HARI BHAJAN

v.

REGINAM

[SUPREME COURT, 1963 (MacDuff C.J.), 26th April, 3rd May]

Appellate Jurisdiction

Criminal law—*mens rea*—possession of ammunition—change of onus—Arms and Ammunition Ordinance 1961 ss. 4 (1) and (2), 36—Penal Code (Kenya) s. 319 (1)—Dangerous Drugs Ordinance (Cap. 129) s. 8 (*b*).

Criminal law—possession—knowledge of accused.

The appellant was convicted of possession of ammunition without a licence, the ammunition having been found in an unlocked suitcase in the appellant's house. The defence was that the police had placed the ammunition there. On appeal it was argued that the prosecution had failed to prove that the ammunition was knowingly in the appellant's possession.

Held.—(1) That while *mens rea* is an ingredient of an offence under s. 4 of the Arms and Ammunition Ordinance, the effect of s. 36, which provides that the occupier of any house or premises in which arms or ammunition are found shall be deemed until the contrary is proved to be the possessor of such arms or ammunition is to shift the onus of proof, where the section applies, to the accused.

(2) It was inherent in the Magistrate's finding that he found that the appellant had failed to raise a reasonable doubt that the ammunition was in his possession without his knowledge.

Cases referred to:

Sambasivam v. Public Prosecutor, Federation of Malaya [1950] A.C. 458: *R. v. Cugullere* [1961] 1 W.L.R. 858; [1961] 2 All E.R. 343: *Ismail Abdul Rihman v. R.* (1953) 20 E.A.C.A. 246: *Kandhaiyalal v. R.* [1958–59] F.L.R. 6: *Ramtullah Panju v. R.* [1943] E.A.C.A. 94: *R. v. Dewji Pragji Mehta* (1946) 13 E.A.C.A. 80: *R. v. Marsh* 2 B. & C. 717; 107 E.R. 550.

Appeal against conviction.

Ramrakha for the appellant.

Gajadhar for the Crown.

MACDUFF C.J. [3rd May, 1963]—

The appellant was convicted by the Magistrate, First Class, Ba, of—

"*Statement of Offence*

Unlicensed possession of ammunition: Contrary to section 4 (1) and (2) of the Arms Ordinance, No. 39 of 1961.

Particulars of Offence

Hari Bhajan son of Latchmi Prasad on the 6th day of October, 1962, at Lavuci, Ba, in the Western Division was in possession of four rounds of ·45 ammunition without licence."

and was sentenced to twelve months' imprisonment.

The facts briefly were that a party of police on 6th October, 1962, went to the house of the appellant at Lavuci, Ba, to execute a search warrant. The appellant was not at home and Detective Constable Abhi Manu went to Ba township where he found the appellant who accompanied Constable Abhi Manu to the appellant's house at Lavuci. The premises were then searched and during the course of the search Constable Sitiveni found the four rounds of ammunition, the subject of the charge, in an unlocked suit case and in the presence of the appellant who immediately accused the police of having " planted " the ammunition where it was found.

The first ground of appeal is—

> " That possession with knowledge was an essential element of the offence envisaged by section 4 (1) and (2) of the Arms Ordinance and the learned trial Magistrate erred in not directing his mind as to this aspect of the case and that the prosecution failed to prove this element of the offence at the trial."

Section 4 of the Arms Ordinance (*sic*) provides—

> " 4.—(1) No person shall possess, use or carry any arm or ammunition except under a licence in respect of each arm and such ammunition so possessed, used or carried and in accordance with the prescribed conditions of such licence.
>
> (2) (*a*) Any person who shall possess, use or carry any arm or ammunition without such licence shall be guilty of an offence and shall be liable on conviction in respect of every such arm or the total amount of ammunition so possessed, used or carried—
>
> (i) if the offence was committed in a prohibited area, to imprisonment for a term not exceeding ten years;
>
> (ii) if the offence was committed elsewhere, to imprisonment for a term not exceeding five years."

In addition it is provided by section 36 that—

> " The occupier of any house or premises in which any arm or ammunition is found shall be deemed until the contrary is proved to be the possessor of such arm or ammunition for the purposes of this Ordinance."

It is contended by the appellant that section 4 (1) requires that the offender must be knowingly in possession of the ammunition, that the prosecution must prove that the appellant had knowledge that the ammunition was in his house. He goes on to contend that section 36 raises the presumption of possession only and that the prosecution failed to prove, nor did the learned trial Magistrate consider, that the appellant had knowledge that the ammunition was where it was found.

Counsel for the Crown concedes that guilty knowledge is an essential ingredient of this offence, in other words that the section should be read " No person shall knowingly possess, use or carry, etc.". In *Sambasivam v. Public Prosecutor*, Federation of Malaya (1950) A.C. 458 it was held by the Privy Council that " carries " in regulation 4 (1) of the Emergency Regulations, 1948, which provides that " any person who carries . . . any firearm . . . shall be guilty of an offence " means " carries to his knowledge ", and that the carrying of a firearm by a person who did not know what he carried would not constitute an offence under this provision. Similarly in *R. v. Cugullere* (1961) 1 W.L.R. 858 it was held by the Court of Criminal Appeal that the words " has with him in any public place " in section 1 (1) of the Prevention of Crime Act, 1953, which provides that " any person who . . .

has with him in any public place any offensive weapon shall be guilty of an offence" means "knowingly has with him" and that the onus remained throughout on the Crown to prove that the accused knew the offensive weapon was in his possession. In *Ismail Abdul Rihman v. R.* (1953) 20 E.A.C.A. 246 it was held in respect of section 319 (1) of the Penal Code, Kenya, which made it an offence to "have in his possession . . . any stores so marked . . ." that knowledge or consciousness of possession was an essential ingredient of the offence. In the light of these authorities I incline to the view that *mens rea* is a necessary ingredient of the offence although to import, as counsel for the Crown would do, the word "knowingly" into the section may be going too far.

I now come to the effect of section 36 of the Ordinance. This deems the occupier of the house or premises in which an arm or ammunition is found to be the possessor of such arm or ammunition for the purposes of this Ordinance and possession for the purposes of this Ordinance can mean only one thing, possession with knowledge, or with *mens rea*. For "possession for the purposes of this Ordinance" to mean possession simpliciter in section 36 while in the offence section—4 (1)—the word "possession" should mean possession with knowledge would be to break every rule of construction.

It will be seen then that the effect of section 36 is therefore to shift the onus of proof of lack of knowledge on to the shoulders of an accused. In this context the judgment of Lowe, C.J., in the Fiji case of *Kandhaiyalal v. R.* [1958–59] F.L.R. 6 and the cases on which he based his decision fall into place. In that case he held that section 8 (*b*) of the Dangerous Drugs Ordinance (Cap. 129, Laws of Fiji) making it an offence to be in possession of Indian hemp was an absolute prohibition of possession and that it was not necessary for the prosecution to show that the accused had guilty knowledge. In my view I think the learned Chief Justice went a little further, in the words he used, than was justified by the authorities on which he relied. In the first case on which he relied, *Remtullah Panju v. R.* (1943) E.A.C.A. 94, he quoted the headnote, but the actual wording in the judgment reads—

> "As the learned judge who heard the appeal said: 'appellant admitted that gold was found upon him and under the section charged the onus was on him to prove that he came by it lawfully'. This onus could be discharged by his proving that he was under the law entitled to possess the gold or by establishing, as he endeavoured to do in his defence, that the gold had been planted on him."

The same court in a later case, *R. v. Dewji Pragji Mehta* (1946) XIII E.A.C.A. 80 considered the same wording in section 3 (1) of the Diamond Industry Protection Ordinance (Cap. 103, Laws of Tanganyika) and in a more considered judgment the court held that the finding of diamonds in the possession of a person raised a prima facie case of possession against him but that it was a good defence to prove or to raise a reasonable doubt that an accused did not know of the presence of the diamonds. From both these cases the *ratio decidendi* is that proof of possession shifts the onus of proof of lack of knowledge on to the accused. The same ratio is apparent in the dictum of Bayley, J., in *R. v. Marsh*, 2 B. & C. 717 at p. 723: 107 E.R. (K.B.) 550 to which the learned Chief Justice also referred—Bayley, J. said—

> "Then as to knowledge the clause itself does nothing about it. If that had been introduced, evidence to establish knowledge must have been given on the part of the prosecutor, but under this enactment the party charged must show a degree of ignorance sufficient to excuse him."

This I also hold to be the effect of section 36 of the Ordinance that it deems the occupier to be in knowing possession and throws on him the onus of raising a reasonable doubt as to that knowledge.

The learned trial Magistrate disbelieved the appellant's allegation that the police planted the ammunition found. It is, therefore, inherent in his finding that he also came to the conclusion that the appellant had failed to raise a reasonable doubt that the ammunition was in his possession without his knowledge.

The second ground of appeal is—

> " That the learned trial Magistrate ought to have directed that possession of ammunition by an offender under section 4 (1) and (2) of the Arms Ordinance must be that of a free man and that at the time of the search the appellant was under arrest and in custody of the police and that therefore the finding of the ammunition at his premises did not amount to possession in law."

Counsel for the appellant did not raise this defence in the Court below with the result that the learned trial Magistrate made no finding as to whether the appellant was in custody or not. From the evidence of Constable Abhi Manu it appears that the appellant accompanied him to his, the appellant's house more or less willingly. The appellant and his witness Ram Shankar gave evidence that the appellant was arrested. Since the learned trial Magistrate disbelieved the appellant entirely it follows that he must necessarily have accepted the evidence of Constable Abhi Manu that the appellant was not under arrest. There is, therefore, no basis in fact for this ground of appeal.

The appellant abandoned his appeal against sentence.

For these reasons his appeal against conviction is dismissed.

Appeal dismissed.

Solicitors for the appellant: *Koya and Co.*

Solicitor-General for the Crown.