekera (a lawyer) gave evidence and said that he had arranged to give a portion of these premises to the two accused on rent.

According to the evidence, there had been disharmony between the 1st and 2nd accused (wife and husband) and consequently they had vacated the premises. By 14. 9. 1975 four keys of these premises had

been handed to Jeevananda Silva, by these two accused, two of them through the medium of M.B. Jayasekera. Jeevananda Silva thereafter had closed all the doors and windows and verified that no one was in occupation thereof. He said none of the goods of the accused were there after they had vacated the premises. He had then informed Dr. Indra Perera, the daughter of G.P.J.Kurukulasuriya.

On 21.1.1975 when he went there he had seen lights inside and when he had questioned who was inside, the 1st accused had replied "I am in". Thereupon he went and made a complaint at the Narahenpita Police Station on 21.9.1975.

On 22.9.1975 Sarathchandra Dissanayake, a Police Officer attached to the Narahenpita Police Station, had visited the house for inquiry. The 1st accused and another girl were there. He found that the inside of the front door frame had been broken. The 1st accused had handed him a key.

At the end of the prosecution case the learned counsel for the defence had made legal submission and cited certain decisions of the Supreme Court.

Thereafter the learned Magistrate by his order dated 27.06.1978 had made order acquitting and discharging both accused.

The learned Magistrate in his order has stated that the possession of this house was in Jeevananda Silva, which possession he obtained after the keys were handed over by the accused. However, the learned Magistrate has gone on to say that it was the intention of Jeevananda Silva to place Indrani Perera in occupation, but he failed to do so. Therefore he says that though the property was in Jeevananda Silva's possession it was not in his occupation. Hence the two accused did not commit an offence under section 434 of the Penal Code. He goes on to say that after leaving the premises it appears that both accused had become friendly again and retaken possession. He further states that being tenants they may have re-entered these premises and committed a wrongful act, but they cannot be convicted under section 434. He goes on to say that section 434 cannot be availed of by the complainant as this dispute should be resolved through an action in the civil court.

The learned Magistrate refers to the decision of the Privy Council in *The King v. Selvanayagam (1)*, *Chitravelu v. S.I. Police, Kantalai (2)*, and *Nandohamy v. Walloopillai (3)*. He goes on to say that Jeevananda Silva did not have occupation of these premises.

From this order of acquittal the Hon. Attorney-General has filed this appeal.

At the hearing Mr. Chandana Prematillake, State Counsel, who appeared for the Attorney-General, made various submissions and cited various authorities.

Mr. Prematillake submitted that the learned Magistrate has understood "occupation" to mean actual residence or physical presence. In *Selvanayagam's* case the Privy Council held that section 427 (dealing with criminal trespass, which is a component of the offence of house-trespass) was not intended to provide a cheap and expeditious method for enforcing a civil right. The Privy Council also held that there must be an occupier whose occupation is interfered with and whom it is intended to insult, intimidate or annoy, unless the intent is to commit an offence. It was also held that the section has no application when the fact of occupation is constant, the only change being in its character as where a tenant holds over after the expiration of his tenancy.

The Privy Council also held that the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult or intimidate or annoy the occupant. Also there must be proof that the trespass is one calculated to cause a breach of the peace.

I shall first deal with the question of occupation. As laid down in the case of *Fernando v. Holloway (4)*, the question as to whether a person is in occupation of any particular premises is a question of fact and depends on the circumstances of each particular case.

In this case really both accused had vacated the house because they had left the house with all their belongings. They had handed all four keys of the house to Jeevananda Silva who was in charge.

Wille in the well-known book "Landlord and Tenant in South Africa" (1948 Edn.) at pages 253 and 254 states as follows:-

"A lease may be terminated at any time by the mutual agreement or consent of the parties. Being a novation, an agreement for premature cancellation of a lease requires clear proof. There must be satisfactory evidence of an unconditional offer by one of the parties to terminate the lease, and of a definite acceptance of the offer by the other party....

The consent of the parties to a premature cancellation may be inferred from their conduct in treating the lease as being at an end, for instance, the acceptance of the keys of the premises by the landlord's agent."

The same principle in converse form was laid down by Sansoni J. in the case of *Abeywardane vs. Rev. Siri Nivasa* (5) by which it was held that a landlord is not entitled to take possession of rented premises unless the tenant has vacated them or surrendered possession of them.

In this case clearly disagreement had arisen between the two accused-respondents (wife and husband) and they had decided to hand over the premises to the landlord's agent Jeevananda Silva. Thereupon Jeevananda Silva took charge of the house and he became the occupier.

The learned Magistrate has misdirected himself—

- (1) by referring to the two accused as tenants when they re-entered the premises ;
- (2) by holding that Jeevananda Silva was not in "occupation".

The tenancy was over when the two accused removed all their belongings, vacated the premises and handed over the keys by way of symbolic delivery of possession. They re-entered the premises as trespassers, without any lawful right.

Thereupon Jeevananda Silva as agent took charge and he came into "occupation" though he was not physically residing therein.

In this connection the case of *Ukku Singho v. Andiris Silva* (6) is almost directly in point. In that case it was held that where the complainant kept the key of a certain room and used to visit the place to see that it was tidy, he was held to be in occupation of those premises. Then again in the case of *The Attorney-General v. Deonis* (7), it was held by Middleton, J. that the word "occupation" does not by any means imply "residence". The decisions in *Speldewinde v. Ward* (8), *Silva v. Silva* (9), *Chandrasekera v. Jayanathan, S.I. Police* (10), and *Nandoris v. Inspector of Police, Warakapola* (11), also support this view.

Jeevananda Silva in his evidence said that he was actually annoyed when he saw the 1st accused inside the premises. Undoubtedly this type of conduct is likely to cause a breach of the peace. Therefore the ingredients of the charge have been proved beyond reasonable doubt.

For these reasons I set aside the order made by the learned Magistrate dated 27.6.1978 acquitting the 1st accused-respondent.

On the evidence it is clear that the 1st accused had, during the period between 15.9.1975 and 21.9.1975, entered into these premises in the occupation of Jeevananda Silva with intent to annoy him and I therefore convict the 1st accused of the charge under section 434 of the Penal Code.

There is no evidence that the 2nd accused was seen on these premises between 15.9.1975 and 21.9.1975. The evidence established that only the 1st accused was inside the premises and not the 2nd accused. It may well be that the 2nd accused (husband) had also entered into these premises at the same time along with the 1st accused (wife). However the prosecution witnesses have not given evidence that the 2nd accused was also there residing in the same premises at any time during this period.

I therefore convict the 1st accused of the charge under section 434. The order of acquittal in respect of the 2nd accused will stand.

The next question that arises is the question of sentence to be passed on the 1st accused. As this is a high handed act by the 1st accused, I sentence the 1st accused to pay a fine of Rs. 1,000/-, in default 3 months' rigorous imprisonment.

Order of acquittal of 1st accused set aside and conviction entered.