SILVA AND ANOTHER
V.
OFFICER-IN-CHARGE, POLICE STATION, TAMBUTTEGAMA AND ANOTHER

COURT OF APPEAL.
S. N. SILVA, J.
C. A. APPLICATION NO. 861/90.
M. C. ANURADHAPURA NO. 58715.
SEPTEMBER 13 AND 17, 1991.

Animals Act – Prevention of Cruelty to Animals Ordinance Seizure of animals - section 431(1) and (2) of the Code of Criminal Procedure Act., No. 15 of 1979.

Three persons were charged under the Animals Act and the Prevention of Cruelty to Animals Ordinance, with offences connected with the transport of 45 head of cattle in a lorry.

Section 431(1) of the Code of Criminal Procedure Act deals with three categories of property seized by a police officer :

1. Property taken under section 29 of the Code relating to the search of persons who are arrested,
2. Property alleged or suspected to have been stolen,
3. Property found under circumstances which create a suspicion of the commission of any offence.

The section requires the matter of delivery of property to be dealt with expeditiously.

Section 431(1) and (2) give a discretion to the magistrate to decide on the following matters with regard to property, the seizure of which is reported to him:

1. Whether the property should be kept in official custody pending the conclusion of the inquiry or trial.
2. Whether the property should be delivered to the person entitled to possession pending the conclusion of the inquiry or trial on conditions to be imposed.
3. Whether the property should be delivered to such person without conditions.

The matters set out in (1) and (2) will arise when a prosecution is pending or likely. The matter set out in (3) will arise when no prosecution is pending or likely. The discretion thus given to the magistrate must be exercised judicially i.e. according to sound principles of law and not in an arbitrary manner. In terms of section 431(1) a person entitled to the possession of property seized by police has a right to make an application for the delivery of such property to him. Such a person could be refused delivery only on the basis of an order which specifies the grounds of such refusal.

In deciding whether property should be kept in official custody the relevant matters will be, the need to identify the property in evidence, the liability to confiscation, the likelihood of speedy and natural decay and the adequacy of the facilities available to keep such property. The magistrate has to consider these matters and any other relevant matters as may be urged by either party and decide whether it is absolutely necessary to keep such property in official custody pending further proceedings. A decision to keep the property

in official custody or to release it to a claimant on conditions pending further proceedings may be reviewed by the Magistrate at any later stage on an application made by either party.

There are limitations to the principle that property must be delivered to the person from whose possession it was seized, since it may result in the property being delivered to a person who may have obtained possession through criminal means. In such an event the Magistrate may have to consider the question of title.

The order for payment of upkeep expenses of the cattle handed over by the Magistrate to a third party has no legal basis.

Compensation for any cattle that died during the custodial period and reimbursement expenses can be considered only in appropriate proceedings.

Cases referred to:

1. *Punchinona v. Hinni Appuhamy* 60 NLR 518
2. *Jayasiri v. Warnakulasuriya* 61 NLR 189
3. *Piyadasa v. Punchibanda* 62 NLR 307
4. *Costa v. Peiris* 35 NLR 326, 328
5. *Sugathapala v. Thambirajah* 67 NLR 91
6. *Balagalle v. Somaratne* 70 NLR 382
7. *Thirunayagam v. Inspector of Police Jaffna,* 74 NLR 161
8. *Freudenberg Industries Ltd. v. Dias Mechanical Engineering Ltd.* C.A. Application No. 69/79 C.A. Appeal No. 102/82, Court of Appeal Minutes of 14.7.1983.
9. *Baseva v. State of Mysore (1977) AIR (S.C. 1749, 1751)*

APPLICATION for Revision of the order of the Magistrate of Anuradhapura.

Upali Gunaratne with *Hemantha Gamage* and *Ranil Dharmasekera* for Petitioners.

Prasanna Gunatilleke S.C. for respondents.

Cur.adv.vult.

November, 29. 1991.

S. N. SILVA, J.

Three persons were charged in the above case with offences connected with the transport of 45 head of cattle in lorry bearing number 29 Sri 7904 on 29-07-1990. The offences are under

the Animals Act and the Prevention of Cruelty to Animals Ordinance and are alleged to have been committed at Moragoda on the Kurunegala-Anuradhapura Road within the police division of Thambuttegama. The offences under the Animals Act are based on the premise that there was no certificate from the Government Vetenary Surgeon in respect of the head of cattle and that there was no permit issued by the Government Agent authorising the transport. These offences are under section 3 of the Act read with the regulations made under that section. The 4th offence under the Prevention of Cruelty to Animals Ordinance is for a contravention of section 2(1)(c) by transporting cattle in a manner as to cause unnecessary pain and suffering.

The accused (who were travelling in the lorry at the time of the detection) were produced with the 45 head of cattle, the vouchers for the purchase of cattle and the lorry, in the Magistrate's Court on 30-07-1990, on a report in terms of section 136(1)(b) of the Code of Criminal Procedure Act, No. 15 of 1979. The accused pleaded not guilty to the charges and were released on cash and certified bail. On the same day, an application was made for the release of the cattle and the lorry, pending trial, on security. Learned Magistrate refused this application without giving reasons and fixed the case for trial. On 01-08-1990 a further application was made for the release of these items. Learned Magistrate refused this application as well, on the basis that the lorry is liable to confiscation and the release of the cattle "amounts to an encouragement to commit the offences again". On 03-08-1990 upon a minute made by the Registrar learned Magistrate directed that the cattle be handed over temporarily to the Chairman of the Gramodaya Mandalaya of Thantirimale in order to ensure their protection and the prevention of any cruelty to them. The order is subject to the condition that the cattle be produced when required by Court. At that stage this application in revision was filed in respect of the orders made by the learned Magistrate regarding the productions. Notice was issued on the

Respondents by this Court and the application was fixed for hearing on 02-02-1991. In the meanwhile, the trial proceeded in the Magistrate's Court and on 22-01-1991 learned Magistrate discharged the three accused without calling for a defence on the basis that the prosecution has not established a prima facie case against them. Learned Magistrate also directed that the lorry and the cattle be released to the respective claimants, who are the Petitioners to this application. It appears that the lorry was removed pursuant to this order.

When this application came up for hearing on 01-02-1991, Mr. Upali Gunaratne, Senior Counsel for the Petitioners submitted that the 2nd Petitioner went to remove the cattle pursuant to the order of the learned Magistrate and the Chairman of the Gramodaya Mandalaya of Thantirimale demanded from the Petitioner a sum of Rs. 50,000/- for looking after the cattle It was further submitted that the 2nd Petitioner bargained with the Chairman and ultimately paid a sum of Rs. 43,000/- and removed the cattle. Mr. Gunaratne undertook to file an affidavit from the 2nd Petitioner in support of this submission. Accordingly, an affidavit dated 20-01-1991 was filed by the 2nd Petitioner regarding this matter. The affidavit states that the money was demanded and taken by the Chairman as "kanu gastuwa".

When this matter came up on 19-02-1991 this Court decided to call for a report from the learned Magistrate of Anuradhapura regarding the matters stated in the affidavit of the 2nd Petitioner. The report of the learned Magistrate is dated 25-02-1991. Learned Magistrate has stated that he questioned the Chairman of the Gramodaya Mandalaya, being a Buddhist monk, and that the Chairman admitted that he recovered from the 2nd Petitioner a sum of Rs. 41,345. This sum is made up as follows:

	Rs.
Kanu gastu for 173 days	35,465/-
Transport charges	4,500/-
Ropes	900/-
Landing charges	480/-
	41,345/-

The report also discloses that in addition to the above sum, an amount of Rs. 1,125/- was charged by the Magistrate's Court as "kanu gastu" from the 2nd Petitioner for the period the cattle were kept in the Court compound.

Another matter to be noted is that the 2nd Petitioner in his affidavit stated that only 41 head of cattle were returned on the basis that 4 died whilst at Thantirimale. This statement is also supported by the report of the learned Magistrate in that kanu gastu has been charged for only 41 head of cattle.

On the aforesaid facts learned Senior Counsel for the Petitioners urged that the following matters be considered by this Court, in revision;

(1) the legality of the orders of the learned Magistrate refusing to release the productions on 30-07-1990 and 01-08-1990;

(2) the legality of the order made by the learned Magistrate handing over the cattle to the Chairman of the Gramodaya Mandalaya on 03-08-1990; and

(3) the legality of the demand and receipt of the money by the Chairman of the Gramodaya Mandalaya, pursuant to the order made by the learned Magistrate.

The foregoing matters on which submissions were made by learned Senior Counsel for the Petitioners and learned State Counsel involve the application of section 431 (1) and (2) of the Code of Criminal Procedure Act. These provisions are found in the chapter titled "the disposal of property-the subject of offences". There are two main sections in the chapter with regard to the "disposal" of property. Section 425 deals with the question of disposal of property produced before the Court, when the inquiry or trial, is concluded. This section is the same as section 413 of the former Criminal Procedure

Code. The other, is section 431 which is substantially the same as section 419 of the Criminal Procedure Code. Section 431 (1) and (2) read as follows:

"431 (1). The seizure by any police officer of property taken under section 29 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate who shall forthwith make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained respecting the custody and production of such property.

(2) If the person as entitled is known the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown the Magistrate may detain it and shall in such case publish a notification in the Court notice-board and two other public places to be decided on by the Magistrate, specifying the articles of which such property consists and requiring any person who may have a claim thereto to come before him and establish his claim within six months from the date of such public notification.

Subsection (1) deals with three categories of property seized by a police officer, namely:

(1) property taken under section 29 of the Code relating to the search of persons who are arrested;

(2) property alleged or suspected to have been stolen,

(3) property found under circumstances which create a suspicion of the commission of any offence.

It requires such seizure of property to be reported "immediately" to a Magistrate. The Magistrate is required to "forthwith" make an order respecting the delivery of such property.

It is to be noted that this section is different from the former section 419 only in one respect. That is, in this section the Magistrate is required to make the order "forthwith". It is clear from the requirement on the police to report the seizure "immediately" and the Magistrate to make an order "forthwith" that the legislature intended the matter of delivery of property to be dealt with expeditiously.

A further aspect in section 431 which is significant, is the element of discretion vested in the Magistrate. This element of discretion is manifest from the use of the words "as he thinks fit" in subsection (1) and the words "the Magistrate may order the property to be delivered to him" in subsection (2).

In the cases of *Punchinona v. Hinni Appuhamy (1)*, *Jayasiri v. Warnakulasuriya (2)*, and *Piyadasa v. Punchibanda (3)*, H. N. G. Fernando, J. (as he then was) considered the application of section 419 of the Criminal Procedure Code being the corresponding provision then in force and expressed the view that the Magistrate could order the delivery of property if he does not consider "official" custody to be necessary. Fernando, J, cited the following passage from the judgment of de Silva, AJ in the case of *Costa v. Peiris (4)*:

> "When the property seized has been removed from the possession of a person a Court has a larger discretion under section 413 as to the order it can make than it has under section 419. Under the latter section it has either to return the property to the same person or refuse to do so if it thinks it necessary to detain the property for the purposes of proceedings before it."

Following the aforesaid dicta, Fernando, J. in the three cases referred above held that if the "Magistrate does not consider official custody to be necessary he has no alternative but to order delivery back to the person from whose possession the property was seized." In other words the phrase "to the person entitled to the possession" as appearing in section 431 (1) was construed as meaning, to the person from whose possession the property was seized. As a broad principle, this construction is consistent with the dicta in India and in this country, primarily on the premise that this provision is not intended to confer a jurisdiction on the Magistrate to decide disputed claims to possession. However, there are obvious limitations to its general application, because it may result in the property being delivered to a person having no legal right to possession but obtained possession through criminal means. Hence in the later cases starting from the judgment of Sri Skandarajah, J. in *Sugathapala v. Thambirajah, (5)* 67 N.L.R. certain modifications of this principle were evolved. This trend was followed by Sirimanne, J. in the case of *Balagalle v. Somaratne, (6)* and by *Samarawickreme, J* in the case of *Thirunayagam v. Inspector of Police Jaffna (7),* In the case of *Freudenberg Industries Ltd. v. Dias Mechanical Engineering Ltd. (8),* Seneviratne, J. examined the two lines of authority and observed that the principle that property be delivered to the person who had possession of it at the time of seizure will not apply if there is an "unlawful" or "criminal" element in such possession. This observation is consistent with the current trend of authority in India as seen from the following passage in Sohoni's The Code of Criminal Procedure, 1973, 18th Edition, 1986 p4839:

> "But in determining who is entitled to possession, actual possession of the property may be a relevant factor, but not conclusive. The words "entitled" to the possession of the property" are not to be equated with actual possession or with the expression "the person from whom the property is seized or taken". Where it is proved that the person from whose possession the property

was seized came by it dishonestly, the Magistrate may have to consider the question of title. But where the person from whose possession the property was seized is not shown to have committed any offence in relation to that property which means he was lawfully in possession, he would be entitled to possession".

The provisions of our Code are based on the Indian Criminal Procedure Code of 1898 which was in force up to the enactment of the new Code of 1973. The provisions of the new Code that correspond to our sections 425 and 431 are respectively sections 452 and 457. However, in India they have always had a provision (section 516-A in the Code of 1898 and 431 in the Code of 1973) which specifically deals with the custody of property pending "the conclusion of the inquiry or trial". The absence of a similar provision in our Code is not significant considering that our Courts have interpreted section 431(1) on the basis that the Magistrate will order delivery of property seized by the Police where it is considered that "official" custody of such property is not necessary. Furthermore, section 431(2) empowers the Magistrate to order the delivery of property on such conditions as he thinks fit. Hence appropriate conditions could be placed to ensure the due production of the property when required.

On the basis of the aforesaid analysis I am of the view that section 431(1) and (2) give a discretion to the Magistrate to decide on the following matters with regard to property, the seizure of which is reported to him. They are:

(i) Whether the property should be kept in "official" custody pending the conclusion of the inquiry or trial;

(ii) Whether the property should be delivered to the person entitled to possession pending the conclusion of the inquiry or trial, on conditions to be imposed;

(iii) Whether the property should be delivered to such person without any conditions.

The matters set out in (i) and (ii) will arise when a prosecution is pending or likely. The matter set out in (iii) will arise when no prosecution is pending or likely.

The discretion thus given to the Magistrate should be exercised judicially. The following comment in Sohoni with regard to the discretion given to the Court by section 452 of the Indian Code is appropriate in this regard:

> "This section invests the Court with a discretionary power and it is a rule of law that such power must be exercised judicially, i.e. according to sound principles of law and not in an arbitrary manner." (page 4757).

In the case of *Basava Vs. State of Mysore (9),* Faizal Ali J. delivering the judgment of the Supreme Court of India made the following observation with regard to the retention of property seized, in "official" custody:

> "The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police it ought not be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government Servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases."

The observation of Faizal Ali J. is highly relevant specially in today's context when there is inadequate space in court houses for the storage of property that is seized. Property seized, decay or at times disappear, from these places of safe custody. Such events could be minimized if the discretion vested in the Magistrate by section 431(1) and (2) is properly exercised. In my view, in deciding whether property should be kept in official custody, the relevant matters will be, the need to identify the property in evidence, the liability to confisca-

tion, the likelihood of speedy and natural decay and the adequacy of the facilities that are available to keep such property. A Magistrate has to consider these matters and any other relevant matters as may be urged by either party and decide whether it is absolutely necessary to keep such property in "official" custody pending further proceedings. A decision to keep the property in official custody or to release it to a claimant on conditions pending further proceedings may be reviewed by the Magistrate at any later stage on an application made by either party.

Moving from the foregoing analysis of the provisions of section 431 (1) and (2), to the facts of this case it is seen that the first application made by the Petitioners on 30-07-1990 for the release of property was refused by the learned Magistrate without assigning any reason. This order is plainly arbitrary. It lacks the characteristics of a judicial order. In terms of section 431(1) a person entitled to the possession of property seized by the police, has a right to make an application for the delivery of such property to him. Such a person could be refused delivery only on the basis of an order which specifies the grounds of such refusal. Therefore, I hold that the first order made on 30-07-1990 is bad in law.

In the second order made on 01-08-1990 the learned Magistrate has given two reasons for the refusal of the application. The first reason with regard to the lorry being liable to confiscation is not canvassed by learned Counsel for the Petitioners, at this stage. Learned Counsel submitted that the second reason with regard to cattle does not bear scrutiny. Learned Magistrate has stated that if the cattle are released, it would be an encouragement for the commission of the offence again. I have to note that this reason assumes that the accused had committed the offence, with which they have been charged. Our law is based on a presumption of innocence which applies in criminal cases. Learned Magistrate had no basis whatever to assume that the accused had committed the offence and would commit

it again if an order for delivery is made. In this connection it is relevant to examine the offences that are contained in the charge sheet, as referred above. The possession of cattle by itself is not an offence, under our law. The offences set out in the charge sheet relate to the contravention of certain conditions imposed by law with regard to the transport of cattle. An order for delivery could well have been made subject to the condition that if the cattle are to be transported, all necessary legal requirements for such transport be fulfilled. It is thus seen that the reason given by the learned Magistrate is baseless and illegal. Therefore I hold that the order made on 01-08-1990 refusing to deliver the cattle to the 2nd Petitioner is bad in law.

The next matter relates to the order made on 03-08-1990 giving the temporary custody of cattle to the Chairman of Thantirimale Gramodaya Mandalaya. Learned Magistrate has observed that the cattle were thus handed over because there is no space in the compound of the Court to keep them. This problem would have not arisen if the learned Magistrate considered the application of section 431(1) in its proper perspective and dealt with the question whether official custody was absolutely necessary in the first instance. It is clear from the charges that the identity of the cattle was not in issue. The trial has proceeded without the cattle being brought from Thantirimale to Anuradhapura, even on one day. Cattle were not liable to confiscation. Hence it is apparent that "official" custody was totally unnecessary in this case. There was no requirement for the learned Magistrate to keep 43 head of cattle in the court compound as envisaged by him when the law empowered him to release them to the person entitled to the possession pending trial. In any event there is no power whatever in the learned Magistrate to hand over the temporary custody of cattle to a third party. Furthermore, this order handing over temporary custody has been made after the 2nd Petitioner made an application for the release of cattle to him. Hence, it was incumbent on the learned Magistrate to hear the

Petitioners before he made the order on 03-08-1990. It appears that this order has been made in chambers upon a minute made by the Registrar of the Court. In the circumstances I hold that this order is also bad in law.

The final matter relates to the recovery of money by the Chairman of the Thantirimale Gramodaya Mandalaya. It is clear that the learned Magistrate had not authorised the Chairman of the Gramodaya Mandalaya to recover the money. However, in his observations he has stated that such recovery was legal and the 2nd Petitioner was bound to pay those charges. The learned Magistrate has failed to identify the legal basis of such recovery.

I have to note that the custody of cattle was given to the Chairman by the learned Magistrate. Therefore the property is custodia legis as observed by Faizal Ali J in Basava's case (supra), at page 1752. In the circumstances any sum of money would have been recoverable only upon an order of the learned Magistrate. As noted above no such order was made and in any event there is no legal basis for the Petitioner to be ordered to pay such sums. The Petitioner has in his affidavit complained about the recovery but has not made a claim for reimbursement. In Basava's case (supra) the Supreme Court of India considered an application for compensation in respect of property that was lost in a police station when the property was in custody. The High Court which considered the application refused it on the basis that the property was not custodia legis since it was not physically produced before court. The Supreme Court reversed this decision and directed the payment of compensation. As noted above the 2nd Petitioner has not made any claim for compensation in respect of the dead cattle or for reimbursement. In the circumstances I am of the view that it is unnecessary to consider this aspect further. The question of liability for compensation and reimbursement and the person who should bear such liability would have to be examined in an appropriate application, made to a court of first instance.

Application allowed.