

1939

*Present : Soertsz, A.C.J.*DUNUWILLA *v.* POOLA *et al.*8,889—*M. C. Kandy, 60,786.*

Unlawful possession of toddy—Toddy found in house occupied by husband and wife—Presumption regarding possession—Excise Ordinance, s. 50.

The first and second accused, husband and wife, were living together in a house in which fermented toddy was found. On the approach of the Excise officers the first accused started to run away, the second accused, who was in the compound rushed in and broke a pot in the kitchen and fermented toddy was spilt on the floor.

Held, that the first accused, the husband was guilty of unlawful possession of the toddy but not the second accused.

Simon v. Jessinona (4 C. L. W. 49), Samaraweera v. Babee (4 C. L. W. 48), referred to.

APPÉAL from a conviction by the Magistrate's Court of Kandy.

L. A. Rajapakse, for the accused, appellants.

D. Jansze, C.C., for the complainant, respondent.

Cur. adv. vult.

June 6, 1939. SOERTSZ A.C.J.—

As Ennis J. observed in *Simon v. Jessinona*¹, “the question whether or not a person who lives in a house in which fermented liquor is found is in possession of that liquor is one of fact”. For this observation, he based himself on the case of *Excise Inspector, Ambalangoda v. Podisinnno*².

In the case before me, the facts as found by the learned Magistrate are that the first and second accused are husband and wife living together in the house in which the offending fermented toddy was found. The Magistrate in the course of his judgment says, “When the Excise party approached the house first accused started to run away I have no doubt that the quantity of fermented toddy spoken to by the Inspector was found in the kitchen of that house. Second accused was in the compound when the Excise party were approaching. She rushed in and broke a pot in the kitchen and fermented toddy was spilt on the floor. Her conduct stamps her with guilty knowledge of the presence of that toddy in the other pots. Her defence is that there was no toddy in the house that day and that she did not break a pot I hold that second accused is guilty of possession of the fermented toddy in the kitchen of her house”.

In this view of the case, the Magistrate sentenced the first accused to a term of four months' rigorous imprisonment, and imposed a fine of Rs. 300 on the second accused, in default of payment, six weeks' rigorous imprisonment.

I agree with the view taken by the Magistrate that the first accused was in possession of this toddy. It was found in the kitchen of the house in which he lives with his wife. As I had occasion to point out in the case of *Samaraweera v. Babee*³ the presumption is that the house occupied by a married couple is in the possession of the husband rather than of the wife. The Magistrate rightly, I think, inferred conscious possession of that toddy on the part of the husband, from his flight on the approach of the Excise Party. The Magistrate rejected his denial of his presence in the village on this day. The result is that the first accused has not accounted for the presence of the toddy in his house in a manner consistent with his innocence. He was, therefore, rightly convicted.

The question that arises for consideration is whether on these facts the second accused too can be said to have been in possession of the toddy. I do not think she can. All that can be found against her on the evidence before me is that she was well aware that her husband was carrying on an illicit trade in toddy, and that on the approach of the Excise party she tried to make evidence of the commission of an offence to disappear in order to screen her husband. It might even be said that she probably helped her husband in this trade, in a wifely sort of way. But the fact seems clear that the toddy was toddy brought into the house by the husband, and was toddy under his control and at his beck and call, at the time the Excise Party visited their house. There can, no

¹ 4 *Ceylon Law Weekly* 49.

² 2 *Times Law Reports* 143.

³ 4 *Ceylon Law Weekly* 48.

doubt, be cases where a wife occupying a house with her husband, may be held to be in possession of something that is the subject matter of an offence. For instance, there are cases in which a wife has been convicted of being in unlawful possession of excisable articles, when at the time the offence was discovered, she was found to be in possession of the key of a box in which the articles were kept, and her husband was absent from home, and she had not given evidence to show, for example, that she had been given the key by her husband, or by some other inmate of the house. Similarly in the case of *Gooneratne v. Ukku*¹, where over four gallons of toddy were found in a house in which the accused woman, her two associated husbands, and another woman lived, and where the accused who was alone in the house at the time, threw away a vessel which must have contained toddy to judge from its smell, Shaw J. upheld the conviction because she had not rebutted the presumption that arose under section 50 of the Excise Ordinance.

In the present case, on the facts as deposed to by the prosecution witnesses, the presumption that arose under that section arose against the fleeing first accused. It probably would have been different if at the time of the raid, the second accused was the sole occupant of the house, and did not account for the presence of the toddy satisfactorily.

I find a case reported in 4 Cox 272, in which a husband and wife and a boy aged ten were charged with *having in their possession a mould* on which was impressed the obverse side of a shilling. The boy had been arrested when passing a counterfeit half-crown. When the Police searched the house in which the boy lived, the husband was found in an upper room. Several moulds and other coining instruments were found in a room below. During the search, the wife came in and destroyed one of the moulds. She was in possession of counterfeit shillings. There were no counterfeit coins on the husband. Telford J. ruled that as the mould was found in the room of a house occupied by the husband, he must *prima facie* be presumed to be in possession of what that room contained, but it was only a presumption that might be rebutted. If the Jury were satisfied that the husband was in possession of the mould, they ought to acquit the wife, as she could not, in law, be said to have any possession separate from her husband; but that if they thought that the criminality was on her part alone, and that he was guiltless, she might be convicted; that *either husband or wife might be convicted on the evidence, but not both*. The fact that the wife attempted to break up coining instruments at the time of her husband's apprehension, if done with the object of screening him, is *no evidence of possession*. He further ruled that in regard to the boy, it would be going too far to say that he was in joint possession with either of his parents.

If I may say so with respect, that is a correct statement of the law, and applying it to this case, I must find the second accused not guilty of the offence with which she was charged.

I set aside her conviction and acquit her.

Set aside.

¹ 1 C. W. R. 276.