

Nizar
v.
Inspector of Police, Wattagama

COURT OF APPEAL.

VYTHIALINGAM, J. AND ABDUL CADER, J.

C.A. (S.C.) 89/77—M.C., KANDY 27553.

NOVEMBER 28, 1978.

Animals Act, No. 29 of 1958, as amended by Act No. 20 of 1968, section 3A—Confiscation of vehicle used in commission of offence—Removal of proviso to section 3A by regulation under Public Security Act—Whether discretion vested in Court removed—Requirement that owner of vehicle be given an opportunity of showing cause against confiscation.

Six persons were charged for transporting buffaloes without a permit from the relevant authority in breach of regulation 1 (1) made under the Animals Act, No. 29 of 1958, and punishable under section 37 of the said Act. The persons so charged included the driver of the lorry and the owner of the buffaloes. On the latter pleading guilty to the charge, the Police withdrew the charge against the other accused who were discharged. Thereafter the Police made an application for the confiscation of the vehicle concerned in the transportation.

The Animals Act was amended by Act No. 20 of 1968 by adding the following new section:

“3A. Where any person is convicted of an offence under this part or any regulation made thereunder, any vehicle used in the commission of such offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting magistrate, to confiscation.

Provided, however, that in any case where the owner of the vehicle is a third party, no order of confiscation shall be made, if the owner proves to the satisfaction of the Court that he has taken all precautions to prevent the use of such vehicle, or that the vehicle, has been used without his knowledge, for the commission of the offence."

The proviso to the new section 3A was removed by a regulation made under the Public Security Act and published in Gazette Extraordinary No. 17 and 194/24 dated 17th December, 1975.

In the present case the Magistrate took the view that by reason of the removal of the said proviso he did not have to consider the question whether the vehicle was being used for this purpose without the owner's knowledge or whether the owner took all steps to prevent the commission of an offence. On the prosecution adducing as the reason for confiscation the fact of the conviction of the owner of the buffaloes the Court made order confiscating the vehicle. At the inquiry the owner of the lorry had however appeared and in showing the cause against confiscation given evidence that he was unaware of the transport of the said buffaloes until after the seizure of the lorry and that he had taken all precautions to prevent any violation of the regulation in question by the driver.

Held

The learned Magistrate was clearly wrong when he took the view that by reason of the removal of the proviso to section 3A by the Emergency Regulation, confiscation of the vehicle must automatically follow on conviction and that he was under no obligation to consider the cause shown by the owner. The words "be liable to confiscation" used in section 3A gave a discretion to the Magistrate whether to confiscate the vehicle or not and accordingly the owner should be given an opportunity of showing cause that he had taken all precautions against the use of his vehicle for the commission of the offence and that he was not in any way a privy to the commission of the offence. The vehicle ought not to be confiscated where the owner succeeded in showing cause.

Cases referred to

- (1) *King v. Punchi Banda*, (1942) 44 N.L.R. 327.
- (2) *Sinnetamby v. Ramalingam*, (1924) 26 N.L.R. 26.
- (3) *Perera v. Abraham (S.I., Police)*, (1962) 64 N.L.R. 456.
- (4) *Mercantile Credit Ltd. v. Sub-Inspector of Police et al.*, (1961) 66 N.L.R. 479 ; 61 C.L.W. 55.
- (5) *Excise Inspector Fernando v. Marther & Sons*, (1932) 1 C.L.W. 249.
- (6) *Rasaiah v. Thambirajah*, (1951) 53 N.L.R. 574.
- (7) *Joslin v. Bandara*, (1970) 74 N.L.R. 48.
- (8) *The Queen v. Alpin Singho*, (1959) 60 N.L.R. 455.

APPLICATION to revise an order of the Magistrate's Court, Kandy.

Nimal Senanayake, with *M. Mouseef Deen* and *K. P. Gunaratne*, for the petitioner.

R. I. Kanagaratnam, State Counsel, for the Attorney-General.

Cur. adv. vult.

February 20, 1979.

VYTHIALINGAM, J.

This is an application in revision to set aside the order made by the Magistrate confiscating a lorry number 24 Sri 6274 alleged to have been used to transport ten head of buffaloes without a valid permit from the relevant authority.

In this connection six persons including the driver of the lorry and the owner of the buffaloes were charged for transporting the buffaloes without a permit from the relevant authority in breach of Regulation 1 (1) made under the Animals Act, No. 29 of 1958, and punishable under section 37 of the said Act. The owner of the buffaloes pleaded guilty to the charge and was convicted and fined Rs. 100. Whereupon the police withdrew the charge against the other five accused and they were discharged.

Thereafter the police made an application for the confiscation of the vehicle. Section 3 of the Animals Act provides for the making of regulations inter alia for the restriction, control or regulation of the removal of animals from one Administrative District to another. Regulations were made under this section and published in Gazette Extraordinary No. 13,268 dated 20th August, 1962, setting out that "no person shall remove any animal from one Administrative District to another unless he has in his possession" the documents specified therein and a permit issued by the relevant authority. Section 3 of the Act was amended by Act No. 20 of 1964 by which, for the words "restriction", the words "prohibition and restriction" were substituted.

The *vires* of the regulation made in 1962 was challenged on the ground that it prohibited the transport of animals and the power to prohibit by regulations was only conferred in 1964 whereas the regulation itself was made in 1962. The magistrate rejected this argument on the ground that the regulation did not prohibit the transport of animals from one Administrative District to another but only regulated such transport. In this Court this argument was not pressed and I need therefore say no more about it.

In 1968 two new sub-sections were added to section 3 of the Act by Act No. 20 of 1968. One of them is as follows:—

"3A. Where any person is convicted of an offence under this part or any regulation made thereunder, any vehicle used in the commission of such offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting magistrate, to confiscation.

Provided, however, that in any case where the owner of the vehicle is a third party, no order of confiscation shall be made, if the owner proves to the satisfaction of the Court that he has taken all precautions to prevent the use of such vehicle, or that the vehicle, has been used without his knowledge, for the commission of the offence."

The petitioner who is the owner of the lorry appeared and showed cause against the confiscation. Admittedly he was not present in the lorry at the time of the detection. He was unaware of the transport of the buffaloes until after the lorry was seized by the Police. He had also stated that he had taken all precautions to prevent any violation of the regulation by the driver and that he had admonished him earlier against such transportation. Apart from stating that the driver had on previous occasions too used this vehicle without his permission and that other than advising him he had not taken any steps to prevent the commission of an offence in the future the magistrate has made no findings in regard to any of these matters set out in the proviso and deposed to by the petitioner in his evidence.

Apart from terminating the driver's services or travelling in the vehicle every time it was taken out, it is difficult to see what steps he could have taken. Imposition of penalties would be worse than useless for the fees for such transportation would have been far more than any penalty which the petitioner could reasonably have imposed. Moreover the petitioner's address is given as Dangolla, Kandy, whereas the detection was made at Wattagama and admittedly he was not present at the time of the detection and so could not have had any knowledge of such transportation.

However, the Magistrate made no finding in regard to this matter at all, for he says in his order that he does not have to decide whether the vehicle was taken without the owner's knowledge or whether the owner took all steps to prevent the commission of an offence. He was of this view because the proviso to section 3 (A) had been removed by regulation made under the Public Security Act, section 5 and published in Gazette Extraordinary No. 17 and 194/24 dated 17.12.1975. Earlier also in his order he says that by this regulation the proviso to section 3 (A) has been removed and as these regulations were in operation at the date of the offence he did not have to consider the proviso to section 3A. He concluded his order by saying that under this regulation the court had only one of two things to do, either release the vehicle or confiscate the vehicle and that if the prosecution adduced sufficient reasons for the confiscation then the court could only confiscate the vehicle and could not do anything else.

The only sufficient reason adduced by the prosecution in the case for the confiscation was the conviction of the owner of the head of cattle for an offence under the regulation. The question which arises for decision in this appeal is therefore whether the confiscation of the vehicle used in the commission of the offence

automatically follows on conviction or whether the Magistrate has still a discretion to consider the complicity of the owner in the commission of the offence before deciding whether to confiscate the vehicle or not.

It is undoubtedly true that the Emergency regulation removed the operation of the proviso to section 3A of the Act during the continuance in force of the regulation. For the regulation sets out that,

“During the continuance in force of these Regulation, the Animals Act, No. 29 of 1958, as amended by Act No. 10 of 1958 shall have effect as though for section 3A thereof, there were substituted the following section 3A:—Where any person is convicted of an offence under this Part or any regulations made thereunder, any vehicle used in the commission of such offence and any animal in respect of which such offence has been committed, shall in addition to any other punishment prescribed for such offence, be liable by order of the convicting Magistrate, to confiscation.”

The proviso has been omitted.

The question however still remains whether despite the removal of the proviso the magistrate has no discretion under this regulation to consider the circumstances of each particular case and decide whether he should confiscate the vehicle used in the commission of the offence or not; The words used are that the “vehicle.....shall.....be liable...to confiscation.” In analogous legislation it has been held that the word “liable” imports the conferment of a discretion. Thus in the case of *King v. Punchi Banda* (1) regulation 27 D (1) (b) of the Emergency Powers (Defence) Acts, 1939 and 1940, provided that for certain offences the accused shall “be liable to suffer death or imprisonment for life.” The Assize Judge was of the opinion that he had to pass either a sentence of death or of imprisonment for life that he could not pass a lesser sentence and that “the penalty was fixed irrevocably by law.” Soertsz, J. in delivering the judgment of the Court of Criminal Appeal said at page 329: “Moreover the word liable is significant and in the context, can only mean that a convicted party is in peril of a term of imprisonment that may vary and extend to the period of his mortal life.”

Similarly in the case of Ordinances which make provision for the confiscation of vehicles and articles used in the commission of offences the words “liable to confiscation” have been consistently interpreted as conferring on the magistrate a discretion to confiscate or not. One such ordinance is the Excise Ordinance

(Cap. 52) and the words used in section 54 (Ord. section 51 (2)) are "be liable to confiscation." In the case of *Sinnathamby v. Ramalingam* (2), Schneider, J. held that where an offence has been committed under the Excise Ordinance no order of confiscation should be made under section 51 of the Ordinance as regards the conveyance used to commit the offence, for example a boat or motor car, unless two things occur, first that the owner should be given an opportunity of being heard against the order and secondly that when the owner himself is not convicted of the offence no order should be made against the owner unless he is implicated in the offence which renders the thing liable to confiscation.

That view has been consistently followed ever since—vide *B. P. Perera v. M. B. Abraham (S.I. Police)* (3) ; *Mercantile Credit v. Sub-Inspector of Police et al.* (4) ; and *Excise Inspector Fernando v. Marther & Sons* (5) Another Ordinance which provides for the confiscation of vehicles used in the commission of offences under it is the Forest Ordinance (Cap. 451) section 40 and the words used again are "be liable to confiscation." In the case of *Rasiah v. Thambirajah* (6), Nagalingam, J. pointed out at page 576, "In cases where the accused person convicted is not himself the owner of the property seized, an order of confiscation without a previous inquiry would be tantamount to depriving the person of his property without an opportunity being given him to show cause against the order being made. It is one of the fundamentals of administration of justice that a person should not be deprived either of his liberty or of his property without an opportunity being given to him to show cause against such an order being made. I think that if the owner can show that the offence was committed without his knowledge and without his participation in the slightest degree justice would seem to demand that he should be restored his property."

So also in the case of *Joslin v. S. Bandara* (7), Thamotheram, J. said "The driver of the lorry pleaded guilty to a charge under the Forest Ordinance and the lorry was liable to forfeiture provided that where the owner proved to the satisfaction of the Court that he had used all precautions to prevent the use of the motor vehicle for the commission of the offence, no such order shall be made. It has not been suggested that the owner or her husband were in any way privy to the commission of the offence or had any reason to anticipate the commission of the offence. In these circumstances I am of the view that the owner had led sufficient evidence to show that all precautions which could have been taken, had been taken."

In all these Ordinances and Regulations there was no proviso similar to the proviso to section 3A of the Animals Act and the decisions in all the cases turned on an interpretation of the sections in which the words used " be liable to confiscation " is identical with the words of section 3A. It was held in all these cases that no order of confiscation should be made without giving the owner an opportunity of showing cause and that if he succeeded in showing that he had taken all precautions against the use of the vehicle for the commission of the offence and that he was not in any way a privy to the commission of the offence then the vehicle ought not to be confiscated.

It may be argued that since the proviso to section 3A of the Act was omitted in the Emergency Regulations it was the intention not to give the owner an opportunity to show cause and the confiscation should automatically follow on conviction. But this is to take a superficial view. The proviso to section 3A only provided for the showing of cause by an owner of the vehicle who is a third party, that is to say one who is himself not the offender. If one takes the view that a third party who is not himself the offender cannot now show cause, then it would follow from a consideration of the judgments cited above that an owner who is himself the offender can still show cause but a third party owner who is in no way connected with the commission of the offence cannot.

For as Nagalingam, J. pointed out in the case of *Rasihah v. Thambirajah* (*supra*) at page 375 " The order in this case would appear to have been made in terms of section 40 of the Ordinance. That section, it is true, does not prescribe for an inquiry or for any special proceedings to be taken by a Magistrate before ordering the confiscation of the property and learned Crown Counsel contends that an order of confiscation can automatically follow an order of conviction. This contention can be upheld if one limits the rule to property of the person who has been convicted of the offence. For instance if the cart belongs to the accused who was convicted in the case, the Magistrate may in exceptional circumstances directly make his order of confiscation after convicting the accused but even in such a case, as a matter of sound judicial discretion a Magistrate should make some investigation before he makes the order of confiscation, thereby affording to the owner an opportunity of being heard against the order of confiscation being made. "

So that the rule is ordinarily even where the owner is himself the offender he should, except in exceptional circumstances be given an opportunity of being heard against the order of confiscation being made. If that be so then it would be manifestly unjust

and inequitable to deprive an owner who is not himself the offender and who may be completely unaware of the use to which his vehicle is put of showing cause against the confiscation of the vehicle merely because the proviso had been removed. No law making body or regulation making authority, can be presumed to act so unreasonably.

Moreover where the identical words which have been interpreted in a particular way by the courts are retained or used in a later enactment or regulation it must be presumed that the words were used in the sense in which they had been interpreted earlier. In *The Queen v. Alpin Singho* (8), Basnayake, C. J. said at page 456 "it is a well-established rule of construction of statutes that where an Act of Parliament has received a judicial construction putting a certain meaning on its words and the Legislature in a subsequent Act *in pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put on the same words before; and unless there is something to rebut that presumption, the Act should be so construed even if the words were such that they might originally have been construed otherwise."

The fact that the proviso to section 3A was not enacted in the Emergency Regulation is not sufficient to show that the presumption has been rebutted. For since it had been held by the Courts that on an interpretation of the words "be liable to confiscation" both the owner who is convicted of the offence as well as an owner who is a third party should be afforded an opportunity of showing cause, the regulation making authority may well have been of the view that the proviso was redundant. In this connection it is significant that the Emergency Regulation made one significant change in section 3A. It provided for the confiscation of the animal in respect of which such offence was committed in addition to the confiscation of the vehicle whereas the original section 3A only provided for the confiscation of the vehicle. If it was the intention to alter the law as laid down by the Courts the simplest thing to have done was to have used some such words as "shall be confiscated" instead of the words "be liable to confiscation." That this was not done is a clear indication that the interpretation given by the Courts was still to prevail.

For these reasons I am of the view that the Magistrate was clearly wrong when he took the view that in view of the removal of the proviso to section 3A by the Emergency Regulation confiscation must automatically follow on conviction and that he was under no obligation to consider the cause shown

by the owner. On the uncontradicted evidence of the owner it is clear that he was not in the lorry at the time of the detection, he had warned the driver against the use of the lorry for any illicit purpose and that he was in no way privy to the commission of the offence. In these circumstances the vehicle was not liable to confiscation. I therefore set aside the order confiscating the vehicle and direct that it be returned to the owner.

ABDUL CADER, J.—I agree.

Application allowed.
