

MEEGAHAPOLA
v.
OFFICER-IN-CHARGE, HARBOUR POLICE, COLOMBO
AND ANOTHER

COURT OF APPEAL

GREERO, J.

C.A. 513/89

HARBOUR COURT (MAGISTRATE) H/6385

25 NOVEMBER 1991

Criminal Procedure - Disposal of productions - Code of Criminal Procedure Act, No. 15 of 1979, s.425 - Acquittal of accused - Claim to productions.

Held :

An acquittal from a charge of possession of 25 radio cassettes, does not entitle the accused to receive the productions as the Police took them from him. Under s.425(1) of the Code of Criminal Procedure Act the Court after inquiry must make such order as it thinks fit in regard to the disposal of the productions. The claimant should have satisfied Court that he was the real owner of the productions in Court. Instead, by relying on his acquittal and not adducing evidence after raising a preliminary objection, he left the Magistrate with no alternative but to confiscate the productions.

Case referred to:

(1) *Thirunayagam v. I.P. Jaffna* 74.NLR 163.

APPLICATION to revise the order of the Magistrate confiscating the productions.

S. R. Crossette Tambiah for petitioner.

A. H. M. D. Nawaz, S.C. for the Attorney-General.

Cur adv vult.

14th January, 1992.

GRERO, J.

The petitioner in this case had come to this Court by way of Revision, to set aside the order made by the learned Magistrate to confiscate the productions (25 cassette radio sets) of this case and the same be sold by public auction, and the proceeds of the sale to be credited to the revenue.

In this case, the claimant was the 5th accused and he along with four others were charged before the Harbour Court Magistrate on five counts under the Penal Code. All the accused pleaded not guilty to the charges, and the trial proceeded against them. At the end of the prosecution case, the learned Magistrate acquitted and discharged all the accused.

Regarding the productions, the learned Magistrate had postponed her order and her order dated 4.4.91 reveals that she wished to make a proper order after holding a due inquiry. But on the date of inquiry, the learned Counsel for the accused-petitioner had raised a preliminary objection against the learned Magistrate holding such inquiry. His contention was that no inquiry was necessary because there had been no counter claimants and the only claimant was the 5th accused-petitioner and therefore the production should be handed over to him as the police had recovered the production from him. He had further submitted to the learned Magistrate as the prosecution failed to prove the charges and there had been no evidence that these articles (radio sets) were missing from the ship in question, they should be handed over to his client without any inquiry.

The learned Magistrate overruled his objection and thereafter made order confiscating the productions. In her order, she had stated that the learned Counsel had informed Court that he was not calling the claimant (accused-petitioner) to give evidence regarding the productions.

When this matter came up before this Court, the learned Counsel for the accused-petitioner submitted to Court as follows:-

- (1) Proceedings do not reveal that the productions were the subject-matter of an offence.
- (2) If the productions are part of the subject-matter of an offence only the accused-petitioner must give evidence.
- (3) There is no burden on him (the petitioner) to show that these productions are his, in the absence of evidence that these productions are the subject-matter of an offence.

Therefore, his contention was, that the learned Magistrate should without holding any inquiry hand over the productions to the accused-petitioner, from whom the police recovered them.

The learned State Counsel submitted to Court that an acquittal from the charges could not be relied upon by the accused-petitioner in view of the construction of Section 425(1) of the Code of Criminal Procedure Act. He also submitted to Court that according to the evidence that had been led at the trial there was sufficient evidence before the Magistrate to show that any offence appears to have been committed. His position was that there was a duty cast on the accused-petitioner to justify his claim.

Both Counsel cited certain decided cases to support their contentions.

The learned Magistrate had made the order regarding the production after trial at that stage; section 425 of the Code of Criminal Procedure Act applied.

Section 425(1) states thus:-

"Where an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of any . . . property produced before it regarding which any offence appears to have been committed or which has been used for the commission of any offence.

Just because an accused person (like the petitioner in this case) is acquitted after trial, the Court is not bound to make an order that the productions in question should be handed over to him.

The above stated section is very clear, that the Court can make an order **which it thinks fit** before the disposal of any production involved in a criminal case. According to this section, the production in question should be either a production in respect of which any offence appears to have been committed or one which has been used for the commission of any offence.

In this case, although the learned Magistrate had acquitted all the accused including the accused-petitioner (5th accused) there was evidence that the productions in question were in respect of which an offence or offences appear to have been committed. But the learned Magistrate was not in a position to convince the accused because the Captain of the ship was not a witness at the trial. He had left the port of Colombo at the time the trial was taken up. Without his evidence possession of the articles had not been proved. Identity of the articles was also not proved. But there was evidence to show that with regard to these productions there appears that an offence would have been committed. But that alone is not sufficient unless there must be evidence regarding the possession of such articles and the identity of such articles. That evidence may have been given by the Captain of the ship if the prosecution was able to call him as a witness.

Under the above stated section, the Court is entitled to make an order regarding the productions which it thinks fit. To make a fit or suitable or proper order, a Court may hold an inquiry in respect of the productions. In this case, specially when an accused who was charged before the learned Magistrate claimed the productions, then the Magistrate is entitled to hold an inquiry into such claim and thereafter, make a **fit order** under the said section 425(1) of the Code. Leave aside an accused in a case. Even if a third party claimed such productions the learned Magistrate is entitled to hold an inquiry if he so wishes, because the provisions of the said Section do not preclude a Magistrate holding such inquiry in order to make a **fit order**.

The learned Magistrate wanted to hold an inquiry with regard to these productions before she made a fit order. But the Attorney-at-Law for the accused-claimant (the petitioner) raised objections and he had informed him that the claimant would not be giving evidence. When the claimant was not prepared to justify his claim to these productions there was no alternative for the learned Magistrate to do other than confiscating these productions and to order the sale of the same and to credit the money realised as a result of such sale.

This Court is of the view, that for the learned Magistrate to make a fit order, he or she is entitled to hold an inquiry if he or she so wishes. When the Magistrate so decided to hold an inquiry then there is a burden on the claimant to satisfy Court that, he is the real owner of the productions in question. It is not open for him to raise an objection with regard to the holding of such inquiry by the learned Magistrate. If he has a genuine claim with regard to such productions he need not fear to face any inquiry. The fact that he was acquitted at the trial alone, is not a sufficient ground to be silent and just ask Court to make an order with regard to productions in his favour. He should have satisfied Court that the productions are his articles.

There is no doubt that the learned Magistrate had decided to hold an inquiry as it appeared, that any offence has been committed although the charges were not proved beyond reasonable doubt. Because the charges were not proved beyond reasonable doubt, she acquitted the accused. That does not mean that the learned Magistrate is not entitled to hold an inquiry into the question of the disposal of productions under Section 425(1) of the Code.

In the case of *Thirunayagam v. I.P. Jaffna*⁽¹⁾ Justice Samarawickrama observed thus:

"A petitioner who makes an application to have an order of this nature set aside in revision must make out a strong case."

This Court is of the view that the petitioner in this case has not made out a strong case for this Court to set aside the learned Magistrate's order.

The cases cited by the learned Counsel for the accused-petitioner are not helpful to set aside the learned Magistrate's order.

For the above stated reasons, this Court is unable to agree with the submissions made by the learned Counsel for the accused-petitioner. This Court sees no reason to act in revision and to set aside the order of the learned Magistrate and therefore, his application is dismissed.

Application dismissed.
