

*Present:* Wood Renton C.J. and Shaw J.

**1917.**

HASSIM *v.* MUSA.

5—D. C. (Crim.) Colombo, 4,466.

*Merchandise Marks Ordinance, No. 13 of 1888—Charge under s. 3—  
Acquittal of accused—Forfeiture of property.*

Where a person charged under section 3 of the Merchandise Marks Ordinance, No. 13 of 1888, is acquitted, the Court cannot order the forfeiture of the articles in relation to which the offence was alleged to have been committed.

**T**HIS case was referred to a Bench of two Judges by Wood Renton C.J. The facts are fully set out in the judgment.

*Bawa, K.C.* (with him *F. M. de Saram*), for the appellant.—The umbrellas with the infringing trade marks are liable to forfeiture, although the accused was acquitted on the ground that he had taken all reasonable precautions, and had no reason to suspect the genuineness of the trade mark. The forfeiture is provided for by section 3, sub-section (3) (iii.), and by section 12.

Under section 12 a forfeiture may be made even if there is no conviction. Even where the owner is unknown the articles may be forfeited.

Even under section 3, sub-section (3), a forfeiture does not depend on a conviction. The Court must be satisfied that an offence was committed. In this case there is no question whatever that there has been an infringement of the trade mark.

The accused cannot sell the goods to any one. He would be committing an offence if he does so. Under section 12 the goods

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may be destroyed. Provision is also made as to forfeiture in section 15. Counsel referred to *Commissioners of Trade and Customs v. Bell*; *Sebastian on Trade Marks* 684; *Kerly, Trade Marks Act 72*. The Court has power to forfeit the goods under section 413 of the Criminal Procedure Code.

*Driberg*, for the respondent.—The mere possession of the goods is not an offence. The goods must be sold or possessed with the intention to sell (see section 6 (1) (c)). The accused may possibly send the goods over to the manufacturer who sold them to him, or he may sell them where the mark is not protected.

Section 3, sub-section (3), makes it clear that the forfeiture can only follow on a conviction for the offence with which he is charged.

This Ordinance does not provide for the forfeiture of goods under section 15; the forfeiture is under the Customs Ordinance.

The Criminal Procedure Code does not apply to this case, as special provisions as to forfeiture are made in this Ordinance. Counsel cited *Kerly, Trade Marks Act 72*; 78 L. T. 520; (1898) 2 Q. B. 19; (1890) 24 Q. B. D. 90.

*Cur. adv. vult.*

February 8, 1917. SHAW J.—

The accused in this case sold certain umbrellas manufactured in Japan, to which the complainant's trade mark had been applied, and had other similar umbrellas in his possession for the purpose of trade, which were brought before the Court by means of a search warrant.

He was charged under section 3 of the Merchandise Marks Ordinance, No. 13 of 1888, with the following offences: (a) forging the trade mark; (b) sell or exposing for sale goods to which a forged trade mark had been applied; and (c) falsely applying or causing to be falsely applied to goods the trade mark of the complainant.

The District Judge has acquitted the accused on all the charges, the ground for the acquittal on charge (b) being that mentioned in section 3 (2) (a) of the Merchandise Marks Ordinance, viz., that he had taken all reasonable precautions against committing an offence against the Ordinance, and at the time of the commission of the alleged offence he had no reason to suspect the genuineness of the trade mark.

The question reserved for the decision of a Bench of two Judges is whether, the accused having been acquitted, the District Judge can order the forfeiture of the umbrellas. The Judge has decided that he cannot. I am of opinion that the decision of the Judge is correct.

The provision for forfeiture is contained in section 3 (3) of the Ordinance. That sub-section is as follows: "Every person charged with an offence against this Ordinance may be tried by the District Court or Police Court, and shall be liable (i.) on conviction by the District Court, to simple or rigorous imprisonment for a term,

<sup>1</sup> (1902) A. C. 563.

&c.; (ii.) on summary conviction by the Police Court, to simple or rigorous imprisonment for a term, &c.; (iii.) in any case, to forfeit to His Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed."

The provision for forfeiture is a penal one, and must consequently, in accordance with the general rules of construction of statutes, be construed strictly against the forfeiture.

It will be noticed that the words of paragraph (iii.) of the sub-section are "the offence," not "an offence," clearly indicating some offence that has been previously referred to. This can, in my opinion, only mean the offence mentioned at the commencement of the sub-section, namely, the offence with which the person is charged, and which may be tried by the District Court or the Police Court, with the consequences mentioned in the sub-section. This reading is borne out by the succeeding sub-section, which provides: "The Court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the Court thinks fit."

We were pressed with an argument that section 12 of the Ordinance shows the Legislature intended any infringing articles to be destroyed, because such articles when brought before the Court on a search warrant may be ordered to be forfeited even if the owner is unknown, thus showing that a conviction is not always necessary before there can be a forfeiture. That section, however, by sub-section (2), only makes such articles liable to forfeiture in cases where the goods are such that they would have been liable to forfeiture "if the owner thereof had been convicted." This section, therefore, seems to me to be more in favour of the view taken by the District Judge than against it.

The case of *Commissioners of Trade and Customs v. Bell*<sup>1</sup> turns on a section in the New Zealand Trade Marks Act corresponding to section 15 of our Ordinance. The section absolutely prohibits the importation of infringing goods and, consequently renders them liable to be forfeited by the Customs on importation. It was argued in that case that the preamble to the section showed that it was not intended that there should be a forfeiture if the articles belonged to an innocent owner, because it indicated that the section only intended to deal with the importation of goods which, if sold, would be liable to forfeiture under the Ordinance, and that the articles, after importation by an innocent owner, might be so sold that he would not be liable to conviction, and the articles therefore not liable to forfeiture. The Court, however, held that the preamble could not be so strained to defeat the obvious intention of the Legislature, that the importation of infringing articles should be absolutely prohibited, and that the proper remedy for an innocent importer was to petition the Government, after the articles had been

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seized, to allow him to resume possession of the articles after they had been rendered innocuous. This decision does not appear to me to have any direct bearing on the point in issue in the present case, or to justify us in varying what seems to me to be the clear wording of section 3 (3).

A further argument was addressed to us that, even if the articles are not liable to forfeiture under the Merchandise Marks Ordinance, they are so under section 413 of the Criminal Procedure Code. That is a general section authorizing the Courts to make orders for the disposal of property regarding which offences have been committed, and does not appear to me to be applicable to forfeitures to the Crown, and in any case is not intended to vary a specific enactment relating to forfeiture of a particular class of articles.

In my opinion the decision on the question referred to us is correct, and the appeal on this ground should be dismissed.

WOOD RENTON C.J.—I agree.

*Appeal dismissed.*

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