1969 *Present :* **Samerawickrame, J.**

M. NANDORIS *et al.*, Appellants, *and* INSPECTOR OF POLICE, WARAKAPOLA, Respondent

S. C. 909—925/68—M. C. Kegalle, 66868

Criminal trespass—Occupation of property—Meaning of term " occupation "—Penal Code, s. 433.

In a prosecution for criminal trespass, occupation of property within the meaning of section 433 of the Penal Code does not mean actual physical possession.

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

V. Kumaraswamy, with *Miss S. M. Senaratne* and *V. Sachithanandan,* for the accused-appellants.

Shibly Aziz, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 15, 1969. SAMERAWICKRAME, J.—

The appellants appeal from their convictions for the offence of criminal trespass upon a land vested in the Basnayaka Nilame of the Maha Vishnu Devale, Kandy.

It appears that the land had been leased to one Herathappuhamy but that the lease was surrendered and the land handed over to the Basnayaka Nilame on 28th November, 1965. Panawala who was the Basnayaka Nilame went to the land on 28th November, 1965, took possession of the land and handed it over to witness Dabilinsingho whom he was placing in charge of it. Dabilinsingho went to the land on 5th December, 1965, and found the appellants in forcible occupation of the land and doing various acts such as tapping the rubber trees, plucking coconuts and putting up sheds. He requested the appellants to leave and they promised to do so, but on a later date when he went to the land the appellants said, they would not leave the land and if anybody came to the land he would be killed. The position taken up by the first accused-appellant who gave evidence was that the appellants had been in possession for a long period of time. The learned magistrate has carefully considered the evidence in the case and has found it impossible to accept the version of the 1st accused-appellant and, on a careful examination of the facts, has held that the version of the prosecution is true and established to his satisfaction. I, therefore, do not find it possible to act otherwise than on the findings of fact made by the learned magistrate.

Learned counsel for the appellants submitted that the offence of criminal trespass was not made out because it could not be said that the complainant Dabilinsingho was in occupation of the land within the meaning of s. 433 of the Penal Code. Dabilinsingho was not in actual physical occupation of the land. In *K. Chandrasekera v. Jayanathan* [1] 68 C. L. W. 66, Manicawasagar, J., considered the position and stated "In *Ward's case* [2] reported in 6 N. L. R. 317, a decision by two Judges of this Court, the Fiscal ejected the accused from a plot of patna and scrub land and delivered it to an agent of the Secretary of State for War, who took possession; after a month the agent left leaving no one in occupation; the accused re-entered, and his conviction for criminal trespass was affirmed. Maartensz, J., in the later case of *Silva,* [3] reported in 10 C. L. R. 107, quoted *Ward's case* with approval, holding that occupation does not mean actual physical possession; with respect, I agree with this opinion."

[1] *(1964) 68 C.L.W. 66.*

[2] *(1903) 6 N.L.R. 317.*

[3] *(1929) 10 C.L.R. 107.*

Dabilinsingho had been placed in charge of the land and he was, though not resident on it or physically present at the time, in occupation of it within the meaning of s. 433 of the Penal Code.

Learned counsel for the appellants also pointed out that the intention referred to in the charge of criminal trespass was to commit mischief but that the appellants had been acquitted on count 2 in which they were alleged to have committed mischief. The learned magistrate has made it clear that he was acquitting the appellants on count 2 because no satisfactory evidence had been led to assess the extent of the damage caused to the land and the evidence on that point was scrappy. In count 2 it was alleged that the appellants had caused damage to the extent of Rs. 3,000. The learned magistrate has also stated, " Further it is clear that the motive in committing trespass into this land was to commit mischief and enjoy the produce of the land and to reside there. " It is also alleged that the appellants were tapping the rubber trees, plucking coconuts, cutting down trees and putting up huts. The trees were cut presumably for the purpose of putting up the huts. The police officer who went to the land corroborates the evidence of the other prosecution witnesses. He says that some huts were being constructed.

Learned counsel for the appellants raised certain other matters which however I do not consider to have much substance. On the findings of fact arrived at by the learned magistrate the convictions are right and must be affirmed.

The learned magistrate has imposed on each of the appellants a fine of Rs. 50 and in default six weeks' rigorous imprisonment. The maximum term of imprisonment which may be imposed for the offence under s. 433 of the Penal Code is three months and accordingly the maximum default sentence the learned magistrate could have imposed was one of three weeks' rigorous imprisonment. The sentence in default of payment of fine is therefore altered in the case of each of the accused-appellants to three weeks' rigorous imprisonment. Subject to this variation in the default sentence, the appeals are dismissed.

Convictions affirmed.
Sentence varied.