

1939

Present : Soertsz A.C.J.

PERUMAL *v.* ARUMOGAM.

50—M. C. Badulla-Haldummulla, 9,990.

Mens rea—Charge of unlawful possession of ganja—Elements of offence—*Poisons, Opium, and Dangerous Drugs Ordinance, s. 28 (Cap. 172.)*

Where a person is charged under section 28 of the *Poisons, Opium, and Dangerous Drugs Ordinance*, with having in his possession, without a licence from the Governor, a preparation or extract from the hemp plant commonly known as ganja or a resin obtained from the hemp plant.

Held, that *mens rea* was not an essential element of the offence.

Burah v. Mohamadu Sally (2. C. L. W. 381) and *Casie Chetty v. Ahamadu* (18 N. L. R. 186) referred to.

A PPEAL from an acquittal by the Magistrate of Badulla-Haldummulla.

M. T. de S. Ameresequera, K.C., S.-G. (with him D. Jansze, C.C.), for the complainant, appellant.

T. K. Curtis, for the accused, respondent.

Cur. adv. vult.

July 25, 1939. SOERTSZ A.C.J.—

The accused in this case was charged with having had in his possession, without a licence from the Governor, a preparation of, or extract from, the hemp plant commonly known as ganja, or a resin obtained from the hemp plant, an offence against section 28 of the *Poisons, Opium, and Dangerous Drugs Ordinance*.

The Magistrate found that the accused was in possession of the impeached preparations. The Analyst's report proves that "ganja" was identified in all the brands of the legium found in the possession of this accused. But the Magistrate acquitted the accused because "on the facts it is clear that the accused never knew that the preparation contained ganja".

The Magistrate took the view that *mens rea* is necessary for the constitution of this offence, and that on a person being found in possession of such a preparation as this, there is a presumption of *mens rea* which he must rebut. He relied on the judgment of *Burah v. Mohamadu Sally*¹ in which Garvin J. concluded his judgment with the observation, "upon proof of the fact of possession the *onus* lay on the appellant to show that his possession was innocent". The learned Magistrate seems to think

¹ 2 *Cey. Law Weekly* 381.

that this view is in conflict with the view taken by de Sampayo J. in *Casie Chetty v. Ahamadu*¹ but, in reality, it is not, for when de Sampayo J. said, "I am of opinion that in respect of the acts made punishable by section 43 which involves no qualifying condition, the absence of knowledge is no ground of defence", he was speaking with reference to section 43 alone, and he went on to consider section 50 of the Ordinance in its bearing on section 43 and said, "I think the circumstances give rise to the presumption created by section 50" "I do not think that he as a medical practitioner *ought* to be heard to say, or to be believed when he says, that he did not know the nature of the drug with which he was dosing his clients". Perhaps it was not quite correct to say that "in the circumstances" of that case the presumption under section 50 arose, the circumstances being the "suspicious and highly unsatisfactory" conduct of the accused when his house was searched. In my view, the presumption arose on the mere fact of possession being established, apart from and independent of the circumstances of that possession. The "circumstances" is something to consider when examining the question whether the presumption has been rebutted or not.

In the present case, the position is quite different from the cases that arose before de Sampayo and Garvin JJ. The position here is what the position would have been in those cases if section 43 of the Excise Ordinance stood without the mitigation offered by section 50. Section 28 states that no person shall have in his possession any such preparation without a licence, and section 76 penalizes such a possession, without qualification or reservation, and does not merely create a presumption of guilt. This is one of those statutory crimes in which it is unnecessary to show anything more than that the accused committed the act forbidden by the statute under which he is charged. The Legislature tends to create such offences when in its view, the damage caused to the public by the offence is great and the offence is such that there would usually be great difficulty in proving *mens rea*, if that degree of guilt was required. *Halsbury* (Vol. IX. of the Hailsham Edition at pages 11 and 12) puts the matter thus: "In a limited class of offences, *mens rea* is not an essential element. This class consists, for the most part, of statutory offences of a minor and only *quasi-criminal* character and, in order to determine whether *mens rea* is an essential element of an offence, it is necessary to look at the object and terms of the Statute which creates it". There are many English cases on this point. For example, in *Reg. v. Bishop*² it was held that keeping two lunatics without a licence was an offence although the accused did not know that the two men were lunatics; in *Hobbs v. Corporation of Winchester*³ it was held that possessing unsound meat for sale was an offence despite the fact that the butcher was not aware that it was unsound; in *Betts v. Arms-tead*⁴, *Goulder v. Rook*⁵ *Laird v. Dobell*⁶, it was held that selling an adulterated article of food was an offence although the accused did not know it was adulterated. For other instances, see *Horton v. Gwynne*⁷.

¹ 18 N. L. R. 186.

² (1879) 5 Q. B. D. 259.

³ (1910) 2 K. B. 471.

⁴ (1888) 20 Q. B. D. 771.

⁵ (1901) 2 K. B. 290.

⁶ (1906) 1 K. B. 131.

⁷ (1921) 2 K. B. 661.

As pointed out by de Sampayo J. on the authority of *Derbyshire v. Houlston*¹, if the Legislature in legislation of this character does not intend to create an absolute liability, it introduces such words as "knowingly", "intentionally", &c. The only defence in a case like this appears to be a successful denial of the fact of physical possession on the part of the accused.

As regards Common law offences, which so far as we are concerned, have been made statutory to the extent that they have been codified in our Penal Code, *mens rea* is necessary as section 72 of the Penal Code indicates. Section 38 makes section 72 applicable to offences punishable under "any law other than this Code" as well, but in my opinion, this does not mean that it necessarily applies to all offences outside the Penal Code. It is not an inflexible rule. Whether it applies or not must as I have pointed out on the authority of the cases I have referred to depend on the particular Legislative Enactment. If I may repeat myself and use the words of de Sampayo J. "there are many branches of social and municipal legislation in which an act is made criminal even without any *mens rea*". The Poisons, Opium, and Dangerous Drugs Ordinance is such an Ordinance.

For these reasons I am of opinion that the order of acquittal was wrong and I set it aside and enter conviction. In regard to the sentence to be imposed, I am of opinion that the absence of *mens rea* can properly be taken into account in that connection, and as the Magistrate took the view in this case that the accused was not aware of the composition of this preparation, I think a nominal sentence will suffice. I sentence the accused to pay a fine of Rs. 5 in default 5 days' simple imprisonment.

Set aside.

