

DHARMARAJAH

v.

**BEDDEWELLA OFFICER IN CHARGE OF
MULLAITIVU POLICE STATION**

COURT OF APPEAL

RATWATTE, J (PRESIDENT) AND L. H. DE ALWIS, J.

C. A. 182/79.

M. C. MULLAITIVU 7628.

Post Office Ordinance – S.76C(1) and (2) – possession of mail bags – exclusive possession – knowledge – burden of proof.

Mail bags belonging to the Postal and Telecommunication Department were found in the house of the accused. The accused was not present at the time of the detection but his mother was present and while claiming the house as hers said the mail bags had been kept there by her son. The Magistrate convicted the accused holding that the accused was deemed to be in possession of the bags although they were not in his own house or in his physical possession - such deeming being in terms of 76C(2) of the Post Office Ordinance amended by Act No. 24 of 1957.

Held

An essential ingredient of the offence under s. 76C(2) is knowledge on the part of the accused. The burden of proving knowledge is on the prosecution and until this burden is discharged there is no burden on the accused to prove any lawful excuse. Even on the facts the prosecution has failed to establish exclusive possession and there was no burden on the accused. The mother's statement was hearsay.

Cases referred to

- (1) *Allegacone v. Mylvaganam and another* 8 C.L.W. 85
- (2) *Labrooy v. Fernando* (1945) 46 N.L.R. 285.

Appeal from judgment of the Magistrate's Court of Mullaitivu.

S. Navaratnam for accused-appellant

A. Wickremanayake State Counsel for the State.

Cur adv. vult

March 17, 1981

RATWATTE, J. (President C/A):

The Mullaitivu Police filed an amended plaint on 03.08.1979 with the authority of the Postmaster-General. The charge against the accused was as follows: That he did on or about 02. 01. 1979 at Muttiyankaddu without lawful authority have in his possession two postal mail bags valued at Rs.100/41 cts. belonging to the

Postal and Telecommunication Department and thereby committed an offence punishable under Section 76 C(1) and (2) of the Post Office Ordinance (Chapter 190) as amended by Act No. 24 of 1957. (Vide 1967 Supplement Volume I page 327).

After trial the learned Magistrate convicted the accused of the charge and sentenced him to pay a fine of Rs 250/-. The case for the prosecution was as follows: The accused was a Linesman in the Telecommunication Department working at Achchuveli. On 02. 01. 1979 Sub Inspector Premadasa of the Mullaitivu Police went along with Army Personnel to Muttiyankaddu and searched houses in that area. Inside one house they found two Mail bags, which were produced at the trial marked P1. According to S. I. Premadasa the house in which the two mail bags were found was the house of the accused. At the time the bags were found the accused's mother Ledchumy was in the house.

Sinnathamby Sivalogasunderam, Divisional Investigation Officer, Post Office, Vavuniya and S. I. Premadasa gave evidence for the prosecution. Sivalogasunderam identified the two mail bags P1 as bags belonging to the Postal Department, from the identification marks on the bags. He stated that the bags are issued from the General Post Office to various Post Offices. He valued the bags at Rs.100/41 cts. He also stated that the mail bags which are old and cannot be used are rejected by a committee and destroyed by a responsible officer. According to him the accused was employed in the Telecommunication Department. S. I. Premadasa under cross-examination stated that at the time the bags were found the accused was not present. The accused's mother told him that the house in which the bags were found was her house. S. I. Premadasa further stated that the accused's mother told him that the mail bags were kept in the house by her son. This is clearly hearsay evidence. Premadasa took the bags and handed them over to the Police. He did not arrest the accused's mother, but warned her to appear at the Police Stations. Premadasa did not know what happened thereafter.

The accused gave evidence and called two witnesses, Vigneswaran a Colonisation Officer and Theivasigamany an Engineer from the Regional Telecommunication Department, Jaffna.

Learned Counsel for the accused submitted that the charge against the accused has not been established. It was not disputed that the two mail bags which were produced belonged to the Postal Department and that they were found in the house at Muttiyankaddu which was occupied by the accused's mother.

Learned Counsel contended that in terms of Section 76 C (1) and (2) the prosecution had to prove knowledge on the part of the

accused before the burden was cast on him and he argued that on the evidence the prosecution has failed to establish this ingredient. Learned Counsel argued that the learned Magistrate has entirely misdirected himself. In his Order the learned Magistrate has stated that as the bags were found in a house occupied by the accused's mother who was present at the time the bags were found, the son "is deemed to be in possession of the bags although they were not in his house or in his physical possession or in his own house." The learned Magistrate has cast the entire burden on the accused. Section 76 C (2) reads as follows:

"For the purposes of Sub-section (1) a mail bag shall be deemed to be in the possession or keeping of any person if *he knowingly has it in the actual possession or keeping of any other person* or in any building or place whether occupied by him or not, and whether it is so had for his own use or benefit or for the use or benefit of another." (The emphasis is mine.)

So that it is clear that the prosecution had to establish knowledge on the part of the accused before the burden was cast on the accused to prove any lawful excuse. There is similar provision in Section 53 of the Excise Ordinance (Chapter 52). In *Allegacone v. Mylvaganam and Another*⁽¹⁾ it was held that for the presumption created by Section 50 of the Excise Ordinance No. 8 of 1912 to arise and for the burden of rebuttal to be cast on the Licence-Holder it must be established by the prosecution that an offence has been committed — Section 50 of the Excise Ordinance Chapter 42 of the 1938 Revised Edition (the same as Section 53 of Chapter 52 of the 1956 Revised Edition). In *Labrooy v. Fernando*⁽²⁾ it was held as follows:

The presumption arising out of Section 50 of the Excise Ordinance that an accused person in possession of an excisable article has committed an offence under Section 43 of the Ordinance can only arise when exclusive possession has been established.

The learned Magistrate arrived at the conclusion, which I have referred to above, because he rejected the accused's evidence for the reason that the accused, according to the Magistrate, uttered three falsehoods. The accused in his evidence stated that his mother lived with his sister at Karaveddy and that he was not on talking terms with his mother. But he stated that he knew that his mother was doing some cultivation at Muttiyankaddu. When he heard that his mother had been asked to report at the Police Station, he went to Mullaitivu and he stated in his examination-in-chief that he was

arrested at the Police Station. Under cross-examination he stated that at the Police Station his mother told him that the Army had arrested her. He therefore went to the Army Camp. The Army Officers telephoned the Police Station and at the request of the Police, the accused was brought and handed over to the Police Station. The learned Magistrate has disbelieved the accused because he states, that if the accused was not on talking terms with his mother, he would not have come to the Police Station to see her. I am of the view that the learned Magistrate has misdirected himself. The second falsehood referred to by the Magistrate is the fact that the accused stated that his mother lived with his sister at Karaveddy. The learned Magistrate states that the accused has been contradicted by his own witness Vigneswaran, the Colonisation Officer who according to the Magistrate stated that the accused's mother lived at Muttiyankaddu. The learned Magistrate has completely misdirected himself. Though the accused stated that his mother lived at Karaveddy with his sister, he knew that she was doing some cultivation at Muttiyankaddu. Vigneswaran in his evidence stated that what was on the land at Muttiyankaddu was only a temporary hut and that during the cultivation period Ledchumy resided there. He further stated under cross-examination by the Police that after the cultivation is over the farmers go back to their villages. So that there is no real conflict between the evidence of the accused and Vigneswaran on this point. The third falsehood referred to by the learned Magistrate is in connection with the situation of the offices of the Postal Department and the Telecommunication Department at Atchuvely. The Magistrate states that the accused was specific in saying that he was not working in the same premises as the Post Office whereas the Telecommunication Engineer who was called by the accused stated that the Post Office and the Telecommunication Office are in separate buildings but in the same premises. What the accused stated in his evidence was that the two offices are not in the same building. He did not say anything about not being in the same premises. The Telecommunication Engineer stated the same thing as what the accused stated. I am of the view that here too the learned Magistrate has misdirected himself.

The position is that the only circumstances on which the prosecution can rely are firstly, that the mail bags were found in a hut which is occupied at times by a woman who is the accused's mother; and secondly, that the accused was working in the Telecommunication Department. In my view these are only grounds for strong suspicion against the accused. I do not think that the prosecution has made out a case beyond reasonable doubt for the presumption, created by Section 76 C (1) and (2)

to arise and that accordingly there was no burden cast on the accused to establish his innocence. I would accordingly set aside the conviction of the accused and the sentence imposed on him and acquit him.

L. H. DE ALWIS, J.

I agree.