Present: Wood Renton C.J.

JAYAWARDENE *v.* DIYONIS *et al.*

199 and 200—P. C. Badulla, 2,854.

Charge of possessing ganja—Defence that ganja was introduced by others—Evidence led by prosecution to prove that accused sold ganja before.

The accused were charged with having been in unlawful possession of ganja. Their defence was that the ganja had been foisted upon them by some person associated with the prosecution. The prosecution led evidence to prove that accused had sold ganja before as a medicine.

Held, that the evidence was admissible to negative the defence.

THE facts are set out in the judgment.

J. W. de Silva, for the appellants.—The conviction is based on evidence which the Magistrate should not have admitted. The statement made to the Ratemahatmaya is inadmissible. See *King v. Kalu Banda;* [1] Evidence Ordinance, section 25.

The evidence of Siyatu that accused had sold ganja to him on previous occasions is inadmissible.

Canekeratne, C.C., for the Crown.—The cross-examination of the Ratemahatmaya shows the actual statement made by the accused. It clears up the statement made in examination-in-chief. The Ratemahatmaya is an Excise officer as well, and a statement made to an Excise officer, even if it amounts to a confession, is admissible.

It is open to the prosecution to prove that the presence of the ganja was not accidental, and may for that purpose lead evidence to show that accused was dealing in ganja even on previous occasions. *See Rex v. Bond.* [2]

March 26, 1915. Wood Renton C.J.—

The accused-appellants have been convicted of having been found in unlawful possession of a certain quantity of ganja, and have been

[1] *(1912) 15 N. L. R. 422.*

[2] *(1906) 2 K. B. 389.*

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sentenced under section 43 of the Excise Ordinance, 1912, taken in conjunction with Excise Notification No. 26 published in the *Gazette* 6,606 of February 13, 1914, to pay each a fine of Rs. 250. or, in default, to undergo six week's rigorous imprisonment. The learned Police Magistrate has discussed the evidence at length, and I see no reason to think that he has come on the facts to a wrong conclusion. The appellants' counsel, however, took two points, as to which it is necessary that a word should be said. The principal witness for the prosecution was the Ratemahatmaya of Wellassa. In his examination-in-chief he stated that he had found ganja in the possession of the accused, and that they stated that "it was not theirs, and that they did not know how it came there." The appellant's defence was that the ganja had been foisted upon them by some person associated with the prosecution. It is obvious that if the Ratemahatmaya's statement as to why they had said to him stood alone, it would not only strike at the very root of the defence, but be obnoxious to the provisions of section 25 of the Evidence Ordinance. But the Ratemahatmaya was cross-examined upon the point, and gave the following evdence: "The second accused then said at once 'that'—meaning the opium—has been introduced. First accused then also said the same." The defence of the appellants was conducted in the Police Court with obvious care and skill. But there was no further cross-examination of the Ratemahatmaya in regard to what, if the point now taken in appeal is a sound one, was a complete and very serious alteration in his evidence. My own view is that the two statements were in substance identical, and that the legal advisers of the appellants in the Court below regarded them as such. The other point was based upon a statement by a witness Siyatu, a forest guard, to the effect that he had bought ganja from the appellants before as a medicine. It was contended that this evidence was inadmissible, on the ground of its being prejudicial to the character of the accused. The evidence in question undoubtedly casts a reflection upon both appellants. But it is admissible for all that. The appellants admitted that ganja had been found in their physical possession. Their defence was that, so far as they were concerned, its presence was accidental. It was open, therefore, to the prosecution, availing itself of the principle affirmed in a long series of cases, of which the judgment of the Privy Council in *Makin v. Attorney-General of New South Wales* [1] may be taken as the *locus classicus*, to negative this defence by proving previous instances in which the appellants had been in possession of, and had been dealing with, ganja.

The appeals must be dismissed.

Appeals dismissed.

[1] *(1894) A. C. 57.*