

VAN DEN TOOREN v. THE ATTORNEY-
GENERAL AND OTHERS.

1909. November 18. SMITH, J.

Criminal procedure.—Stolen property.—Conviction of thief.—Owner of property. — Restitution order. — Application to magistrate. — Sec. 266 of Ordinance 1 of 1903.—Magistrate's discretion.— Application to Supreme Court.—Jurisdiction.

At the conclusion of a criminal trial application was made to the presiding magistrate, under sec. 266 of Ordinance 1 of 1903, to direct that the stolen scrip which had formed the subject of the inquiry should be handed to the owner. The magistrate refused the application, and directed that the police should restore the scrip to the persons from whom they had obtained it. *Held*, that the Supreme Court had no jurisdiction, at the instance of the owner, to interfere with the magistrate's discretion.

Application for an order on the Assistant Resident Magistrate of Pretoria to deliver certain share certificates to the applicant.

The applicant alleged that in September, 1908, his house had been broken into and certain share certificates stolen, and that at the trial and conviction before the magistrate of the guilty parties it was conclusively proved that the share certificates produced in court were his property. The applicant forthwith applied to the presiding magistrate for delivery of the shares, but the application was refused. After the conviction had been confirmed on appeal the applicant wrote to the magistrate requesting that the shares might be delivered to no one but himself. About two weeks later a reply was received to the effect that the shares were to be handed to the police, after the lapse of fourteen days, for transmission to the persons from whom they received them. The shares were claimed by several other persons.

He then applied to the Supreme Court for an order on the magistrate to deliver the shares to him. Notice of the application was given to the other claimants.

Jeppé, for the applicant: The Court has jurisdiction to make the order asked for. The magistrate by directing the police to retain the shares for fourteen days before handing them over apparently intended that the applicant should have time to take steps to prevent their being parted with. If this relief is refused the applicant will be compelled to institute action.

No appearance for the respondents.

SMITH, J.: This is an application for an order on the magistrate directing him to hand over to the applicant certain scrip. It appears that the scrip was the property of the applicant, and was stolen from him on the night of the 26th September by two men named Petersen and Macdonald, who were afterwards convicted of the theft and sentenced. One of them appealed against the conviction, and it appears to have been confirmed by the Court on the 15th October last. On the 18th the applicant wrote to the magistrate asking him to hand over the scrip to him. On the 4th November the magistrate made an order stating that the scrip would be handed to the police at the expiration of fourteen days, for delivery to the persons from whom they had obtained it. Notice of that order was given to the applicant, and apparently also to the persons who were then supposed to be claiming the scrip—a gentleman named Burton, the secretary of one of the companies from whom the scrip was obtained, and a gentleman named Gunn, who had purchased the shares from Burton—these persons being, I assume, the individuals from whom the police had recovered the scrip. Application is now made to me for an order directing the magistrate to hand the scrip to the applicant, notice having been given to the other claimants. The only difficulty I have is to see what jurisdiction I have to make such an order upon the magistrate. Under sec. 266 of the Criminal Procedure Code he might, when he sentenced the accused, have made an order directing the stolen property to be handed back to the person who was proved to be the owner. He did not do that, but he directed that it should be handed to the police, to be by them returned to the persons from whom they had obtained it. The magistrate has performed his duty under the law. He has declined to hand the scrip to

the applicant, and has directed the police to hand it back to the persons who claim it. Mr. *Jeppe* argues that the magistrate's intention, in fixing fourteen days as the period at the expiration of which the scrip was to be handed back, was to enable the applicant to assert his claim to it. I do not know what his object was. His object may have been that, or it may have been to allow the persons claiming the scrip to consent to it being handed over. But, the magistrate having performed his duty, I do not see how I can on the present application—which, as I have said, is practically one for a mandamus—order him to do it. He has given his decision, and there is an end of the matter. I do not wish for a moment—I should be the last person to do so—to drive the applicant to incur the costs of bringing an unnecessary action. An action may not be necessary, if the persons who claim the scrip are satisfied that the applicant has a *bonâ fide* title to it. It is said to be of small value, and if that is so I hope they will take that view, and that the scrip may be handed to the applicant. I have no doubt that he is the person entitled to it, but I do not feel that I can make an order on this application, because I do not think I have jurisdiction to do so. Under these circumstances I shall make no order.

Applicant's Attorney: *C. H. H. Sheppard.*
