

1945

Present: **Rose J.**

LABROOY, Appellant, and FERNANDO, Respondent.

1,192—*M. C. Panadure*, 28,704.

Excise Ordinance—Possession of excisable article—Presumption arising under section 50—Proof of exclusive possession—Excise Ordinance, s. 50.

The presumption arising under section 50 of the Excise Ordinance that an accused person in possession of an excisable article has committed an offence under section 43 of the Ordinance can only arise when exclusive possession has been established.

APPEAL against an acquittal by the Magistrate of Panadura.

T. S. Fernando, C.C., for complainant, appellant.

P. Malalgoda for accused, respondent.

February 15, 1945. Rose J.—

This is an appeal with the leave of the Attorney-General from an acquittal by the Magistrate. The respondent was charged on three counts with being in possession of certain articles contra the provisions of the Excise Ordinance (Chapter 42) and Mr. Fernando asks me to say that the Magistrate was wrong in acquitting in this case. The first point taken is that the Magistrate should have been satisfied that the possession by the respondent had been proved. Now I would say, in passing, that Mr. Fernando invoked section 50 of the Excise Ordinance and contended that there was a presumption in his favour to which the Magistrate should have given effect. It is clear, however, that this presumption only arises once possession has been established, and the point, therefore, which I have to consider in the present matter is whether the Magistrate should on the evidence have come to the conclusion that the possession was proved.

The only evidence of possession was given by two witnesses, Mr. Charles and Mr. Labrooy. Mr. Labrooy says that the accused is the chief occupier of the house and at a later stage, he said, "I cannot say whether more than two persons are living in the house". Charles says, "I do not know the inmates of the accused's house. I do not know whether anyone else is living in this house". On that the Magistrate makes the following observations. He says, "The prosecution witnesses said that they did not know who occupied this house besides the accused and his daughter." It seems to me that that is a fair summary of the evidence for the prosecution. The Magistrate goes on to say that the man is described as the chief occupier of the house and that there is no evidence before him as to how many other occupiers there may have been. So in his opinion there is no ground for his taking the view that the chief occupier is in possession of everything that was found in the house. It seems to me that is a perfectly reasonable view to take, and I cannot therefore say that the Magistrate was wrong in having drawn the inference he did. It was perfectly open to him for the reasons he gave to say that he was not satisfied with the prosecution evidence.

There is a further point which was raised by Crown Counsel relating to the key. It appears that one of these two men, Labrooy, asked for the key of the wooden box in which these bottles and many other articles were contained, whereupon R. Samararatne produced this key and the box was then opened and various articles were found, amongst them some bottles of arrack.

Mr. Fernando states that the production of the key is "conduct" within the meaning of section 5 and therefore it was for the respondent to give a satisfactory account of the facts. The Magistrate refers to this

question of the key and he comes to the conclusion—and again I am unable to say he is wrong in coming to the conclusion—that it is not to his mind conclusive. It would be wrong for me to say that he was bound to draw the inferences from this key which the Crown asks to be drawn.

For these reasons I am of opinion that the appeal fails and must be dismissed.

Appeal dismissed.

