Judge to make any reference to section 92 (1), whose negative provisions were inapplicable in the present case, where the acts and threats of the police did cause apprehension of death or grievous hurt. Regarding the question whether the police were themselves committing any offence the learned trial Judge rightly referred to the evidence that the accused was reasonably suspected of having committed a murder, to the evidence that he was evading arrest and that the police were endeavouring to arrest him, and to the provisions of section 23 of the Criminal Procedure Code, whereunder in such circumstances the police, in effecting the arrest, would be justified if necessary in going even so far as to cause the death of the accused. In these circumstances it was clear that the police were committing no offence in shooting or threatening to shoot the accused (who was armed), after warning him, and that accordingly the accused was not entitled to plead the right of private defence.

For these reasons we would dismiss the application and the appeal.

Application and appeal dismissed.

1949 *Present :* **Gunasekara J.**

WICKREMEWARDENE *et al.*, Appellants, *and* ABEYESINGHE (P. S. 644), Respondent

S. C. 920-921—M. C. Nuwara Eliya, 4,149

Unlawful possession of tea leaf—Common possession in motor car—Conscious control of one person only—Inference of guilt—Protection of Produce Ordinance (Cap. 28), section 4.

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.

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

H. V. Perera, K.C., with *Kingsley Herat*, for accused appellants.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 12, 1949. GUNASEKARA J.—

The two appellants were convicted of an offence punishable under section 4 of the Protection of Produce Ordinance (Cap. 28) and were sentenced to a term of six months' rigorous imprisonment each. The enactment in question provides *inter alia* that whenever anyone is found in possession of any tea leaf (whether in a natural or manufactured state) under such circumstances that there is reason to suspect that the same is not honestly in his possession, and he is unable to give to the court before whom he is tried a satisfactory account of his possession thereof, such person shall be guilty of an offence.

According to the case for the prosecution, which was accepted by the Magistrate, motor car No. B. 1728, which belongs to the first appellant was driven into a tea estate at Ambawela at about 12.30 a.m. on March 21. Half an hour later it was driven back to the main road without lights. Two of a party of police officers that had been watching the car tried to stop it by stepping in front of it and signalling with electric torches. The car lights were then switched on and the car swerved towards them and passed them as they leaped out of its way. The police officers thereupon boarded their own car and gave chase, but as they approached it the other car was driven with accelerated speed. The police had it within their view, however, except for a short time when it went round a bend, until it stopped outside the first appellant's garage which was by the side of the main road. They immediately went up to it before its occupants could get out and found the first appellant in the driving seat and the second appellant seated beside him. Inside the car they also found seven bags of tea covered with a blanket and a sarong. Neither of the appellants produced a receipt or a permit or gave an explanation of the presence of the tea in the car. The tea weighed 690 lb. and was valued at Rs. 1,000.

According to the defence the tea belonged to the second appellant who was a dealer in tea, and had been left for him in the first appellant's garage by a man who had bought it for him. Evidence was adduced to the effect that it was inside the garage and not in the car that the police found it, and that the police story of a pursuit by them of the first appellant's car and their account of the circumstances in which they found the tea were false. The learned Magistrate has carefully considered all the evidence in the case and has believed the evidence for the prosecution and disbelieved the defence contradiction of it, and I can see no reason for saying that he ought not to have accepted that evidence.

Having accepted the evidence for the prosecution, the Magistrate holds that—

> "the circumstances under which the tea was found, as testified to in this case, are certainly circumstances in which one may suspect that the tea was not come by honestly".

and that

> "in a case of this kind, having regard to the circumstances in which the tea was found, it is incumbent upon the defence, as the section requires, to give a satisfactory account of the possession of the tea".

The section imposes such a duty on an accused person, however, only when it has been proved that the tea was found in his possession, and it does not appear that the learned Magistrate has directed his mind to the question whether it has been proved as against each of the appellants that the tea was found in his possession. He appears to have assumed that it was found in their joint possession and to have proceeded to consider whether they have given a satisfactory account of such possession.

Stroud's Judicial Dictionary, citing *Stephens' Digest of the Criminal Law*, gives the following definition :

> " ' Possession ' *qua* the *Criminal Law* and offences against Property, has been thus defined :—
>
> > ' a movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. ' "

It has been pressed upon me on behalf of the first appellant that the facts accepted by the learned Magistrate are insufficient to show that the first appellant was so situated with respect to the tea that he had the power to deal with it as owner, or that the circumstances were such that he might be presumed to have intended to do so in case of need : and that the evidence that the second appellant was a trader in tea, which has not been rejected, would at the lowest involve in doubt the question whether the tea that was in the car was in the possession of the first appellant. It seems to me that the learned Magistrate has misdirected himself in omitting to consider the effect of this evidence on the question whether it has been proved beyond reasonable doubt that the tea was in the possession of the first appellant.

It has been held in a series of cases, following *Banda v. Haramanis* [1], 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 the person : *cf. Sethukavalar v. Kandiah* [2], *Police Inspector, Galagedera v. Punchirala* [3], *Silva v. Kandiah* [4]. In the present case, if the learned Magistrate had considered the effect of the evidence that the second appellant was a trader in tea he may well have entertained a doubt as to whether the tea was in the possession of the first appellant. He may well have held that the facts proved against the first appellant were not inconsistent with his having conveyed in his car a tea trader and a large quantity of tea that was in the latter's exclusive possession ; and that while his conduct proved that he knew or suspected that the tea was " not honestly in the possession " of the second appellant, such knowledge or suspicion could not make him a joint possessor of the tea.

[1] *(1919) 21 N. L. R. 141.*
[2] *(1920) 7 C. W. R. 141, 1 Rec. 177.*
[3] *(1925) 6 Rec. 70.*
[4] *(1931) 32 N. L. R. 253.*

It seems to me that the learned Magistrate's omission to direct his mind to the question whether possession has been brought home to the first appellant and his omission to consider the bearing on that question of the evidence that the second appellant was a tea trader were misdirections that vitiate the conviction of the first appellant. I therefore set aside the conviction of the first appellant and the sentence passed upon him.

In view of the second appellant's admission that he is a trader in tea and the fact that he claims the tea as his, I see no reason to interfere with his conviction. No previous conviction has been proved against him, however, and I do not think that the case is one that calls for the imposition of a sentence of imprisonment for a first offence.

I affirm the conviction of the second appellant and vary the sentence to a fine of Rs. 200 or six weeks' rigorous imprisonment in default of payment of the fine.

Appeal of first accused allowed.

Conviction of second accused affirmed.

Sentence varied.