

1951

Present : Nagalingam J.

RASIAH, Petitioner, and TAMBIRAJAH (Divisional Forest Officer) *et al.*, Respondents

S. C. 360—Application in revision in M. C. Point Pedro, 14,264

Forest Ordinance (Cap. 311), ss. 40, 43—Order of confiscation—Legality of ex parte order—Right of appeal—Revision—Criminal Procedure Code, s. 340.

Where a person is convicted of a forest offence, property used by him in the commission of the offence but belonging to a third party cannot be confiscated by order of Court under section 40 of the Forest Ordinance without an opportunity being given to the third party against the order being made.

Held further, that if an order of confiscation is made against such third party *ex parte*, he is entitled to move in revision and is not bound by the time limit imposed by section 43 of the Forest Ordinance in relation to appeals.

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

H. Wanigatunga, with *M. Ramalingam*, for the petitioner.

L. B. T. Premaratne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 25, 1951. NAGALINGAM J.—

This is an application in revision by the petitioner who claims to be the owner of a double bullock cart which was ordered to be confiscated by the Magistrate in these proceedings upon his convicting the accused person who had transported firewood in the cart without permit or pass in breach of Regulations framed under the Forest Ordinance. The order of confiscation was made on 30th May, 1951. These papers were filed on 11th July, 1951.

¹ (1907) 9 N. L. R. 316.

² (1913) 15 N. L. R. 57.

Learned Crown Counsel takes a preliminary objection to this application on the ground that the petitioner, who has been given a right of appeal by section 43 of the Forest Ordinance, not having exercised that right, is precluded from seeking relief which he could have obtained by way of appeal but for his laches by filing papers in revision.

Section 37 of the Forest Ordinance provides that a Forest or Police Officer may seize any timber or forest produce in respect of which a forest offence has been committed as well as all tools, boats carts and cattle used in committing such offence. Section 43 goes on to prescribe that any person claiming to have an interest in property seized under section 37 may within thirty days from the date of any order passed under section 40 or 41, that is to say, an order of confiscation, present an appeal to this Court. It has been urged that the words "any person claiming to have an interest in property seized" are wide enough to include a person with an interest in the property seized but who has not appeared in Court and taken no part in any proceedings before Court. At first sight such a construction would appear to receive countenance from the very wide wording of the language, but on closer scrutiny it would be found that this contention cannot be sustained.

In Section 340 of the Criminal Procedure Code, which deals with the mode of filing a petition of appeal, there is an express requirement that the grounds of appeal should be set out. If no proceedings had taken place before the Magistrate and in fact the person interested in the property had not appeared before him at any stage before an order of confiscation was made, it will be difficult to set out in a petition of appeal the grounds upon which the person interested appeals *from the order of the Magistrate*. The words italicized by me are of special importance because an appeal always means an appeal from an order previously made and with which the party appealing is dissatisfied. In a case such as this the appellants can give no grounds of appeal because he has no knowledge of the reasons that would have actuated the Magistrate in making the order, for no grounds were placed before the Magistrate for adjudication, and the only ground of appeal, if one may regard it as a ground of appeal, would be that the Magistrate's order is wrong, which certainly would not be very illuminating. The section, therefore, must be limited in its application to persons interested in the property seized and who had appeared before the Magistrate and in respect of whose claims the Magistrate had made the order.

I do not, therefore, think that the preliminary objection is entitled to succeed.

The main question is whether the learned Magistrate was right in ordering the confiscation of the cart without an inquiry having been held by him before making the order. The order in this case would appear to have been made in terms of section 40 of the Ordinance. That section, it is true, does not prescribe for an inquiry or for any special proceedings to be taken by a Magistrate before ordering the confiscation of the property and learned Crown Counsel contends that an order of confiscation can automatically follow an order of conviction. This contention can be upheld if one limits the rule to property of the person who has

been convicted of the offence. For instance, if the cart belongs to the accused who was convicted in the case, the Magistrate may in exceptional circumstances directly make his order of confiscation after convicting the accused, but even in such a case, as a matter of sound judicial discretion a Magistrate should make some investigation before he makes the order of confiscation, thereby affording to the owner an opportunity of being heard against the order of confiscation being made. In cases where the accused person convicted of the offence is not himself the owner of the property seized, an order of confiscation without a previous inquiry would be tantamount to depriving the person of his property without an opportunity being given him to show cause against the order being made.

It is one of the fundamentals of administration of justice that a person should not be deprived either of his liberty or of his property without an opportunity being given to him to show cause against such an order being made. To take a case, which cannot be regarded as an extreme one, where an owner lends or hires his cart to another without knowing that the borrower or the hirer intends to use it for the purpose of committing an offence, would it be right to confiscate the cart merely because it has been so used? I think if the owner can show that the offence was committed without his knowledge and without his participation in the slightest degree justice would seem to demand that he should be restored his property.

It has been contended by learned Crown Counsel that the Magistrate may find it difficult to trace the owner. In fact, in this case, the accused who was convicted stated that the cart had been driven by one Rasiah and that it did belong to one Nadarajah. There was material, therefore, in this case in any event, for the Magistrate to have noticed either Rasiah or Nadarajah or both of them in order to ascertain the ownership of the cart. But even if there was no such evidence, I think the Magistrate should have called upon the prosecuting officer to lead evidence as regards the ownership of the vehicle. Learned Crown Counsel stresses that there may be a case where the Police themselves are unable to trace the owner of the cart. The decision in regard to such a case is best allowed to remain over till the case itself actually arises.

It would be clear that the order of the learned Magistrate ordering the confiscation of the cart without the owner being given an opportunity of being heard cannot be upheld. I would therefore set aside the order confiscating the cart *pro forma* and direct the Magistrate to hold an inquiry into the application of the petitioner and make such order as to him shall seem just.

Order pro forma set aside.