

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA

SC. Appeal No. 92/2017

SC (SPL) LA No. 121/2015

High Court Colombo Case

No: HCMCA 222/2013

Magistrate's Court Colombo Fort

Case No: B 148/09

In the matter of an application for Special Leave to Appeal in terms of Section 09 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Sri Lanka Insurance Corporation,
No. 21, "Rakshana Mandiraya",
Vauxhall Street,
Colombo 02.

Virtual-Complainant-Claimant-
Appellant-Appellant

Vs.

Darshana Rajitha Hallabagamage,
70B, Kosnathota,
Godakawela.

1st Suspect-Claimant-Respondent-
Respondent

Officer-in-Charge,
Crimes Division,
Police Station,
Slave Island.

Complainant-Respondent-Respondent

Hon. Attorney General,
Attorney General's Dept,
Colombo 12.

Respondent-Respondent

BEFORE : SISIRA J. DE ABREW, J.
K.K. WICKRAMASINGHE, J.
JANAK DE SILVA, J.

COUNSEL : Anil Silva, PC. with Leon Fernando and Isuru
Jayawardena for the Virtual -Complainant-Claimant-
Appellant-Appellant.

Asoka Weerasooriya with Arumugam Dhanushan for
the 1st Suspect-Claimant-Respondent-Respondent.

Ms. Ganga Wakishta Arachchi, SSC. For the Hon.
Attorney General.

ARGUED &

DECIDED ON : 12.02.2021

SISIRA J. DE ABREW, J.

Heard Counsel for both parties in support of their respective case. This is an appeal filed against the judgment of the learned High Court Judge of Colombo dated 04.06.2015 wherein he has dismissed the appeal and the revision application filed by the Virtual-Complainant-Claimant-Appellant-Appellant

(hereinafter referred to as the Virtual-Complainant-Appellant). This Court on 08.05.2017 granted Leave to Appeal on the questions of law set out in paragraph 25(d), (e), (f) and (g) of the Petition of Appeal dated 14.07.2015 which are set out below;

1. Did the learned Magistrate as well as the Learned High Court Judge fail to consider that in the Statement made by the Claimant-Respondent to the police he categorically stated that the recovered items belonged to the Petitioner Corporation and it was stolen from the Petitioner Corporation?
2. Did the Learned High Court Judge misdirect himself in law in not considering at all the voluntary statement made by the Claimant-Respondent to the Police and its significance to the inquiry pertaining in disposal of the stolen jewellery?
3. Did the Learned High Court Judge and the Learned Magistrate misdirect themselves in law when they failed to appreciate that in view of the matters set out in the statement made by the Claimant-Respondent it is clear that there was a criminal element involved in his possession of the goods and therefore has misinterpreted the authorities referred to in the order of the Learned Magistrate?
4. Did the Learned High Court Judge misdirect himself in law when he failed to consider the facts that the affidavits also disclose that the Claimant-Respondent's possession had a criminal element?

Facts of this case may be briefly summarized as follows;

The 1st Suspect-Claimant-Respondent-Respondent (hereinafter referred to as the Suspect-Claimant-Respondent) was arrested by Police in Galle. When he was arrested, Police found melted gold in his possession. He was produced before the Magistrate, Galle on 19.01.2009. Later, Galle Police informed the matter to the Slave Island Police. Slave Island Police filed a case bearing No. B 148/09 in the Magistrate's Court of Fort. The Suspect-Claimant-Respondent was cited as an Accused. Later, the learned Magistrate, Colombo-Fort discharged the Accused on the advice of the Attorney General. It has to be noted here that after he was discharged by the Magistrate on the advice of the Attorney General, he is no longer an Accused in the case. Thereafter, an inquiry was held under Section 431 of the Criminal Procedure Code to decide the person entitled to possession of the production in the case. Parties agreed to file affidavit at the inquiry. It has to be noted here that no person gave evidence in the witness box. After considering the affidavits filed by the parties, the learned Magistrate, Colombo-Fort by order dated 19.08.2013 decided to hand over the production in the case which is melted gold to the Suspect-Claimant-Respondent.

Being aggrieved by the said order of the learned Magistrate, Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant) filed an appeal and a revision application in the High Court and the learned High Court Judge by his order dated 04.06.2015 dismissed both the appeal and the revision application. Being aggrieved by the said order of the learned High Court Judge, the Virtual-Complainant-Appellant has appealed to this Court. This Court has granted Leave to Appeal. I have earlier set out the questions of law on which Leave to Appeal was granted. At the inquiry, before the Magistrate the Suspect-Claimant-Respondent filed an affidavit. The said Suspect-Claimant-Respondent filed a statement made by him to Galle Police along with his affidavit marked 'P9'. It

has to be noted here that the Suspect-Claimant-Respondent, in the said statement marked 'P9', admitted that he had stolen jewellery from the possession of the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant). The Suspect-Claimant-Respondent was an Audit Trainee of the Sri Lanka Insurance Corporation. The question that should be considered in this case is whether the said statement marked 'P9' made by the Suspect-Claimant-Respondent to Galle Police can be used as evidence in this inquiry. In considering this question, it has to be noted here that at the time of the inquiry conducted by the learned Magistrate, the Suspect-Claimant-Respondent had been discharged from the criminal case by the learned Magistrate on the advice of the Attorney General. Therefore, he is no longer a person accused of any offence. In this connection Section 25 of the Evidence Ordinance should be considered, which states as follows;

“No confession made to a Police Officer shall be proved as against a person accused of any offence”

When the person who made the confession to a Police Officer has been discharged from the criminal case, he is not accused of any offence in the inquiry where the court is called upon to decide to whom the production should be handed over. Since the Suspect-Claimant-Respondent had been discharged from the criminal case at the time of the said inquiry, Section 25 of the Evidence Ordinance does not operate as a bar to use the confession of the Suspect-Claimant-Respondent at the inquiry. At this juncture, it is important to consider the judgment of Justice Wijeyawardene in the case of **Joseph Vs. Attorney General 47 NLR page 446** wherein Court held that; “Where an Accused is acquitted on the ground that the evidence to prove the alleged offence is insufficient the Court can, nevertheless, by virtue of section 413(1) of the Criminal

Procedure Code, make an order for disposal of the property produced before it by directing its delivery to a person entitled to its possession if the Court considers that an offence has been committed in respect of that property. The opinion of Court as to the ownership of the property may be based on a confession made by the accused; section 24 of the Evidence Ordinance which makes confessions “irrelevant in a criminal proceeding” does not prevent a court from acting on them in an application under section 413(1) of the Criminal Procedure Code. His Lordship Justice Wijeyawardene at page 448 and 449 made the following observation.

“It is true that this Court has held these statements to be inadmissible in the criminal case against the accused. But section 24 of the Evidence Ordinance which makes those statements “irrelevant in a criminal proceeding” does not prevent a Court from acting on them in an application under section 413(1) of the Criminal Procedure Code which is not a “criminal matter”.

Considering all the above matters, I hold that a confession made by a suspect to a Police Officer can be used as evidence in an inquiry where the Court is called upon to decide to whom the production in the case should be handed over if the Suspect has been discharged from the criminal case. In the present case when the inquiry was being conducted by the learned Magistrate, the Suspect-Claimant-Respondent had been discharged from the criminal case. Considering all these matters, I hold that his confession made to the Police Officer can be used in the inquiry where the Court is called upon to decide to whom the production should be handed over.

Next question that must be considered is whether the property seized by a Police Officer should be handed over to the person from whose custody it was taken or the Court has the power to hand it over to any other person. In early judicial decisions it had been settled that the property seized by a Police Officer should be handed over to the person from whose custody it was taken. In **Punchinona Vs. Hinniappuhamy** 60 NLR page 518 it has been held that where the seizure by a Police Officer or property alleged or suspected to have been stolen is reported to a Magistrate under Section 419 of the the Criminal Procedure Code, the Magistrate, if he does not consider official custody to be necessary, has no alternative but to order the property to be delivered back to the person from whose possession it was seized and that the Magistrate has no power to order the property to be given to any other person on the ground that the latter is the true owner. But the judicial decision in the above case was not followed in **Balagalla Vs Somarathne** 70 NLR page 383 wherein it was held that where a person after discovering the stolen property has been sold to him, surrenders the property to the Police, the Magistrate has power under Section 419(1) of the Criminal Procedure Code to order the property to be handed over to the true owner and not to the person from whom it was taken by the Police.

In **Silva and Others Vs. O.I.C. Police Station, Thambuththegama** [1991] 2 SLR 83 His Lordship Justice S N Silva considering Section 431 of the Criminal Procedure Code held that there are limitations to the principle that property must be delivered to the person from whose possession it was seized, since it may result in the property being delivered to a person who may have obtained possession through criminal means. In such an event, Magistrate has to consider the question of title. In the said case His Lordship Justice S N Silva at page 91 made the following observation.

“However, there are obvious limitations to its general application, because it may result in the property being delivered to a person having no legal right to possession but obtained possession through criminal means. Hence in the later cases starting from the Judgment of Sri Skandarajah, J in *Sugathapala v. Thambirajah*, 67 N.L.R. 91 certain modifications of this principle were evolved. This trend was followed by Sirimanne, J. in the case of *Balagalla v. Somaratne*, 70 NLR 382 and by *Samarawickreme, J* in the case of *Thirunayagam v. Inspector of Police Jaffna* 74 NLR 161, in the case of *Freudenberg Industries Ltd v. Dias Mechanical Engineering Ltd.*, C.A. Application No. 69/79, CA Appeal No. 102/82, Court of Appeal Minutes of 14.7.1983. Seneviratne, J. examined the two lines of authority and observed that the principle that property be delivered to the person who had possession of it at the time of seizure will not apply if there is an “unlawful” or “criminal” element in such possession.”

In this connection Section 431(1) of the Criminal Procedure Code must be considered, which reads as follows:

“ The seizure by any police officer of property taken under section 29 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate who shall forthwith make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained respecting the custody and production of such property.”

After considering the above legal literature, I hold that the Magistrate, under Section 431(1) of the Criminal Procedure Code, has the power to make an order to hand over the property seized by a Police Officer to a person other than the person from whose custody it was taken. I further hold that on the material placed before the Magistrate, if the Magistrate can decide that the person claiming the property has got it by way of stealing the property, the Magistrate has no authority to give it to the said person.

In this case, the statement made by the Suspect-Claimant-Respondent to the Police marked 'P9' must be considered. In the said statement, the Suspect-Claimant-Respondent has admitted that he had stolen jewellery (the production in the case) from the cupboards of the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant). Therefore, on the strength of 'P9' itself, the Suspect-Claimant-Respondent is not entitled to claim the production in the case and the Magistrate could not have handed over the production in the case to the Suspect-Claimant-Respondent especially in view of the contents in document marked 'P9'. If there is material before Court that the person claiming the production has obtained the production by dishonest way, can the Court hand over such production to the said person? In this connection, I would like to consider the judgment of His Lordship Justice Sansoni in **Kanapathipillai Vs. Meerasaibu** in **58 NLR page 41**, His Lordship Justice Sansoni in the said case (supra) at page 43 has made the following observation;

“There is well established rule that the law will presume in favour of honesty and against fraud”

In this case, it is clear from the statement made by the Suspect-Claimant-Respondent marked 'P9', that he has stolen the jewellery from the cupboards of

the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant). Therefore applying the principles laid down in **Kanapathipillai Vs Meerasaibu (supra)**, I hold that that the learned Magistrate could not have come to the conclusion that the Suspect-Claimant-Respondent was entitled to receive the production (melted gold) and that the learned Magistrate was clearly wrong when he, by his order dated 19.08.2013, came to the above conclusion.

The learned High Court Judge was wrong when he affirmed the above order of the learned Magistrate.

Considering all the above matters, I set aside the judgment of the learned High Court Judge dated 04.06.2015 and the order of the learned Magistrate dated 19.08.2013. The Suspect-Claimant-Respondent has admitted that he had stolen the said property (melted gold) from the cupboards of the Sri Lanka Insurance Corporation. The Internal Auditor of the Virtual-Complainant-Appellant in his affidavit filed in the Magistrate's Court has stated that clients of State Banks and Private Banks have pawned jewellery to the said Banks; that the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant) has issued insurance policies in respect of the said jewellery; and that said jewellery was kept in the cupboards of Sri Lanka Insurance Corporation.

For the above reason, I hold that the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant) is entitled to receive the production in the case (melted gold). The learned Magistrate, Fort is directed to act in accordance with this judgment.

We appreciate the submissions made by Mr. Anil Silva, PC, Mr. Asoka Weerasooriya and Ms. Ganga Wakishta Arachchi, SSC.

In view of the conclusion reached above, I answer the 1st and 4th questions of law in the affirmative. 2nd and 3rd questions of law do not arise for consideration.

JUDGE OF THE SUPREME COURT

K.K. WICKRAMASINGHE, J.

I agree

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I agree

JUDGE OF THE SUPREME COURT

NT/-