1970 *Present :* **Wijayatilake, J.**

M. H. SEYED AHAMAD, Petitioner, *and* I. P. W. FERNANDO (Chief Assistant Preventive Officer, Customs), Respondent

S.C. 447/69—Application in Revision in J. M. C. Colombo, 40860

Customs Ordinance (Cap. 235)—Sections 43, 107 (1), 129, 146, 152, 154—Criminal prosecution in respect of goods seized—Burden of proof—Withdrawal of prosecution—Discharge of accused—Proper order as to disposal of the goods seized—Evidence Ordinance, s. 106.

Where a prosecution under section 146 of the Customs Ordinance is withdrawn by the prosecuting officer even before it is closed, and the accused is thereupon discharged, the Magistrate has no power to refuse to return to the

accused the goods in respect of which the prosecution was instituted. In such a case, the refusal to return the goods to the accused cannot be justified on the ground that the remedy of the accused is under section 154 of the Customs Ordinance.

Obiter: In a criminal prosecution under the Customs Ordinance in respect of possession of unlawfully imported goods, section 152 imposes the burden on the accused person, if he is claiming the goods, to explain at least how he came to possess them. (In the present case, however, the Customs abandoned the prosecution.)

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

J. V. C. Nathaniels, for the accused-petitioner.

Ananda G. de Silva, Crown Counsel, for the complainant-respondent.

Cur. adv. vult.

January 17, 1970 WIJAYATILAKE, J.—

This is an Application by the accused-petitioner for a revision of the Order made by the Magistrate refusing to return to him the goods seized by the Customs despite his discharge by the Magistrate, in a prosecution under the Customs Ordinance in respect of these goods. The accused-petitioner was charged in the Joint Magistrate's Court of Colombo in that he did on or about 4th October 1968 within the limits of the Port of Colombo knowingly procure to be harboured restricted goods of the value of Rs. 8,896/- imported contrary to such restrictions in contravention of Sections 43, 107 (1) and 129 of Customs Ordinance, Chapter 235 read with regulation 2 made under Section 2 of the Imports and Exports Control Act, Chapter 236 as appearing in the *Government Gazette* No. 1347 of 11.1.63, and that in terms of Section 129 of the Customs Ordinance a forfeiture of Rs. 26,628 was imposed on the accused and he has failed and neglected to pay the said sum and that he is thereby guilty of an offence punishable under Section 146 of the Customs Ordinance. The goods in question included 10 parcels containing *inter alia* Dacca, Kashmir, Avvayar, and Saraswathy Sabatham sarees, 1 parcel containing Navy Fleet, Naidu and Toyo Tokoy fountain pens; and 1 Sony 9 transistor radio set made in Japan.

When the case up for trial on 14.5.69, Mr G. K. Pillai the Assistant Preventive Officer, Customs admitted that prior to the *Gazette* notification in January 1963 there was no restriction in regard to such goods. He further stated that even after the restriction referred to such goods were sold by public auction by the Customs and any member of the public could purchase and resell them. He could not say whether the goods in question had been bought at such an auction sale or whether these goods had been imported to the Island after restriction. He only entertained

a suspicion. After two other Customs Officers had given evidence the Chief Assistant Preventive Officer who was in charge of the prosecution had indicated to the Magistrate that he is not proceeding with the case. Accordingly, the accused was discharged. Thereupon, the learned Counsel for the petitioner had moved that the goods P2 to P13 which had been seized be returned to him. The learned Magistrate refused this application on the ground that the goods are no longer the property of the accused as they have been *rightly or wrongly forfeited* to the State under the provisions of the Customs Ordinance ; and that the accused has his remedy to prosecute his claim under Section 154 of the Customs Ordinance which provides that the owner or claimant shall within one month from the date of seizure give notice in writing of such claim and further furnish security to prosecute such claim before the Court having jurisdiction to entertain the same. This would be in the nature of a civil claim. Learned Crown Counsel has made a strenuous effort to justify the order of the learned Magistrate and he has been of considerable assistance to me in referring to a whole series of cases touching on certain aspects of the question in issue.—*Vide Somasunderam v. Customs*[1]; *Sangarapillai v. Customs*[2]; *A. G. v. Febbe Thanby*[3]; *A. G. v. Gnanapragasam*[4]; *A. G. v. Sathasivam*[5]; *Perera v. M. C. Negombo*[6]; *Palasamy Nadar v. Lanktree*[7]; *Henderick Appuhamy v. John Appuhamy*[8]; *Omer v. Caspersz*[9]; *A. G. v. Kadirgamar*[10]; *Tennekoon v. Customs*[11]; *Jayawardene v. Silva*[12] (Divisional Bench 61 N. L. R. 232 overruled, 65 N. L. R. 494 partly overruled).

Mr. Nathaniels, learned Counsel for the petitioner, submits that Section 43 is of no avail to the prosecution as the seizure was admittedly wrongful and therefore illegal and void in law. Section 154 would come into operation only in respect of goods which are *liable to seizure and forfeiture* and/or goods which are seized as *forfeited by operation of law*. In the instant case Mr. S. Selvaratnam, the Chief Assistant Preventive Officer, categorically indicated to Court that he could not maintain the prosecution and the accused was accordingly discharged. The prosecution was clearly based on a seizure and forfeiture which now the Customs have acknowledged to be wrongful and therefore in effect illegal and void in law. In my opinion there is much merit in the submissions of learned Counsel for the petitioner ; and as Wijeyewardene J. in *Velupillai v. The Collector of Customs*[13] observed that although the Magistrate has no jurisdiction to make an Order under section 413 of the Criminal Procedure Code, under the circumstances the only proper course to adopt would be to return the goods to the person in whose possession they were. From every point of view it would be contrary to the principles of natural

[1] *(1942) 45 N. L. R. 43.*
[2] *(1944) 45 N. L. R. 443.*
[3] *(1958) 61 N. L. R. 254.*
[4] *(1965) 68 N. L. R. 49.*
[5] *(1966) 69 N. L. R. 110.*
[6] *(1968) 75 C. L. W. 28.*
[7] *(1949) 51 N. L. R. 520.*
[8] *(1966) 69 N. L. R. 29, 32, 33.*
[9] *(1963) 65 N. L. R. 494.*
[10] *(1965) 68 N. L. R. 352.*
[11] *(1959) 61 N. L. R. 232.*
[12] *(1962) 72 N. L. R. 25.*
[13] *(1943) 45 N. L. R. 93.*

justice for the Customs to declare before the Magistrate that they are unable to prove that any offence has been committed in respect of these goods and in the same breath refuse to return such goods to the accused. I think the cases relied on by learned Crown counsel can be distinguished as in the instant case the Customs have in effect admitted the seizure to be illegal. As to whether the admission by the prosecuting officer at that stage was premature and ill-advised is another matter.

The question does arise why the Customs abandoned the prosecution even before it was closed in the light of the strong circumstantial evidence led. The productions tend to show that most of them have been imported to this country. The quantity and the stealthy manner in which they were found stacked too are strong indications that the accused was conscious of an irregular dealing. The circumstantial evidence would appear to have established a strong *prima facie* case against the accused. As for the date of importation whether it was before or after the *Gazette* notification in 1963 it would be well nigh impossible for the Crown to establish this fact. Crown Counsel submits that this being a criminal proceeding the onus in regard to every ingredient of the offence is on the Crown. In this situation there is very little chance of any accused being convicted. Are these prosecutions therefore merely a threat on persons accused who are not fully conversant with their legal rights with a view to extracting the fines imposed ? One can conceive of opportunities for bribery and corruption in this context. In my view if the prosecution has no hope whatever of establishing the charge it would be highly improper to make use of Court procedure with the object of collecting the penalty—which is three times the value of the goods—by imposing a threat of a conviction with its consequent publicity. To say the least this would be to encourage these Customs officials to interfere with the liberty of the subject in a manner which would jettison the Rule of Law, shock the public conscience and ultimately shake their confidence in the administration of justice.

As I see it, the circumstantial evidence in this case was sufficiently adequate to invoke an explanation from the accused as to how he came by this large quantity of this kind of goods. This is a fact especially within his knowledge and the Crown not being in a position to prove the date of importation of these goods to the Island I think there was a burden on the accused under section 106 of the Evidence Ordinance to explain how he came to possess these goods in such suspicious circumstances. See *Arendtz v. Wilfred Peiris*[1] which upheld the principle that when pretty stringent proof of circumstances is produced tending to support a charge against the accused, and it is evident that the accused is so situated that he could offer an explanation consistent with his innocence and he fails to offer such proof the natural conclusion is that the evidence if produced would sustain the charge instead of rebutting it. I am unable to agree with the submission that section 106 contemplates facts which in their nature are such as to be within the knowledge of the accused and

[1] *(1938) 10 C. L. W. 121.*

nobody else. The illustrations to this section do not support this narrow interpretation. Furthermore section 152 of the Customs Ordinance provides that the *onus probandi* shall be on the owner or claimer of the goods. Learned Crown Counsel has drawn my attention to the judgment of Howard C. J. in the case of *Somasunderam v. Asst. Collector of Customs* [1] where it was held that this section does not impose on an accused person the burden of proving his innocence. It applies to a case where goods have been seized for non-payment of duties and not to a criminal case. Section 152 provides that " if any goods shall be seized for non-payment of duties or any other case of forfeiture and any dispute shall arise whether the duties have been paid for the same, or whether the same have been lawfully imported, or lawfully laden or exported, the proof thereof shall be on the owner or claimer of such goods, and not on the Attorney-General or the officer who shall seize or stop the same ". It may be noted that the sections immediately prior to this section pertain to rules dealing with the proof of criminal offences. With great respect I am unable to adopt the interpretation of Howard C.J. that this section does not apply to criminal prosecutions under the Customs Ordinance. This section clearly rests the onus on the owner or claimer of the goods when *any dispute* shall arise whether the duties have been paid for the same, or *whether the same have been lawfully imported,* or lawfully laden or exported. In the instant case, I should think if the prosecuting officer did not abandon his case prematurely the onus would have shifted to the accused under this section. As I have already observed the kind of goods, the strong *prima facie* evidence that most of it has been imported, the large quantity and attempt to keep them in concealment invoke the application of Section 152. I would not go so far as to say that this section imposes a burden on the accused to prove his innocence but if he is claiming them he has to explain at least how he came to possess them although he may not be in a position to show that they are not imported and/or restricted goods. Be that as it may now that the Magistrate has discharged the accused on the application of the Customs the instant issue is in regard to the disposal of these goods. As I have indicated, in consequence of the discharge of the Accused on the application of the prosecuting officer, the resulting position is that these goods are not liable to seizure and forfeiture and that there was no forfeiture by operation of law. In the circumstances it is not incumbent upon the accused to pursue a claim under section 154. Learned Crown Counsel has stressed the principle set out in *Wilkinson v. Barking Corporation* [2] which has been referred to by Sansoni C.J. in *Hendrick Appuhamy v. John Appuhamy* [3]—" It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others ". See also *Perera v. M.C. Negombo:* [4] He accordingly submits that section 154 of the Customs Ordinance provides the remedy. But, as I have already observed, this would be to ignore the proceedings in the Magistrate's Court.

[1] *(1942) 45 N. L. R. 43.*
[2] *(1948) 1 K. B. 721.*
[3] *(1966) 69 N. L. R. 30 at p. 32.*
[4] *(1968) 75 C. L. W. 28.*

Before I conclude I am constrained to observe that it would be in the interests of the public and the officers in the Customs to revise and amend the Customs Ordinance with a view to clarifying matters controversial and closing the easy avenues of temptation, it now affords. As it is, even a *bona fide* withdrawal of a plaint (perhaps as in the instant case) can be misinterpreted.

Acting in revision I quash the Order of the learned Magistrate refusing to return the goods to the accused and I direct that these goods be restored to the accused forthwith. I award the petitioner Rs. 150 as the costs of this Application.

Order quashed.