

1969

Present : Samerawickrame, J.

J. THIRUNAYAGHAM, Petitioner, and INSPECTOR OF POLICE,
JAFFNA, and another, Respondents

S. C. 293/68—Application in Revision in M. C. Jaffna, 33722

*Criminal Procedure Code—Section 419—Charge of theft—Acquittal of accused—
Disposal of property which was the subject-matter of the charge.*

In a prosecution for theft of certain articles the accused was acquitted on 19th March 1968. An inquiry as to whether the articles belonged to the accused or to the virtual complainant was fixed for 8th April 1968. On that day the accused failed to appear and the Magistrate, after hearing the evidence given by the complainant, made order for the delivery of the articles to the complainant. In the present application in revision the accused moved to have the order of the Magistrate set aside on the main ground that, as no offence had been committed, it was the duty of the Magistrate to have returned the articles to the person from whom they had been seized.

Held, that it is open to a Magistrate, where special circumstances exist, to order property to be delivered to a person other than the person from whose possession it was seized. There was no reason, in the present application, for the exercise of the Court's extra-ordinary powers of revision.

APPPLICATION to revise an order of the Magistrate's Court, Jaffna.

R. Manikkavasagar, for the accused-petitioner.

Lalith Rodrigo, Crown Counsel, for the Attorney-General.

L. A. T. Williams, for the 2nd complainant-respondent.

Cur. adv. vult.

August 18, 1969. SAMERAWICKRAME, J.—

The accused-petitioner has made this application for revision of the order made by the learned Magistrate directing that fishing nets and poles that had been produced in the case should be delivered to Anthony Sebamalai the virtual complainant in the case. At the trial the accused-petitioner, who stood charged with the theft of these articles, was acquitted

on 19th March, 1968. On that day he claimed the nets and the poles while the complainant made a counter-claim. The matter was fixed for inquiry for 8th April, 1968. On that date the accused-petitioner failed to appear. The complainant-respondent gave evidence on oath and stated that the nets and poles belonged to him and the learned Magistrate made order for the delivery of the nets and poles to him. The accused-petitioner has, in his petition, stated that he heard the date of inquiry as 8th May, 1968, and that when he went to the Magistrate's Court on 8th May, 1968, he found that the inquiry had been concluded and an order made in favour of the virtual complainant-respondent.

Learned Counsel appearing for the accused-petitioner submitted that as the Magistrate did not take the view that these were articles regarding which an offence had been committed he had no power to do anything else except to return them to the person from whom they had been seized. It would appear that these nets and poles had been taken by the police from the custody of one Lucille Ammah who however stated that they had been left with her three days before by the accused-petitioner. Counsel for the accused-petitioner relied on the case of *Punchinona v. Hinniappuhamy*¹ and the case of *K. Piyadasa v. R. M. Punchi Banda*². In these cases it has been laid down that the Magistrate has no power to deliver articles taken from the possession of one person to any other person on the ground that he and not the former possessor is entitled to possession. In the case of *G. V. Sugathapala v. J. K. Thambirajah*³, it was held that while, as a rule, property should be delivered to the person in whose possession it was at the time of seizure by the police, it is open to a Magistrate to order it to be delivered to some other person where there were special circumstances. This decision has been followed in the case of *W. Balagalle v. K. Somaratne*⁴. I am in agreement with the view that it is open to a Magistrate, where special circumstances exist, to order property to be delivered to a person other than the person from whose possession it was seized.

In this case, on 8th April, 1968, when the Magistrate held an inquiry, the accused-petitioner, who had made a claim orally to the fishing nets and poles, was not present. The virtual complainant-respondent was present. He gave evidence on oath and stated that he was the owner of these nets and poles. At the trial, though the accused-petitioner was acquitted, the learned Magistrate who tried the case had not disbelieved the complainant's evidence that he was the owner of the nets and poles but he was not satisfied with the identification of them. The accused-petitioner appeared not to be pursuing his claim in view of his absence from the inquiry.

In the case of *Punchinona v. Hinniappuhamy* (supra) the main ground for the decision is that section 419 of the Criminal Procedure Code is not a provision which confers jurisdiction to decide claims to

¹ (1959) 60 N. L. R. 518.

² (1964) 67 N. L. R. 91.

³ (1959) 62 N. L. R. 307.

⁴ (1967) 70 N. L. R. 332.

possession. On 5th April, 1968, when the inquiry was held it can hardly be said that there were disputed claims to possession as the accused-petitioner by his non-attendance was in effect not prosecuting the oral claim which he had made on the earlier date.

A petitioner who makes an application to have an order of this nature set aside in revision must make out a strong case. The order of the learned Magistrate was, in my view, made within jurisdiction and, having regard to the facts and other matters before the learned Magistrate at the time it was made, I am not disposed, in any event, to interfere with his order by way of revision.

The accused-petitioner has submitted that he had misheard the date of inquiry as 5th May, 1968. In his petition he has stated that an application for revision to this Court was filed on 9th May, 1968, the day after he discovered that the inquiry had not been fixed for 5th May, 1968, but for 5th April, 1968. That application had been withdrawn by Counsel with liberty to file a fresh application later. I have sent for and examined the papers filed by the accused-petitioner on 9th May, 1968, and I find that in those papers he has not set out the fact that he made a mistake in regard to the date of inquiry. The assertion of a mistake was made for the first time in the papers filed in the present application on 26th June, 1968. To put it at the lowest the petitioner has not set out the fact of mistake at the earliest opportunity that he had. Moreover, both in his petition as well as in the argument on his behalf in Court reliance was placed primarily on the fact that the order of the learned Magistrate was made without jurisdiction and/or was incorrect.

I am of the view that the accused-petitioner has failed to make out a case for the intervention of this Court by the exercise of the extra-ordinary powers of revision. The application is accordingly dismissed.

Application dismissed.

