

A

REZA KIANMEHR

v.

PP

B

HIGH COURT MALAYA, KUALA LUMPUR  
KAMARDIN HASHIM J  
[CRIMINAL APPEAL NO: 41H-86-07-2012]  
23 JANUARY 2012

C

**CRIMINAL LAW:** *Forfeiture - Powers of Magistrate - Order for forfeiture of vehicle - Offence of operating public service vehicle without licence - Whether forfeiture mandatory under s. 80(4) Land Public Transport Act 2010 - Whether evidence adduced as to identity of person who seized vehicle - Whether seizure of vehicle exceeded period allowed under s. 80(5) Land Public Transport Act 2010 - Whether Magistrate erred in ordering forfeiture of vehicle - Criminal Procedure Code, s. 136(1) - Land Public Transport Act 2010, ss. 16(5), 80(1)*

D

E

**CRIMINAL PROCEDURE:** *Forfeiture - Powers of Magistrate - Order for forfeiture of vehicle - Offence of operating public service vehicle without licence - Whether forfeiture mandatory under s. 80(4) Land Public Transport Act 2010 - Whether evidence adduced as to identity of person who seized vehicle - Whether seizure of vehicle exceeded period allowed under s. 80(5) Land Public Transport Act 2010 - Whether Magistrate erred in ordering forfeiture of vehicle - Criminal Procedure Code, s. 136(1) - Land Public Transport Act 2010, ss. 16(5), 80(1)*

F

G

The appellant was convicted in the Magistrate's Court for the offence of operating a public service vehicle service without a licence under s. 16(5) of the Land Public Transport Act 2010 ('the Act') and was sentenced to a fine of RM2,000 in default two months/ imprisonment. It was further ordered by the Magistrate that motor vehicle registration BFT 8613 belonging to the appellant be forfeited to the government under s. 80(4) of the same Act. In the appellant's appeal against the said forfeiture, he alleged that the learned Magistrate had failed to exercise her discretion judiciously in ordering the forfeiture of the appellant's vehicle and that the said forfeiture was not mandatory under s. 80(4) of the Act. The issues raised were: (i) whether there was evidence adduced as to the identity of the person who seized the said vehicle; and (ii) whether the seizure of the said vehicle exceeded the period allowed under s. 80(5) of the Act.

H

I

**Held (dismissing the appeal):**

- (1) Under s. 128(1)(a) of the Criminal Procedure Code ("CPC"), a Magistrate may take cognizance of an offence upon receiving a complaint as defined by the Code. The complaint in this case was made to the Magistrate by an officer authorised by Suruhanjaya Pengangkutan Awam Darat (SPAD) under oath. The Magistrate took cognizance of the offence and proceeded to issue summons against the appellant under s. 35 of the CPC. The relevant documents *ie*, the charge sheet, the summons and the complaints issued against the appellant had been served onto the appellant herein. Due notice had been given to the appellant that the said vehicle had been duly seized in accordance to the provision of the Act by the appointed officer. The complaint was part of the proceedings before the Magistrate in a summons case. Therefore, there was no merit in the appellant's submission on the issue of the identity of the person who seized the said vehicle. (paras 14 & 15)
- (2) In respect of proceedings by summons under s. 136(1) of the CPC, the proceedings for indictment of the person summoned starts after the Magistrate takes cognizance of the offence complained of. When there are sufficient grounds for summons to be issued to the person, the summons is issued for the appearance of the person named in the summons. When the summons is issued and if it is so required, the sanction, consent or requisition of the Public Prosecutor is issued, then the proceedings for the prosecution of the person so summoned commences. Herein, the consent dated 6 April 2012 showed serious intention by the prosecution to prosecute the appellant. The summons issued by the Magistrate's Court on 17 April 2012 was well within one month after the said vehicle had been seized. Therefore, the Magistrate had the power to order for the forfeiture of the said vehicle. (para 18)
- (3) Pursuant to s. 80(4) of the Act, the Magistrate shall order the forfeiture if it is proved to the satisfaction of the court that an offence specified under subsection (1) had been committed and that the vehicle was the subject matter of the offence. There is no ambiguity in the said provision. The appellant herein had pleaded guilty to the charge for an offence under

- A s. 16, and was convicted for the same offence. The facts presented by the prosecution and admitted by the appellant showed that the said vehicle had been used by the appellant in the commission of the same offence. The said vehicle had been proven to be the subject matter of the offence. The
- B conditions provided under s. 80(4) had been fulfilled. The forfeiture thus became mandatory. There was no discretion given to the Magistrate due to the words “shall be made” in s. 80(4) of the Act. In the circumstances, Magistrate was correct in making an order for the forfeiture of the said vehicle.
- C (para 21)

**Case(s) referred to:**

*Duning Jubin v. PP* [1997] 5 CLJ 170 HC (*refd*)

*Kerajaan Malaysia v. Ambank (M) Bhd* [2010] 2 CLJ 91 HC (*refd*)

*Ngeranter Ripai v. PP* [1990] 2 CLJ 273; [1990] 2 CLJ (Rep) 530 HC (*refd*)

- D *PP v. Leonard* [1959] 1 LNS 75 HC (*refd*)  
*R v. Kenneth John Ball* 35 Cr App R 164 (*refd*)

**Legislation referred to:**

- E Commercial Vehicles Licensing Board Act 1987, s. 51(3)  
Criminal Procedure Code, ss. 35, 128(1)(a), 136(1), 137  
Land Public Transport Act 2010, ss. 16(1), (5), 80(1), (4), (5), 241

*For the appellant - Idris Seydalavi; M/s Wan Ewe Chong & Khoo*

*For the respondent - Jean Syarmila; DPP*

- F *Reported by Suhainah Wahiduddin*

## JUDGMENT

- G **Kamardin Hashim J:**

**Introduction**

- H [1] This is in respect of an appeal by the appellant, Reza Kianmehr, an Iranian citizen against the learned Magistrate’s decision given at Kuala Lumpur Magistrates’ Court whereby the appellant was convicted and sentenced to a fine of RM2,000 in default two months imprisonment for an offence of operating a public service vehicle service without a licence under s. 16(5) of
- I the Land Public Transport Act 2010 (“Act 715”). The learned

Magistrate further ordered that motor vehicle registration No: BFT 8613 belonging to the appellant be forfeited to the government under s. 80(4) of the same Act 715. A

[2] The appellant's appeals is against the order of the forfeiture of the appellant's motor vehicle No: BFT 8613, as ordered by the learned Magistrate. B

[3] The charge against the appellant is reproduced as follows:

Bahawa kamu, pada 17 Mac 2012 lebih kurang jam 11, bertempat di hadapan lobi Hotel Seri Pasific, Jalan Putra, Kuala Lumpur sebagai pemilik kenderaan Nombor Pendaftaran BFT 8613 tanpa kuasa yang sah telah tidak mematuhi kehendak bagi lesen pengendali dengan mengadakan suatu perkhidmatan kenderaan perkhidmatan awam (kereta/van sapu) dengan menggunakan suatu kelas kenderaan perkhidmatan awam dengan sendiri bagi maksud menawarkan perkhidmatan yang berkaitan untuk mengangkut penumpang bagi kenderaan perkhidmatan awam. Dengan itu kamu telah melakukan kesalahan dan boleh dihukum di bawah s. 16(5) dan di bawah s. 80(4) Akta Pengangkutan Awam Darat 2010 (Akta 715) dimana kenderaan bernombor pendaftaran BFT 8613 dilucuthakan. C D E

[4] The appellant, without any hesitation, pleaded guilty to the charge whereby he was sentenced at once and the vehicle BFT 8613 be forfeited to the Government of Malaysia.

#### The Facts F

[5] From the facts presented by the prosecution at the lower court, it was disclosed that on 13 March 2012 at around 9am a team of officers from Suruhanjaya Pengangkutan Awam Darat (SPAD) lead by one Senior Assistant Director Asymal bin Mansor carry out an observation over the appellant's activity believed to operate or provide a public vehicle service without licence in front of Hotel Pacific Lobby, at Jalan Putra, Kuala Lumpur, using a Toyota Unser 1.8 GLi registration number BFT 8613 ("the said vehicle"). During the observation, the appellant was seen offering a vehicle service to Genting Highland, Pahang at a fee of RM300 per trip. The appellant was detained when he was about to drive his vehicle from the place of the incident. G H

I

**A Grounds Of Appeal**

**B** [6] In his petition of appeal, the appellant alleged that the learned Magistrate failed to exercise his discretion judiciously in ordering the forfeiture of the appellant said vehicle. It is appellant's contention that the forfeiture of the said vehicle which is the subject matter of the offence is not mandatory under s. 80(4) of Act 715.

**C** [7] The appellant further alleged that the learned Magistrate failed to take into consideration facts favourable to the appellant such as that the said vehicle is the only mode of transportation for the appellant and his family. Furthermore, the same vehicle is necessary for the transportation of the appellant's daughter who is studying at the local university. The forfeiture of the said vehicle is to cause hardship to the appellant and his family.

**D** [8] Lastly, the appellant argued that the learned Magistrate cannot order a forfeiture of the said vehicle which the seizure was not made in accordance with the provisions as under s. 80 of Act 715. The appellant submitted that there was no evidence to show who seized the said vehicle and the seizure was taken place more than one month before the appellant was being prosecuted for an offence as per the charge.

**E** [9] The appellant was charged for an offence under s. 16(1) and punishable under s. 16(5) of the said Act 715. The relevant provisions are as follows:

**16. Requirement for operator's licence**

**G** (1) Subject to ss. 194 and 195, no person shall operate or provide a public service vehicle service using a class of public service vehicles unless he holds an operator's licence issued under this chapter.

(2) ...

**H** (3) ...

(4) ...

**I** (5) Subject to subsection (4), a person, other than a company or corporation, who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit but not more than ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[10] Whereas s. 80 of Act 715 read as follows:

A

**80. Power to seize relevant vehicle for certain offences**

(1) Any relevant vehicle in respect of which there has been or there is reasonable cause to suspect that there has been committed any offence against s. 16, 28, 36, 46, 51 or 63, subsection 22(3), 41(3) or 57(3), or para. 23(1)(b), 42(1)(b) or 58(1)(b) may be seized by any police officer not below the rank of inspector, road transport officer or appointed officer, at any place.

B

(2) When a relevant vehicle has been seized under subsection (1), a police officer not below the rank of inspector, a road transport officer or an appointed officer, may, at his discretion, temporarily return such vehicle to the owner of the same, on security being furnished to the satisfaction of such officer that the vehicle shall be surrendered to him on demand.

C

(3) An order for the forfeiture or for the release of any relevant vehicle seized under subsection (1) shall be made by the court before which the prosecution with regard thereto has been held.

D

E

(4) An order for the forfeiture of a relevant vehicle under subsection (3) shall be made if it is proved to the satisfaction of the court that an offence against any of the provisions referred to under subsection (1) has been committed and that the vehicle was the subject matter of the offence, notwithstanding that no person may have been convicted of such an offence.

F

(5) If there is no prosecution with regard to any relevant vehicle seized under subsection (1), such vehicle shall be released at the expiration of one calendar month from the date of seizure unless it has sooner been released.

G

**Submissions And Decision**

[11] In his submission, En. Idris Seydalavi, learned counsel for the appellant, raised three grounds of appeal, ie, there was no evidence adduced as to the identity of the person who seized the said vehicle, the seizure of the said vehicle exceeded the period allowed under s. 80(5) of Act 715 and that the learned Magistrate exercised her discretion wrongly when she ordered forfeiture of the said vehicle.

H

I

- A [12] As to the first issue, learned counsel submitted that there was no evidence adduced as regard to the identity of person or persons who seized the appellant's said vehicle on that day. Referring to s. 80(1) of Act 715 which specifically stated that only certain person have the power to seize the said vehicles namely
- B either by any police officer not below the rank of Inspector, road transport officer or appointed officer. As the identity of the person who made the seizure of the appellant's said vehicle is unknown, learned counsel submitted that the said vehicle had not been properly seized and therefore, the order of forfeiture is bad and
- C must be set aside. Learned counsel made reference to the decision by His Lordship Chong Siew Fai J (as His Lordship then was) in *Ngeranter Ripai v. PP* [1990] 2 CLJ 273; [1990] 2 CLJ (Rep) 530 and the decision of Zamani Rahim JC (as His Lordship then was) in the case of *Kerajaan Malaysia v. Ambank (M) Bhd* [2010] 2
- D CLJ 91, for this court's consideration.

- [13] Learned Deputy Public Prosecutor, Cik Jean Syarmila ("DPP") submitted that the appellant was fully aware about the said vehicle being seized on the same day he was detained by the
- E team from SPAD. The appellant was also fully aware when the charge was read to him that the said vehicle was bound to be forfeited to the Government of Malaysia and he still maintained his guilty plea. Learned DPP further refers to the complaint at p. 15 of the appeal record clearly shows that the said vehicle had been
- F seized by a team of appointed officers of SPAD under the said Act 715 headed by PPK Asymal bin Mansor. The identity of the person who made the seizure is known and an appointed officer for the purpose of s. 80(1) of Act 715. Learned DPP reputed learned counsel's submission on this point and submitted that the
- G said vehicle had been properly seized under Act 715. Learned DPP also submitted that case *Ngeranter (supra)* is not applicable in the present case.

- [14] Learned counsel in his reply said that the complaint was never served to the appellant. The case against the appellant is
- H classified as a summons case under Code 87 registered in a Magistrate's Court. Under s. 128(1)(a) of the Criminal Procedure Code ("CPC"), a Magistrate may take cognizance of an offence upon receiving a complaint as defined by this Code. The complaint
- I in this case was made to the Magistrate by an officer authorised by SPAD under oath and at the same time the officer applied for

summons to be issued against the appellant. The Magistrate after applying his mind to the suspected commission of an offence based on the complaint, decided to take cognizance of the offence and the Magistrate proceeded to issue summons against the appellant under s. 35 of the CPC as in his opinion there was sufficient ground for proceeding. The summons issued by the Magistrate under case number 87A-0597-04-2012. The summons issued together with the complaint which bears the same case number normally will be served onto the person named in the summons. The summons specified the date and time when the person summoned to appear in the identified Magistrate court to answer the charge or charges.

A

B

C

[15] After careful consideration of the charge sheet, the summons and the complaints issued in this present case against the appellant which appears at pp. 13, 14 and 15 of the record of appeal, I am satisfied that all the said documents including the complaint had been served onto the appellant herein. Allegation by learned counsel that the appellant did not receive the complaint is just a bare allegation from the bar table. I am satisfied that due notice had been given to the appellant that the said vehicle had been duly seized in accordance to the provision of Act 715 by the appointed officer. I hold that the complaint is part of the proceedings before the Magistrate in a summons case. Therefore I hold that there is no merit in learned counsel's submission on this issue of identity of the person that made the seizure of the said vehicle.

D

E

F

[16] The second issue projected by learned counsel for the appellant is on the contention that the seizure of the said vehicle was exceeded the period of one month specified under s. 80(5) of Act 715. It was argued by learned counsel that the said vehicle was seized on the 17 March 2012 but the prosecution was only done on 17 June 2012. It was submitted that there was a delay in the prosecution of the appellant over more than three months. Therefore learned counsel submitted that the said vehicle should be released earlier to the appellant that is after the expiration of one month after the date of seizure. As in this case, the said vehicle was wrongly seized therefore the Magistrate does not have the power to order for the forfeiture of the said vehicle.

G

H

I



- A [17] Learned DPP submitted that the consent in writing from the PP to prosecute the appellant under s. 241 of Act 715 (p. 16 Record of Appeal) was issued on 6 April 2012 and the summons was issued by the Magistrates' Court on 17 April 2012. Therefore there was prosecution initiated within one month against the appellant. The question arose when the prosecution commenced against the appellant in the present case.

- C [18] Under Chapter XVI and ss. 136 and 137 of the CPC provides provisions regarding commencement of proceedings before a Magistrate Court. In respect of proceedings by summons, under s. 136(1) of the CPC the proceedings for indictment of the person summoned of starts after the Magistrate take cognizance of the offence complained of and there is sufficient ground for summons to be issued to the person and thereby summons issued for the appearance of the person named in the summons. When the summons is issued and if it is so required, the sanction, consent or requisition of the PP is issued, then the proceedings for the prosecution of the person so summoned starts to commence (see *PP v. Leonard* [1959] 1 LNS 75). In the present case, the consent dated 6 April 2012 shows serious intention by the prosecution to prosecute the appellant. The summons was issued by the Magistrates' Court on 17 April 2012 which is well within one month after the said vehicle had been seized. Therefore the Magistrate has the power to order for the forfeiture of the said vehicle. I hold that the issue raised by learned counsel for the appellant is without merits.

- G [19] The third issue raised by learned counsel is in respect of the Magistrate's discretion in ordering the forfeiture and failure of the Magistrate to consider mitigating factors put forward by the appellant. Learned counsel also submitted that the Magistrate had given undue emphasis on public interest without considering the interest of the appellant. Learned DPP submitted that it is not wrong for the Magistrate in assessing the appropriate sentence to consider question of public interest. Hilbery J in *R v. Kenneth John Ball* 35 Cr App R 164 had this to say:

- I In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be

tempted to try the crime as seeming to offer easy money on the supposition that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living...

A

B

[20] Learned DPP produced to this court three newspaper reports about activities involving Arabs in or around Bukit Bintang operate or provide a public vehicle services using a class of public vehicles without operator's licence. The three reports with the titled "SPAD akan peringkat operasi banteras 'ulat'", "'ulat' arab samseng" and "'ulat arab' caj hingga RM5,000". From the reports it shows that not only the said activities should not be allowed to happen in our country as it will tarnish the nation's image, it will also affect our own taxi drivers' income besides contravening provisions under Act 715. The offence committed by the appellant is therefore a very serious offence because of the repercussion.

C

D

[21] Learned counsel for the appellant talks about the Magistrate's discretion in ordering the forfeiture of the said vehicle without due regard to the mitigating factors put forward by the appellant. On a bare reading of s. 80(4) of Act 715, this court has no hesitation in concluding that the Magistrate shall order the forfeiture if it is proved to the satisfaction of the court that an offence against specified subsection (1) has been committed and that the vehicle was the subject matter of the offence. There is no ambiguity in the said provision. In the present case, the appellant pleaded guilty to the charge of an offence under s. 16, which is listed under subsection (1) and was convicted for the same offence. This means that the offence under subsection (1) had been committed by the appellant. The facts presented by the prosecution and admitted by the appellant shows that the said vehicle had been used by the appellant in the commission of the same offence. The said vehicle had been proven as the subject matter of the offence. The conditions provided under subsection (4) of s. 80 had been fulfilled. Therefore, the Magistrate shall order forfeiture of the said vehicle. Once the conditions under that subsection (4) of s. 80 of Act 715 had been fulfilled, the forfeiture therefore becomes mandatory. There is no discretion given to the Magistrate because of the words "shall be made" in s. 80(4) of

E

F

G

H

I

- A Act 715. When the provision of the statute is clear without any ambiguity, then the court must give effect to the clear and explicit language of the enacting words of the statute. The learned Magistrate was correct in making an order for the forfeiture of the said vehicle.
- B [22] In *Duning Jubin v. PP* [1997] 5 CLJ 170 involving forfeiture of vehicle under s. 51(3) of the Commercial Vehicles Licensing Board Act 1987 which is in *pari materia* with s. 80(4) of Act 715, Tee Ah Sing J (as His Lordship then was) decided that:
- C Section 51(3) of the Act does not impose upon the court a discretion to call the owner and anyone else who may have legitimate interest in the vehicle, an opportunity to show cause why it shall not be forfeited. If Parliament had intended to give an opportunity to show cause why the vehicle shall not be
- D forfeited then it would have enacted relevant provisions to provide for the same...the words of s. 51(3) of the Act are so clear that an order for forfeiture shall be made if it is proved to the satisfaction of the court that an offence against s. 33 or 34 has been committed and that the motor vehicle was the subject matter of the offence.
- E [23] On perusal of the record of proceedings, the charge proffered against the appellant and the facts presented by the prosecution, it is noted that the charge had been read and explained to the appellant and he understood it and pleaded guilty. In the charge
- F and underneath it, there are words to the effect that the said vehicle is liable to be forfeited. The effect of pleading guilty was explained to the appellant and he maintained his guilty plea even though effect and consequences of his plea of guilty had been explained and understood by him. The appellant also admitted to
- G the facts of the case. Therefore, in the present case there was no miscarriage of justice occurred to the appellant. The order of forfeiture of the said vehicle by the Magistrate is perfectly in order and safe. There is no ground to differ from the decision made by the Magistrate and no grounds to disturb the order of the
- H Magistrate. Therefore, there was no merit in the appellant's appeal herein.

I

**Conclusion**

[24] Based on the above reasons, this court finds that the order of forfeiture of the said vehicle by the Magistrate is in order. Accordingly, the appellant's appeal against that order is dismissed.

**A****B****C****D****E****F****G****H****I**