

[IN REVISION]

1933

*Present : de Silva A.J.*COSTA *v.* PEIRIS.*P. C. Chilaw, 38,040.*

Search warrant—Order respecting property seized—Powers of Police Magistrate—Right to restore property to person from whom it is taken—Criminal Procedure Code, ss. 413 and 419.

Under section 419 of the Criminal Procedure Code a Police Magistrate has power to order property seized on a search warrant to be restored to the person from whom it was taken. Before exercising his discretion under the section the Magistrate is bound to give notice to the adverse party.

APPPLICATION to revise an order made by the Police Magistrate of Chilaw.

Hayley, K.C. (with him *Ranawake* and *R. H. E. de Silva*), for the applicant.

H. V. Perera, for the respondent.

Cur. adv. vult.

May 22, 1933. DE SILVA A.J.—

On October 26, 1932, the complainant charged the accused with criminal misappropriation of certain property which included an iron safe said to contain about Rs. 1,300 in cash. On October 29, a search warrant was issued by the learned Police Magistrate of Chilaw directing a search for the property in the house of the accused. On October 31, a return was made and among the things produced was a sum of Rs. 3,230.92, the greater part, if not all of which, was found in the safe. Inquiry into the case was fixed for November 19, 1932. On November 1, the proctor for the accused moved that a sum of Rs. 1,300 be kept in Court and that the balance of the money produced be returned to the accused. The application was supported by an affidavit by the accused in which he claimed the entire sum of Rs. 3,230.92. The learned Magistrate without notice to the complainant allowed the accused to remove a sum of Rs. 1,500 of the money in Court on the accused giving a personal bond in Rs. 3,000 for its return if called upon so to do. The complainant moves in revision that the order of the learned Magistrate be set aside and that the accused be directed to bring back the money into Court.

It is argued for the complainant that the learned Magistrate had no power to make the order in question, and, even if he had the power, that the order should not have been made.

It is necessary to examine the powers of a Police Magistrate in respect of articles seized on a search warrant. Chapter 6 of the Criminal Procedure Code deals with process to compel the production of documents and other movable property, and part B (sections 68 to 71) of that chapter relates to search warrants. Sections 68 to 70 provide for the issue of search warrants and section 71 prescribes the procedure

for the production in Court of things seized. There is no section either in part B or in the rest of the chapter providing for the disposal of the articles so seized. The "disposal of property the subject of offences" is provided for in chapter 40.

It is argued for the complainant that section 413 of chapter 40 is the only section under which the Magistrate could have acted, and that he had no power to act under the section till the trial was concluded. The section provides for the disposal of property (a) at the conclusion of the trial, (b) in respect of property produced before it, and (c) on the Court being satisfied that an offence has been committed regarding such property or that the property has been used for the commission of an offence. All these conditions must be satisfied before action can be taken under the section. Property seized on a search warrant may not conform to one or more of such conditions.

It is necessary that a Court issuing a search warrant should have a power of disposal over all the articles produced in Court, whether or not the conditions I have referred to are satisfied. Some articles produced may be utterly unnecessary for the proceedings. Unless it is altogether impossible, a view of the law ought to be taken giving a Court such a power. The only section on which such a power can be founded is section 419 and I will proceed to examine its provisions.

The section reads "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 Police 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". Fulton J. in *In re Lakshman Govind Nirgude*¹, disagreeing with earlier decisions of the Indian Courts, thought that the corresponding Indian section (which is identical with ours) applied to seizures made under a Magistrate's warrant as well as to those without a warrant. I am of the same opinion. The section directs a report to be made to the Police Magistrate of the seizure of property "found under circumstances which create suspicion of the commission of any offence". The phrase was intended primarily to cover circumstances discovered for the first time at the time of the seizure, but it is capable of a wider interpretation. The fact that the property seized conforms to the description appearing in a search warrant issued by a Police Magistrate after due consideration of facts placed before him is a circumstance sufficient to "create suspicion of the commission of an offence". I think, therefore, that section 419 is applicable to property seized on a search warrant.

Chapter 40 is headed "Of the disposal of property the subject of offences", but I do not think that the heading gives any strong indication that the sections which follow relate only to property which has been the subject of an offence. Section 413, in very clear language, relates not only to property in respect of which an offence has been committed

¹ I. L. R. 26 Bom. 552.

but also to property which has been used for the commission of an offence. The latter is not the subject of an offence, so that it appears that the heading in this chapter cannot be utilized to any great extent in the interpretation of the sections which follow.

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 it necessary to detain the property for the purposes of proceedings before it. The former power was referred to in *William v. Silva*¹ and is in accordance 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.

Frequently, it is proper not to make an order until after the conclusion of the case. In such event a Court will order that the property be kept in safe custody until the case is concluded. At that stage, if the conditions of section 413 are satisfied, order should be made under that section. If the conditions are not satisfied, if for instance property has been seized and produced in respect of which no offence has been committed and which has not been used for the commission of an offence, an order for delivery will have to be made under section 419. In other words a Court may, and frequently will, desist from making an order under section 419 until it is satisfied that section 413 is inapplicable. It cannot be so satisfied until the case is concluded.

Under section 419 a Court has to exercise a judicial discretion. It should hear both the complainant and the accused before doing so. On an application by an accused for an order of delivery of property seized, it may well be that the complainant is able to point out marks on, or other characteristics of, the property, furnishing relevant and important evidence which a Court is unable to detect for itself. It may be that the complainant is himself contemplating an application for an order in his favour under section 413. Before property seized is handed over on the giving of security an adverse party has a right to be heard on the nature of the security to be given, if on nothing else. There are numerous other reasons why both sides should be heard before the judicial discretion vested in a Court under section 419 is exercised.

It is unfortunate that in this case the complainant was not heard before an order for delivery was made. I set aside the order of the learned Magistrate. The accused has given a bond for the return when called upon of the property delivered to him, and the Magistrate will

¹ 22 N. L. R. 408.

order him to return it. He will return it, as far as it is possible, in the currency in which he received it. If the accused after bringing the property into Court makes a further application, notice will issue on the complainant who will be heard, and the learned Magistrate will apply the principles set out above in making order.

Set aside.

