1971 *Present :* H. N. G. Fernando, C.J., and Thamotheram, J.

A. H. KOTHARI, Petitioner, *and* K. P. W. FERNANDO (H. M. Customs), Respondent

S.C. 186/69—In the matter of an Application under Section 356 of the Criminal Procedure Code

Customs Ordinance (Cap. 235)—Sections 43, 125, 129, 146, 147, 152, 154—Goods seized as forfeited—Penalty not paid—Subsequent charge of unlawful importation —Acquittal of accused—Such acquittal does not entitle accused to restoration of the goods—Remedy of person whose goods have been wrongly seized as forfeited.

[1] *(1960) 69 N. L. R. 419.*

Certain goods (synthetic stones), the importation of which was suspected to have been prohibited by s. 43 of the Customs Ordinance, were found in the possession of the accused-petitioner. They were seized by Customs officers under s. 125 as forfeited by s. 43 and, in addition, a penalty of Rs. 10,000 was imposed under s. 129. As the penalty was not paid, a prosecution was instituted against the accused under s. 146. The Magistrate acquitted the accused mainly for the reason that it was not proved beyond doubt that the importation of the goods was prohibited by the relevant Regulations. At the same time he refused an application made by the accused for the return of the goods to him. Thereupon the accused moved the Supreme Court in revision for the return of the goods.

Held, that the acquittal of the accused in the prosecution under s. 146 did not entitle him to the return of the seized goods. Where goods have been wrongly seized on suspicion as forfeited by law under s. 43, the proper remedy of the person who claims the restoration of the goods to him is to institute proceedings in accordance with s. 154 in a competent Court.

Seyed Ahamed v. Fernando (73 N. L. R. 139) not followed.

Obiter : In a prosecution under S·146, the burden of proving unlawful importation of goods is on the prosecution.

APPLICATION to revise an order of a Magistrate's Court in a prosecution under the Customs Ordinance.

M. Kanagasunderam, for the petitioner.

V. S. A. Pullenayegum, Deputy Solicitor-General, with *Ananda de Silva*, Crown Counsel, and *Tyrone Fernando*, Crown Counsel, for the Crown.

Cur. adv. vult.

September 2, 1971. H. N. G. FERNANDO, C.J.—

On 19th February 1968, Customs officers found in the possession of the accused eleven packets of synthetic stones suspected to have been manufactured in Switzerland. The importation of such stones had been prohibited by certain Regulations which came into force in January 1963.

On the day of this discovery, the packets of stones were seized under Section 125 of the Customs Ordinance ; in addition a penalty of Rs. 10,000 was imposed under s. 129 of the Ordinance.

The penalty of Rs. 10,000 was not paid by the accused, and a prosecution was instituted against the accused for an offence under s. 146 of the Customs Ordinance. The learned Magistrate acquitted the accused mainly for the reason that the prosecution had failed to prove beyond reasonable doubt that the stones found in the possession of the accused had been imported into Ceylon after the date on which the importation of such stones was prohibited by the relevant Regulations.

After the acquittal of the accused, he made an application to the Magistrate for the return to him of the stones which had been seized by the Customs officers. This application was refused by order of the Magistrate, and the present application to this Court is for the revision of that order.

In *Velupillai v. The Collector of Customs* [1], the accused was charged with the unlawful importation of goods which were liable to customs duty and on which the duty had not been paid. The Magistrate acquitted the accused, holding that there was not even prima facie evidence that the goods in question were dutiable or that they were imported goods. But he made order that the goods which had been seized from the possession of the accused be returned to the Customs authorities. Wijeyewardene J. held that in these circumstances the only proper course to adopt is to return the goods to the accused. But the following observations of the learned Judge are relevant for present purposes :—

> " There is some reference in the judgment to an order of forfeiture by the Customs authorities. It is sufficient to say that there is no evidence of such an order, as, of course, the statement of Counsel after the acquittal of the accused cannot be considered as evidence. Moreover neither the plaint nor the written sanction of the Principal Collector of Customs refers to a section of the Customs Ordinance under which these goods could have been forfeited. *It is not, therefore, necessary to consider in this case what the effect of such an order of forfeiture would have been.* "

The sentence which I have italicized indicates at the least that Wijeyewardene J. did contemplate that if goods are seized by Customs authorities as forfeited under the Customs Ordinance the acquittal of an accused on a charge of unlawful importation may not have to be followed by the return to the accused of goods seized from his possession. But the point was not actually considered because there was no evidence of the forfeiture. In the present case there is the evidence of one of the Customs officers as to the forfeiture of the stones found in the possession of the accused.

The facts of the recent case of *Seyed Ahamad v. Fernando* [2] are similar to the present facts. Certain goods in the possession of the accused had been seized on the suspicion that they had been imported contrary to the Regulations of January 1963 to which I have already referred, and subsequently the accused was charged with an offence under s. 146 of the Customs Ordinance. After some evidence of Customs officers had been recorded at the trial, the prosecuting officer informed the Magistrate that he was not proceeding with the case. This was apparently because of an admission by one of the Customs officers that the seized goods could have been imported into Ceylon prior to 1963 or could have been lawfully purchased at a public auction held

[1] *(1943) 45 N. L. R. 93.* [2] *(1970) 73 N. L. R. 139.*

by the Customs. The accused was thereupon discharged, but his application for the return of the goods was refused by the Magistrate on the ground that they had "rightly or wrongly" been forfeited under the Ordinance.

In referring to the circumstances of the case, Wijayatilake, J. rightly observed that the goods had been seized only on the suspicion that they had been unlawfully imported into Ceylon. But I doubt whether he could rightly assume that "the Customs acknowledged the seizure and forfeiture to be wrongful and therefore illegal and void in law". Even if the prosecuting officer made such an acknowledgment, the question of the legality of a forfeiture depends not on the opinion of a prosecuting officer, but on the relevant provisions of law.

Schedule B to the Customs Ordinance contains a "Table of Prohibitions and Restrictions Inwards", which includes articles the importation of which is prohibited by regulations such as those of 1963. Section 43 of the Ordinance provides that "if any goods enumerated in the table of prohibitions and restrictions in Schedule B shall be imported into Ceylon....., such goods shall be forfeited".

In the case of *Palasamy Nadar v. Lanktree*[1], Gratiaen J. referred to the different phrases used in the Ordinance "*shall be* forfeited", and "liable to be forfeited". He pointed out that in a case in which it is declared that goods shall be forfeited on the happening of a given event, "the owner is automatically and by operation of law divested of his property so soon as the event occurs". If then any goods are in fact unlawfully imported in contravention of s. 43, they are forfeited by operation of law and become the property of the State at the moment of importation, even if the Customs may be unaware of the unlawful importation. But naturally, possession remains in the importer unless and until he is physically deprived of the goods by a seizure.

The provision for seizure is s. 125, which enacts that "all goods which by this Ordinance are declared to be forfeited shall and may be seized by any officer of Customs". It is clear from this section that the power is to seize what has already been forfeited by operation of law. It is not that goods are seized and then forfeited, but rather that goods are seized because they have become forfeited by law.

Of course, it commonly happens that a Customs officer only suspects that goods have been imported contrary to law, and therefore only suspects that they have been forfeited by law. But nevertheless the Ordinance contemplates that there can be cases of the seizure of goods, which are not in law forfeited, and a seizure is not unlawful merely because it is subsequently found that the goods were lawfully imported. A parallel is seen in s. 32 (1) (*b*) of the Criminal Procedure Code, under which a peace officer may arrest a person if reasonable suspicion exists

[1] *(1949) 51 N. L. R. 520.*

that he has been concerned in any cognisable offence. An arrest upon reasonable suspicion is thus a lawful arrest, even though the person arrested may actually be innocent.

The provisions of the Ordinance relating to the consequences of a seizure do contemplate that the Customs have power to seize goods upon the suspicion that they were unlawfully imported. Section 154 empowers the Customs to deal with all goods seized as forfeited, unless the person concerned within one month of the date of seizure gives notice to the Collector of intention to prosecute a claim to the goods, and unless proceedings are instituted within one month in a competent Court for the recovery of the goods. When such proceedings are instituted, s. 152 definitely imposes on the claimant the burden of proving that the goods had been lawfully imported.

Let me now apply the relevant statutory provisions to a case in which the Customs (as in the instant case and that of *Ahamad v. Fernando*) suspect that goods have been imported in contravention of the Regulations of 1963, and are therefore forfeited by law, and proceed to seize the goods.

If a claimant to the goods wishes to contest the forfeiture and seizure, S. 154 provides for the procedure by which he may do so. If then proceedings are duly instituted in accordance with s. 154 in a competent Court, the Court will decide whether or not the forfeiture operated by reason of an unlawful importation. And if the claimant discharges the burden of proving *lawful* importation, the Court will order restoration of the goods. Indeed, s. 154 provides also that a claimant can obtain restoration while such proceedings are pending, if he gives proper security. What is important for present purposes is that s. 154 affords a clear remedy for a case of seizure on a suspicion which turns out to be incorrect.

If no claim is made in accordance with s. 154 to goods thus seized on suspicion, or if such a claim is rejected by the Court, the matter becomes finalised, and the forfeiture is no longer open to question.

It thus appears that the Legislature did have it in mind that there may be a seizure of goods lawfully imported and therefore not subject to forfeiture. The fact that a competent Court may subsequently decide, in proceedings referred to in s. 154, that the goods were not forfeited by the operation of s. 43, does not by itself render the seizure unlawful. I revert to the case of an arrest under s. 32 (1) (*b*) of the Criminal Procedure Code : it is surely not the case that every such arrest of an accused person on suspicion becomes wrongful and unlawful, if the person is not subsequently charged or is acquitted on being charged.

In the instant case, as also in the case of *Ahamad v. Fernando*, there was a seizure of goods on the ground that they were forfeited by s. 43; and also a penalty imposed by the Customs. In each case there was a

prosecution under s. 146, but only because, in terms of the Proviso to that Section, the Collector was of opinion that the penalty could not be recovered. A resort to s. 146 is a resort to the criminal law and to the sanctions which attach to the commission of an offence. Howard C. J. held in *Somasunderam v. Assistant Collector of Customs* [1], that in such a prosecution, there is no burden on the accused to prove his innocence. With respect, I think that my brother Wijayatilake who took a contrary view in his recent judgment, failed to take account of the limited scope of s. 152 of the Customs Ordinance :—

> "If any goods shall be seized for non-payment of duties or any other cause of forfeiture, and any dispute shall arise whether the duties have been paid for the same, or whether the same have been lawfully imported, or lawfully laden or exported, the proof thereof shall lie on the owner or claimer of such goods, and not on the Attorney-General or the officer who shall seize or stop the same."

When there has been a seizure of goods, a dispute can arise only if some person claims restoration of the goods. Such a claim is no different from a claim by a plaintiff in an ordinary civil action that goods have been wrongfully taken from him ; and the burden which s. 152 imposes on a claimant resembles the burden which a plaintiff in such an action has to discharge.

But when a person is prosecuted under s. 146, the issue is not whether seized goods should be restored to him, but whether he was guilty of the act of unlawful importation.

Moreover a person can be prosecuted under s. 146, although no goods were seized from his possession. Suppose that a passenger arriving at the Port of Colombo is seen by a Customs officer to be carrying a prohibited article, and that the passenger prevents seizure by throwing the article into the water. Although the article is not seized and produced in Court, the passenger may yet be convicted of unlawful importation under s. 146, if the evidence of the Customs officer is accepted as true beyond reasonable doubt. But what if the article is recovered from the water and seized by the Customs ? Is the burden of proof now cast on the passenger when he is prosecuted under s. 146 ? I can see nothing in s. 152 which might lead to so unreasonable a result, and I respectfully agree with Howard C.J. that in a prosecution under s. 146 there is no burden cast on the accused to prove his innocence.

I hold that s. 152 applies only when a claimant of goods seized as forfeited seeks restoration on the ground that the goods were not in law forfeited. The claimant may seek such restoration at some Departmental inquiry, or else in a Court in proceedings referred to in s. 154, and the burden in such a case will be on the claimant.

[1] *(1942) 45 N. L. R. 43.*

To hold that a Magistrate has jurisdiction to restore goods seized as forfeited, because a claimant is acquitted of an offence charged under s. 146, is to ignore the express provision in s. 154 which gives finality to the question of forfeiture if proceedings for restoration are not duly instituted in accordance with s. 154. The jurisdiction to order restoration of goods seized as forfeited is vested by s. 154 in the Court in which such proceedings are instituted, and not in a Magistrate's Court.

This conclusion, that a Magistrate has no jurisdiction to order restoration of seized goods, does not conflict with the principles of natural justice. Those principles are satisfied by s. 154 of the Customs Ordinance, which provides for the institution of proceedings in which a claimant of seized goods can seek, and can in a fit case obtain, restoration of the goods.

I hold for these reasons that in the instant case the Magistrate rightly refused to order restoration of the seized articles, despite the fact that he acquitted the accused of the charge under s. 146.

The application in revision is dismissed, with costs fixed at Rs. 210.

THAMOTHERAM, J.—

I agree with my Lord the Chief Justice that the application in revision should be dismissed.

On 19th February 1968 Customs officers seized 11 packets of synthetic stones which they found in the possession of the accused. They suspected them to have been manufactured in Switzerland. The importation of such stones had been prohibited by certain regulations which came into force in January 1963. They had no means of knowing whether these stones were imported before or after 1963.

Under Section 152 of the Customs Ordinance "if any goods should be seized for non-payment of duties or any other cause of forfeiture and any dispute shall arise.....whether the (goods) have been lawfully imported.....the proof thereof shall lie on the owner or the claimer of such goods".

Under Section 154 of the Ordinance "all .....goods which shall have been seized as forfeited under the Ordinance shall be deemed and taken to be condemned.....unless the person from whom such goods shall have been seized.....gives notice in writing within one month from the date of seizing of the same that he intends to enter a claim to the goods.....and institutes proceedings before the proper court within 30 days from the date of notice". The accused did not give notice under Section 154.

Under Section 43 of the Ordinance "if any goods enumerated in the table of prohibition.....shall be imported or brought into Ceylon contrary to the prohibitions.....such goods shall be forfeited".

The seizure was effected under Section 125 which states that "all goods declared to be forfeited shall and may be seized by any officers of the Customs".

Gratiaen J. pointed out in *Palasamy Nadar v. Lanktree* [1] that if goods are declared to be "forfeited" as opposed to "liable to forfeiture" on the happening of a given event their owner is automatically and by operation of law divested of his property in the goods as soon as the event occurs. The event in Section 43 is the importation or the bringing into Ceylon these goods after January 1963. They became forfeit at the importation or bringing into Ceylon and the owner was automatically and by operation of law divested of his property at that time.

This then was the position in regard to the 11 packets of synthetic stones seized from the possession of the accused when the Customs authorities came into court under Section 146 of the Ordinance.

Section 146 reads "if any person by reason of any act or omission becomes liable under the provisions of any Section of this Ordinance to forfeit any goods.....such person shall in addition be guilty of an offence."

Section 146 is not a provision for recovery as a fine of what is already due. Sections 146 and 147 deal with offences under the Ordinance. It is to be noted that the words are "if any person by reason of any act or omission becomes liable to forfeit any goods". I make reference again to the distinction Gratiaen J. made between goods "declared to be forfeited" and goods "liable to forfeiture". In a prosecution under Section 146 the liability to forfeit must be established by the prosecution and this cannot be done without proving that the importation was after January 1963. Difficulty in proving this cannot have the effect of shifting the burden on the accused. One can think of cases where such proof will be available.

Section 152 of the Ordinance cannot help the prosecution. It refers to a dispute as to whether the goods have been lawfully imported. In a prosecution under Section 146 there is no reference of a dispute to the Magistrate for decision but an averment by the prosecution that the accused was liable to forfeit the goods. This must be affirmatively established by the prosecution. Failure to discharge this burden cannot affect the validity of the forfeiture which operated under Section 43 coupled with the accused not setting up a claim under Section 154. The burden which the prosecution undertakes when it comes into court under Section 146 is no different to the burden it undertakes in any criminal case. The prosecution must prove what it asserts beyond reasonable doubt.

[1] *(1949) 51 N. L. R. 520.*

It is presumed that the Principal Collector of Customs proceeded under Section 146 as he was of the view that the penalty could not or was not likely to be recovered from the accused. Vide proviso to Section 146. Failure to establish this offence under the Section does not mean that he should be denied the goods which have been automatically and validly forfeited. A reading of Sections 43, 125, 152 and 154 of the Ordinance makes it clear that the seizure in this case was lawful and the forfeiture of the goods was automatic and valid in the absence of a claim under Section 154.

The position regarding the goods would remain the same as it was when the prosecution was instituted.

The application in revision is dismissed with costs at Rs. 210.

Application dismissed.