

In Re: Jafferbhai Hasam

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Court : Mumbai

Decided On : Jul-09-1936

Reported in : AIR1937Bom10; (1936)38BOMLR961; 166Ind.Cas.562

Judge : Broomfield and ;Wassoodew, JJ.

Appeal No. : Criminal Application for Revision No. 98 of 1936

Appellant : In Re: Jafferbhai Hasam

Judgement :

Wassoodew, J.

1. The petitioner whose motor-car has been ordered to be confiscated by the Honorary Presidency Magistrate under Section 18 of the Tobacco Duty (Town of Bombay) Act (IV of 1857) on the ground that it was employed in conveying tobacco contrary to the provisions of the said Act has applied to set aside that order as no notice had been given to him by the Magistrate prior to the order of confiscation.

2. Three persons, including the petitioner's driver, were convicted on their own plea for an offence under Section 19 of the Tobacco Duty Act for illegal importation of tobacco on January 13, 1936. The order of conviction and confiscation of the car was passed on January 23, 1936. The petitioner was not among the persons prosecuted and was not heard before the order of confiscation was made. The

petitioner applied to the Magistrate on March 14, 1936, to revise that order of confiscation. That application was rejected without reasons on March 19, 1936.

3. The provisions of the Act relating to confiscation of the vehicle in which tobacco is illegally imported or conveyed are contained in Section 18, and they are as follows:-

. .every vehicle, boat or animal employed with the consent and knowledge of the owner or his servant in conveying the same, [tobacco] (contrary to the provisions of the Act) shall be liable to confiscation.

Undoubtedly, those provisions leave it to the Court's discretion to confiscate the vehicle. That discretion, therefore, has to be judicially exercised. In other words, the Court must be satisfied whether the owner had consented or knew that the vehicle (here the motor-car) was used for the said illegal purpose. According to elementary principles of natural justice, that discretion could only be properly used after hearing the owner, and ascertaining whether he had given his consent or knew the use to which the vehicle was put.

4. It has been urged for the Crown that according to the plain and natural interpretation of Clause (3) of Section 18, there is no necessity to give notice to the owner, where it is demonstrably clear that his servant has consented to such use. The interpretation of that clause is by no means free from difficulty. The obvious interpretation is that when the servant, in the course of his employment, has consented to the illegal use, it would be sufficient to justify the order for it could be presumed that he was representing his master. That representation could not be assumed merely upon the conviction of the servant for the offence; for his act might be outside his employment. That is the natural construction of the words used. Any other interpretation would involve an obvious hardship to the owner which cannot be imputed to the Legislature within its intention.

5. Our attention has been drawn to the provisions relating to confiscation under the Opium Act (I of 1878), and the authorities under Section 11 which insist upon the giving of notice to the owner prior to the confiscation of his vessel. There is a clear difference between the provisions of Section 11 of the Opium Act and those with

which we have to deal in the present case, for there is no provision in the Opium Act for ascertaining the consent and knowledge of the owner or the servant before confiscating the vehicle conveying the illegal opium. Consequently the cases decided under Section 11 of the Opium Act to which we were referred amid not be regarded as authority in support of the petition. But the principle underlying those cases is the principle which we think should be applied to all cases to be decided in accordance with instinctive justice, which cannot always find expression in detailed rules.

6. But it was pointed out for the Crown that there is a special proviso in Clause (3) of Section 12 of the Opium Act which requires that persons claiming any right in the articles to be confiscated must be heard before an order of confiscation can be passed; and it was contended that as there is no such proviso to Section 18 of the Tobacco E>uty Act, the Legislature intended that the order of confiscation should be made without hearing the persons concerned. That clause of the Opium Act perhaps refers to confiscation authorised by the Act in Clause (2) thereof. But even then the absence of such a proviso in the Tobacco Duty Act would make no difference, in our opinion, as regards the necessity for hearing the parties concerned. The discretion has to be exercised upon discovery of the part which the owner has taken in the use of his conveyance; and the Court is given the option to mitigate the rigour of confiscation by commuting the same to fine. That is an additional reason why the owner should be heard. We think the omission to give notice to the owner has resulted in injustice.

7. We, therefore, set aside the order of confiscation, and direct that the papers should be returned to the Magistrate with a direction to give notice to the petitioner before exercising his discretion under Section 18 of the Tobacco Duty Act.

Broomfield, J.

8. The principal argument on behalf of the Crown is that under Section 18 of the Act knowledge of the servant,-(chauffeur in this case), is enough to justify confiscation of a car used for the illegal transport of tobacco even if the master is ignorant of the matter. It would certainly seem,-having regard to the way the

section is worded, -that the consent and knowledge of the servant may be enough to give the power to confiscate. The question is, however, whether it is enough to justify the exercise of the power. The section says 'liable to confiscation' not 'shall be confiscated.' It would obviously be arbitrary and unjust in many cases to confiscate a man's motor-car by reason of its illegal use by his servant, without there being any evidence or reason to suppose that the owner himself was cognisant of the illegal use.

9. It might be said in the present case that the applicant was heard by the Magistrate, though he was heard after the order of forfeiture was made and not before. It is not clear whether the Magistrate refused the application on the merits or because he had no power to revise his own order. However, this is not really material. We are revising the order of confiscation and not the order refusing the latter application. I agree with the order proposed by my learned brother.

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