

1968

Present : de Kretser, J.

**K. M. DHARMAWARDENA and another, Appellants, and
EDIRISINGHE (Municipal Inspector), Respondent**

S. C. 108-109/1968—M. M. C. Colombo, 31054

Charge of possessing unstamped weights or measures—Ingredients of offence—Weights and Measures Ordinance (Cap. 158), ss. 41 (b), 51—Penal Code, ss. 25, 259.

In a prosecution for possessing any unstamped weight or measure in contravention of Section 41 (b) of the Weights and Measures Ordinance, the possession contemplated in that Section involves the idea of proprietorship, in contradistinction to mere custody, of the weight or measure,

APPEAL from a judgment of the Municipal Magistrate's Court, Colombo.

A. S. Wijetunge, for the Accused-Appellants.

Annesley Perera, with *Nalin Abeysekera*, for the Complainant-Respondent.

Cur. adv. vult.

August 20, 1968. DE KRETSEK, J.—

The evidence in this case is that an organisation referred to in the plaint, charge sheet and evidence as the C. W. E. which Counsel informed me is how the Co-operative Wholesale Establishment is generally known, is the licensee of Stall No. 6 in the Municipal Council Market at Bambalapitiya and does a retail trade in Dry Fish in it.

K. M. Dharmawardena, an employee of the C. W. E., was the salesman in charge of the stall and Tikiri Banda also an employee of the C. W. E. was the Bill Clerk who took over charge of the stall when Dharmawardena was away from it. There were other employees of the C. W. E. in this stall as salesmen, etc. This stall together with a number of other stalls were under the supervision of a regional officer who was also an employee of the C. W. E.

On 11.5.67, D. B. Edirisinghe, a Weights and Measures Inspector who was a duly authorised officer, found in this stall an Avery Counter Scale and a set of weights ranging from 4 lbs. to $\frac{1}{4}$ lb. unstamped. W. Tikiri Banda was in charge of the stall at the time of this detection.

The consequence was the plaint in this case which charged both Dharmawardena and Tikiri Banda with having in their possession for use in the trade in Dry Fish, the Counter Scale and the weights which were unstamped. The offence was one punishable under Section 41 (b) of Cap. 158, Vol. 6 of the L. E.

The Magistrate (Mr. C. B. Walgampaya) found both the Accused guilty and fined each of them Rs. 25. Both Accused have appealed.

Mr. A. S. Wijetunge urges that the Magistrate was wrong in imputing constructive possession of these weights to 1st Accused Dharmawardena who admittedly was not in this stall at the time of the detection, and that the Magistrate was wrong in holding that the 2nd Accused was in "possession" of these weights in terms of Section 41 (b) of Cap. 158.

Section 25 of the Penal Code recognises that possession of property by a servant on account of a master is the possession of the master. It is true that there is no definition of possession in Cap. 158, but one must remember that Chapter 13 of the Penal Code also deals with offences relating to weights and measures and Section 51 of Cap. 158 states that the provisions of Part 6 of Cap. 158 which commences with Section 41 are in addition to, and not in substitution for the provisions of Cap. 13 of the Penal Code. In Chapter 13 of the Penal Code as well as in Part 6 of Cap. 158 there are sections dealing with offences of which the main ingredient is possession, e.g., Section 259 of Chapter 13 of the Penal Code and Section 41 (b) in Part 6 of Cap. 158.

If possession by a servant on account of a master can be possession of the master for the purposes of Section 259 of the Penal Code, then there is no reason why it should not be the possession of the master for the purposes of Section 41 (b) of Cap. 158. It appears to me that the possession referred to in the Section is the possession which involves the idea of proprietorship, the right to exercise power and control over the thing possessed in contradistinction to the mere physical possession by the officer in charge of the stall which is really the equivalent of custody.

The evidence shows that in regard to the stamping of weights neither Accused could do anything except to request the general manager of the C. W. E. to take the necessary action, and 2D (a) shows that this was done as far back as 11.2.67, and no action was taken by the General Manager to have the weights stamped.

The learned Magistrate has referred to a number of cases which would have been of much assistance in showing that if Accused had been detected using these unstamped weights, they would be as much guilty of an offence as the licence holder of the stall. But in the instant case, the charge is not one of user, but of possession and the evidence makes it clear that whether it was 1st Accused who was in charge of the stall or whether it was 2nd Accused acting for 1st Accused in charge of the stall, he had no more than the custody of everything including the scale and weights in the stall, and had not the power to deal with them as owner. He held them on account of the employer, the licence holder and any physical possession he had must be deemed to be that of the licence holder.

In the result I am of the view that it was the C. W. E. as licence holder that should have been prosecuted in this case for being in possession of unstamped weights and not the 2nd Accused who was in charge of the stall at the time of detection nor the 1st Accused for whom he was deputising.

The appeal is allowed and the Accused are acquitted.

I think it necessary to invite the attention of the Magistrate to the fact that the clerk in his court, responsible for the preparation of appeal briefs, has caused considerable inconvenience to this Court by not having copies of the relevant documents that were produced at the Trial, typed in the brief, and that he himself should not have permitted the production of documents without translations as required by law.

Appeal allowed.
