

1974 Present : Walgampaya, J., and Sharvananda, J.

D. E. PATHIRANA, Appellant, and G. JAYATILEKA and another, Respondents

S. C. 498/72—M. C. Anuradhapura, 34454

*Weights and Measures Ordinance (Cap. 158)—Sections 29, 41 (b), 48, 51—Charge of possessing unstamped weights—Meaning of word “possession”—Manager and his assistant—Whether the assistant’s possession is that of the Manager—Penal Code (Cap. 19), ss. 6, 25, 259.*

The 1st and 2nd accused-respondents were charged with having had in their possession, for use in a trade, certain unstamped weights in contravention of section 41 (b) of the Weights and Measures Ordinance. At the time of the discovery of the weights inside a store belonging to a co-operative society, the 1st accused, who was the Manager of the store was away but the 2nd accused, who was the Manager’s assistant, was in charge of the store.

*Held*, that the 1st accused was entitled to be acquitted and that the 2nd accused was liable to be convicted. Section 25 of the Penal Code, which provides that “when property is in the possession of a person’s wife, clerk or servant, on account of that person, it is in that person’s possession within the meaning of this Code”, can only be applied to cases arising under the Penal Code, and cannot be extended to explain possession under other statute law, like the Weights and Measures Ordinance.

*Dharmawardena v. Edirisinghe* (71 N.L.R. 261) not followed.

**A**PPEAL from a judgment of the Magistrate’s Court, Anuradhapura.

T. D. Bandaranayake, Senior State Counsel, with G. L. M. de Silva, State Counsel, for the State.

Respondents absent and unrepresented.

*Cur. adv. vult.*

February 27, 1974. SHARVANANDA, J.—

The charges against the two accused in this case are that they did at Madawachchiya M. P. C. S. Union branch at Padavi Parakramapura on the 4th day of March 1970, an area in which there was in force an order under Section 29 of the Weights and Measures Ordinance . . . . have in their possession for use in a trade to wit sale of provisions such as flour, sugar, rice, etc. weights to wit one 1 pound weight and one 2 lbs. weight which had not in the period of twelve months immediately preceding the said 4th day of March 1970 been stamped by an Inspector of Weights and Measures with the mark of verification prescribed

by Regulation 159 of the Weights and Measures Regulation 1955 and that they were thereby guilty of an offence punishable under Section 41 (b) of the Weights and Measures Ordinance (Chapter 158).

On the evidence led in the case the learned Magistrate rightly held that the 1st accused was the Manager of the said M. P. C. S. Union branch and the 2nd accused was his assistant. It will appear that the 1st accused was not at the Co-operative stores at the time of the detection on 4th March 1970, but had gone to Madawachchiya and that the 2nd accused was acting for him in the capacity of Manager and was in charge of the store in the absence of the 1st accused.

According to the evidence of the Inspector of Weights and Measures when he went to the said store he saw the 2nd accused issuing rice and he found the three unstamped weights marked P1 among other stamped weights in the section where the rice was issued. He added that he did not see these three weights being used.

Apart from the evidence of the Inspector of Weights and Measures, the case for the prosecution consisted of the evidence of the Co-operative Inspector, Madawachchiya and of the Grama Sevaka, Padavi Parakrama.

The defence did not seriously contest the evidence of the prosecution and did not lead any evidence but contented itself with relying on the judgment of De Kretser J. in *Dharmawardenu v. Edirisinghe*<sup>1</sup> reported in 71 N.L.R. 261. Following the said judgment the learned Magistrate, though he was satisfied that the charge against the accused had been established, acquitted the accused.

The only question that arises in this appeal is whether the said judgment reported in 71 N.L.R. 261 should be re-considered.

On facts very similar to the facts in this case De Kretser, J. acquitted the salesman (an employee of the C.W.E.) who was in actual possession of the unstamped weights as in his view "the possession referred to in Section 41 (b) of Chapter 158 was the possession which involves the idea of proprietorship, the right to exercise power and control over the thing possessed in contradiction to the mere physical possession by the officer in charge of the stall which is really the equivalent of custody". For this view he relies on Section 25 of the Penal Code (Chap. 19). His conclusion is based on the following reasoning. To quote his own words—"It is true that there is no definition of possession in

<sup>1</sup> (1968) 71 N. L. R. 261.

Chapter 158, but one must remember that Chapter 13 of the Penal Code also deals with offences relating to weights and measures and section 51 of Chapter 158 states that the provisions of Part 6 of Chapter 158 which commences with Section 41 are in addition to and not in substitution for the provisions of Chapter 13 of the Penal Code. In Chapter 13 of the Penal Code as well as in Part 6 of Chapter 158 there are sections dealing with offences of which the main ingredient is possession, e.g., Section 259 of Chapter 13 of the Penal Code and Section 41 (b) in Part 6 of Chapter 158 ”.

I regret to say that the above process of reasoning does not commend itself to me. It assumes that the constructive possession of the husband or employer postulated by Section 25 of the Penal Code excludes the possession of the wife or servant. Though the said section 25 says that the possession of a person's wife or servant is in certain circumstances the possession of that person it does not say that such possession is not that of the wife or servant also. Section 25 of the Penal Code defines the limits of constructive possession recognised in the Penal Code. It does not define possession as such which it leaves to the determination of the civil law.

Further Section 25 of the Penal Code can only be applied to cases arising under the Penal Code, and cannot be extended to situations arising under the provisions of other statute law. A consideration of Section 6 of the Penal Code, which appears along with Section 25 in Chapter II of the Penal Code, under the caption 'General Explanations' makes this position clear. Section 25 of the Penal Code cannot be applied to explain possession under a special statute, like the Weights and Measures Ordinance (Chapter 158). Though Part VI of Chapter 158 and Chapter XIII of the Penal Code deal with offences relating weights and measures yet they respectively deal with entirely different species of offences. The element of fraud pervades the offences dealt with by Chapter XIII of the Penal Code unlike the offences dealt with by Part VI of Chapter 158. Section 51 of Chapter 158 appears to me to be superfluous and to have been enacted *ex abundanti cautela* and no argument can be based on that section. De Krester, J. appears to me to have been in error in importing the concept of constructive possession contained in Section 25 of the Penal Code into a charge under Section 41 (b) of the Weights and Measures Ordinance. In an inquiry under Section 41 (b) of Chapter 158, the essential question is "did the accused use for the purpose of any trade or have in his possession for use in any trade the impugned weight"? Section 48 of Chapter 158 provides that any such weight found in the possession of any

person who carries on any trade or on any premises used by any person for the purposes of any trade, shall be deemed until the contrary is proved to be in the possession of that person for use in trade. This rebuttable presumption militates against the application of the doctrine of constructive possession embodied in Section 25 of the Penal Code.

In my view, the judgment reported in 71 N. L. R. 261 does not correctly set out the law and should no longer be followed.

On the facts in the case it appears that the 2nd accused was the *locum tenens* in charge of the stores in the absence of the 1st accused who was the permanent manager. At the time of detection the impugned weights P1 were found in his possession. In my view the charge against the 2nd accused has been established. I set aside the order of acquittal entered against the 2nd accused and find him guilty and order him to pay a fine of Rs. 20. In default of his paying the fine he shall undergo three weeks simple imprisonment. In my view of the circumstances it is hoped that the Union will pay out of its funds the said fine of Rs. 20 on behalf of the 2nd accused.

Since the 1st accused was absent and the 2nd accused was in control of the shop at the time P1 was found, the 1st accused cannot be said to have been in possession of the impugned weights and hence the order of acquittal entered by the learned Magistrate against him will stand and the appeal against him is dismissed.

WALGAMPAYA, J.—I agree.

*Acquittal of 1st accused upheld.*

*Acquittal of 2nd accused set aside.*