

1935

*Present : Macdonell C.J.*POLICE SERGEANT *v.* RAMAN KANGANY *et al.*370-372—*P. C. Hatton, 1,565.*

Confiscation of property—Property used for commission of offence—Statutory offence—Powers of Police Magistrate—Criminal Procedure Code, s. 413 (1).

Where a person was convicted under section 5 (2) of the Game Protection Ordinance of attempting to capture or kill a game animal without a licence,—

Held, that the Police Magistrate had no power under section 413 (1) of the Criminal Procedure Code to order the confiscation of the gun found upon the accused at the time of the offence.

A PPEAL from a conviction by the Police Magistrate of Hatton.

C. V. Ranawake, for appellant.

S. J. C. Schokman, C. C., appears as *amicus curiae*, on notice.

February 15, 1935. MACDONELL C.J.—

In this case the appellant was convicted under section 5 (2) of Ordinance No. 1 of 1909 for attempting to capture or kill a game animal without a licence. The learned Magistrate when sentencing the appellant to a fine of Rs. 50 also made order confiscating the gun found upon him at the time of the offence. The appeal against the conviction itself was

¹ 2 N. L. R. 159.

² 17 N. L. R. 238.

dismissed by my brother Garvin. I now have to determine whether the order confiscating the gun can be sustained.

The order of confiscation was made under section 413 (1) of the Criminal Procedure Code, which is as follows :—

“413. (1) When an inquiry or trial in any criminal court is concluded the court may make such order as it thinks fit 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.”

There have been a number of conflicting decisions on this section both here and in India, namely, whether the section does empower the confiscation of property which is used for the commission of any offence. In this difficulty I prefer to follow the judgment of Ennis J. in *Govinden v. Nagoor Pitche*¹. He says, “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”. With all respect I would agree with these *dicta*. When in India it became necessary to amend this section, it was amended to read “For the disposal by destruction, confiscation, or delivery of any document or other property”, thus plainly showing, so it seems to me, that the word “disposal” is in itself capable of including the notion of confiscation. The amended Indian Act was not an alteration of the law but an explanation of what the existing law meant. Ennis J. in the case cited, continues, “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 housebreaking, 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 would also respectfully concur in these passages from the judgment, and applying

¹ 20 N. L. R. 115, at p. 118.

them to the present case I would be inclined to hold that the gun here was "used for" the commission of the offence of which the appellant was convicted, and therefore liable to confiscation. Ennis J. then proceeds to say, "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". We must remember that forfeiture or confiscation is a penal provision and the power to confiscate should clearly be given by law. The offence of which the appellant has been convicted in this case is not an offence under the Penal Code, but under a special statute. That statute does not seem to give the power of confiscation, and I think it will be best if I follow the opinion just quoted of Ennis J. If that is so, then the confiscation of this gun was not authorized under section 413 (1) of the Criminal Procedure Code, and I set aside the order appealed from.

I gather that an Ordinance has been drafted for the better protection of wild animals in the Island, with a view to preventing the wanton slaughter of the same which is said to be going on at present almost unchecked. If this is so, an opportunity seems clearly to have arisen to amend the statute law on this and similar points and to give statutory power of confiscating guns and other instruments used in the unlawful pursuit of game.

Set aside.

