1937

Present : **Abrahams C.J.**

WIJEYMANNE *v.* SINNATAMBY.

191—P. C. Batticaloa, 45,136.

Opium—Illicit possession—Discovery of opium under pillow—Reception of hearsay evidence—duty of Magistrate—Poisons, Opium and Dangerous Drugs Ordinance, No. 17 of 1929, s. 32.

Where the accused was found, in a house occupied by another person, sleeping on a camp bed under the pillow of which there were two packets of opium,—

***Held*, that there was not sufficient proof of possession to constitute an offence under section 32 of the Poisons, Opium and Dangerous Drugs Ordinance, No. 17 of 1929.**

APPEAL from a conviction by the Police Magistrate of Batticaloa.

L. A. Rajapakse (with him *Dodwell Gunawardena*), for accused, appellant.

M. F. S. Pulle, C.C., for complainant, respondent.

Cur. adv. vult.

October 20, 1937. ABRAHAMS C.J.—

The appellant was convicted of having in his possession without a licence two pounds of prepared opium in breach of section 32 of the Poisons, Opium and Dangerous Drugs Ordinance, No. 17 of 1929, and read with section 74 (1) (*a*) of the same Ordinance. The facts were very brief. The police entered the house of one Sampunathan, it would appear to ascertain whether the appellant, who had gone to Sampunathan's house, was in possession of opium. They found the appellant sleeping on a camp bed in the verandah. He had nothing on his person but on lifting the pillows of the camp bed two packets of opium amounting to two pounds in weight were discovered covered with paper and wrapped up in a shawl. It was not questioned that the stuff was opium and the appellant gave no evidence, but it was suggested in cross-examination of one of the police officers that the opium was actually found in the garden.

It is objected that the mere discovery of the opium beneath the pillow of the bed occupied by the appellant is not more than suspicion that the appellant had it in his possession. It does not even provide sufficient evidence to call upon him to explain why it was there. The learned Magistrate who tried the case seems to have only concerned himself with deciding whether the opium was found under the pillows of the bed or whether it was found, as suggested by the defence, in the garden, and he decided without any hesitation that it was found under the pillows, but no fault can be found with him for that. There is another question that must be decided before the appellant could be convicted, and the learned Magistrate has not given that any attention. That question is whether the appellant's connection with the opium is sufficient to imply that he had possession of it. I am not prepared to say that it is sufficient. The appellant was not in his own house. There is nothing to show how long the opium had been there. It might have been put there by the

occupier of the house who was sleeping actually inside the house. It might have been put there by any other person who had been previously in the house, and there is nothing to show that the bulk or shape of the packet was such that a person with his head on the pillows must have known of the presence of the article under the pillows, and there is nothing in the conduct of the appellant either before or after the discovery of the opium to indicate that he knew it was there.

Evidence was given that earlier in the day there was a raid in somebody else's house and that the appellant ran away on the approach of the Excise party, but the purpose of that raid was not explained. This is at any rate inadmissible, and there is nothing to show that anything was discovered as a consequence of the raid. A little more care, it may be, in the conducting of the prosecution might have produced evidence both admissible and valid. I am of opinion that though this is a very suspicious case, it lacks that finality in proof which every criminal case must have.

I must also make some observations on the action of the Magistrate in admitting evidence of information made to the police that the appellant had two pounds of opium in Sampunathan's house. It is very difficult to resist the conclusion that the Magistrate was influenced by that hearsay evidence because he opens his judgment by stating that an informant had conveyed this news to the police. He further says that the proctor for the appellant had only himself to blame for the adoption of this hearsay evidence through his line of cross-examination of the police witnesses who preceded the witness who gave the hearsay evidence. I fear that the learned Magistrate has completely overlooked the fact that the very first witness in the case, namely, the Police Inspector who raided Sampunathan's house, gave in ample detail the information which he had received from the informant. That being so, how the proctor is to be blamed I entirely fail to understand. Magistrates must remember that it is their duty to keep out inadmissible evidence.

I quash the conviction and acquit the accused.

Conviction quashed.