

Aug. 22, 1911

Present : Lascelles C.J. and Middleton J.

THE KING v. SILVA.

92—D. C. (Crim.) Kalutara, 2,384.

Jurisdiction—Indictment under s. 8 (1) of "The Opium Ordinance, 1910"—Objection to jurisdiction not taken in District Court—Test of jurisdiction of District Court—Forfeiture of property no test—Criminal Procedure Code, s. 11—Courts Ordinance, s. 73.

The accused was convicted by the District Court under section 8 (1) of "The Opium Ordinance, 1910". On appeal objection was taken to the jurisdiction of the District Court, and it was contended (a) that as the indictment did not specify the quantity of opium alleged to have been unlawfully possessed, it was open to the Crown to prove the possession of such a quantity of opium that the fine, at the rate of Rs. 250 for every ounce, would exceed the statutory limit of Rs. 1,000; and (b) that inasmuch as section 8 (1) requires the forfeiture of the opium in respect of which the conviction is had in addition to a fine, which may extend to Rs. 1,000, the offence is punishable with a more severe penalty than the District Courts are empowered to impose.

Held, (1) that the first objection would have been well founded if it had been taken at the District Court at the proper time.

A person indicted before the District Court, who has pleaded to the indictment without pleading to the jurisdiction, is not entitled to take exception to the jurisdiction of the Court afterwards. There is nothing in the language or context of section 73 of "The Courts Ordinance, 1889," to show that the section has reference only to local jurisdiction.

Held, further, (2) that the second objection was unsound.

Section 11 of the Criminal Procedure Code fixes the jurisdiction of District Courts with reference only to imprisonment and fine. The forfeiture of an article in *specie* does not fall within the definition of a fine.

A PPEAL from a judgment of the District Judge of Kalutara (T. B. Russell, Esq.). The accused in this case was charged under section 8 (1) of the Opium Ordinance of 1910 with having been in unlawful possession of opium, and was convicted and sentenced to pay a fine of Rs. 500, or to undergo in default six months' rigorous imprisonment.

Bawa, for accused appellant.—Offences under sections 7 and 21 of the Opium Ordinance are specially made triable by a District Court by section 28; that section enables the District Court in such cases to impose a penalty which it cannot ordinarily impose. An offence under section 8 is not specially made triable by the District Court.

Aug. 22, 1911

*The King
v. Silva*

Section 11 of the Criminal Procedure Code gives jurisdiction to a District Court to try offences which are punishable with imprisonment for a period not exceeding two years, or with a fine which does not exceed Rs. 1,000. An offence under section 8 of the Opium Ordinance involves a forfeiture of property. Forfeiture is a punishment under the Penal Code. The District Court had, therefore, no jurisdiction to try this offence. Under the indictment it was open to the Crown to have proved that the accused had over four ounces of opium. The offence in that event would have been one punishable with more than Rs. 1,000. In such a case the District Court would have no jurisdiction. Counsel referred to *Ireson v. Whittle*,¹ *Queen v. Fonseka*,² and *Gunasekere v. Van Cuylenberg*.³

Walter Pereira, K.C., S.-G., for the respondent.—Forfeiture of property is not a test of jurisdiction under section 11 of the Criminal Procedure Code. The reason why section 28 of the Opium Ordinance does not give jurisdiction to the District Court to try offences under section 8 is because the punishment provided by that section is only imprisonment for one year and Rs. 1,000 fine. In this case the Crown has not proved that the accused had over four ounces of opium. No objection was taken in the lower Court against the jurisdiction of the District Court. Section 73 of the Courts Ordinance enacts that an accused who had pleaded to the charge without pleading to the jurisdiction cannot afterwards object to the jurisdiction of the Court. See *King v. Fernando*.⁴

Bawa, in reply. Section 73 of the Courts Ordinance refers only to local jurisdiction. Counsel referred to *Queen v. O'Connor*.⁵ All that *King v. Fernando* decided was the District Court could have punished for the lower offence, and ignored the facts which went to make the offence a higher one.

Cur. adv. vult.

August 22, 1911. LASCELLES C.J.—

This is an appeal against a conviction under section 8 (1) of "The Opium Ordinance, 1910." In the petition of appeal several objections are set out, but on the argument none of these were urged, and the appellant's counsel relied only on the objection that an offence under section 8 (1) of the Ordinance was not within the jurisdiction of a District Court, as defined by section 11 of "The Criminal Procedure Code, 1889." It was contended (a) that as the indictment in the present case did not specify the quantity of opium alleged to have been unlawfully possessed, it was open to the Crown to prove the possession of such a quantity of opium that the fine,

¹ (1891) 1 C. L. R. 34.³ (1894) 3 S. C. R. 59.² (1900) 4 N. L. R. 223.⁴ (1905) 8 N. L. R. 354.⁵ (1843) 5 Q. B. 16.

Aug. 22, 1911

LASCELLES
C.J.*The King*
v. Silva

at the rate of Rs. 250 for every ounce, would exceed the statutory limit of Rs. 1,000 ; and (b) that inasmuch as section 8 (1) requires the forfeiture of the opium in respect of which the conviction is had in addition to a fine, which may extend to Rs. 1,000, the offence is punishable with a more severe penalty than District Courts are empowered to impose.

Dealing first with the latter of these objections, it is clear that section 11 of the Criminal Procedure Code fixes the jurisdiction of District Courts with reference only to imprisonment and fine in the same way that the Criminal Procedure Code of 1883, by section 12, made the length of the imprisonment by which the offence is punishable the only test of jurisdiction. As the forfeiture of an article *in specie* does not fall within the definition of a fine, it follows that the provision as to the forfeiture of the opium should not be taken into account in considering whether offences under section 8 (1) are within the jurisdiction of a District Court. This ground of objection therefore fails.

The former ground of objection, if it had been taken at the proper time and place, would, in my opinion, have been well founded, for the indictment is so framed that the possession of a quantity of opium might have been proved, which would have justified a fine exceeding Rs. 1,000. But it is objected by the learned Solicitor-General that under section 73 of "The Courts Ordinance, 1889," an accused person, who in a prosecution in the District Court has pleaded without pleading to the jurisdiction, is not entitled to take exception to the jurisdiction of the Court afterwards, and that the District Court must be taken to have had jurisdiction over the matter. Mr. Bawa contends that this section has reference only to the local jurisdiction of the Court, but there is nothing in the language of the section or in the context which suggests that the natural and ordinary meaning of the word "jurisdiction" should be so restricted. Such authority as is to be found does not support the construction for which the appellant contends. In *R. v. Fernando*¹ Wendt J. considered the point and expressed himself as inclined to the opinion that the objection to the jurisdiction in that case (which was not an objection to the territorial jurisdiction of the Court) came too late. In the same case, two other cases, namely, *Regina v. ———*² and *The Secretary of the District Court v. Nikajutiya*,³ were cited, where section 73 was held to apply in cases where the objection was not merely to the local jurisdiction of the Court. In view of these authorities and of the unequivocal language of section 73, I am unable to adopt the restricted interpretation of the section for which the appellant's counsel contends. It was not argued that section 73 of "The Courts Ordinance, 1889," has been modified by the general provisions of the

¹ (1905) 8 N. L. R. 357.² (1879) 2 S. C. C. 50.³ (1880) 3 S. C. C. 96.

Criminal Procedure Code (chapter XXX.) relating to appeals, and I do not desire to express any final opinion on this point. But as at present advised, I scarcely think that such a contention is tenable—*generalia specialibus non derogant*. The Legislature, having already made special provision for the manner in which objections to the jurisdiction should be taken, cannot, I think, be presumed to have intended to alter that special provision by a subsequent general enactment which does not deal specifically with objections to the jurisdiction. In my opinion the appellant, for the reasons above stated, is debarred by section 73 of the Courts Ordinance from now objecting to the jurisdiction of the District Court. I would add that, in my opinion, this is not a case in which the Court ought to act in revision, for, if the objection had been taken at the proper time, the Court would almost certainly have allowed such an amendment in the indictment as would have kept the offence within the jurisdiction of the District Court. No question with regard to jurisdiction could have arisen in the present case, if the indictment had laid the offence with regard to a specific quantity of opium not greater than four ounces.

While I am fully alive to the importance of strictly enforcing the provisions of the Opium Ordinance, I concur with my brother Middleton in thinking that in the present case a fine of Rs. 250 is a sufficient penalty. The appeal against the conviction is dismissed, but the fine is reduced to Rs. 250, with rigorous imprisonment for three months in default of payment.

MIDDLETON J.—

I agree, but I think that the fine imposed is excessive considering the position of the defendant, apparently a small boutique keeper I would reduce the fine to Rs. 250.

Conviction affirmed ; sentence varied.

Aug. 22, 1911

LASCELLES
C.J.

*The King
v. Silva*

