
DE ALWIS v. DE ALWIS

SUPREME COURT

SAMERAWICKREMA, J., THAMOTHERAM, J. AND ISMAIL, J.

S.C. APPEAL NO. 11/79

MAY 24, 25, 1979.

Administration of Justice Law, No. 44 of 1973, section 102 - Disposal of property seized by police officer - In what circumstances may a Magistrate make order in regard to delivery of such property - Criminal Procedure Code, section 419.

The car which was the subject of the inquiry in this case was produced by the police at the Magistrate's Court, Colombo, and the police also filed a summary of the evidence of the appellant, the respondent and the respondent's son. The appellant who had been the registered owner of the car had made a complaint to the police regarding the snatching of its ignition key by the respondent's son. By an order of the Magistrate after due inquiry the appellant from whose possession the car had been taken was given custody. On an application in revision to the Court of Appeal this order was reversed and the vehicle handed to the respondent. The appellant was granted leave to appeal to the Supreme Court.

Held :

That for an order to be made for disposal of this property under section 102 of the Administration of Justice Law (which was based on section 419 of the Criminal Procedure Code) the car must have been property alleged to be stolen or suspected to have been stolen or found in circumstances which created the suspicion of the commission of any offence. As the vehicle did not fall into any of these categories the Magistrate had no jurisdiction to make an order for its disposal under this section and had no alternative but to order its return to the possession of the person from whose custody the police had apparently taken it.

APPEAL from a judgment of the Court of Appeal.*H. L. de Silva*, with *E. D. Wickremarajapaksa*, for the petitioner.*V. S. A. Pullenayagam*, with *F. Mustapha*, *Miss Fernandopulle* and *Mrs. S. Gnanakaran*, for the respondent.*Cur. adv. vult.*

July 3, 1979.

ISMAIL, J.

On 23.3.78 the police filed a report under section 102 of the Administration of Justice Law (hereinafter referred to as AJL) and produced car No. 5 Sri 2124 along with the switch key of this car at the Magistrate's Court of Colombo. Along with the report the police also filed a summary of the evidence of the appellant and of the respondent and of the respondent's son Shanthi Kumar. The police moved for a disposal of the two productions and the Magistrate after due inquiry made order that the car and the switch key be handed over to the appellant from whose custody the police had

taken possession of the car. The respondent thereupon filed papers in revision and the application for revision came up for hearing before the Court of Appeal, which Court, after arguments before it, reversed the order of the Magistrate and directed that the car and the switch key be handed over to the respondent. Subsequently the appellant had filed papers asking for leave to appeal to the Supreme Court and on leave being granted this matter was argued before us.

The facts relevant for the purpose of this appeal indicate that the car had been in the registered ownership of the appellant. There is evidence of certain monetary transactions between the two parties, and it is also in evidence that the appellant and respondent are two brothers. The appellant is unmarried and has been a heart patient for some years now. In July 1976 the appellant had gifted this car to the respondent reserving in himself life interest in the said car. The respondent denies that there was any reservation of life interest and his position is that this was an outright gift.

The appellant had been at one time a Member of Parliament and a Deputy Minister till July 1977. The evidence also discloses that the appellant has had possession and use of this car from July 1977 till the incident which had taken place on 21.3.78. During this period of time the respondent had taken the car for his use on a few occasions and returned the car thereafter to the appellant. It is also in evidence that on 12.2.78 the respondent has asked the car from the appellant to go for a funeral but the appellant has refused to give him the car. A week later when the respondent again required the car the appellant had not given the car to the respondent. No complaint whatsoever appears to have been made on this score to the police or to any other person in authority. The next occurrence in relation to this car is what is stated to have happened according to the parties on 21.3.78 when the respondent's son one Shanthy Kumar is alleged to have snatched the switch key of the car and run away, whereupon the appellant had gone to the police station in the same car after having got it started by some mechanic and made a complaint to the police requesting the police to get back the switch key from the respondent's son.

It will therefore be seen from the facts that the purpose for which the appellant went in the car to the police station on 21.3.78 was to make a complaint about the snatching of the switch key of the car by the respondent's son. It was thereafter that when the police were conducting inquiries into that complaint that from the statements of the appellant, the respondent and Shanthy Kumar

that a dispute with regard to right of possession of the car had surfaced. The police found that they were unable to bring about a settlement between the parties with regard to the conflicting claims regarding possession of the car. Thereupon the police had filed a report under section 102 of the AJL and had asked Court to make order with regard to the disposal of the car. It is to be noted that there is no indication whatsoever in the report of the police of their intention to file any action in respect of this car either against the appellant, respondent or Shanthi Kumar. The report under section 102 of the AJL is only a bald statement of facts and a request to Court to make order for disposal of the productions.

Section 102(1) of the AJL is really based on section 419 of the Criminal Procedure Code. There is a significant omission in section 102 of the AJL for it does not incorporate "the seizure by any police officer of property taken under section 29". However that omission has no impact on the matters that are in issue in the present case. Section 102(1) of the AJL reads:

"The seizure by any police officer of property 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 in respect of the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained in respect of the custody and production of such property."

Provisions of section 102 of the AJL can therefore only apply to three classes of property stipulated in that section which are,

- (1) seizure by any police officer of any property alleged to have been stolen,
- (2) seizure by any police officer of property suspected to have been stolen, or
- (3) seizure by any police officer of property found under circumstances which creates suspicion of the commission of any offence.

Therefore to invoke the procedure under section 102 of the AJL for disposal of property seized by the police one of these three conditions must exist in respect of that property. If none of these conditions exist then no application can be maintained under section 102 of the AJL, regarding the disposal of such property.

When, therefore one examines the facts of the present case one has to see whether the production of the car and the key is one warranted by section 102 of the AJL. If the facts in the present case do not come within the ambit of the three categories specified in section 102 of the AJL then clearly the Magistrate would not have jurisdiction to take order with regard to the disposal of the property under section 102, whatever other powers he might have under any other provision of law regarding disposal of property;

I have adverted to the relevant facts in this case briefly and the facts are fully dealt with both in the order of the Magistrate and in the judgment of the Court of Appeal. Applying the facts of this case to the provisions of section 102 one has to address one's mind and determine whether production of the car and the switch key in this case fall within any of the categories set out in section 102 of the AJL. To my mind the car, the possession of which appears to be so vital to both the parties, does not fall within any of the three categories described in section 102 of the AJL. The car is not property alleged to have been stolen nor is it suspected to have been stolen nor was it found under circumstances which create suspicion of the commission of any offence.

Mr. Pullenayagam in the course of his submissions referred to the definition of stolen property in section 393 of the Penal Code and to the definition of dishonest misappropriation of property in section 386 of the Penal Code and submitted that the car in question had been criminally misappropriated. From the facts it appears to us that there is no evidence to justify any inference that this car had been criminally misappropriated, particularly since all the evidence indicates that the car had been voluntarily handed over to the appellant by the respondent as far back as July 1977 from which time the appellant has had possession of the vehicle almost continuously till 21st March, 1978. I am therefore of the view that the car in question would not come into the category of property which had been criminally misappropriated. The only matter in contention between the parties is the right of possession of this car which will have to be determined in the Civil Court.

In these circumstances it appears to me that the police could not and should not have produced this car for disposal in terms of section 102 of the AJL and the Magistrate had no jurisdiction to make order for its disposal under this section. It therefore appears to me that the Magistrate had no alternative but to order the return of the car to the possession of the person from whose custody the police had apparently taken this car.

The right to possession of this car is the matter in contention between the parties. That is a matter which will have to be decided by a civil action in an appropriate form. Since section 102 of the AJL does not appear to apply to the facts of the present case it appears to be futile to embark upon a voyage of discovery to find out "The person entitled to the possession thereof....." as indicated in that section.

It appears to me that the Court of Appeal had not addressed its mind to this fundamental aspect of this case as to whether the facts of this case brought the application for disposal of the car and the switch key within the scope and ambit of section 102 of the AJL.

In the arguments at the revision application before the Court of Appeal much attention seems to have been placed upon the interpretation of the term "person entitled to the possession thereof....." as occurring in section 102 of the AJL. The Court of Appeal in its judgment has come to a finding that it was the respondent who had the right to possess this vehicle since it was gifted to him by the appellant in 1976 and has proceeded to hold that neither the document P1 nor P6 establishes that possession was with the appellant and that it was the respondent who had the legal right to possess the car. With the greatest respect; I am of the view that the interpretation of the term "person entitled to be in possession thereof....." under section 102 of the AJL does not arise for consideration in this case as the facts here clearly demonstrate that the right to the possession of this car is not one which comes within the ambit of section 102 of the AJL. On the other hand it was the appellant who had voluntarily gone to the police to make a complaint, not regarding the ownership or possession of the car but, with regard to the snatching away of the switch key of the car by the respondent's son. As against the claim for legal ownership and legal right to possession by the respondent the appellant has also placed evidence to show that from July 1977 till 21.3.78 he was more or less in continuous possession of this car and he contends that during this period it was with his permission that the respondent used the car on and off. These are matters that will have to be decided in another forum and cannot be prejudged on the facts that have transpired in the course of this case.

Since it is my view that section 102 of the AJL does not apply to the facts of this case the order made by the Court of Appeal giving possession of the car and the switch key to the respondent is accordingly quashed and the order made by the Magistrate giving possession of the car and switch key to the appellant is affirmed.

A large number of authorities interpreting certain provisions of section 419 of the Criminal Procedure Code were cited to us in the course of the arguments adduced before us together with certain authorities from the Indian Courts. I am however of the view that it is not necessary to comment on the authorities which have been cited to us in view of my finding that section 102 has no application to the facts of the present case and whatever view I might take in respect of these authorities will not be authoritatively binding and would at the most be only of persuasive value being *obiter dicta*.

I accordingly order that possession of the car and the switch key be handed over to the appellant subject to rights of parties to be determined in an appropriate action in the proper forum. The appellant will be entitled to costs in this Court and costs in the Court of Appeal.

SAMERAWICKREMA, J. — I agree.

THAMOTHERAM, J. — I agree

Appeal allowed.