IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 3 of 1961

Between:

REGINA Appellant

v.

JOE SINN CHANG Respondent

Liquor Ordinance (Cap. 209) s. 48—selling liquor without licence—automatic forfeiture of liquor.

The respondent was convicted of selling liquor without a licence contrary to s. 48 Liquor Ordinance (Cap. 209). The Magistrate refused the Crown's application for an order confiscating the liquor and directed that it be returned to the respondent. Upon appeal by the Crown, the respondent contended that since the Crown had not applied for a suspension of the Magistrate's order, it was in contempt for not having returned the liquor to the respondent. The Crown maintained, *inter alia*, that it was not open to the Magistrate to order the return of the liquor to the respondent.

Held.—(1) Although the correct course would have been for the Crown to have applied for a suspension of the Magistrate's order until the determination of the appeal, the omission to do so did not amount to contempt.

(2) Since upon conviction the forfeiture of the liquor in question was automatic it was not open to the Magistrate to order its return to the respondent.

Magistrate's order set aside.

Cases cited:

Gordon v. Gordon (1904) P. 163 C.A.

Rex v. Koboko & Ors. 15 E.A.C.A. 118.

R. v. Gibbs & Ors. 16 E.A.C.A. 95.

Gill v. Bright (1871) 36 J.P. 198.

Surat Singh v. Receiver-General 3 F.L.R. 11.

Justin Lewis, Solicitor-General, for the Appellant.

A. Lateef for the Respondent.

HAMMETT, Ag. C.J. (28th July, 1961).

This appeal by the Crown against the decision of the Magistrate's Court sitting at Suva arises in the following circumstances.

The respondent was convicted of the following offences:—

First Count—

Statement of Offence

Selling Liquor without Licence: Contrary to section 48 of Liquor Ordinance, Cap. 209.

Particulars of Offence

Joe Sinn Chang, Storekeeper of Rewa Street, Suva in the Central Division, on 30th November, 1960, sold one bottle of beer to Semi Tubuna without being the holder of a licence authorising the sale thereof.

Second Count—

Statement of Offence

Selling Liquor without Licence: Contrary to section 48 of Liquor Ordinance, Cap. 209.

Particulars of Offence

Joe Sinn Chang, Storekeeper of Rewa Street, Suva in the Central Division, on 30th November, 1960, sold one bottle of beer to Epi Durugulevu without being the holder of a licence authorising the sale thereof.

On each count a fine of £2 was imposed.

At the conclusion of the trial the prosecution applied for an order confiscating a quantity of beer etc. which he said was found by the Police in a house attached to the respondent's store.

The learned trial Magistrate refused to make the order sought and ordered that such beer etc. found in the house should be returned to the owner.

The Crown has appealed against the sentences imposed in this case on the following grounds—

(1) that they are manifestly inadequate, and

(2) that they are wrong in principle

and against the order that the liquor be returned to the owner on the ground that the learned trial Magistrate erred in law in making the said order.

At the original hearing of the appeal Counsel for the respondent raised two preliminary objections and submitted that the appeal was not properly before the Court.

The first of these grounds was that the Crown was in contempt for not having complied with the order to return the liquor to the owner. It is quite true that the prosecutor should have applied for a suspension of the order pending the hearing of this appeal but the fact that this was not done does not alone, in my view, amount to contempt. There was no time limit prescribed within which the order to return the liquor was to be complied with. It was not a question of the order of the Court being flouted to the extent that it was ignored or of any act being done in defiance of the order. The prosecution without delay did, within a matter of four days, file a Petition of Appeal against the order.

The respondent has in the meantime made no attempt to draw up or serve or enforce the order nor has an application been made by the respondent for a stay of these proceedings. The subject matter of the order is not at all clear from the record and whilst therefore I consider the correct course would have

been for an application to be made to suspend the order until the determination of this appeal, I do not consider that the omission to do so alone amounts to contempt. In this connection I have considered the case of *Gordon v. Gordon* (1904) P. 163 C.A. and the references to this matter in *Halsbury Laws of England* (3rd Edition) Vol. 8 at pages 42 and 43.

The second preliminary objection concerns the question of whether this appeal can be entertained without leave in view of section 315 (2) of the Criminal Procedure Code which reads as follows:—

"315 . . . .

(2) Save with the leave of the Supreme Court, no appeal shall be allowed in a case in which a magistrate's court has passed a sentence of a fine not exceeding five pounds only, notwithstanding that a sentence of imprisonment has been passed by such court in default of the payment of such fine, if no substantive sentence of imprisonment has also been passed."

It was submitted by the respondent that since the fines in this case amounted only to £2 on each count no appeal would lie without leave.

As was pointed out, however, by the learned Solicitor-General who appeared for the Crown the Magistrate's Court in this case did not " pass a sentence of a fine not exceeding £5 only " it passed two sentences of £2 each and made an order concerning the disposal of liquor in the possession of the prosecution. In these circumstances I do not consider that leave was required before this appeal was brought since the provisions of section 315 (2) do not apply.

The cases of *Rex v. Koboko & Ors.* 15 E.A.C.A. 118 and *R. v. Gibbs & Ors.* 16 E.A.C.A. 95 are in point.

On the merits of the appeal against sentence it has to be borne in mind that the prosecution in the court below specifically asked the learned trial Magistrate to deal with this case summarily under section 211 of the Criminal Procedure Code; under that procedure the maximum fine that may be imposed is £10. The learned trial Magistrate imposed two fines of £2 each. I have considered all that has been urged on behalf of the Crown to the effect the sentence was both manifestly inadequate and imposed upon wrong principles.

The real truth of the matter appears to me to be that the prosecutor in the court below should not have asked for this case to be tried summarily and I do not think the learned trial Magistrate should have agreed to try it summarily, but that he did so and that he had the right to do so has not been challenged.

The learned trial Magistrate said that he imposed the fines of £2 on each count because he considered the respondent was encouraged by the police witnesses to commit this offence. In my opinion this was one of the factors that could properly be taken into account by the trial court in imposing its sentence. I find it difficult to hold, where the maximum fine the Magistrate could have imposed under this procedure was £10, that a fine of £2 was manifestly inadequate. This type of case is not, however, in my view appropriate to be dealt with under section 211 of the Criminal Procedure Code as a minor offence and I hope they will not be so dealt with in future.

As far as the order that the liquor seized be returned to the owner is concerned, I am doubtful whether it was open to the learned trial Magistrate to make any such order. To begin with the liquor concerned was not exhibited and there was no evidence before the Court of what exactly it consisted of or exactly where it was found.

The respondent was convicted of two offences contrary to section 48 of the Liquor Ordinance, Cap. 209, in which appear the following words:—

> " . . . . Upon conviction under this section the offender shall forfeit all liquor in his possession with the vessels containing the same . . . "

Section 109 states:—

> " All forfeitures under this Ordinance shall be sold or otherwise disposed of as the court may in its discretion direct."

It is clear that since the forfeiture is automatic by operation of law it does not depend upon any order of the court. I do not think it was open to the learned trial Magistrate to make an order which would operate against the express meaning and intention of these words in this section. The learned trial Magistrate said in the statement of his reason for his decision:—

> " I found there was no evidence to support the allegation that he was the holder of a retail store licence, and consequently I ruled that the liquor found in his dwelling house was not liable to be confiscated and accordingly ordered that it be returned to him."

It appears from this that his attention was focussed on the provisions of section 106 (2) of the Liquor Ordinance which had no application to the facts of this case, and had not been drawn to the express provisions of section 48 of which the material parts have just been quoted.

For these reasons the order that the liquor found in the respondent's house be returned to him is set aside.

The proper procedure to be followed where a statutory mandatory or automatic forfeiture arises, following a conviction for an offence, was referred to in the case of *Gill v. Bright* (1871) 36 J.P. 198 and in a local case *Surat Singh v. Receiver-General* 3 F.L.R. 11. An interesting article to which the learned Solicitor-General has referred my attention appears in the *Journal of Criminal Law* Vol. 31 at pages 84 and 183 in which a very apt statement appears under the heading " Procedure " at page 187 as follows:—

> " It is common justice for the court to invite the defendant to show cause why an order for forfeiture and destruction should not be made, even though the statute is mandatory. It may avoid a mistake as to identity of the property, its ownership, or the court's powers inasmuch as whether it ' shall ' or ' may ' make such an order. In the case of *Gill v. Bright* (1871) 36 J.P. 198 . . . it was laid down that before an order for forfeiture is made the convicted person should be given an opportunity of showing cause why such an order should not be made, e.g. it may be unjust to third parties."

Under these circumstances I direct the papers be returned to the court below for the prosecution to apply for a summons to the respondent to show cause why the liquor it has seized—(in which full particulars of the date, place and time of seizure and of the liquor seized should of course be given) —should not be disposed of as the court may in its discretion direct under the provisions of section 109 of the Liquor Ordinance.