

Present: Jayewardene A.J.

1925.

EXCISE INSPECTOR, POINT PEDRO, v. THANKAMMA.

720—P. C, Point Pedro, 1,075.

Search warrant—Presence of the occupant of the place searched—Method of effecting an entrance—List of articles seized—Criminal Procedure Code, ss. 25, 75, and 76.

In the execution of a search warrant under section 76 of the Criminal Procedure Code, the provision which requires the presence of the occupant of the place searched or of someone on his behalf must be strictly observed as a guarantee of the reality of the search.

Where an Excise Inspector in executing a search warrant found himself unable to gain entrance to a house, and sent one of his officers to ascend the roof and let himself down,—

Held, that the method adopted was a violation of the procedure laid down in section 25 of the Criminal Procedure Code, which requires the officer executing the warrant to "break open any outer or inner door" in order to effect an entrance to such a place.

The terms of section 25 of the Criminal Procedure, which requires an officer to make a list of the things seized are imperative.

A PPEAL from a conviction of an offence under section 43 (a) of the Excise Ordinance, No. 8 of 1912, of being in possession of ganja. On a search warrant issued by the Police Magistrate of Point Pedro, the complainant, an Excise Inspector, entered and searched the house of the accused, a woman, and found some ganja in a box in a wall and some wrapped in a paper in a locked box. The accused was not present at the search. The Excise Inspector went to the house accompanied by three sergeants. When he found the accused absent and the house locked, he sent one of his sergeants to go up the roof of the house. The latter removed some of the cadjans and let himself down to the house and opened the door from inside, when the ganja, it was alleged, was discovered. The defence was that the ganja was introduced from outside, and that the circumstances under which the entry was made and the search conducted enabled it to be done. The learned Police Magistrate convicted the accused, and sentenced her to pay a fine of Rs. 100.

H. V. Perera, for accused, appellant.

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In this case the appellant has been convicted of being in possession of ganja, an offence punishable under section 43 (a) of the Excise Ordinance, and sentenced to pay a fine of Rs. 100. Objection is taken to the conviction on various grounds.

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On a search warrant issued by the Police Magistrate of Point Pedro, the Excise Inspector says he entered and searched the house of the accused, who is a woman, and found ganja, some in a box on a wall and some wrapped in a paper in a box which was locked. The accused was not present at the search, and she says she was at Jaffna on the day in question. The Excise Inspector went to the house accompanied by three Excise Sergeants and others. When he found that the house was locked, and the accused, the occupant of the house, absent, he sent for the Vidane of Valvetty, who came up. He then sent one of his sergeants, Ramalingam, to the roof of the house. The latter went up, removed some of the cadjans and got down into the house, and opened the door from inside. Then the Inspector's party entered the room and found a tin (C 1) containing six packets of ganja on the eastern wall and some ganja wrapped up in a piece of paper in the box which was locked. The Inspector also says that he found some pills, which he says are opium pills, but they do not come into this case. The defence contends that the excisable articles have been introduced from outside, and that the circumstances under which the entry was made and the search conducted enabled this to be done.

Under section 37 of the Excise Ordinance, the provisions of the Criminal Procedure Code relating to arrests, searches, and search warrants are applicable to all action taken in these respects in the case of Excise offences. Now, section 76 of the Criminal Procedure Code requires that the occupant of the place searched, or some person on his behalf, shall, in every case, be permitted to attend during the search. This rule is not one merely of technicality, but of substance, and its observance is necessary as a guarantee of the reality of the search. In the present case the occupant was not in the house, and the Excise Inspector said that his witness, Kandiah, whom he intended to call, but did not, in fact, call, would prove that she was in the vicinity. The Inspector thinks she was keeping away through fear. On this point I need only refer to what the learned Police Magistrate says in his judgment: "The search warrant only empowers them to use reasonable force, if necessary. I do not consider that in this case force was necessary, that it was reasonable. The party could have well nigh waited till the accused turned up and if she persisted in not coming, could have put a watcher behind. The Inspector could have at any rate approached me and asked me if he should force open the house."

In the absence of Kandiah's evidence, I do not think the Inspector has succeeded in proving that the accused was intentionally keeping away from the premises. If the search party was unable to wait till the accused turned up, the steps indicated by the learned Magistrate should have been adopted before making the forcible entry. How was this entry effected? Section 25 of the Criminal Procedure Code, which is applicable to the execution of search warrants, lays

down the procedure to be adopted where ingress to any place cannot be obtained. In order to effect an entrance into such place, the officer executing the warrant is entitled "to break open any outer or inner door of any place."

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The provisions with regard to the execution of warrants of arrest and search warrants must be strictly observed, and this case is an illustration of the difficulties that arise by the failure to observe them strictly. In this case the Inspector, instead of breaking open the door of the house, as he was bound to do, sent one of his officers to the roof and got him to remove some cadjans and then descend into the room and open the door from inside. This is a clear violation of the procedure laid down in section 25. The procedure adopted necessitated the officer being in the room alone. The time during which he was there alone is said to be about five or ten minutes. The officer in question had therefore every opportunity of introducing the ganja into the place where it was discovered when the door was opened if he wanted to do so. This is what the defence alleges happened in this instance. If the door had been broken open no such opportunity would have been afforded, and the search would have taken place immediately in the presence of the Inspector. The Inspector might have adopted this procedure as he did not wish to cause more damage than was absolutely necessary, but such solicitude is misplaced, and his conduct is liable to be misconstrued. Further, there is no evidence that the person who was sent to enter the room was searched before he was sent up for the purpose. Nor is there any evidence that any of the seven persons who accompanied the Inspector, or the Inspector himself, was searched before entering the room. This is an elementary precaution which should never be overlooked. As proof of the fact that ganja had been introduced by the officer who descended into the room, the defence points out the contradictions in the evidence as to the place where the key of the box containing the ganja was found. On the first day of the trial Excise Sergeant Ramalingam said the key of the box was in the keyhole of the box.

On the second day of trial the Inspector said that Excise Sergeant Khan found the key on the wall, Ramalingam contradicted his previous statement and said the key was in another box, and Saravanamuttu, the Police Vidane of Valvetty, said the keys were taken from a big box. According to this witness, Ramalingam was in the room alone for ten minutes. The defence suggests that the place where the key was found when the door was opened has been changed from the keyhole, as originally admitted by Ramalingam, to another place, to show that the introduction of ganja into the box by Ramalingam was difficult, if not impossible. Further, the Inspector here violated another provision of the law with regard to the execution of search warrants, in that he failed to make a list of the things seized, as required by section 75. The terms of this

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section are imperative. The learned Magistrate has taken a serious view of the conduct of the Excise Inspector, but thinks the Inspector does not deserve to be punished for his action as he has acted from "undue devotion to duty." However that may be, the question is, whether in the circumstances I have pointed out above it is safe to hold that possession of ganja by the accused has been clearly proved. In my opinion, the grave irregularities in the conduct of the search, which afforded an opportunity for the introduction of the prohibited article, seriously affect the credit to be attached to the evidence of the discoveries said to have been made on such search.

While there is no proof that ganja was in fact introduced, I hold that there was a possibility of its being introduced. That, I think, is sufficient to raise a doubt with regard to the case for the prosecution, the benefit of which must be given to the accused.

I accordingly set aside the conviction, and acquit the accused.

Conviction set aside.

