

1931

Present : Akbar J.

SILVA v. KANDIAH

622-623—P. C. Colombo, 16,410.

Unlawful possession of opium—Common possession—Property in occupation of several persons—Conscious control of one.

Where property is found upon premises of which several persons are in common occupation, it cannot be said to be in the possession of any one of them in particular, unless there are facts pointing to the property being in the conscious control of that person.

A PPEAL from a conviction by the Police Magistrate of Colombo.

R. L. Pereira, K.C. (with him *Supra-maniam* and *Sanmugam*), for first accused, appellant.

Hayley, K.C. (with him *Gnanaprakasam*), for second accused, appellant.

Pulle, C.C., for Crown respondent.

January 19, 1931. AKBAR J.—

The first accused is an advocate of Jaffna and also an unofficial Excise Officer under the Excise Ordinance, No. 8 of 1912. He was on a visit to the second accused, said to be his cousin, on July 10, 1930. On July 15 at 7 P.M. the second accused's house at Wellawatta was searched by Mr. de Silva, Assistant Superintendent of Police, and Sub-Inspector Perkins on a search warrant and in a front room occupied by the first accused they found Mr. Kandiah, the first accused, seated by a desk and on the ground there was a parcel of opium. When the Police seized this opium Kandiah got up and sat on a sofa in the room. He was asked to get up and when the mattress was lifted up there were 4 other packets of opium. All the opium seized was produced in Court and weighed no less than 9½ pounds. The two accused were charged on two counts, the first count charged both with possessing on July 15 the 9½ pounds of opium, and the second count charged the

second accused in the alternative with aiding and abetting the first accused to possess this opium. The Police Magistrate found the two accused guilty, on what counts he does not say, and he has sentenced them both to one year's rigorous imprisonment each. When the accused were produced in Court on July 16, the second accused disclaimed all knowledge of the opium, and further stated that the first accused was his cousin and that he used to stay with him on his visits to Colombo as his guest.

The first accused came out with a most incredible explanation to account for his possession of the opium. His story was that he had received information that some persons were smuggling opium and ganja at Wellawatta and that he went to spy on these smugglers at the Wellawatta seabeach with one Addison Perera, chauffeur of a car belonging to an Insurance Co., of which the second accused was the agent. They saw two men with a parcel each, whom they chased; but these two men escaped and very obligingly dropped the parcels among the rocks on the seabeach. They searched for the packets most diligently from 3 P.M. to 6.30 P.M. and at last found them. The first accused brought them to his room and was just opening them when the Police pounced on him. The first accused also stated that he sent Addison Perera to fetch an Excise Superintendent and Excise guards to come and take charge of the opium. Unfortunately this Superintendent was not at home, and by the time Addison returned the house was occupied by the Police.

This story is too strange to be believed and counsel for the first accused realizing the difficulty put forward a new theory which, as far as I can see, was not attempted in the Police Court.

The Police, it appeared, received information from the witness Kalianaratna, car driver of car No. 7019, on July 10, 1930, that the second accused was selling ganja and opium. The search warrant was not immediately applied for as

Kalianaratna told the Police that no orders had been booked for the last few days and that he would inform the Assistant Superintendent of Police when the stores had been replenished.

On the 13th Perkins watched the second accused's house, and he saw Kalianaratna's car and a man going from the car to the second accused's house. Perkins saw the car again on the 14th. Perkins did not see any of the events occurring in the house on these two dates; nor did he see the second accused there at the time. On the 15th, the date of the raid, Kalianaratna came and told the Assistant Superintendent of Police that the time was ripe for a raid. The Assistant Superintendent of Police asked Kalianaratna to book 5 pounds of opium which Kalianaratna said he had done by telephone. The search warrant was issued by the Additional Police Magistrate at about 4.30 P.M. and the search took place at 7 P.M. It is quite clear from the evidence that as was to be expected the Police informant is an accomplice. The law requires that an accomplice's evidence implicating any accused should be corroborated by other evidence. As regards the second accused there is no legal evidence to justify the conviction, which the Crown Counsel himself quite frankly admitted. Kalianaratna's evidence implicating the second accused on which the search warrant was issued is not corroborated by other evidence, for the Sub-Inspector did not see the second accused when he kept watch on the 13th and 14th. Moreover, the charge is concerned with the possession on July 15, and not with the second accused's activities previous to that date. It is true that the house belongs to the second accused, but the first accused was there as his guest. The opium was found in the room occupied by the first accused, and although the second accused was inside the house at the time of the search, nothing incriminating was found in any other part of the house or the grounds.

It was held by this Court in *Jansen v. Kanden*¹ and *Setukavaler v. Kandiah*² that where property is found upon premises of which several persons are in common occupation, it cannot be said to be in the possession of any one of them in particular, unless there are facts pointing to the property being in the conscious control of that person. I am therefore reluctantly compelled to acquit the second accused owing to the three grounds I have mentioned, namely :—

- (a) Kalianaratna's evidence being that of an accomplice has not been corroborated where it implicates the second accused.
- (b) Kalianaratna's evidence even if accepted does not touch the charge laid in the charge sheet, viz., possession of the 9½ pounds on July 15 at 7 P.M.
- (c) Possession by the first accused does not affect the second accused, even though he is the principal occupant of the house.

A man cannot be responsible for the articles possessed by his guest in the privacy of his room. As regards the first accused there can be no doubt. He was actually unpacking the articles, and his attempt to conceal the presence of the 4 packets under the mattress is irresistible proof of his guilt. Moreover, he admits the possession and his explanation of how he came to possess it sounds like a fairy tale. As unofficial Excise Officer he had nothing to do with opium, which comes under the Opium Ordinance, No. 5 of 1910, and not under the Excise Ordinance, No. 8 of 1912. The attempt of his advocate to argue for the first time in this Court that Kalianaratna, out of revenge because first accused was spying on him, had elaborately arranged the whole scheme by getting two men to run with 9½ pounds of opium and drop it so that the first accused should pick it after a 3 hours' search and be ready to be seized by the

Police in the second accused's house, has only to be stated to be discredited. Moreover, Kalianaratna was with the Police most of the time on the 15th trying to get a search warrant. I cannot understand how he could have been at Wellawatta to stage the scene depicting the pursuit of the two men, and the search for the dropped opium, and also have been at the same time with the Police to help them to get the search warrant. Mr. Pereira pleaded that the sentence was too severe. I do not think so and would dismiss the appeal of the first accused. The appeal of the second accused is allowed and he is acquitted.

Varied.

¹ 1 *Current Law Reports*, 28.

² 7 *C. L. R.* 141.