were found was in a dilapidated condition. It is therefore possible that the articles had been hidden there by Shamrao or some other person and that the accused only knew about this. It would therefore not be right to infer from the fact that the accused knew where the articles had been hidden that he had hidden them there. It cannot therefore be stated definitely that the accused himself was in possession of these articles.

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The convictions of the accused and the sentence passed upon him are therefore, set aside and he is acquitted.

Conviction and sentence set aside.

K. B. S.

APPELLATE CRIMINAL

Before the Honourable Mr. M. C. Chagla, Chief Justice, and Mr. Justice Gajendragadkar.

STATE *v.* SIMON KAITAN FERNANDEZ (ORIGINAL ACCUSED No. 1).*

Criminal Procedure Code (Act V of 1898), s. 103—Panch witness—Rule for appreciating evidence of—Prohibition Act (Bombay Act XXV of 1949), s. 66 (b).

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In order that the Court should attach importance to the evidence of Panch witnesses it is essential that they should be independent witnesses unbiased and without being in any way under the control of the Police. If it is established that a Panch witness is likely to be a pliable agent in the hands of the Police, or is likely to be amenable to the influence of the Police, or he may be looked upon as a Police agent, it is clear that the evidence of such a witness cannot be relied upon. In deciding whether the evidence of a Panch witness should be believed or not, his status and position in life, the fact whether he is in the habit frequently of acting as a Panch and the nature of the evidence given by him are to be considered.

Criminal Appeal against the conviction and sentence passed by J. M. Barot, Esquire, Presidency Magistrate, 4th Court, Bombay.

Accused No. 1 (the appellant) was the owner of a tailoring shop at Dongri. His shop was raided by the Police on August 19, 1949 in the presence of two Panchas when 17½ drams of rectified spirit was found in the rear portion of the shop. The accused and his wife were prosecuted under s. 66 (*b*) of the Prohibition Act.

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* Criminal Appeal No. 211 of 1951.

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The defence of the accused was that the article seized in the raid was planted in his room through the rear door of the shop.

Besides the Police Officer, the Prosecution examined one Panch witness who had acted four times before as a Panch and who owned a coal shop in a different locality near the Police station there.

The learned Magistrate believed the Prosecution case and convicted accused No. 1 of the offence charged and sentenced him to 1 month's rigorous imprisonment and a fine of Rs. 300. His wife was acquitted.

Accused No. 1 appealed against the order.

S. G. K. Husseini for the appellant.

H. M. Choksi, Government Pleader for the State.

CHAGLA C. J. This is an appeal against an order passed by the learned Presidency Magistrate, 4th Court, by which he convicted the accused under section 66 (*b*) of the Prohibition Act and sentenced him to one month's rigorous imprisonment and a fine of Rs. 300 in default rigorous imprisonment for four weeks.

The case for the prosecution was that the first accused and his wife, who was acquitted by the learned Presidency Magistrate, were in possession of 17½ drams of rectified spirit and this possession was contrary to the provisions of section 66 (*b*) of the Prohibition Act. Accused No. 1, the appellant before us, is the owner of a tailoring shop and that shop was raided on August 19, 1949 at 8 p.m.. The raid took place in the presence of panchas, and according to the prosecution in the rear portion of the shop 17½ drams of rectified spirit was found, The defence of the accused was that this spirit was planted by the police through the rear door and he was innocent of the offence with which he was charged. The prosecution case was supported by the head constable Mahomed Akram and the Panch witness Trivene Ramlakhan.

It has been contended before us that in this case we should not accept the evidence of the Panch who supports the police officer and who deposes to the finding of the contraband liquor. It is very necessary that in this case we should lay down clearly how the evidence of Panch witnesses should be appreciated. This point is frequently raised before us and conflicting judgments are being cited on this point. It is unnecessary to state

how important and how valuable for the liberty of the subject the provisions with regard to search are, and the law provides that the house or the shop of a citizen cannot be searched in the absence of panchas. The Courts are bound to attach the greatest importance to the evidence of panch witnesses, and in order that the Court should attach such importance to panch witnesses it is essential that panch witnesses should be independent witnesses, unbiased and without being in any way under the control of the police. It is only when panch witnesses are independent that the liberty of the subject can be safeguarded as far as searches are concerned. If it is established that a panch witness is likely to be a pliable agent in the hands of the police or is likely to be amenable to the influence of the police or he may be looked upon as a police agent, it is clear that the evidence of such a witness cannot be relied upon. Primarily it is for the Magistrate to come to the conclusion whether a panch witness suffers from the infirmity to which we have just drawn attention. He has to appreciate evidence and, as I said, primarily it is for him to say whether the evidence of a particular panch witness should be believed or not. But the Court of appeal must be vigilant in seeing that convictions are not based upon the evidence of panch witnesses whose evidence should not be accepted as suffering from the infirmity of being in a position where they might be looked upon as police agents. In deciding whether the evidence of a panch witness should be believed or not, undoubtedly, his status and position in life should be considered. It should also be considered as to whether he is in the habit frequently of acting as a panch, because the very fact that a man constantly acts as a panch may lead to the inference that he is easily available to the police and he would be prepared to be amenable to their influence. The nature of the evidence given by the particular panch witness should also be borne in mind. The Government Pleader is right when he suggests that the mere fact that a man has acted on several occasions as a panch witness should not be sufficient by itself to lead to the inference that the man is a police agent. Take the case of a highly respectable man holding a status in life and who out of a sense of his duty to the State has gone and acted as a panch. Can it be said that a man like this should be disbelieved merely because what is established against him is the frequency with which he has acted as a panch witness?

Now, applying these tests to the present case, we find that the panch witness is the owner of a coal shop. The learned Presidency Magistrate takes the view that this establishes the status of the panch. This witness has his shop near the Phalton Road Police Station. He has admitted that he acted as a panch

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in two cases with the same police officer who investigated this offence and who made the raid, and he has also admitted that he acted as a panch in four other cases under other officers. Therefore we have here a man whose shop is situated near the police station and who has acted on some occasions as a panch prior to the case in question. We have also this important fact that although the raid took place in Dongri and the shop was situated in Dongri, the panch is taken from Phalton Road to Dongri to witness the search. Although s. 103 requires that ordinarily panch witnesses should be respectable men of the locality, we have had occasion to point out in the past that it is not always possible for the police to get men from the same locality, and therefore the mere fact that men are taken from one locality to another should not be looked upon as a factor militating against the respectability of the panch witness. But in this particular case we have a man who has acted as a panch on several occasions and who is prepared to leave his own shop and go to Dongri in order to witness a search. There is one other important factor in this case which has got to be considered in order to decide whether we should accept the evidence of the panch witness. As I said before, the defence put forward by the accused was that the liquor was planted by the police in the shop through the rear door, and in support of this evidence he called two witnesses, a tailor working with him, one, Mahomedkhan Ismailkhan, and a woman by the name of Rita Joseph Fernandez who was a customer and who said that she was present at the time when the raid took place. The panch was asked in cross-examination whether there was a rear door to the shop and the panch denied the fact of there being a rear door. Whether there is a rear door to a shop or not is an objective fact. The Government Pleader seems to think it is a matter of argument. I should have thought that nothing could be more objective than a door and nothing could be more objective than the question whether such a door exists or not. It is clear from the evidence of the panch that according to him and according to his knowledge no such door existed. Both the defence witnesses have stated that there was a rear door to this shop and the learned Magistrate in his judgment has accepted that finding, although he has disbelieved the defence theory of planting. From the point of view of the defence it will be realised that the existence of a rear door was very important because the whole defence theory was based on the existence of this rear door and the

police bringing in the liquor through the rear door and leaving it in the shop and then having a search and trying to hold the accused guilty of being in possession of this liquor. Therefore it is rather significant that this panch witness whom we are asked to believe should have so emphatically denied the existence of this rear door. The learned Presidency Magistrate concedes in his judgment that the panch witness made a mistake about this door, but he tries to explain this mistake by saying ".....but it is perhaps due to not seeing things properly with which he was not concerned or it may be a slip of memory." With great respect to the learned Magistrate, this mistake could not have been due to not seeing things properly. I should have understood the panch witness saying that he did not notice whether there was a rear door or that he did not remember whether there was a rear door or he could not say whether there was a rear door. But what the panch witness says is that there was no rear door to the said shop. As I said, it is clear evidence as to the knowledge of the panch witness, and his knowledge is that there was no rear door. It is also difficult to believe that he could not have noticed whether there was or there was not a rear door because the liquor was found in the rear portion of the shop, the search took place there, the panchnama was prepared there, the panchas were present there, and therefore the panch witness should have known whether there was or there was not a rear door. This is not a minor point nor a point of no importance, because this shows that the panch witness was anxious to support the prosecution case by denying something which was patently false. Taking all these factors into consideration we do not feel that in a case like this we should accept the evidence of the panch.

We would like to sound a note of warning to the police and to the investigating officers that as far as possible they should avoid utilising persons as panch witnesses when these persons have already acted as panchas. The City of Bombay is very large, it contains a very large population, and ordinarily there should not be much difficulty in the way of the police having different people to act as panch witnesses. This would obviate any comment from the accused that the persons acting as panch witnesses are not independent witnesses. We appreciate also the difficulty of the police and there may be cases where it may be difficult for the police to avail themselves of the services of people whom they do not know. But as far as possible they should have panch witnesses who have had nothing to do with

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the police at all, whom the police officer does not know at all, and about whose independence and impartiality there can be no question at all.

If we eliminate the evidence of the panch in this case we are only left with the evidence of the police officer, and obviously we cannot convict the accused for possession of liquor on the evidence of the police officer who raided the shop. There was also another panch who is supposed to be a baker judging by what appears in the panchnama. He was not called. It is not obligatory upon the police to call both the panch witnesses, but when one panch witness is cross-examined and when it is elicited in his cross-examination that he has acted as a panch witness before and when his evidence suffers from other infirmities, we do not see why the police should not have called the other panch witness so as to remove any doubt in this case. This is certainly a case where the benefit of the doubt should be given to the accused.

There is one other point which has been raised before us, and that is that the head constable was not authorised under s. 118 to conduct the search. It is perfectly true that the head constable without the necessary authority would not be entitled to raid the tailoring shop. But the Government Pleader has drawn our attention to the panchnama which says that it is signed by Mr. Deshpande, Sub-Inspector, and Mr. Deshpande was also cited as a witness. But for some reason Mr. Deshpande did not go into the witness-box and only the head constable Mahomed Akram went into the witness-box. The learned advocate for the accused has found some strength for his argument from the fact that the head constable says in his evidence that he raided the tailoring shop and does not refer to Sub-Inspector Deshpande at all. It is urged that even Sub-Inspector Deshpande was not authorised to raid the shop. We do not think it necessary to express any opinion on this point because in our opinion the accused is entitled to an acquittal on the merits of the case.

The result is that the order of conviction and sentence is set aside and the accused directed to be acquitted and discharged. Fine if paid to be refunded. Bail bond cancelled.

Appeal allowed.

K. B. S.