1964 *Present:* **Sri Skanda Rajah, J.**

G. V. SUGATHAPALA, Appellant, *and* J. K. THAMBIRAJAH, Respondent

S. C. 89/1964—M. C. Colombo, 35434/C

Property found by police under circumstances which create suspicion of the commission of an offence—Mode of disposal thereof by Magistrate—Power of Magistrate to decide disputed claims—Criminal Procedure Code, ss. 413, 419 (1).

Section 419 (1) of the Criminal Procedure Code is as follows :—

" 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 forthwith reported to a Magistrate who shall 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.

Held, that it is open to a Magistrate, when he acts under section 419 (1), to direct the property found in the possession of one person to be delivered to another person who is entitled to possess it. Section 419 has conferred jurisdiction on the Magistrate to decide who is entitled to the possession of such property. In exercising that power, the Magistrate is not deciding a civil dispute, but only the right of possession in respect of the property. In the absence of anything to show the title to the property, it should be ordered to be delivered to the person in whose possession it was when it was seized by the police.

William v. Silva (22 N. L. R. 403) followed.

Punchinona v. Hinniappuhamy (60 N. L. R. 518) and *Piyadasa v. Punchi Banda* (62 N. L. R. 307) not followed.

APPEAL from an order of the Magistrate's Court, Colombo.

No appearance for the appellant or respondent.

V. S. A. Pullenayegum, Crown Counsel, with *D. S. Wijesinghe*, Crown Counsel, as *amicus curiae*.

April 6, 1964. SRI SKANDA RAJAH, J.

The facts relevant to this appeal may be summarised as follows :

The appellant Sugathapala complained to the police that his motor car 1 Sri 4307 had been stolen from his possession on 31. 3. 1963. On 3.5.1963 the police seized the car which was in the possession of the respondent J. K. Thambirajah, who claimed to have purchased it in April, 1963, from two persons alleged to bear the names A. J. R. Fernando and K. A. Martin. The police have not been able to trace them. At the time of the seizure the car carried false number plates—1 Sri 1693—but the chassis No. FAA 21'488286 and engine No. APJML 46006 were those of car 1 Sri 4307. Also, the genuine number Plates 1 Sri 4307 were still on the car, but very cleverly concealed under the false number plates. The police produced the car before the Magistrate with their report and moved for an order for its disposal.

In short, the Magistrate was called upon to make an order under Section 419 of the Criminal Procedure Code, the relevant portion of which is reproduced below :—

> Section 419 (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 forthwith reported to a Magistrate who shall 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.

This provision and the corresponding provision of the Indian Code of Criminal Procedure, Section 523, are in identical terms.

After hearing Counsel the Magistrate, following *Punchinona v. Hinniappuhamy*[1], held that he had " no alternative but toorder the property to be delivered back to the person from whose possession it was seized ", viz., Thambirajah. It is from that order that this appeal has been taken.

When this appeal came up before me on 20.3.64, there was no appearance for either party. As my view of section 419 differed from that taken in recent decisions of this Court, I informed Mr. D. S. Wijesinghe, Crown Counsel, who was in Court, that I would very much appreciate

[1] *(1959) 60 N. L. R. 518.*

assistance. In response, Mr. Pullenayagam, Crown Counsel, appeared with him on 24.3.64 as *amicus curiae.* I am indebted to him for his assistance. Three of the cases cited by him, viz., *William v. Silva* [1], *Lakshmichand Rajmal v. Gopiksan Balmukund* [2], *Vaiyapuri Chetty v. Sinniah Chetty* [3], support my view.

In *Martin Silva v. Kanapathipillai* [4], the subject matter of the order of the Magistrate was some money. Abrahams, C.J., thought that the Magistrate had acted under Section 413 of the Criminal Procedure Code and held that that section had no application. He did not express any view regarding section 419, because his attention does not appear to have been drawn to it. He, however, went on to express the view that a criminal court should not be employed as a tribunal to investigate rival claims to property.

In *William v. Silva* [5], property seized by the police from the pocket of the accused was directed by the Magistrate to be returned to the complainant after he disbelieved the charge and discharged the accused. The accused then moved that the property be returned to him. That was refused. Thereupon the accused appealed to this Court. His appeal was dismissed for more than one reason. In the course of the judgment, Schneider, A. J., said : " ....., the Magistrate did not act upon the provision of section 413, but upon a well recognized principle that where property is brought into Court as having been in the possession of a particular person upon an allegation that an offence has been committed, it *may* order the restoration of the property to the person in whose possession it had been found (*Katha v. Meera*, 3 N. L. R. 90 ; *Thambipulle v. Ramaswamy*, 4 Balasingham Reports 89 ; *Doloswala v. Eknelligodde*, 7 S. C. D. 37)."

I have already pointed out that the Magistrate did not return the money to the accused in whose possession it was when seized by the police. In the next sentence the learned Judge continued, " *In making such an order the Magistrate may also have acted under section 419 of the Criminal Procedure Code.*"

Schneider, A.J., was therefore, of the view that when the Magistrate acts under section 419 it is open to him, " *if he thinks fit* ", to direct the property found in the possession of one person to be delivered to another person entitled to the possession thereof.

In *Costa v. Peiris* [6], de Silva, A.J., said : " 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 necessary to detain the property for the purposes of proceedings before it. The former power was referred to in *William v. Silva*, 22 N. L. R. 403, and is in accordance

[1] *(1921) 22 N. L. R 403.*
[2] *A. I. R. 1936 Bombay 171*
[3] *A. I. R. 1931 Madras 17.*
[4] *(1939) 14 C. L. W. 41.*
[5] *(1921) 22 N. L. R. 403.*
[6] *35 N. L. R. 325 ; 13 C. L. Rec. 73.*

with the decisions in the cases referred to therein. The possession of property cannot be lightly interfered with, and I do not think it has power under the section to order property seized and removed from the possession of one person to be given to another person. If a court under section 413 finds that an offence has been committed in respect of property produced before it or that it has been used for the commission of an offence, then it may make order interfering with the possession of the person from whom the property was taken. If it does not arrive at one of these findings, then the ' person entitled to possession ' is the person from whom it was taken. Any person disputing his rights must do so in civil proceedings."—35 N. L. R. at 328.

If I may say so with great respect to one who was later elevated to the Judicial Committee of the Privy Council, it is difficult to reconcile this with what the learned Judge said later on at the same page : " Under section 419 a Court has to exercise a judicial discretion. It should hear both the complainant and the accused before doing so." If the Magistrate acting under section 419 is bound to hand over the property seized to the person from whom it was taken (unless he thinks it necessary to detain it for the purposes of the proceedings before him), as stated earlier, there would be no useful purpose in hearing the complainant, though he may have " the best right to possession ", to borrow the words from Beaumont, C.J., (v. infra).

I would observe that the " judicial discretion " vested in the Magistrate by the words " as he thinks fit " is not such a limited one but includes the right to hand over the property even to the complainant if the latter establishes that he is entitled to the possession thereof. I would also point out that it is only when " the person entitled to the possession " of the property in question " cannot be ascertained " that the Magistrate can make order " respecting the custody and production " ' for the purpose of the proceedings before him ', in the words of de Silva, A. J., or ' official ' custody, in the words of H. N. G. Fernando, J., 60 N. L. R. at 519 (infra). It is for the purpose of ascertaining the person entitled to the possession of the property that the complainant is also heard.

If by the words, " the former power was referred to in *William v. Silva* ....." in the above passage de Silva, A.J. referred to the power under section 413, I would respectfully point out that Schneider, A.J., said that the order of the Magistrate was not made under section 413. If, on the other hand, he referred to the earlier words, " it has . . . . to return the property to the same person . . . ." I would also respectfully point out that in *William v. Silva* the property was returned not " to the same person " b t to the complainant.

In *Punchinona v. Hinniappuhamy*[1], H. N. G. Fernando, J., quoted the earlier of the above passages from the judgment of de Silva, A.J., in *Costa v. Peiris* (supra) and added " section 419 is not a provision which confers jurisdiction to decide disputed claims to possession."

[1] *(1959) 60 N.L.R. 518.*

The same learned Judge took the same view in *Piyadasa v. Punchi Banda*[1], decided by him on the same day as the 60 N. L. R. case and in the earlier case of *Jayasuriya v. Warnakulasuriya*[2], where he referred to *Martin Silva v. Kanapathipillai* (supra).

In the 61 N. L. R. case the original "intimation to the Court" by the police who produced the boat and asked for an order regarding its possession was that "there was a dispute between the parties claiming ownership of the boat." The police did not report that the boat was "alleged or suspected to have been stolen . . . ." In short, the seizure of the boat was not under the circumstances referred to in section 419.

No one will dispute the proposition that a criminal court cannot assume civil jurisdiction. Recently I had occasion to remark that parties cannot, even by agreement, confer civil jurisdiction on a criminal court: *Fernando v. Wijesekera*[3].

But the legislature has by section 419 conferred jurisdiction on the Magistrate to "order as he thinks fit . . . . . the delivery of *such property* (i.e., ... alleged or suspected to have been stolen . . . .) to the person entitled to the possession thereof . . . .". In the exercise of this jurisdiction he is given the power to decide as to who is entitled to the possession of such *property*. In order to decide it, he must first make investigation. In exercising that power given him by section 419, he is not deciding a civil dispute, but only the right of possession in respect of property referred to therein.

In *Lakshmichand Rajmal v. Gopikisan Balmukund* (supra) Beaumont, C.J., who too was later elevated to membership of the Judicial Committee of the Privy Council, with whom Macklin, J., agreed, said: "Under section 523 (our section 419) what the Magistrate has to consider is, who is entitled to the possession of property which has been seized by the police. 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 questions of title in order to determine the best right to possession."

In *Vaiyapuri Chetty v. Sinniah Chetty* (supra), a decision under section 517 (our section 413) at page 18: "It may therefore seem that the simple rule should be that if no crime is made out the Magistrate should return the property to the person from whom it was taken. But the rule is just too simple. Suppose, to make a common example, the accused person whom the Magistrate acquits, has pleaded that the property was foisted upon him (as in *William v. Silva* (supra)). There would then be no sense in the Magistrate telling him to keep it. Other instances can no doubt be imagined, but, except in these special cases, the Magistrate should return the property to the person from whom it was taken. The same rule is laid down in *Srinivasamurti v. Narasinhalu Naidu*, 50 Madras

[1] *(1957) 62 N. L. R. 307.* [2] *(1958) 61 N.L.R. 189.*
[3] *(1964) 66 N. L. R. 23.*

916, in almost identical terms on page 919. It should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable."

The phrase "as he thinks fit" in section 419 gives the Magistrate discretion. He should exercise such discretion judicially. In the absence of anything to show the title to the property, it should be ordered to be delivered to the person in whose possession it was when seized by the police. This Court will not interfere with the judicial discretion exercised by the Magistrate if it appears that he had applied his mind as to who was entitled to possession and come to a conclusion on the materials placed before him.

Are there such special circumstances in this case and/or did Thambirajah come by this car dishonestly ?

Recent possession of the stolen car would raise the presumption—rebuttable, no doubt—that Thambirajah was either the thief or that he received it knowing or having reason to believe that it was stolen property—that he came by the car dishonestly. This is further evidenced by the fact that the true number plates were concealed under false ones.

Sugathapala, the registered owner of the car, was entitled to its possession. Possession of a car can be transferred only in a special way. Notice of transfer signed by the vendor and vendee should be forwarded to the Registrar of Motor Vehicles. If, as was submitted by Thambirajah's Counsel to the Magistrate, Sugathapala's agents had sold the car to him, he would have insisted on Sugathapala himself signing the transfer form.

The above two questions should, therefore, be answered in the affirmative.

For these reasons, I am of opinion that Sugathapala had "the best right to possession". Therefore, I set aside the order made by the learned Magistrate and direct him to have the car delivered to Sugathapala.

Order set aside.