1944 *Present:* **Howard C.J.**

SAHABANDU, Appellant, *and* RATNASABAPATHI, Respondent.

251—M. C. Point Pedro, 2,764.

Criminal Procedure—Charge of unlawful possession of opium and ganja—Seizure of packet in possession of accused and sealing of same in his presence—Breaking of seals in course of inquiry—Irregularity not fatal.

In a charge of unlawful possession of opium and ganja the packet seized in the possession of the accused was sealed at the Police Station in the presence of the accused with the Police seal along with the accused's thumb impression.

On the following day at an inquiry held by the Assistant Superintendent of Police regarding certain allegations made by the accused against the Police Officers, who took part in the raid, the seal was broken by the Assistant Superintendent of Police and resealed with his private seal which was identified by the Sub-Inspector of Police, who gave evidence at the trial.

Held, that the failure to reseal the packet in the presence of the accused was not a fatal irregularity.

APPEAL from an acquittal by the Magistrate of Point Pedro.

H. A. Wijemanna, C.C., for the complainant, appellant.

C. Suntheralingam, for the accused, respondent.

Cur. adv. vult.

June 9, 1944. HOWARD C.J.—

This is an appeal with the leave of the Attorney-General against the acquittal of the respondent for having on July 12, 1943, committed an offence punishable under section 76 (5) (*a*) of the Poisons, Opium and Dangerous Drugs Ordinance in that he did unlawfully have in his possession one pound of ganja and one pound of opium. At the trial the prosecution produced evidence to the effect that the respondent on the approach of a party of Police Officers ran into his mother's house and locked the door. He was later seen going from the house towards a straw shed carrying a parcel which he threw at the entrance to the shed. The respondent was seized and the parcel was examined. According to the evidence of the Sub-Inspector and a Sergeant the parcel contained 1 packet of opium and 1 packet of ganja in an ola box wrapped in oil cloth. The respondent was taken to the Police Station where the two packets were weighed in his presence. They were found to contain one pound of each substance. After being weighed, the packets were put back in the ola box which was wrapped in the oil cloth. The parcel was then sealed with the Police seal along with the respondent's left thumb impression. On the following day there was a departmental inquiry by the Assistant Superintendent of Police, Northern Province, regarding certain allegations made by the respondent against the Police Officers who took part in the raid. At this inquiry the seals on the parcel were broken by the Assistant Superintendent of Police and re-sealed with his private seal. This seal was still intact when the parcel was produced at the trial.

The respondent did not go into the witness-box and contest the evidence of the Police. In these circumstances the Magistrate accepted without hesitation the story of the prosecution. He held, however, that the breaking of the seals by the Assistant Superintendent of Police was a fatal irregularity and on the authority of *Holsinger v. Joseph*[1] and *Vandendriesen S. I., Police v. Ossen Beebee*[2] acquitted the respondent. No doubt these two cases to some extent justify the action of the Magistrate in acquitting the respondent. In *Holsinger v. Joseph*, the tins of ganja which had been seized were not sealed until the Police Station was reached. Lyall Grant J. in these circumstances, followed a case reported in S. C. Minutes of September 14, 1926, where Jayewardene J. held that the failure to seal the tins at once entitled the accused to take the objection that the ganja inside them might have been introduced between the seizure in the dispensary and its sealing at the Police Station. In the present case the respondent was taken to the police station with the packets. No suggestion was made during the course of the trial either by cross-examination or direct evidence that the ganja and opium had been introduced by the Police. In *Vandendriesen v. Beebee*, the raid took place at 3 P.M., but the opium was not sealed till 6 P.M. Later the seals were broken in the absence of the accused and re-sealed. Moseley J. held that he was bound to follow the judgment in *Holsinger v. Joseph* and allowed the appeal. There are, however, other cases not brought to the notice of the Magistrate in which it was held that failure to seal was not a fatal irregularity. In *Prins v. Sabaratnam*[3] Jayewardene J.

[1] *31 N. L. R. 250.* [2] *1 C. L. J. 138.* [3] *34 N.L. R. 164.*

considered *Holsinger v. Joseph* and other authorities and held that there is no imperative or inflexible rule that the articles or things seized should be sealed immediately after seizure in the presence of the accused and before they are removed to the Police Station. The delay in the sealing and informalities in the manner in which a search is conducted, are circumstances to be weighed in the consideration of the cases and often diminish the weight of the evidence given as to the possession of the incriminating articles and have seriously affected the credit to be attached to the evidence in many cases. They do not, however, preclude the admission of such evidence. It seems desirable nevertheless that the articles found should be sealed, wherever practicable, immediately after search in the presence of the accused and before removal to the Police Station. Failure in this respect is not an irregularity fatal to a conviction for unlawful possession, provided the oral evidence is otherwise satisfactory.

In *Kupasamy v. Cader Saibo*[1], Poyser J. also held that the delay in sealing excisable articles in the course of a raid is an irregularity that is not necessarily fatal to a conviction.

In *De Silva v. Sarpin Singho*[2], Soertsz J. formulated the same principle as that laid down in *Prins v. Sabaratnam* (*supra*) and held that delay in the sealing of the productions is a matter to be considered when the Magistrate is examining the possibility or probability of an introduction of an excisable article with a view to implicating an accused on a false charge and that it has no other bearing on the case.

Again in *Bandaranayake v. Ismail*[3] Lyall Grant J. held that the purpose underlying the rules that in a case of illicit possession of ganja the substance found in the accused's possession should be immediately sealed in his presence is to prevent the suggestion that a substitution has taken place after the seizure. A failure to observe the rule is not necessarily fatal to a conviction.

Mr. Suntheralingam on behalf of the respondent concedes that there is no inflexible rule with regard to immediate sealing and failure to do so is not an irregularity fatal to conviction. He contends that the breaking of the seals and their resealing without the presence of the accused is such an irregularity. In my opinion I can see no reason why the principle formulated by Jayewardene A.J. in *Prins v. Sabaratnam* (*supra*) and followed in the other cases I have cited should not apply where the seals have been broken and resealing has taken place in the absence of the accused. In this case the seals were broken for an official enquiry by a responsible officer, an Assistant Superintendent of Police. The packages were resealed in the presence of the Sub-Inspector who has identified his seal. No suggestion has been made at any time that the ganja and opium were introduced. The Sub-Inspector and Sergeant, with several years' experience of ganja and opium cases, testified that the substances found in the parcel were in fact ganja and opium. The Magistrate accepted the evidence of these two witnesses. There is neither probability nor possibility that these substances were introduced with a view to implicating the respondent on a false charge.

[1] *2 C. L. W. 416.* [2] *17 C. L. Rec 78.* [3] *Times of Cey. L. R. Vol. 7, p. 91.*

In these circumstances I set aside the order of acquittal and convict the respondent. The case is remitted to the Magistrate for imposition of sentence after due consideration of his previous record.

Order of acquittal set aside.
Case remitted.