

1927.

Present: Dalton J.

SUB-INSPECTOR OF POLICE, KURUNEGALA
RAN MENIKA.

638—P. C. Kurunegala, 9,873.

*Lotteries Ordinance—Forfeiture of property—Prizes of the lottery—
Powers of Court—Criminal Procedure Code, Chapter XL.*

Where a person was convicted of an offence under the Lotteries Ordinance, the Court has no power to order the forfeiture of articles in the possession of the accused said to be the prospective prizes in the lottery.

PPEAL from an order of the Police Magistrate of Kurunegala, confiscating a travelling cart, a race cart, and a bull, which were in the possession of one Herathamy, who was convicted of publishing proposals for a lottery. They were seized as the prospective prizes in the lottery, but no order was made confiscating them on the conviction of the accused. Some time later the appellants filed a petition claiming the property as theirs; and after inquiry the learned Police Magistrate made the order appealed from.

H. V. Perera (with Chelvanayagam), for appellants.

Scholman C.C., for the Crown.

January 18, 1927. DALTON J.—

This is an appeal by two persons, Ran Menika and Ukku Banda, against an order of the Police Magistrate confiscating a travelling cart, a race cart, and a bull.

It appears that one Herathamy was convicted on June 4 last under section 288 of the Penal Code of publishing proposals for a lottery and, under section 4 of the Lotteries Ordinance of 1844, of selling tickets in a lottery. This conviction was confirmed on appeal on July 20. The property, the subject of this appeal, was found in Herathamy's possession and was said to be the prospective prizes in the lottery. It was seized by the Police in the course of the proceedings, but no order was made at the conclusion of the case as contemplated by section 413 (1). It appears, although I can find no definite evidence to that effect, to have remained in Police custody.

Some time in August the two appellants filed a petition claiming the property as theirs. A date for inquiry was fixed by the Magistrate, and evidence was led.

The proceedings in the lower Court appear to have been most informal and casual, counsel before me not being able to say under what authority the petition was filed, or by what authority the

Magistrate held any inquiry. I can in fact find no petition. It is assumed, however, the Magistrate purported to proceed under some section contained in Chapter XL. of the Criminal Procedure Code. At the conclusion of the inquiry he made the order of confiscation appealed against.

1927.

DALTON J.

Sub-Inspector
of Police
Kurunegala,

Ram Maniko

The first point raised is that the appellants have no right of appeal. They are no parties to the case against Herathamy, which is the only "criminal case or matter" related to this application. They have no right of appeal derived from section 338 of the Criminal Procedure Code. It is urged, however, that, assuming the order of confiscation is made under some section of Chapter XL., the right of appeal given by section 420 (2) applies. That right clearly applies only in case of an order made under section 420. It is admitted that the order appealed from has not been made under that section, therefore, the provisions of sub-section (2) do not apply. The wording of the section is quite clear and explicit. This point was raised and dealt with in *King v. Mack*.¹

It was then urged for appellants that if they have no right of appeal, the matter be dealt with in revision as the Court had no power to make the order of confiscation. I am satisfied that there is no right of appeal here, but I am equally satisfied that the Court had no power to make the order complained of. I am disposed therefore to deal with the matter in revision.

The argument on both sides was based upon the assumption that the order of confiscation was made under some provision of Chapter XL. already referred to, and I am dealing with the matter on that footing. Crown Counsel was able to cite no section of any other Ordinance (e.g., the Lotteries Ordinance) authorizing the Court to confiscate property, the subject matter of lotteries. It was admitted that in some cases the Court was especially empowered by statute to make an order of confiscation, but there was no such power, apart from anything contained in Chapter XL. in this case.

Chapter XL. deals with the disposal of property, the subject of offences. I have read that chapter very carefully and I can find nothing in it which, in my opinion, supports the contention of Mr. Schokman. This point was raised in *De Saram v. Wijesekera*.² There the Magistrate made an order under section 413 confiscating a pistol. I entirely agree with the opinion to which Ennis J. gave expression there, that section 413 was never intended to authorize a Court to order a forfeiture in any case where there is no express penal provision in law authorizing forfeiture on the commission of any offence. As he points out, forfeiture is a punishment. Apart from section 417, which authorizes destruction of property in certain cases, the provisions of Chapter XL. give powers to regulate the possession of property.

¹ 1 *Bul.* 194.² 4 *G. W. R.* 403.

1927.

DALTON J.

*Sub-Inspector of Police,
Kurunegala,
v.
Ran Menika*

There appear to be contradictory decisions in the Indian Court on this point arising under the equivalent provisions of the Indian Code of Criminal Procedure, but the better authority appears to be that "disposal" does not include confiscation or forfeiture, as a provision of adjective law cannot authorize an encroachment on the legal rights of the owner of the property.

The Magistrate then had no power to make the order of confiscation under the provisions of Chapter XL. and it must be set aside. In the result the property will remain where it now is, it being open to the appellants in appropriate proceedings to recover the property if they can show that it is theirs. Apart from the order of confiscation, they have failed to do so in these proceedings.

Order set aside.
