JAYAGODA AND ANOTHER
VS
ATTORNEY GENERAL

COURT OF APPEAL.
BALAPATABENDI. J.
BASNAYAKE. J.
CA PHC 147/2004.
HC COLOMBO 29/2000.
MARCH 30, 2005.
NOVEMBER 21, 2005.
DECEMBER 5, 2005.
JANUARY 26, 2006.

Code of Criminal Procedure Act - Sections 29, 110 (3), 110 (4), 425, 425 (1) - 431 (1) - Penal Code 391 - Evidence Ordinance 24, 27 - No evidence to prove charge - Should the property against which an offence appears to have been committed be returned to the person from whom it was taken ? - Applicability of 110 (4) (3) and 110,110 (3) limited only to trials ? - Proviso to a section - What does it signify ?

The petitioners seek to revise the order made by the High Court Judge forfeiting some productions claimed by them at the claim inquiry. The 1st petitioner was indicted on a charge of criminal breach of trust and was acquitted after trial. It was contended that, the petitioners are entitled to the items, as they were acquitted.

HELD:

(1) In terms of section 425 (1) there is no requirement that a charge should be established or proved prior to the disposal inquiry.

(2) There is no rule that the property against which an offence appears to have been committed should be returned to the person from whom it was taken. The Court is entrusted to make such order as it thinks fit.

(3) Application of 110 (3) is limited to trials where rules of the Evidence Ordinance have to be observed.

(4) The formula beginning "provided that....." is placed at the end of a section/sub section/paragraph/sub paragraph of a schedule and the intention of which is to narrow the effect of the preceding words. Ordinarily a proviso to a section is intended to take out a part of the

main section for special treatment, it is not expected to enlarge the scope of the main section.

(5) In any event, the High Court Judge erred by holding the inquiry under section 431 (1) which deals with property seized under section 29. However no prejudice has been caused to any party.

APPLICATION in Revision from an order of the High Court of Colombo.

Cases referred to :

(1) *Bal Kaur vs State of Himachal Pradesh* - 1976 Cr. LJ 1928 (HP)
(2) *Johari Lal Debisahai Agrawal vs Emperor* - AIR 1949 Nag 17
(3) *Queen Empress vs Nilamber* - 1 LR 2 All 276
(4) *Maithripala Senanayake vs Mahindasoma* - 1998 2 Sri LR 333 at 344
(5) *Joseph vs Attorney General* - 47 NLR 446
(6) *Dhanaraj Baldeo Kishan vs State* - AIR 1961 - Raj 238

Dulendra Weerasuriya with Janaka Amerasinghe for petitioners.
Buwaneka Aluvihare DSG for respondent.

cur.adv.vult

May 18, 2006.

ERIC BASNAYAKE, J.

The petitioners are seeking to revise the order made on 21.01.2004 by the learned High Court Judge, Colombo forfeiting some productions claimed by them at a claim inquiry. The first petitioner was the accused in this case. He was indicted in the High Court, Colombo, on a charge of criminal breach of trust under section 391 of the Penal Code. The accused is a former Director of Sri Lanka Plywood Products Ltd. One Mr. Dodangodagama was its Chairman at the time. The charge was that the accused committed criminal breach of trust to the value of Rs. 2,250,000 together with Mr. Dodangodagama. At the time of the indictment, Mr. Dodangodagama was deceased. The petitioner was acquitted after trial due to want of prosecution.

The productions claimed are listed as items 6, 9 and 11 in the list of productions to the indictment. Item No. 6 contained two certificates of

deposits to the value of Rs. 200,000. No. 9 is a saving pass book. No. 11 is cash amounting to Rs. 100,000. Items 6 and 9 were claimed by the accused - 1st petitioner. Item No. 11 was claimed by the 2nd petitioner. The 2nd petitioner is the 10th witness in the indictment. The petitioners were the only claimants. The moneys were said to belong to Sri Lanka Plywood Products Ltd. which was not in existence at the time of the trial.

No evidence was placed at the inquiry by the claimants. It is common ground that these productions were taken into custody by the police while they were in the possession of the petitioners. The accused in this case had, in his statement to the police, stated that he (the accused) took a sum of Rs. 500,000 of the sum mentioned in the charge and invested same in the certificates of deposits and with his brother-in-law who is the 2nd petitioner. The police recovered the certificates and cash in consequence of this statement. There is no dispute that the accused - 1st petitioner made this statement to the police. There is no complaint that what is found in the statement is false. The learned High Court Judge by considering the admissions so recorded of the accused made order forfeiting the item Nos. 6 and 11. No. 9 was allowed to be given to the 1st petitioner as the money deposited was withdrawn previously. The learned counsel for the petitioners submitted that the petitioners are entitled to the items claimed as of right due to the following reasons namely :

* No proof of any offence being committed.
* The accused was acquitted of the charge.
* No other claimants.
* The property was taken from the possession of the petitioners.
* Admissions of the accused could be used only for the purpose mentioned in section 110(3) of the Code of Criminal Procedure Act and "shall only be used to prove that he made a different statement at a different time".

Section 425 of the Code of Criminal Procedure which is as follows :

> 425 (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". Sub section (4) to section 425 defines property to include such property as has been originally in the possession of any party or property converted or exchanged and anything acquired by such conversion or exchange (emphasis added.).

In terms of the above provision there is no requirement that a charge should be established or proved prior to the disposal inquiry. At the conclusion of a trial when an accused is acquitted, a court may not always find whether an offence was committed. What the court finds out is whether the accused had committed a crime. There may be numerous occasions where although crimes are committed no charges are successfully brought against anyone. It may be that the accused' are not known or that the evidence is not sufficient or that the witnesses cannot be traced. A court will not just go in to the question whether a crime had been committed against a person or property unless there is a person who can be held responsible. Even if a particular accused could not be found guilty, it does not mean that a crime had not been committed. That may be the reason why courts are given authority to dispose of property **when it appears to court** that an offence has been committed in respect of any property.

When the court finds that there is no evidence to prove a charge, there is no rule that the property against which an offence appears to have been committed should be returned to the person from whom it was taken. If that is the case criminals could obtain the maximum benefit by eliminating all the evidence against them. To illustrate this point if, for example, X robbed a bank and hid the loot but one day got caught and showed the police where the loot was, admitting to the police that he robbed the bank and what was shown was part of the loot, and yet got an acquittal due to lack of evidence, should the court return the money to X to be taken away ? This is the reason why the law empowers court to "**make such order as it thinks fit for the disposal of property produced before it**". In *Bal Kaur vs. State Himachal Pradesh*[1] the accused were acquitted of the charge and the car involved in the case was not returned to the accused. In *Johari Lal Debisahai Agrawal vs. Emperor*[2] the property was found to be the subject of theft. Although the accused were acquitted due to incomplete evidence, the property was not returned to the accused. In *Queen Empress vs. Nilamber*[3] an accused person who was discharged for want of evidence on a charge of dishonestly receiving stolen property was deprived of the property.

Section 110 (3) and (4) are as follows :-110 (3) "A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of

the Evidence Ordinance **except for the purpose of corroborating the testimony of such person in court** :

Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time."

Anything in this sub section shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or. . .

(4) "Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial" . . ..

The learned counsel submitted that the proviso to section 110(3) applies to sub section (4) as well and therefore even if the statements recorded during the investigation are called for, those statements if made by the accused could be used only to contradict and nothing else. This submission cannot be accepted as sound due to the reason that the application of section 110(3) is limited to trials. "The formula beginning 'provided that. . . .' is placed at the end of a section or sub section of an Act, or a paragraph or sub paragraph of a schedule, and the intention of which is to **narrow the effect of the preceding words.** Amarasinghe J. in *Maithripala Senanayake vs. Mahindasoma*[5] Quoting Francis Bennion, statutory Interpretation 1984 at pg. 570. The proviso"refers only to the provisions to which it is attached. Ordinarily, a proviso to a section is intended to take out a part of the main section for special treatment Amarasinghe J. Quoting Bindra Interpretation of Statutes 7th ed. pg. 79- *Maithripala Senanayake vs. Mahindasoma (supra)*; it is not expected to enlarge the scope of the main section". Therefore the proviso has no application to **sub sections other than sub section (3)** (emphasis added).

In *Joseph vs. Attorney General*,[6] two accused', a cleaner and a driver, were charged for theft of 10 bags of Maldive fish. They confessed to the theft and also handed over the money earned on the deal (Rs. 2,000). They were convicted and part of the money was remitted to the C. W. E. being the owner of the Maldive fish and the balance money was confiscated. The conviction was quashed in appeal on the ground that the confession was inadmissible in evidence. After acquittal one of the accused claimed the Two Thousand Rupees handed over to the police. This claim was refused. In appeal Wijewardene J held that "section 24 of the Evidence Ordinance which makes those statements "irrelevant in criminal proceedings" does not prevent a court from acting on them in an application

under section 413(1) [same as section 425] of the Criminal Procedure Code which is not a criminal matter".

In *Dhanraj BaldeoKishan vs. State*[7] a confession was used in the disposal of sale proceeds of stolen property recovered after the recording of the confession.

According to section 110(3) statements made by any persons to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance other than to corroborate. Such statement, if made by an accused, could be used only to contradict. This restriction would not apply in the event of a discovery made in terms of the provisions of section 27 of the Evidence Ordinance. It is clear therefore that this section applies to trials where rules of the Evidence Ordinance have to be observed.

There is no dispute that the accused made admissions to the police that the money formed part of the charge. Nowhere did the petitioners make a claim to this money other than through this motion in the High Court at the conclusion of the trial. The submission of the learned counsel is that the money should be returned to the petitioners as the police took this money from them. There is no rule that the property should be returned to the person from whom it was taken when the court finds that an offence appears to have been committed in respect of the property. The court is entrusted to make such order as it thinks fit. If the court is bound to return the property to the person from whom it was taken from knowing that it did not belong to him and that no evidence had been led to prove that the claimant is entitled to it, it would not be a fit order. Therefore I do not find this a fit case to exercise the revisionary jurisdiction of this court.

The learned High Court Judge erred by holding this inquiry in terms of section 431 (1) of the Code of Criminal Procedure Act which deals with property seized under section 29 of the said Act. Anyhow no prejudice was caused to any party due to this error. Further this was not raised as an issue. Hence this application is refused.

BALAPATABENDI J. (P/CA)— *I agree.*

Appeal dismissed.