

**STATE GEM CORPORATION AND OTHERS**  
**v.**  
**JAYASUNDERA**

COURT OF APPEAL

YAPA, J.

C.A. NO. 1072/88

M.C. RAKWANA NO. 38031

FEBRUARY 12, 1997

OCTOBER 22, 1997

NOVEMBER 28, 1997

FEBRUARY 13, 1998

*Code of Criminal Procedure Act No. 15 of 1975 – S. 425, State Gem Corporation Act – 13 of 1971 – S. 32, 32 (3) (4), 41 – Purchase without a gem dealer's licence – Seizure of the gem by Police or Authorised Officer of the State Gem Corporation – Accused acquitted – Failure of accused to make an application to the District Court against seizure – Should the gem be forfeited to the State?*

Accused-respondent was charged in the Magistrate's court in terms of the State Gem Corporation Act, for purchasing a gem without a gem dealer's licence. The accused-respondent was acquitted. As the petitioners claimed that the gem should be forfeited to the State inquiry was held by the Magistrate. The learned Magistrate made order to hand over the gem to the accused-respondent, acting in terms of S. 425 Criminal Procedure Code.

It was contended by the petitioners that as the seizure was affected by the State Gem Corporation (SGC) with the assistance of the Police in terms of S. 32 of the SGC Act, as the accused-respondent is an aggrieved person he should have made an application against the seizure to the District Court, and due to his failure to do so the gem should be forfeited to the State.

**Held:**

1. The gem had been seized by the Police and it had not been in the custody and control of the Gem Corporation, since it had been produced in court and ordered to be kept in the custody of the Bank.

*Per Yapa, J.*

"It is unthinkable that the legislature intended to create a situation where a person is made to defend himself in a criminal case and also file a

civil action in the District court within 30 days against the seizure of the gem which is a production in a criminal case."

2. According to S. 41 of the State Gem Corporation Act provision has been made that in the event of a conviction of any person for an offence, under the Act any article in connection with which the offence was committed shall be forfeited to the State. Therefore, it would follow that when a person is acquitted, the article in question should be released.

*Per Yapa, J.*

"The accused-respondent was acquitted after trial, since there had been no proof regard to the sale of the gem or the place where the sale took place or the identity of the gem, therefore it is not logical or reasonable to make an order that the gem should be forfeited."

**Cases referred to:**

1. *Palasamy Nadar v. Lanka Tree* – 51 NLR 520.
2. *Jayawardena v. Silva* – 72 NLR 5.
3. *Kothari v. Fernando* – 74 NLR 436.

**APPLICATION** in Revision from the order of the Magistrate's Court of Rakwana.

*N. R. M. Daluwatta* PC, with *B. J. V. Silva* and *Neville Joseph* for petitioner.

*D. S. Wijesinghe* PC, with *Denzil Gunaratne* for accused-respondent.

*Cur. adv. vult.*

December 17, 1998.

**HECTOR YAPA, J.**

In this case the accused-respondent now deceased, (who has been duly substituted) was charged in the Magistrate's Court of Rakwana, in terms of the State Gem Corporation Act, No. 13 of 1971 for the contravention of a by-law framed under the said act, by purchasing a gem without a gem dealer's licence. The purchase of the gem which was a cat's eye (*Vyrodi*) valued at Rs. 8,50,000 had taken place on or about 31. 07. 1982 and the gem was a production in the case. After trial the accused-respondent was acquitted by the Magistrate

and thereafter an inquiry was held to decide the question whether the gem should be returned to the accused-respondent from whose possession it was taken. This inquiry became necessary since the petitioners claimed that the gem should be forfeited to the state in terms of section 32 (4) of the State Gem Corporation Act, for the failure of the accused-respondent to make an application to the District Court against the seizure of the gem by the State Gem Corporation. After the inquiry the learned Magistrate by his order dated 30. 09. 88 decided to hand over the gem in question to the accused-respondent acting in terms of section 425 of the Code of Criminal Procedure Act, No. 15 of 1979. It would appear from the order of the Magistrate that the acquittal of the accused-respondent from the charge levelled against him had been the basis for his decision to hand over the gem in question to the accused-respondent. In the present application, the petitioners are seeking to set aside the said order of the Magistrate releasing the gem in question to the accused-respondent.

The main submission of the learned counsel for the petitioners was that the seizure of the gem in question was affected by the 2nd petitioner, an authorized officer of the State Gem Corporation with the assistance of the Police, and the provision that is applicable is section 32 of the State Gem Corporation Act. Therefore, in terms of section 32 (3) of the said Act, the accused-respondent as an aggrieved person should have made an application against the seizure of the gem to the District Court, and due to his failure to do so, the gem in question should be forfeited to the state. It was further argued by counsel that according to the evidence available, the 2nd petitioner sought the assistance of the Police to obtain the gem from the accused-respondent and the gem was valued, packed in a bag and was sealed with the Gem Corporation seal, and thereafter on 16. 08. 1982 the Police had obtained the gem from the 2nd petitioner to be produced in court as a production in the case. Therefore, counsel submitted that the evidence clearly showed that the Police were not doing an investigation of their own but was merely assisting the State Gem Corporation. In the circumstances, it was contended by counsel that the gem in question was seized and detained by an authorized Officer of the Gem Corporation and therefore, the accused-respondent was required to make an application to the District Court in terms of section 32 (3) of the State Gem Corporation Act as an aggrieved party. Therefore, counsel submitted that the Magistrate was in error when he made the order to hand over the gem to the accused-

respondent on the basis that the gem in question was not seized by an officer of the Gem Corporation, but by the Police, and therefore, section 425 of the Code of Criminal Procedure Act would apply and in the circumstances, since the gem was taken from the possession of the accused-respondent who was acquitted of the charge, the gem should be returned to him.

On the other hand it was submitted by learned counsel for the accused-respondent that the seizure of the gem in question was not by an authorized officer of the Gem Corporation but the Police. Learned counsel referred to the following facts to show that the gem was not seized and detained by an authorized officer of the Gem Corporation :

- i. The first "B" report in the case is dated 17. 12. 1982 and it is a report made in terms of the provisions of chapter XI of the Code of Criminal Procedure Act which relates to the investigation of offences by Police officers.*
- ii. The said "B" report has been filed by Inspector Gunawardene of the Criminal Investigation Department who was the "the officer-in-charge of the investigation".*
- iii. In the said report the said "officer-in-charge of the investigation" has stated that he investigated the complaint of the 2nd petitioner made on 16. 08. 82 and summarizes the complaint made to him by the said 2nd petitioner.*
- iv. In that summary the said Inspector describes how the 2nd petitioner complained to him that he (the 2nd petitioner) arrested 5 suspects in connection with an offence of theft of a gem from a land belonging to the State, an offence punishable under section 367 of the Penal Code. The 2nd petitioner further complained that the said suspects had sold the gem to the accused-respondent.*
- v. Upon the basis of the aforesaid complaint of the 2nd petitioner to the CID, Inspector Gunawardene states that he conducted an investigation and took the gem into his custody from the accused-respondent.*

*vi. Pending inquiries Inspector Gunawardene has moved court to keep the said gem in the custody of court.*

*vii. The minute at the end of the "B" report made by the learned Magistrate in consequence of the request made by Inspector Gunawardene states that this gem is a production in the case. Further the Magistrate has ordered the office to take steps to have the gem kept in the custody of the Bank.*

Learned counsel for the accused-respondent further submitted that the gem in question was not in the custody and control of the Gem Corporation pending its disposal, but it was with the Police who had produced it in court and later the Magistrate had ordered the office to take steps to have the gem to be kept in the custody of the bank. In the circumstances learned counsel argued that the question of the accused-respondent making an application to the District Court in terms of section 32 (3) of the State Gem Corporation Act does not arise for consideration at all.

It is relevant at this stage to examine section 32 of the State Gem Corporation Act. Section 32 of the Act provides as follows:

*Section 32 (1) Any authorized officer of the Corporation may, if he has reason to believe that any offence under this Act has been or is committed, seize and detain –*

- (a) any article in connexion with which the offence is believed to have been or to be committed or which is believed to have been or to be used in or in connexion with the commission of the offence; and*
  - (b) any book, register, record or other document which in his opinion will be necessary or useful for the prosecution of any person for an offence under this Act.*
- (2) Where any authorized officer of the Corporation seizes any article under subsection (1), such article shall be kept in the custody and control of the Corporation pending its disposal as hereinafter provided.*

- (3) *Any person aggrieved by the seizure of any article by any authorized officer of the corporation under subsection (1) may, within a period of thirty days after the date of such seizure, make an application in writing against such seizure to any District Court within the local limits of whose jurisdiction such seizure was effected.*
- (4) *Where –*
- (a) *no application against the seizure of any article by any authorized officer of the Corporation under subsection (1) is made to any District Court under subsection (3) within the period specified in that subsection, such article shall be forfeited to the Republic on the expiration of that period; or*
- (b) *any application so made is dismissed by a determination of the District Court, such article shall be forfeited to the Republic as from the date of such determination.*

According to the above section it is very clear that section 32 (3) to be applicable, the seizure of the article must be by an authorized officer of the Gem Corporation and thereafter the article in question should be kept in the custody and control of the Corporation. However, in this case it would appear from the available material that the gem in question had been seized by the Police and further, the gem had not being in the custody and control of Gem Corporation, since it had been produced in court and ordered to be kept in the custody of the bank. Therefore, it is very clear that the Gem Corporation did not have the custody and control of the gem. In this situation it seems to me, as submitted by the counsel for the accused-respondent, that the question of making an application to the District Court by the accused-respondent in terms of section 32 (3) of the State Gem Corporation Act would not arise.

Further it is pertinent to consider that if the argument of learned counsel for the petitioner, that the accused-respondent should have made an application to the District Court in terms of section 32 (3)

of the said Act is accepted, it would give rise to a situation where there would be two actions, one filed in the Magistrate's Court and the other in the District Court in respect of the same matter and further it may become necessary to have the gem in question produced in both courts as a production. In addition there is also the possibility of the Magistrate's Court and the District Court making two conflicting decisions with regard to the gem in question. Therefore, in my view it is unthinkable that the legislature intended to create a situation where a person is made to defend himself in a criminal case and also file a Civil Action in the District Court within 30 days against the seizure of the gem which is a production in a criminal case.

In this case it is to be observed that the question has been raised before the Magistrate as to whether the Magistrate's Court even though it purported to acquit the accused-respondent in respect of the charge preferred against him, has the jurisdiction to act under section 425 of the Code of Criminal Procedure Act to make an order releasing the gem to the accused-respondent. The reason being that the State Gem Corporation Act is a special Act which creates a new jurisdiction, new procedure and a new remedy and therefore, the special procedure provided for the restoration of property has to be made in terms of the provisions of the State Gem Corporation Act and not under the Code of Criminal Procedure Act. In support of this contention counsel had referred to the case of *Palasamy Nadar v. Lanka Tree*<sup>(1)</sup>, *Jayawardena v. Silva*<sup>(2)</sup> and *Kothari v. Fernando*<sup>(3)</sup> decided under the Customs Ordinance, where it had been held that when goods are forfeited and seized in terms of section 125 of the Customs Ordinance, the property in the goods will be lost to their owner unless validity of the seizure is challenged by an action instituted in a competent court within a strictly limited period. However, in the present case since I am of the view that the question of making an application to the District Court by the accused-respondent in terms of section 32 (3) of the State Gem Corporation Act would not arise, these cases will have no application to the facts in this case and are clearly distinguishable.

It may be necessary to consider the claim of the petitioners that the gem which has been returned to the accused-respondent by the Magistrate should be forfeited to the state, since the accused-

respondent failed to file an application in the District Court within 30 days of the seizure of the gem, in the light of the provision made in section 41 of the State Gem Corporation Act. The section 41 provides as follows:

*A Magistrate's Court may, on the conviction of any person for an offence under this Act, make order that any article in connection with which the offence was committed or which was used in or in connection with the commission of the offence shall be forfeited to the Republic.*

According to section 41 of the State Gem Corporation Act clear provision has been made that in the event of a conviction of any person for an offence under the Act, any article in connexion with which the offence was committed shall be forfeited to the Republic. Therefore, it would follow that when a person is acquitted of the charge as in this case, the article in question should be released. In the present case if the argument put forward by counsel for the petitioners is accepted, whether the accused-respondent is acquitted or convicted, the gem in question should be forfeited. Therefore, I am unable to agree with this submission. Further in the present case after a full investigation the Police filed action against the accused-respondent and after trial he was acquitted. As stated by the Magistrate the accused-respondent was acquitted since there had been no proof regard to the sale of the gem or the place where the sale took place and the identity of the gem. Therefore, clearly the accused-respondent has not committed any offence regard to the gem in question. In other words he is an innocent person in respect of the allegation made against him relating to the gem. In the circumstances it is not logical nor reasonable to make an order that the gem in question should be forfeited. Therefore, I see no error in the order of the Magistrate releasing the gem to the accused-respondent, since it is a case in which the Magistrate could have acted under section 425 of the Code of Criminal Procedure Act.

For the above reasons, I would uphold the Magistrate's order for the restoration of the gem in question to the accused-respondent and dismiss the application of the petitioners without costs.

*Application dismissed.*