1937 *Present:* **Abrahams C.J.**

PONNIAH *v.* ABDUL CADER

543—P. C. Jaffna, 10,306

Criminal Procedure—Case for prosecution and defence closed—Magistrate's power to call witness to fill a gap in the prosecution—Criminal Procedure Code, ss. 190 and 429—Excise Ordinance—Presumption regarding offence—Suspicious behaviour regarding excisable article—Ordinance No. 8 of 1912, s. 50—Production of copy of Police Information Book.

Where, in a summary trial, after the case for the prosecution and the defence had been closed the Police Magistrate reserved his order and on a subsequent date called further witnesses of his own motion,—

Held, the powers given to the Magistrate under section 429 of the Criminal Procedure Code should not be used to remedy a defect or to fill a gap in the case for the prosecution.

Where it is sought to prove a statement recorded in the information book of a Police station by the production of a certified copy, the copy must be produced by the Police officer, who recorded the statement.

The presumption created by section 50 of the Excise Ordinance does not arise merely because a man behaves in a suspicious way in respect of any excisable article.

Section 50 comes into effect when from the suspicious behaviour of the person charged an element of an offence under section 43 of the Ordinance can be proved.

APPEAL from a conviction by the Police Magistrate of Jaffna. The accused was convicted of transporting nine slabs of ganja without a permit and of possessing an excisable article, the possession of which is prohibited and sentenced to six months' rigorous imprisonment and to a fine of Rs. 500. The facts are stated in the judgment.

Rajapakse (with him *Thiagaraja*), for the accused, appellant.—Constructive possession is insufficient in criminal law. Here there is something even less than constructive possession.

A mass of hearsay has been admitted in evidence. The circumstantial evidence is insufficient to have a conviction.

The extract from the information book is inadmissible, since the person to whom the statement was made has not been called. After the close of the case for the prosecution and the defence, the Police Magistrate should not have called for further evidence. The circumstances do not justify the application of sections 429 or 190 of the Criminal Procedure Code. See *Rex v. Dora Harris*[1]. To apply the presumption under section 50 of the Excise Ordinance the conduct of the accused must amount to a breach under section 43, *e.g.*, if he *in fact* was in possession, the prosecution need not go further and prove *mens rea*. (*Silva v. Silva* [2], *Lockhart v. Fernando* [3].)

N. Nadarajah, C.C., for the complainant, respondent.—The hearsay evidence that has been recorded has not influenced the Police Magistrate in arriving at his decision. The circumstances are not only suspicious, but pont to the guilt of the accused.

[1] *(1927) 2 K. B. 587.* [2] *32 N. L. R. 230.* [3] *27 N. L. R. 229.*

Under section 50 of the Excise Ordinance, No. 8 of 1912, a presumption that the accused is guilty in a prosecution such as this (possession of ganja) arises, if the accused does not give a satisfactory explanation of his conduct in connection with its possession, and he is guilty.

The extract from the information book is a public document under section 74 of the Evidence Ordinance. Ordinance No. 12 of 1864, which is at the end of the Evidence Ordinance, makes admissible a certified copy of such a document.

Rajapakse (with permission of the Court), in reply.—Ordinance No. 12 of 1864 applies only where the original document is admissible. It does not make a copy admissible where the original is not.

Cur. adv. vult.

February 4, 1937. ABRAHAMS C.J.—

The appellant was convicted of transporting nine slabs of ganja without a permit and of possessing an excisable article the possession of which is totally prohibited. He was sentenced to six months' rigorous imprisonment and to a fine of Rs. 500.

The following facts were led in evidence by the prosecution. On December 2, 1934, a woman named Chellamma residing in Anuradhapura received by post a parcel. This parcel was later returned unopened by her husband to the Postmaster, on the ground that the parcel was not meant for his wife but for some other woman of the same name. The parcel was addressed, "Mrs. Sellammah, Maiwat-oya, Anuradhapura". The parcel was eventually opened by the postal authorities and was found to contain nine slabs of ganja packed in a towel bearing a laundry mark "N". Later, on December 2, the appellant complained to the Anuradhapura Police that he had come to the town at 1 A.M. by the night mail from Jaffna and had stayed in the house of Chellamma where he was robbed of Rs. 244. On this complaint the house of Chellamma was searched by the Police, and two letters were found purporting to be written by the appellant to Chellamma's husband where he refers to certain transactions between them expressing himself in mysterious language, referring in Tamil to the word which translated was taken to mean "stuff" and which the prosecution allege means ganja. It was also alleged that shortly after the parcel had been delivered to Chellamma the appellant displayed considerable anxiety about the parcel and reproached the postal peon for delivering it to Chellamma and asked him to get it back from her and hand it over to him. He also complained to a neighbour of Chellamma's to the effect that the woman had wrongfully taken in a parcel that was intended for him.

The Jaffna Police searched a house in Jaffna which they believed on certain information they said they had received to belong to the appellant, and there they found a towel and a shirt with the laundry mark "N". The Magistrate seems to have concluded that the accused himself posted the parcel to Chellamma from Jaffna and had travelled down by the same train in order to obtain the parcel on its arrival in Chellamma's house, and that he had been carrying on an extensive trade in dope with the assistance of Chellamma's husband and that for some reason or other he had fallen out with his confederates and had brought a false charge against the latter.

Unfortunately for the prosecution the learned Magistrate has accepted their theory on evidence improperly received and on inferences which have been drawn from objectionable evidence which, in my opinion, he was not justified in doing. Undoubtedly it could have been proved from properly receivable evidence that the appellant had actually travelled down from Jaffna by the same train that carried the parcel, that it was his house that was searched in Jaffna and that therefore the towel found in that house belonged to him, and that the letters found in the house of Chellamma's husband did actually refer to dealings in ganja. That would go a very long way to proving that the appellant had posted the parcel containing a contraband drug. However, it was sought to be proved that the appellant had travelled from Jaffna on the night of the 1st by producing a copy of a complaint in the Police information book in Anuradhapura. An objection was taken before me as to the admissibility of this document on the ground that, assuming the information book was itself a document which need not be produced and could be represented by a certified copy of any entry in it, that copy was not produced by the Police officer who took down the alleged complaint of the appellant. I am of the opinion that this submission is sound. Next, as to the contents of the letters found in the house of Chellamma's husband. This man was called by the prosecution and admitted that the letters were in the writing of the appellant but he says that they referred to transactions dealing with dried fish. This witness was a witness for the prosecution and he was not cross-examined by the prosecution as hostile, although it could hardly have been expected that he would admit that he had been engaged in any transaction in which he had broken the law. I cannot see therefore how the Magistrate was entitled to discredit him. The prosecution having called him, they vouched for him as a witness of truth and had to take their chance that his evidence would not be completely satisfactory to their case.

Then as to the discovery of the towel, the Police officer who searched the house in Jaffna said that the house was pointed out to him as being that of the appellant by the son of the local Police Vidane. This youth was called by the prosecution and said that he did not point out that house as being that of the appellant but of some other person. The Magistrate believed that this witness was lying. He was of course entitled to come to that conclusion if he wished, but that conclusion did not bring the prosecution any nearer to proving that the house pointed out to the Police was that of the appellant, since the statement that the information on which they acted was hearsay. Although he does not say so, the Magistrate himself seems to have come to the conclusion that the house had not been properly identified, and he took this extraordinary course. After the conclusion of the defence which consisted only of an address by Counsel, the Magistrate recorded that he would make his order on June 16 (the hearing terminated on the 11th). Later it does not appear on what date the learned Magistrate recalled the Police officer who searched the house. He said he could not find it but if he went inside it he would be able to identify it. The learned Magistrate directed the witness to draw a plan of the house which he searched and the witness sketched a rough plan. The Magistrate then adjourned the case to enable the Maniagar

to submit a plan of the appellant's house. On June 30, the Maniagar produced a sketch of three houses in which the appellant had admitted he had lived during the period of three years which included the date on which this offence was said to have been committed. The Magistrate was of the opinion that the sketch made by the Police officer was very similar to the plan of one of the houses made by the Maniagar. Apart from the admissibility of this belated evidence to which I shall presently refer, I do not think that any inference adverse to the appellant could have been drawn from the comparison of the rough sketch with the plan. There was nothing distinctive about the house which the sketch and the plan disclosed and although the two were certainly similar in appearance neither was drawn to any sort of scale. I am also of the opinion that the action of the Magistrate in calling evidence to supplement the case for the prosecution after the close of the defence was unwarranted by law. Section 429 of the Criminal Procedure Code gives any Court very wide powers to take evidence *suo proprio motu* either by summoning any person as a witness or examining a person in attendance. Section 190 of the Code lays down the procedure that is to be adopted by the Magistrate after taking all the evidence, that is to say, the evidence for the prosecution and the defence and any evidence that he himself may have called for. It runs as follows :—

> " If the Magistrate after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty, he shall forthwith record a verdict of acquittal. If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence."

There is a number of decisions of this Court to the effect that section 190 requires a Magistrate to write his judgment immediately after he has taken all the evidence which means that he is not entitled to reserve his decision, and that if he does reserve his decision his action is so irregular as to vitiate any conviction which he may have recorded. There are other decisions to the effect that such an action would be an irregularity in the procedure but will only be fatal to the conviction if an injustice resulted from the delay. The cases on both sides were considered by Koch J. in *Seneviratne v. Bodia*[1]. In the case before me the Magistrate had actually concluded the trial. He had reserved his decision, and the taking of further evidence *suo proprio motu* was an afterthought possibly excited by the appearance in his mind of certain doubts in considering what his decision should be. I do not, however, propose to consider whether it is a fatal or incurable irregularity for the Magistrate to reserve his judgment because I am prepared to go so far as to say that the provisions of section 490 must be interpreted by a Magistrate with reasonableness and ought not be used to remedy a dangerous defect or to fill a gap in the case for the prosecution. It has been held in England that it is illegal for a Judge to call a witness in favour of the prosecution's case after the close of the defence, and it is not very difficult to visualize the perpetration of a serious injustice if a Magistrate is given a free hand to assist the prosecution in this way. See *Rex v. Dora Harris*[2].

[1] *35 N. L. R. 252.*

[2] *(1927) 2 K. B. 597.*

It appears to me that the very most that the prosecution has been able to prove in this case is a strong inference from the behaviour of the appellant that he anticipated the receipt of a parcel by Chellamma, which parcel was intended for him and which contained to his knowledge contraband goods. This, however, does not make him guilty of any offence. It was nevertheless argued by Counsel for the Crown that section 50 of the Excise Ordinance, No. 8 of 1912, places upon the appellant, in view of the circumstances prevailing in this case, the burden of proving that he is not guilty of the offence of which he is charged. The substance of this section is as follows: In prosecutions under section 43 it shall be presumed, until the contrary is proved, that the accused person has committed an offence in respect of any excisable article for the possession of which, or for his conduct in connection with which, he is unable to account satisfactorily. It is argued on the strength of that section that the conduct of the appellant in respect of this parcel was such that an obligation was placed upon him to explain his conduct, and that as he made no attempt to do so he was guilty of the offence of which he was charged. I cannot agree that the section can be interpreted to admit of this contention. It cannot mean that because a man behaves in a suspicious way in respect of ganja that he can be convicted of any offence under section 43 unless he gives a satisfactory explanation of his conduct. I think section 50 comes into effect when from the suspicious behaviour of the person charged an element of an offence under section 43 can be proved. The prosecution has then done all that it can be called upon to do and it then remains for the accused to give a reasonable account of his behaviour. In this case the most that can be inferred from the appellant's behaviour is, as I have said, that he expected the arrival of a parcel and that he knew that that parcel contained contraband goods. Supposing that to be his explanation, it is not an unreasonable one and it does not amount to the admission of an offence.

I therefore quash the conviction and acquit the appellant.

Conviction quashed.