

1946

Present : Dias J.

IN RE SUPPIAH

In revision—M. C. Colombo, 16,289.

Criminal procedure—Conviction for criminal breach of trust—Order for disposal of property regarding which offence was committed—Criminal Procedure Code, s. 413 (1).

A criminal court has no power to order goods, in respect of which criminal breach of trust has been committed, to be restored to the owner.

A PPLICATION to revise an order of the Magistrate's Court.
Colombo.

H. A. Koattegoda, for the petitioner.

S. J. Kadirgamar, for the 2nd and 3rd respondents.

Cur. adv. vult.

October 23, 1946. DIAS J.—

In this case the Police charged one Madasamy Suppiah with having on April 23, 1946, committed criminal breach of trust of 15 cases of

Capstan Navy Cut cigarettes, the property of the third respondent, which had been entrusted to Suppiah as a carter, in breach of section 390 of the Penal Code. Amongst the productions referred to in this plaint are 205 tins of cigarettes—Capstan Navy Cut (P2). It appears that Suppiah misappropriated these cases and transferred them to Somapala, who transferred them to Noris, who in turn sold them to the second petitioner Mahatun; in whose possession 205 tins of cigarettes were found.

Mahatun gave evidence at the trial for the prosecution.

After trial the Magistrate convicted Suppiah who was sentenced to undergo 2 years' rigorous imprisonment. The Magistrate then made the following order: "It is clear from his (Mahatun's) statement that P2 (the 205 tins of cigarettes) were stolen goods bought from Noris Appu. I order the restoration of the tins to the complainant", i.e., the third respondent, whose servant the second respondent is.

It is obvious that this order was made under section 413 (1) of the Criminal Procedure Code.

The petitioners who are Mahatun, and his brother the first petitioner said to be the owner of Sirima Stores, where the cigarettes were found, now move the Court to revise the Magistrate's order and that the cigarettes should be restored to them.

I accept the findings of the Magistrate. The cigarettes are property produced before the Magistrate's Court regarding which an offence of criminal breach of trust appears to have been committed within the meaning of section 413 (1) of the Criminal Procedure Code. It is laid down in *Shand v. Atukorale*¹ that a criminal court has no power to order goods in respect of which *criminal breach of trust* has been committed to be restored to the owner. It is clear that not only are these cigarette tins the subject of a criminal breach of trust but they also passed through the hands of two persons before Mahatun purchased them. I see no reason why I should not follow this decision, which although not cited at the argument, appears to be exactly in point.

I think it was the duty of the Magistrate in these circumstances to restore the property to the possession in which it was found, leaving it to the respondents to establish any claim thereto in a civil action.

No doubt as laid down in *Thyriar v. Sinnetamby*² and *Abdul Hamid v. Alvarez*³ a Magistrate is vested with a judicial discretion by section 413 in making an order for the restoration of property; but this Court has the undoubted power in proper cases to revise the exercise of that discretion although it would be slow to do so.

In this case the Magistrate has made a wrong order which must be rectified.

¹ (1934) 37 N. L. R. 55.

² (1916) 3 C. W. R. 9.

³ (1917) 4 C. W. R. 250.

I therefore set aside the order of the Magistrate and direct that the 205 tins of cigarettes (P2) should be forthwith restored to the possession of Mahatun, the second petitioner.

Since writing this judgment Mr. Kadingamar has brought to my notice the case of *Shand v. Atukorale (supra)* as he thought it was his duty to do so. Counsel has acted rightly and properly. For the reasons I have given earlier I cannot distinguish this case from that case.

Order set aside.
