1955 *Present :* Weerasooriya, J.

ALICE *et al.*, Appellants, and EXCISE INSPECTOR, KANDY, Respondent

S. C. 921–922—M. C. Kandy, 1,311

Excisable article—Unlawful possession alleged against husband and wife—Proof of conscious possession—Excise Ordinance, ss. 43 (a), 50.

Where an excisable article is found inside a house, the chief occupant is not liable to be prosecuted for unlawful possession of it unless there is evidence that he was in conscious possession of it.

APPEALS from a judgment of the Magistrate's Court, Kandy.

M. M. Kumarakulasingham, for the accused-appellants.

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

Cur. adv. vult.

November 25, 1955. WEERASOORIYA, J.—

Learned counsel who appeared for the two accused-appellants (who are husband and wife) submitted that the prosecution version that five gallons of fermented toddy in various utensils were found in the kitchen of the house occupied by the appellants should not have been accepted

by the trial Judge in view of certain contradictions in the evidence of the two principal witnesses who spoke to the raid. But the trial Judge, no doubt, took into consideration these contradictions when he decided that the testimony of the witnesses relating to the discovery of the toddy was true. The finding against the 1st accused-appellant (the wife) must, therefore, be affirmed, and her appeal is dismissed.

Then it was submitted that in any event the conviction of the 2nd accused-appellant cannot stand since it was admitted by the prosecution witnesses that at no time during the raid or even thereafter while the raiding party were in the house of the appellants, was the 2nd accused-appellant seen either in the house or the vicinity of it. The raid took place at about 6 a.m. The 2nd accused-appellant gave evidence that he left home at 4.30 a.m. on a journey involving the purchase of a cow, and returned only at 6.30 p.m. Even accepting this evidence there is the fact, as held by the learned trial Judge to have been proved, that at about 6 a.m. this large quantity of fermented toddy was found in the kitchen of the house of which he admittedly was the chief occupant. Having regard to the time of the raid it seems highly improbable that the toddy was brought into the house after the 2nd accused-appellant had left it. According to the evidence the only inmates of the house when the raiding party arrived were the 1st accused-appellant and some children. It must be taken, therefore, as sufficiently established that the toddy had been brought into the house prior to the departure of the 2nd accused-appellant. The important question then is whether the learned trial Judge was in the circumstances justified in finding that the 2nd accused-appellant also, as the chief occupant, was in conscious possession of the toddy. Learned counsel for the appellant referred me to the case of *Cornelis et al. v. Excise Inspector* [1] where it was held, following certain previous decisions cited in the judgment, that the mere finding of an excisable article in a house occupied by husband and wife was insufficient to establish possession by the husband who was not present at the time of the search. In that case (unlike in the case under appeal) there was, apparently, no evidence supporting an inference that the article in question had been brought into the house at a time when the husband was present.

Learned Crown Counsel cited the unreported case of *Attapattu v. Ponnusamy et al.* [2] where the evidence was that in the course of a search of a house in the absence of the husband, who was the chief occupant, but in the presence of his wife who objected to the search, some ganja was found in a locked room which had to be forced open as the key of it was not forthcoming. It was held on those facts by Macdonell C.J. that both husband and wife were in possession of the ganja.

There is, therefore, authority for the view that the chief occupant of a house may, having regard to the circumstances proved, be held to be in possession of an article found in the house in the course of a search in his absence. In the present case, however, the toddy was found in

[1] *(1946) 47 N. L. R. 407.*
[2] *S. C. Nos. 460-461 ; P. C. Point Pedro 1908 (S. C. Minutes of Sept. 23rd 1932) ; Excise Judgments File E. O. S. 713. III-7.*

the kitchen of the house. The house is said to consist of a living room, a kitchen and a verandah. There is no evidence whether the kitchen is an open one or not, and the situation of it in relation to the living room. The raid took place on a Sunday but no evidence has been led to show when the 2nd accused-appellant, who is employed in the Public Works Department, returned home on the previous day and, assuming that the toddy had been brought on that evening, what opportunities he had of knowing that it was in his house.

The learned Magistrate has stated that he had no doubt that the 2nd accused-appellant was in control of the toddy, but in the absence of direct evidence it seems to me that he should have indicated in his judgment the process of reasoning on which he arrived at that view. He also observed that the 2nd accused-appellant "possibly managed to make good his escape when the police party raided his house". Now if this was a reasonable inference it might have been urged that since the 2nd accused-appellant's conduct when the raiding party approached the house was unsatisfactory the presumption in S. 50 of the Excise Ordinance could be applied against him. But it is clear that in making this observation the learned Magistrate merely gave expression to what was nothing more than a surmise.

The appeal of the 2nd accused-appellant is allowed and his conviction and sentence are set aside.

Appeal of 1st accused dismissed.
Appeal of 2nd accused allowed.