

1954

Present : Swan J.

S. P. SIMON SINGHO, Appellant, and C. B. THORADENIYA (S. I. Police), Respondent

S. C. 1,346—M. C. Matara, 32,038

Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), ss. 26, 76 (1) (a)—Charge of unlawful possession of seeds, &c., of hemp plant—Mention of wrong person as proper authority—Curable irregularity—Criminal Procedure Code, s. 425—Burden of proof—Evidence Ordinance, s. 106.

Appellant was charged with being in possession of certain quantity of seeds, pods, leaves and flowers of the hemp plant without a licence from the proper authority in breach of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance. The "proper authority" mentioned in the plaint was the Minister of Justice instead of the Minister of Health.

Held, that the mention of the wrong person in the plaint as the proper authority was nothing more than a mere irregularity curable under section 425 of the Criminal Procedure Code.

Held further, that under section 106 of the Evidence Ordinance the burden was on the accused to prove that his possession of the prohibited seeds, &c., was lawful. *Sanitary Inspector, Mirigama v. Thangamani Nadar* (1953) 55 N. L. R. 302, distinguished.

APPPEAL from a judgment of the Magistrate's Court, Matara.

Sir Lalita Rajapakse, Q.C., with *M. L. S. Jayasekera* and *D. R. P. Goonetilleke*, for the accused appellant.

P. Colin Thome, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 9, 1954. SWAN J.—

The appellant in this case was charged with being in possession of 89½ pounds of seeds, pods, leaves and flowers of the hemp plant commonly known as *Cannabis Sativa L* without a licence from the proper authority in breach of section 26 read with section 76 (1) (a) of the Poisons, Opium and Dangerous Drugs Ordinance, Cap. 172 of the New Legislative Enactments. The proper authority mentioned in the plaint was the Minister of Justice. The appellant was found guilty after trial and sentenced to 6 months rigorous imprisonment.

Learned counsel for the appellant contends that the conviction is bad for two reasons, namely: (1) the prosecution did not prove that the alleged possession of this stuff was without a licence from the proper authority, (2) that the charge was defective in that it mentioned the Minister of Justice as the proper authority.

Dealing with the latter point I find that the proper authority under *Gazette Notifications* No. 10,407 of the 2nd June, 1952 and No. 10,605 dated 28th October, 1953, is the Minister of Health and not the Minister of Justice. I cannot however agree with the contention that the defect in the charge is an illegality. In my opinion it is nothing more than a mere irregularity and section 425 of the Criminal Procedure Code would therefore apply and the conviction cannot be set aside on that account. Learned counsel for the appellant referred me to a judgment of Gratiaen J. in *M. C. Negombo No. 3,389*¹ where the conviction was quashed in similar circumstances. But in that case I find that there were other defects, the most vital of which was that the production was not proved to be the identical article on which the Government Analyst had submitted his report. I was also referred to another judgment of Gratiaen J. in *M. C. Colombo A 1,851/B*². In that case the proper authority referred to was the Minister of Home Affairs and not the Minister of Health. Gratiaen J. dismissed the appeals and affirmed the sentences subject to the alteration that the convictions should be recorded as for the commission of the offence charged "without a licence from the Minister of Health". It will thus be seen that Gratiaen J. did not consider the defect in the charge as fatal to the conviction.

I shall now deal with the other point taken, namely that the prosecution had to prove that the accused did not have a licence from the proper authority. Learned counsel for the appellant relied on the decision of Nagalingam A.C.J. in *Sanitary Inspector, Mirigama v. Thangamani Nadar*³. That was a prosecution under Regulation 46 of the *Prevention of Diseases Ordinance*. It was there held that the burden was on the prosecution to prove that the accused had failed to inform the proper authority of the presence in his house of a person suffering from a contagious disease. In my opinion that case can have no application to the present case. I find that dealing with the interpretation of the Regulation the learned Acting Chief Justice said :

"Had, for instance, the Regulation in the present instance run as follows :—

'No person shall permanently or temporarily reside in any building in which there shall be any person affected with any contagious disease, unless he shall forthwith inform the proper authority thereof.'

there can be no question but that the prosecution need only prove (a) that the accused person had resided in a building, (b) that in that building there was a person affected with the contagious disease, and then it would be upon the accused person to establish that he had informed the proper authority ; for the offence would consist in occupying a building in which a person affected with a disease was present and not consist in a failure to do an act such as to give information of the presence of a

¹ *S. C. No. 1,137—S. C. Min. of 1.2.50.*

² *S. C. No. 1,377—S. C. Min. of 1.2.54.*

³ (1953) 55 *N. L. R.* 302; 49 *C. L. W.* 81.

diseased person. In these circumstances on his failure to do so he could properly be found guilty of the offence as under section 106 of the Evidence Ordinance the burden of proving the exception would lie on him.”

In this case the relevant section reads as follows :—

“ No person shall, without the licence of the Governor, sow, plant, cultivate, obtain or have in his possession any poppy plant, cocoa plant or hemp plant, or collect or have in his possession the seeds, pods, leaves, flowers or any part of any such plant. ”

In my opinion section 106 of the Evidence Ordinance applies and the burden was on the accused to prove that his possession was not in contravention of section 26 and that he had a licence from the Minister of Health to possess the prohibited plant or any of its component parts. It is quite plain from the wording of the section that the law prohibited the sowing, planting, cultivation or possession of the hemp plant or the seeds, pods, leaves and flowers thereof. Any person found in possession of the prohibited stuff is bound to prove that he holds a licence from the proper authority.

The appeal is dismissed and the conviction and sentence affirmed.

Appeal dismissed.
