APPELLATE CRIMINAL.

Before Mr Justice E Maung.

1947

Sept. 22.

CHANNA SAMMA (APPLICANT)

v.

SANKARAYA (RESPONDENT).*

Criminal Procedure Code, s. 523 (1)—Amending Act† adding a proviso - Power of Police Officer to delivery to any person.

Held: That addition of proviso to s. 523 (1) has altered the law. In respect of a light or portable article the police have no power to make any disposition, but when cattle, paddy or rice, boat or other bulky articles are concerned, subject to the review by the Magistrate, the police may at any time before the termination of the trial, dispose of the property in the way provided in the proviso.

The Court and the police should in each case consider who was in apparent lawful possession of the goods at one particular moment. It may vary according to the circumstances of the case. This does not mean that the goods should be delivered to a thief or a dacoit because he was last in possession.

P.R.V.N. Valiappa Chetty v. *S. Joseph*, 2 B.L.J. 85 ; *Laxmichand Rajmal* v. *Gopikisan Balmukund*, 60 Bom. 183, referred to.

B. C. Paul for the applicant.

G. N. Banerji for the respondent.

E MAUNG, J.—The facts necessary for the purposes of this revision application lie within a very short compass. One Hussein lodged a report with the Taunglonbyan police on the 27th June 1947, charging the respondent with theft in respect of two rickshaws which Hussein claimed were taken away from his godown. The police started investigation and seized the two rickshaws from Lewis Street where the respondent kept them. Having seized the rickshaws and having completed the investigation, the police sent up the

* Criminal Revision No. 140B of 1947 being review of the order of Eastern Subdivisional Magistrate, Rangoon, Criminal Regular Trial No. 187 of 1947.

† Burma Act XI of 1941.

charge sheet to the Court of the District Magistrate, Rangoon, on the 30th June 1947

At the time the charge sheet was sent up, the rickshaws were still in the custody of the police ; but on the 1st July 1947 on the orders of the Superintendent of Police, East, who purported apparently to act under the powers given to him under the proviso to section 523 (1) of the Code of Criminal Procedure, the Taunglonbyan police returned the two rickshaws to the informant Hussein. I may note here that section 523 of the Code of Criminal Procedure, so far as it is applicable in Burma, is fundamentally different from similar provisions originally enacted when the Code was first passed by the Indian Legislature in 1898. The additional proviso to sub-section (1) has made it open to the police in certain cases to dispose of certain classes of property pending the orders of the magistrate.

On the 4th July 1947 and apparently in ignorance of the arrangement made by the police, the respondent applied to the Eastern Subdivisional Magistrate, before whom the trial was pending, for the return to him of the two rickshaws. The learned trial Magistrate, also clearly in ignorance of the arrangement already made by the police, summarily directed the return of the two rickshaws to the respondent on his executing a bond with two sureties for Rs. 500. The bond was executed and the orders of the Court were communicated to the police who reported that the rickshaws in question had already been returned to Hussein. On the 25th July 1947 the learned trial Magistrate passed orders directing the complainant Hussein to produce the rickshaws before the Court on the 31st July 1947. On the latter date the complainant failed to produce the rickshaws and he was given further time till 7th August 1947. On the 7th August the complainant asked for another

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postponement and he was granted time till the next day. On the next day the present applicant appeared in Court, being represented by Mr. B. C. Paul, and filed a written objection showing cause against the rickshaws being returned to the respondent. The rickshaws were at the same time produced before the Court and the Magistrate directed the Bailiff to take charge of them pending further orders.

On 11th August 1947, the learned Magistrate directed that the rickshaws be returned to the respondent on his furnishing security for the sum of Rs. 500 to produce them whenever required by Court. The order in question is very short.

With great respect, it seems to me that the learned Magistrate began with a misappreciation of the position. In the course of his order he said : " The police to say the least has no business to do so " referring to the police action in returning the rickshaws to Hussein. In coming to this view, the learned Magistrate appears to have either ignored the provisions of the proviso to section 523 (1) of the Code of Criminal Procedure or took the view that once a charge sheet has been presented to a magistrate the police become *functus officio* and that thereafter no disposition whatsoever can be made by the police of any of the exhibits which should have been submitted to the Court for orders. Either view is not justified in law. But I must say this in all fairness to the learned Magistrate that if section 523 (1) stood as it was when originally enacted, he would be perfectly right. Under the scheme set up by the Criminal Procedure Code before the Burma Legislature inserted the proviso to sub-section (1) of the said section, I agree with him that once the charge sheet is submitted to the Court, the police would not have any right to make any disposal of the exhibit property which will have to be before the Court.

But because of the great inconvenience which would result from a strict application of that rule, the Legislature in Burma has inserted this proviso. This proviso reads :

" Provided that any police officer, who has made a seizure of cattle, paddy or rice or of a boat or any other bulky article, may, pending the order of the magistrate, deliver such cattle or article to any person who may appear to be entitled to the possession of such cattle or article on his executing a bond, with or without sureties, to return or produce such cattle or article at a police-station whenever required."

Now, as I understand the legal position, if the article falling within sub-section (1) of section 523 had been a light or portable article, the duty of the police would be to submit it to the Court together with the charge sheet. In respect of such articles, the police would have no power whatsoever to make any disposition, either before or after the charge sheet has been submitted. It would be for the Court under section 516A of the Code of Criminal Procedure or under section 517, according as to whether the order is to be made pending the trial or at the termination of the trial, to pass the necessary orders for the disposal of the article. But when the article is of the nature specified in the proviso to sub-section (1) of section 523 of the Code of Criminal Procedure, the police cannot be expected to have such articles taken bodily before the Court and therefore in these cases, subject to the power of review by the magistrate, the police at any time before the termination of the trial can make such disposition of the article in consonance with the principles laid down in the said proviso.

The learned Magistrate, having misdirected himself with respect to the powers of the police, proceeded on the basis of the decision of this Court in

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P.R.V.N. Valiappa Chetty v. *S. Joseph* (1) to direct that the two rickshaws be returned to the respondent Sankaraya from whom they had been seized by the police. With the principle laid down in that case and in other cases, one of which for instance would be *Laxmichand Rajmal* v. *Gopikisan Balmukund* (2) that the Court, and accordingly the police also, in exercising the powers under sections 516A, 517 or 523 of the Code of Criminal Procedure, would have to ignore the civil rights of the parties and confine their attention to the question of the present right to possession, I have no quarrel whatever. I agree with the learned Judge who decided *P.R.V.N. Valiappa Chetty*'s case that what the Court, and therefore in this case what the police, would have to consider would be a question of fact, namely, who was in apparent lawful possession of the goods at one particular moment ; but, speaking with great respect, it seems to me that the learned Magistrate in applying that rule failed to remember that the particular moment at which the possession has to be established must vary according to the circumstances of the case. When under section 517 of the Code of Criminal Procedure the Court has to make an order at the termination of the trial for the disposal of the property, the Court has either convicted or acquitted the accused or has discharged him. In each case the Court bases its order on the materials which has been placed before it on behalf of the complainant or of the accused or either. Therefore in a case like that the material point of time at which right to possession must be established is generally in relation to the moment when the property was seized from the person who had been accused or from a person who derived a claim to the property through the accused. But where, as in

(1) 2 B.L.J. 85. (2) 60 Bom. 183.

this case, the trial is still pending, the relevant moment is the moment at which the accused person is alleged to have committed the offence.

In the present case, the charge made by Hussein was that on the 27th June 1947 the two rickshaws were in his possession. That fact is not disputed by the respondent. What the respondent says is that he took the two rickshaws away from Hussein because he had a lawful right to take possession thereof. Now that is a matter in dispute ; whereas the other matter that prior to the respondent taking away the rickshaws Hussein was in lawful physical possession thereof, is not at all in dispute. To take the other view, as has been taken by the learned trial Magistrate, would lead to this absurdity that in all cases of theft and all cases where theft forms an ingredient of the offence charged, the property will have, during the pendency of the trial, to be returned to the accused ; for if the principle were inflexibly applied that the person last in possession of the goods when the police made the seizure should be given possession, such person can be no other than the thief or the dacoit or such person claiming through the thief or dacoit. Accordingly, in this case, as I have said, on the 26th June 1947 Hussein's possession was lawful possession and the fact of that possession was not disputed by the respondent. It may be found that the respondent has a higher right to possession after material evidence is gone into. But pending the respondent establishing his claim, which may be a perfectly good one, the person at present shown as having a present right to possession of the rickshaws would be Hussein.

It has been urged by Mr. Banerji, who appears for the respondent Sankaraya, that Hussein is not now in actual possession. He says that Hussein, having got the two rickshaws from the police, has handed them

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over to the applicant who is represented before me by Mr. B. C. Paul. That, however, is not of any moment. Hussein has entered into a bond to be responsible for the two rickshaws and that is what matters.

Accordingly I set aside the order of the Eastern Subdivisional Magistrate, Rangoon, and direct that Hussein, during the pendency of the trial, retain possession of the two rickshaws the custody of which have been given to him by the police.