1928

Present : Jayewardene A.J.

DISSANAYAKE *v.* PERERA.

249—P. C. Colombo, 38,488.

Unlawful possession—Tea found in box of rickshaw—Presumption of theft—Evidence of accomplice—Statement to Police Officer.

Where tea was found in a box under the seat of a rickshaw, the person travelling in the rickshaw cannot be said to be in the possession of the tea within the meaning of section 4 of Ordinance No. 38 of 1917.

APPEAL from a conviction of the Police Magistrate of Colombo.

De Jong, for accused, appellant.

June 14, 1928. JAYEWARDENE A.J.—

The accused was charged with possessing 13½ lb. of tea and being unable to give a satisfactory account of his possession under Ordinance No. 38 of 1917.

The tea was found under the seat of the rickshaw in which the accused was travelling. The rickshaw belongs to Mr. Drury. The rickshaw cooly was charged with this accused and pleaded guilty and was fined Rs. 25 and imprisoned till the rising of the Court. The crucial question in the case is whether the appellant can be said to have been in the conscious possession of the tea. The Magistrate says that the accused travelled in Mr. Drury's private rickshaw, and when the rickshaw was searched the parcel of tea was found in the box below the seat of the rickshaw, and the accused was thus found in possession of 13½ lb. of tea. To my mind this does not follow. A person travelling in a rickshaw cannot be said to be in possession, necessarily, of what is in the box under the seat.

The rickshaw cooly, Madappen, gives the most important evidence on the point. He says that the appellant himself gave him the parcel of tea and asked him to keep it in the rickshaw, at about 6 P.M., at Forbes & Walkers'. If his (Madappen's) statement is true, the tea was not in his possession, and his conviction is wrong. Madappen has, however, pleaded guilty and must be looked upon, in any event, as an accomplice. His evidence must be viewed with caution, and unless corroborated should not be accepted. The learned Magistrate says that he believes Madappen. His evidence was objected to, but the Magistrate was right in holding that his evidence was admissible. His judgment, however, does not show whether he regarded him as an accomplice. Accomplices are not like ordinary witnesses in respect of credibility, but their evidence is tainted and should be carefully scrutinized before being accepted, and therefore the presumption that an accomplice is unworthy of credit, unless corroborated in material particulars, has become a rule of practice of almost universal application. (*Ameer Ali's Evidence Act, 5th ed., p. 831.*)

Lord Abinger C.B., in summing up in *Rex v. Farber*,[1] told the jury: "It is a practice which deserves all the reverence of Law . . . . The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others."

There is no difference between the English law relating to accomplices and our own law as contained in sections 144 and 133 of the Evidence Act. (*R. v. Loku Nona.*[2])

As regards the material point, whether the appellant handed the tea to Madappen, there is no corroborative evidence implicating the appellant. The Magistrate says that he believed Madappen, but he has not considered this aspect of his evidence.

In regard to the confessions made to the Police Officers, section 25 of the Evidence Act enacts that no confession made to a Police Officer shall be proved as against a person accused of any offence.

[1] (*1837*) *8 C. & P. 106.*

[2] (*1907*) *11 N. L. R. 4.*

1928

JAYEWARDENE A.J.

Dissanayake v. Perera

In *R. v. Hurribole Chunder*,[1] Garth C.J. remarked: "I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification." The rule enacted by the section is without limitation or qualification. There are numerous local decisions on the point: *King v. Kalu Banda*, [2] *Appuhamy v. Palis*, [3] and *Nambiar v. Fernando*.[4]

Any relaxation of the strictness with which such statements have been excluded in Ceylon would, as observed by Branch C.J. in *Weerakoon v. Ranghamy*, [5] be followed by abuses which the Legislature intended to guard against.

The record does not show that the accused was defended by an Advocate or Proctor, but he probably was defended. The incriminating statements made to the constables were elicited in cross-examination. Sergeant Dissanayake stated: "The accused said he had got a little tea and asked me to let him go. He said also 'my pension will also be taken.' I did not record his statement in my notebook. P. C. Tambimuttu heard the conversation. At the Police Station accused said he knew nothing about the tea."

The sergeant gives no excuse for not recording this all-important statement. The constable, Tambimuttu, stated, also in cross-examination, "Sergeant asked me to search; accused did not express surprise when the tea was found. He said, 'there is tea, and why do you want to take'."

These two statements are somewhat at variance. The Magistrate says in his judgment that he believes Sergeant Dissanayake and P. C. Tambimuttu when they say accused admitted his possession at the time the tea was found. In criminal cases evidence of oral confession of guilt ought to be received with great caution. (*Taylor on Evidence, 10th ed., p. 605.*)

It would have been more satisfactory if the Magistrate had examined the Police Officers more fully in regard to the circumstances under which the incriminating statements as to his possession were made, and whether they were made under the influence of hope or fear. In *R. v. Thompson*, [6] Cave J., after considering the authorities, laid down the test by which the admissibility of a confession may be decided as follows: "Is it proved affirmatively that the confession was free and voluntary, that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statements were made evidence of, the statement is inadmissible."

[1] *(1876) I. L. R. 1 Cal. 215.*
[2] *(1912) 15 N. L. R. 422.*
[3] *4 C. W. R. 355.*
[4] *(1925) 27 N. L. R. 404.*
[5] *(1926) 27 N. L. R. 267.*
[6] *(1893) 2 Q. B. 12.*

I should like to draw attention to the observations of Carnduff J. in *Barindra Kumar Ghose v. Emperor* [1]: "There is, however, one remark regarding confessions which I am anxious to add before leaving the subject. For very obvious reasons there can be no surer foundation of conviction. But for equally obvious reasons, confessions have always been, and always will be regarded by Judges with suspicion, and I trust that nothing I have said in this judgment will be viewed as an incentive to the Police to aim at securing evidence of this class."

In *Queen v. Matthews*,[2] a Police Officer under cross-examination stated that the prisoner, when arrested, said that some Chinamen at the time of the occurrence came out with hatchets. In re-examination he stated that the accused used the words "at the time I struck the deceased." On objection, Field J. held that that evidence could not be given. In the course of the argument counsel for the defence preferred the whole statement made by the accused to the Police Officer to be given, as the whole statement showed that the accused did not strike the deceased with a knife. Field J. would not permit it, holding that the law was imperative in excluding what comes from an accused person in the custody of the Police, if it incriminates him.

In my opinion it would not be safe to accept the evidence of Madappen or the statement alleged to have been made to the Police Officers. The accused is a Police pensioner, who has always borne a good character.

I quash the conviction and acquit the accused.

Set aside.

[1] *(1909) I. L. R. 37 Cal. 467, at p. 515.*

[2] *(1884) I. L. R. 10 Cal. 1022.*