

1946

*Present : Dias J.*

**MARAMBE (EXCISE INSPECTOR), Appellant,**  
*and JOHN, Respondent.*

*1,064—M. C. Kurunegala, 30,470.*

*Cultivation of hemp plants—Nature of evidence sufficient to prove cultivation—Ganja plants fall within the definition of “hemp plants”—Burden of proof as regards licence—Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), ss. 26, 76 (5) (a).*

Where the charge against the accused was that, without a licence from the Governor, he planted, cultivated or had in his possession a number of hemp plants in breach of the provisions of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance—

*Held*, (i.) that the accused's act of placing a shade or screen over newly planted ganja plants amounted to the cultivation of such plants ;  
 (ii.) that ganja plants come within the definition of “hemp plants” ;  
 (iii.) that the burden was on the accused to prove that he had a licence.

<sup>1</sup> (1934) 36 N. L. R. 135. Cf. *Dias v Wijetunge* (1946) 47 N. L. R. at p. 225.

<sup>2</sup> (1916) 2 C. W. R. 69.

<sup>3</sup> (1931) 32 N. L. R. 318.

<sup>4</sup> (1922) 4 Cey L Rec 83.

<sup>5</sup> (1943) 45 N. L. R. 115.

# APPEAL against an acquittal from the Magistrate's Court, Kurungala.

*A. C. M. Ameer, C.C.*, for the complainant, appellant.

*C. R. Guneratne*, for the accused, respondent.

*Cur. adv. vult.*

October 23, 1946. DIAS J.—

The charge against the accused is that on March 26, 1945, at Meegaha-ella, without a licence from the Governor, he planted, cultivated or had in his possession fifteen hemp plants in breach of the provisions of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance (Chap. 172) and punishable under section 76 (5) (a) of that Ordinance.

The testimony of Excise Inspectors Marambe and Sabaratnam is to the effect that on receipt of certain information they proceeded to the spot and saw the accused by the side of a stream planting branches to serve as a screen to give shade to fifteen ganja plants. These appeared to have been newly planted. The soil was loose round them and the leaves were drooping. When the accused saw the Inspectors, he took to his heels and was arrested. The plants were then uprooted, parcelled, sealed and produced in Court. Both Inspectors say that they are ganja plants, and there has been no cross-examination to suggest that it is disputed that the plants are ganja plants.

When the case for the prosecution closed, the Magistrate without calling upon the defence, acquitted the accused holding that the evidence did not disclose that the accused planted, cultivated or possessed the ganja plants. In his opinion, the case, at its best, is only one of strong suspicion against him. The complainant appeals against that order with the sanction of the Attorney-General.

I agree with the Magistrate that there is no evidence that the accused planted or possessed these ganja plants. Is there evidence that he cultivated them? "Cultivation" is the improvement of a plant by the exercise of labour and care. In *Inspector of Excise v. Lebbe*<sup>1</sup> where the evidence was that a site had been cleared and prepared in a belt of jungle adjoining the garden of the accused, who was seen loosening the soil round the ganja plants growing at that spot and weeding the site, it was held that the accused had "cultivated" ganja plants.

I hold that the act of placing a shade or screen over newly planted ganja plants amounts to the cultivation of such plants. The evidence which the Magistrate has not disbelieved proves that these plants had been newly planted in a prepared site and that by giving cover or shade to them, the accused was engaged in cultivating them.

Ganja plants come within the definition of "hemp plants". See *Wilson v. Kotalavela*<sup>2</sup>. The offence with which the accused is charged is one which does not require the proof of *mens rea* by the prosecution—*Perumal v. Arumogam*<sup>3</sup>.

<sup>1</sup> 1929) 31 N. L. R. 211.

<sup>2</sup> (1939) 40 N. L. R. 532.

<sup>3</sup> (1946) 47 N. L. R. 46.

It has been urged on behalf of the accused that it is incumbent on the prosecution to establish that the accused acted "without the licence of the Governor" in terms of section 26 which defines the offence. I am unable to agree. It is for the prosecution to establish that hemp or ganja plants had been cultivated, and that such cultivation was done by the accused. The onus then shifts to the accused to establish by a balance of evidence that what he did was with the licence of the Governor, this being an exception to criminal liability. See *Mudaliyar, Pitigal Korale v. Kiribanda*<sup>1</sup>, *Chelliah v. Cooper*<sup>2</sup>, *Wijesinghe v. Dhanapala*<sup>3</sup>, *Joseph v. Sugathadasa*<sup>4</sup>, and *Perera v. Kannangara*<sup>5</sup>.

In my opinion the acquittal of the accused was premature. The accused should have been called upon for his defence. I set aside the acquittal, and send the case back for trial in due course.

*Acquittal set aside*

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<sup>1</sup> (1909) 12 N. L. R. 304 (Div. Ct.).

<sup>2</sup> (1937) 39 N. L. R. 172.

<sup>3</sup> (1938) 39 N. L. R. 534

<sup>4</sup> (1938) 16 T. L. R. 3.

<sup>5</sup> (1939) 40 N. L. R. at p. 468.