1957 *Present :* **H. N. G. Fernando, J.**

M. D. MAYAWATHIE, Appellant, *and* R. S. DE SILVA (S. I. Police), Respondent

S. C. 874—M. C. Avissawella, 21,681

Evidence—Prosecuting officer as material witness—Duty of Court then to test truth of prosecution—Illegal raid—Weight of evidence of participants—Possession of contraband by husband—Liability of wife.

The fact that the same person is both prosecuting officer and material witness renders the prosecution case open to suspicion and imposes upon the Judge the duty of making certain that the interests of justice have not suffered in consequence.

The evidence of officers who took part in an illegal raid should be viewed with suspicion. Liability of a wife for her husband's possession of prohibited articles considered.

APPEAL from a judgment of the Magistrate's Court, Avissawella.

M. M. Kumarakulasingham, with *K. Shinya*, for the accused-appellant.

S. Pasupati, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 29, 1957. H. N. G. FERNANDO, J.—

The practice under which prosecutions are conducted by officers who are themselves material witnesses has repeatedly been condemned by this Court, but the view has never been taken that the adoption of such a practice, however reprehensible, would without more be a ground for setting aside a conviction. My Lord the present Chief Justice, who in earlier cases had condemned the practice, nevertheless was of opinion

(*Santiapillai v. Sittampalam* [1]) that if the interests of justice have not suffered by a prosecution being conducted by a person who is a material witness there would be no ground for setting aside the conviction. If I construe his view aright the fact that the same person is both prosecuting officer and material witness renders the prosecution case open to suspicion and imposes upon the Judge the duty of making certain that the interests of justice have not suffered in consequence. This view is at any rate that which I myself take and propose to apply in the present case.

No objection was taken at the present trial to the conduct of the prosecution by Sub-Inspector de Silva and the defence made no submission as to the matter even when the Sub-Inspector entered the witness-box. In my opinion, however, the omission of the defence to make a formal objection did not absolve the Magistrate from the duty to take account of the fact that Sub-Inspector de Silva was a material witness and to assure himself that there was no consequent prejudice to the due administration of justice. In fact the matter appears to have passed unnoticed by the Magistrate who has considered the evidence regardless of this special feature.

This was not the only matter which escaped the attention of the Magistrate. The entry into the house of the accused was made without a search warrant and there is no evidence to indicate that the provisions of section 72 (5) of the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172) which require a record to be made of the grounds of an unauthorised entry were complied with. It is now settled law (*Rajapakse v. Fernando* [2]) that the fact that the entry is unlawful does not render inadmissible in consequence thereof the evidence obtained in an illegal search. But that decision of three Judges did not in any way reduce the force of earlier observations of this Court that such evidence should be looked upon with suspicion. In the present case the only evidence for the prosecution was that of the Sub-Inspector and Police Constable, and the Magistrate in accepting that evidence observes that "the defence have not urged any motive as to why Inspector Silva should give false evidence." This observation is an indication of the Magistrate's failure to view with suspicion the evidence of officers who participated in an illegal raid.

Thirdly there was here a possible explanation of the innocence of the accused which though not put forward by her might well have been taken into account in testing the truth of the evidence for the prosecution. The prosecution version was that the Excise party stopped their jeep near the house of the accused and that, as they did so, the accused's husband promptly ran away from the scene while the accused herself was seen to enter the house from the verandah; shortly thereafter the officers themselves entered the house and found the accused near the kitchen having in one hand a bottle of arrack and in the other a tin containing portions of the Hemp plant, the latter of which are the subject of this prosecution. However false portions of the defence evidence may have been the essential position for the defence was that the tin and the bottle were introductions and were not found in the hands of the

[1] (*1948*) *49 N. L. R. 138.* [2] (*1951*) *52 N. L. R. 361.*

accused. The accused's husband of course denied that he was ever at the scene, but it was part of the prosecution case that he was there and ran away. The husband admitted in his evidence that he had been previously convicted for offences of this nature, an admission which explains why the raiding party decided to stop their jeep near this particular house, and it renders reasonable the explanation that having found prohibited articles in the house, the officers decided to foist them on the accused for want of evidence against the true offender, the husband. The case is not in my view on all fours with that of *Cornelis v. Excise Inspector* [1] because there, there was no evidence that the husband was present at all, and that being so, the inference that the wife was in possession of the articles was a legitimate one. The present case more nearly resembles that of *Dunuwila v. Poola* [2] where Soertsz, J. thought that the attempt of the wife to destroy the article might have been merely an effort to screen the husband. In a case where there are present, as I have pointed out earlier, two reasons for viewing the prosecution evidence with suspicion, the possibility that the wife either seized the articles in an attempt to destroy evidence against her husband or that the articles were found by the Police but not in her physical possession as alleged, should not have been disregarded by the Magistrate. I would therefore allow the appeal and acquit the accused.

Appeal allowed.

[1] *(1946) 47 N. L. R. 407.*

[2] *(1939) 40 N. L. R. 413.*