

IN REVISION.

1917.

Present : Ennis J.

GOVINDEN *v.* NAGOOR PITCHÉ.

P. C. Colombo (M. C.), 6,983.

*Obstructing road—Conviction under s. 53 (4), Police Ordinance, 1865—
Forfeiture of sherbet cart causing obstruction—Criminal Procedure
Code, ss. 3, 15, and 413.*

Accused was convicted under section 53 (4) of the Police Ordinance, 1865, with obstructing a public road by a sherbet cart containing sherbet, aerated waters, &c., for sale, and was fined Rs. 5, and an order was made forfeiting the cart and its contents.

Held, that the order as to forfeiture was wrong.

“It is to be observed that if the value of the goods forfeited (about Rs. 260 in value) be regarded as coming within the term ‘pecuniary forfeiture’ in section 3 of the Criminal Procedure Code, it would seem that the punishment exceeds the amount of the fine awardable under section 53 of the Police Ordinance.”

Under section 413 of the Criminal Procedure Code an order for the disposal of property may be one of forfeiture, as when knives, guns, or clubs are used in the commission of an offence. In such a case an order that they are to be handed to the police for custody, sale, or destruction would work a forfeiture and would come within the section. Where the property belongs to a person who is not a party to the offence, it would be inequitable in most cases to make any order other than one directing the return of the property to the owner.

The question resolves itself into one of fact in each case. If, for instance, the property were “used for” obstructing passengers an order for confiscation could be made, but if it were being carried

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along the road and incidentally obstructed passengers, it cannot be said to have been "used for" the purpose of obstruction: the offence is the consequence of an unlawful user of the property on the one hand, and is incidental to a lawful use of the property on the other.

THE facts are set out in the judgment.

Tisseverasinghe for applicant.—The order is apparently made under section 413, Criminal Procedure Code. The "disposal" of property under that section cannot be held to include confiscation or forfeiture. A penal provision of that kind should be expressly enacted, and cannot be implied. When forfeiture or confiscation is intended the Legislature expressly enacts it. See sections 51 and 52 of the Excise Ordinance, 1912; sections 7, 8, and 21 of the Opium Ordinance, 1910, &c. Suppose the cart had been hired by the accused. A provision of adjective law cannot authorize an encroachment on the legal rights of the owner of the property who is not before Court.

In India, under the corresponding section 517 of the Indian Code, it has been held that such an order cannot be made. *Lakshmi Narayan Dutt v. Ureagan*,¹ *Prithwegir v. Emperor*.²

If it does include forfeiture, property used in the actual commission of the offence only comes under its purview. In case of rash driving, harness, carriage, and pony cannot be confiscated or sold, *Crown v. Ilahi Baksh*;³ nor a press when seditious matters have been printed in it, *Bhattachariya v. Emperor*;⁴ nor the gold ornaments found on the accused who was afterwards convicted of criminal breach of trust, *Queen Empress v. Fattar Chand*.⁵

Obeyesekere, C.C., for the Crown.—An order for "disposal" includes an order for forfeiture or confiscation. *In re Ishwar*.⁶

Cur. adv. vult.

November 17, 1917. ENNIS J.—

This application raises an intricate question. The accused was convicted of exposing for sale a sherbet cart containing sherbet, oranges, aerated waters, &c., on the side of a public road in such a manner as to obstruct foot passengers. On his plea of guilty he was fined Rs. 5, and an order forfeiting the cart and its contents was made. The affidavit of the accused in support of his application states that the forfeited property is about Rs. 60 in value, and is the only property and means of livelihood of the accused, who is only seventeen years of age and has to support his mother. The Magistrate explains that he has fixed the punishment to prevent

¹ 2 *Crim. L. J. R.* 273.

² 9 *Crim. L. J. R.* 539.

³ 4 *P. L. R.* 1904.

⁴ 1 *L. R.* 34 *Cal.* 986.

⁵ 1 *L. R.* 24 *Cal.* 499.

⁶ *Rat. Unrep. Cr. Cases* 492.

the accused committing the offence again, and to deter others from committing a similar offence. I need not discuss the severity of the sentence, as the application is pressed on another point. Section 53 of the Police Ordinance, No. 16 of 1865, under which the conviction is had, limits the punishment for an offence under the section to a fine not exceeding £5 (i.e., Rs. 50, see Ordinance No. 2 of 1862), or imprisonment not exceeding three months; no mention is made of a forfeiture.

Section 15 of the Criminal Procedure Code, which enumerates the punishments which a Police Court can impose, makes no mention of forfeiture, but "fine," which is mentioned, is defined by section 3 to include a "pecuniary forfeiture." The forfeiture in this case, however, is not a pecuniary forfeiture. (It is to be observed that if the value of the goods forfeited be regarded as coming within the term "pecuniary forfeiture," it would seem that the punishment exceeds the amount of fine awardable under section 53 of the Police Ordinance.) It is suggested that the Magistrate acted under section 413 of the Criminal Procedure Code, which authorizes a criminal Court to make orders "for the disposal of any document or other property produced before it regarding which any offence appears to have been committed or which has been used for the commission of any offence."

Two Indian cases have been cited in which a similar section (517) of the Indian Code was considered. In *Lakshmi Narayan Dutt v. Ureagan*,¹ articles alleged to be stolen were found in the possession of the informant. On a charge against the informant for giving false information the order forfeiting the articles was made. The High Court set aside the order, on the ground that "section 517 was never intended to authorize the disposal of property in the manner directed in this case. The object of the section is to enable the Magistrate to direct the property to be given to some person to whom it appears to belong, or to allow it to continue in the possession of the person in whose possession it was found, or to make some order of that character."

In *Bhattachariya v. Emperor*² an order confiscating a printing press on a conviction for publishing seditious articles was set aside, the Judges holding: "The first part of section (517) appears to us to have reference to cases of offences relating to property or relating to documents, e.g., where the Court directs, as in the case of theft or criminal misappropriation or offences of similar description, that the property which is stolen or misappropriated be restored to its owner. The last words of the section must refer to cases of the same nature, i.e., to instruments like guns or swords produced in Court. The Magistrate has, under section 517, power to give directions as to disposal of property or instruments produced in Court, and not to direct a forfeiture."

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Both of these cases were decided on the intention and scope of the section. It must be remembered that the section under consideration appears in the Procedure Code and not the Penal Code, and where a construction consonant with procedure is available, it would not be right to read a highly penal provision into the words of the section.

Under the section it is clear that an order for the disposal of property may be one of forfeiture, as when knives, guns, or clubs are used in the commission of an offence. In such a case an order that they are to be handed to the police for custody, sale, or destruction would work a forfeiture and would come within the section. Where the property belongs to a person who is not a party to the offence, it would be inequitable in most cases to make any order other than one directing the return of the property to the owner, so the consideration of the point can be limited conveniently to cases in which the property belongs to the accused. This appears to have been the position in both the Indian cases mentioned, but in neither of them has it been enunciated clearly when an order working a forfeiture can be made and when it cannot.

In considering the matter it is desirable to take an illustration; e.g., a baulk of timber belonging to an accused may (1) be used as a battering ram for the commission of house-breaking, and (2) be exposed on the public road in such a manner as to obstruct passengers. May an order for forfeiture be made in the one case and not in the other? The illustration sufficiently shows that the kind or value of the property does not affect the question. In my opinion the distinction lies in the words "used for." When can property properly be said to be "used for" the commission of an offence? In the case of the printing press mentioned above, the Judges added: "We are also of opinion that the press could not be said to have been used for the commission of the offence in the same way as a gun, sword, or dagger. The offence was publication and not printing, and the press is a remote instrument."

In my opinion the question resolves itself into one of fact in each case. In the illustration I have given, if the baulk of timber were used for the purpose of obstructing passengers an order for confiscation could be made, but if it were being carried along the road and incidentally obstructed passengers, through want of care in the transport or otherwise, although it may be said to have been "exposed so as to obstruct passengers," it cannot be said to have been "used for" the purpose of obstruction; the offence is the consequence of an unlawful user of the property on the one hand, and is incidental to a lawful use of the property on the other.

I doubt if any statutory offence as distinct from an offence under the Penal Code would ever, in the absence of express provision, justify an order for forfeiture. In the present case the sherbet

cart was being used for street sales, and not for the purpose of committing the offence of obstruction. In the circumstances I set aside the order for forfeiture.

Since the above was written I have seen the reports of two other Indian cases. *In re Ishwar* ¹ and *Queen Empress v. Bcera*, ² but they afford no assistance on the question as to when an order for forfeiture can be made, but they show that the section under consideration has no extensive application.

Set aside.

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