1916.

Present : De Sampayo J.

NALLAN CHETTY *v.* MUSTAFA.

23—P. C. Gampola, 8,325.

Criminal trespass—"Occupation"—"Possession."

Obiter.—The word "occupation" in section 427 of the Penal Code denotes something more than "possession" in the legal sense; it implies actual physical possession by oneself or through an agent.

APPEAL with the sanction of the Attorney-General. The facts are set out in the judgment.

F. J. de Saram, for complainant, appellant.

G. V. Perera, for accused, respondent.

Cur. adv. vult.

January 18, 1916. DE SAMPAYO J.—

In the case the complainant appeals, with the sanction of the Attorney-General, from an order of the Police Magistrate acquitting the accused-respondent on a charge of criminal trespass. The accused and his mother are the owners of a certain house in Gampola, and they, by deed of lease dated August 8, 1912, leased it to the complainant for a term of 9½ years, commencing from August 1, 1912. It appears that after the lease they continued to occupy the house as tenants of the complainant, but in August, 1915, they were ejected from the premises as the result of an action brought against them by the complainant. The house was vacant and unoccupied till October 21, 1915, when certain workmen, whom the accused sent ostensibly for the purpose of effecting repairs, removed some tiles and old reepers from the roof of the house. In these circumstances the complainant charged the accused with the offence of criminal trespass under section 433 of the Penal Code.

At the argument of the appeal I had some doubt as to whether the house at the time of the alleged offence could be said to have been in the "occupation" of the complainant, so as to constitute

the accused's entry thereon an act of trespass within the meaning of section 427. This section, as it originally stood, penalized entry by one person upon property in the " possession or occupation " of another person. But by the amending Ordinance No. 16 of 1898 the word " possession " has been struck out, and now it is necessary that the property should be in the " occupation " of a person. What is " occupation " in this connection? No certain guidance can be derived from any mere definition of the word, or from the use of it in any other connection. It is clear, however, that it is something more than " possession " in the legal sense. It seems to me to imply actual physical possession by oneself or through an agent. This distinction is emphasized by the amendment made by the Ordinance No. 16 of 1898, which appears intended to make it clear that the offence of criminal trespass is one that affects not so much the property which is entered upon as the person who is in occupation. Mr. Perera, for the accused-respondent, very candidly referred me to *Speldewinde v. Ward*,[1] which appears to favour the complainant's position in this case. There the accused had been ejected by the process of a Civil Court from a certain land, and at a subsequent date, when there was no one in actual occupation, he re-entered upon the premises, and it was held that the offence of criminal trespass was committed. But I do not find from the report of the argument, or from the judgment, that the significance of the amendment of section 427 above referred to was taken into consideration. On the other hand, in *Pitche Bawa v. Abdul Cader*,[2] where a recent purchaser prosecuted a person who had after his purchase forcibly entered the premises, the point indicated above was taken, and Hutchinson C.J. observed: " All that I need say about that is that a mere statement by a purchaser ' I entered into possession '—which is all that Pitche Bawa (complainant) says—would not satisfy me that he was ever in occupation."

Here, too, all that the complainant says is that he was " put in possession " by the Fiscal on the execution of the writ of ejectment against the accused. In this case, however, I am relieved of the necessity of deciding the question, because the appeal may be disposed of on another point.

The deed of lease by the accused and his mother in favour of the complainant contains a provision whereby the lessors undertook to effect the necessary repairs to the buildings at their own cost and expense, and if they failed, on being called upon, to do so, it was lawful for the lessee to effect such repairs and to recover the cost from the lessors. The Police Magistrate finds that the house required some repairs at this time, though not to the extent suggested by the work apparently undertaken by the accused, and I think he rightly held that the entry upon the premises for that purpose was justified by the provision in the lease. Mr. de Saram, for the

[1] *(1903) 6 N. L. R. 317.*

1916.

DE SAMPAYO J.

Nallan Chetty v. Mustafa

complainant, however, argues that the accused had no right to enter without being called upon by the complainant, or at least without giving him notice. I do not agree that this is in all cases necessary, and when the house was unoccupied—in this instance it was vacant for about two months—there was, I think, no objection to the accused taking steps of his own accord to fulfil his obligation under the lease, especially as the accused and his mother had been previously sued for the cost of repairs effected by the complainant. This appeal, however, is mainly based on the fact that in the opinion of the Police Magistrate the accused at the same time had the intention to annoy the complainant on account of some ill-feeling between them. That may be so, but in order to constitute the offence of criminal trespass as defined in section 427 of the Code there must in the first instance be a trespass. Lawful entry is not trespass, whatever ulterior motive may partly actuate the party in exercising the right of entry.

I think the order acquitting the accused on the charge of criminal trespass is right. Mr. de Saram further asked that the accused might at all events be dealt with for the offence of committing mischief, but I do not consider that the circumstances amount to such an offence.

The appeal is dismissed.

Appeal dismissed.