IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1 Derek Kelly,

Director,

Restructuring and Strategic Development

People's Bank,

No. 75, Sir Chiththampalam A Gardiner

Mawatha, Colombo 2.

2 W.J. Martin Fernando,

Additional General Manager,

People's Bank,

No. 75, Sir Chiththampalam A Gardiner

Mawatha, Colombo 2.

Accused Petitioners Appellants

C.A. (PHC) Appeal No. 57/2008

H.C. Colombo No: HCRA 522/2004

Vs

Yasasiri Kasthuriarachchi,

No. 19, Nugegoda Road,Pepiliyana,

Boralesgamuwa.

Complainant- Respondent

Before : **W.R.L.Silva, J. &**

H.N.J.Perera, J

Counsel : C.R. De Silva, P C, for the Petitioners

Anil Silva, P.C. with Bhathiya Wijesinghe for the Respondent

Decided on: 7.9.20012

H.N.J.Perera, J.

The Appellants have filed this appeal to set aside the order made by the learned High Court Judge of Colombo dated 28.03.2008 where the learned High Court Judge has held that he has no reasons to interfere with the decision made by the learned Magistrate of Fort and dismissed the said application for revision .

The complainant Respondent instituted case No 60390 in the Magistrates Court Fort on 25.2.2004 under section 136(1) (a) of the code of Criminal Procedure Act No 15 of 1979 against the Accused Appellants. In the said action he complained that the accused appellants had committed an offence punishable under section 459 of the Penal Code read with sections 32 and 454 of the Penal Code. After recording the evidence of the Complainant Respondent on oath the learned Magistrate on 25.02.2004 issued summons on the accused appellants. Aggrieved by the said order of the learned Magistrate the Accused Appellants filed a revision Application in the Provincial High Court of Colombo. The High Court in the first instance issued notice and stayed the proceedings in the Fort Magistrates Court, but subsequently dismissed the said application filed by the Accused Appellants stating that there is no reason to interfere with the order made by the learned Magistrate.

The main contention of the counsel for the Petitioners Accused Appellants was that the learned Magistrate had formed his opinion to proceed against the petitioners without having objectively assessing the material placed before him, both in respect of establishing the ingredients of the alleged offence and its purported commission by the petitioners.

In this case the complainant Respondent had testified on oath and the learned Magistrate being of the opinion that there was sufficient grounds for proceeding against the accused issued summons on the accused petitioners appellants in terms of section 139 (1) of the Criminal Procedure Act N0 15 of 1979.

In Malini Gunaratne, Additional District Judge, Galle vs Abeysinghe and another [1994] 3 Sri LR 196 it was held that the opinion to be formed should relate to the offence, the commission of which, is alleged in the complaint or plaint filed under section 136(1). The words "sufficient ground" embraces both the ingredients of the offence and the evidence of its commission. Since the opinion relates to the existence of sufficient ground for proceeding against the person accused, the material acted upon by the Magistrate should withstand an objective assessment. The proper test is to ascertain whether on the material before court, prima facie, there is sufficient ground on which it may be reasonably inferred that the offence alleged in the complaint or plaint has been committed by the person who is accused of it.

In Leo Fernando vs Attorney General [1985] 2 Sri LR 341, at page 349 Colin Thome, J observed that "The requirement as to the examination of the complainant is imperative and should be strictly complied with in order to prevent a false, frivolous and vexatious complaint being made to harass an innocent party and the waste of time of court."

In Sohoni's The Code of Criminal Procedure, 16 th Ed., Vol 11, 1234 it is stated that the object of this provision is to prevent the issue of process in cases where the examination of the complainant would show that the complaint was false, frivolous or vexatious, and that further proceedings would tend merely to harass unnecessarily an accused person and waste the time of the court. The underline principle for the examination of the complainant at the time of filing of a complaint is to ascertain whether the complaint established a prima facie case; that is, whether the facts disclosed in the petition of complaint called for investigation by a criminal court. It is to help the

court concerned in finding out whether there were sufficient material for the purpose of summoning the accused or for an enquiry into the grievances made by the complainant.

In Parmanand Brahmachari vs Emperor AIR 1930 Patna 30 it was held that the High Court will not ordinarily interfere with the details of an enquiry or investigation under S 202 and particularly will not do so on the ground that it was inadequate.

It was further held in that case that an enquiry or an investigation under section 202 is designed to afford the magistrate an opportunity of either confirming or removing such hesitation as he may feel in respect of issuing process against the accused. The nature of the enquiry varies with the circumstances of each case and it is certainly not contemplated that it should always be exhaustive. Frequently all that is required is the elucidation of some minor point or the summery determination of the sufficiency of the available evidence, but least of all is the enquiry-a preliminary trial of the accused at which he is entitled to adduce his evidence before process can issue upon him. The degree of formality of the proceedings and the width and the depth of the enquiry is entirely in the discretion of the Magistrate (so long at least as he confines himself to the simple question of issue of process or dismissal of the complaint), the provision is enabling and not obligatory. As soon as he has satisfied himself that process should issue its object is fulfilled and it is certainly not incumbent upon him or ordinarily expedient that he should practically enter upon a trial of the case.

In Bhim Lal Sah vs Emperor Indian Law Reports Vol XL 444 it was held that when a complainant prefers a complaint and supports it by oath,

he is entitled to be believed, unless there is some apparent reason for disbelieving him, and he is entitled to have the persons complained against brought to trial. It was further observed that "When a man files a complaint and supports it by his oath, rendering himself liable to prosecution and imprisonment if it is false, he is entitled to be believed, unless there is some apparent reason for disbelieving him; and he is entitled to have the persons, against whom he complains, brought before the court and tried.

In Ram Pershad vs Moti and others The Criminal Law Journal Reports Vol 14 493 it was held that the law intends that upon examination of a complainant the Magistrate, who examined the complainant, shall exercise his judgment as to how far the complainant appears to be a true complaint or reverse. If the Magistrate considers that the complainant is entitled to consideration, it is his duty then and there to proceed under section 204 of the Code of Criminal Procedure. In other words, the Magistrate starts upon the right and healthy presumption that a person who has taken the trouble to come to court and to take the further step of instituting a complaint, is acting upon knowledge or information which he believes to be true. To start with the presumption that a complaint is false is not a sound method of procedure. Hence it is when a Magistrate is not satisfied as to the truth of the complaint that the law requires him to record reasons for not being so satisfied. Sohoni's code of Criminal Procedure 16 th Edition Vol 11, 124.

It is also the contention of the counsel for the appellants that the order made by the learned Magistrate on 25.02.2004 is an appealable order, therefore the learned Magistrate is bound to give reasons for the order he made on that date.

Section 319 of the Criminal Procedure Act reads as follows:-

" Where a Magistrate.s Court has refused to issue process a mandamus shall lie to compel such court to issue process, but an appeal shall not lie against such refusal except at the instance or with the written sanction of the Attorney-General."

Therefore it is very clear that an order by a Magistrate refusing to issue process is an appealable order, provided that the appeal is preferred at the instance or with the written consent of the Attorney-General. This court cannot agree with the submissions made on behalf of the appellants that the order made by the Magistrate to issue process on the petitioners is an appealable order.

In Ram Pershad vs Moti and others The Criminal Law Journal Reports Vol 14, 493 it was held that the law intends that upon the examination of a complainant, the magistrate, who had examined the complainant, shall exercise his judgment as to how far the complaint appears to be a true complaint or the reverse. Hence it is that when a magistrate is not satisfied as to the truth of the complaint that the law requires him to record his reasons for not being so satisfied.

Therefore this court cannot agree with the submissions made by the counsel for the appellants that the learned Magistrate, in not recording reasons and / or the grounds which he deemed sufficient to proceed against the appellants, has acted contrary to law

The learned Magistrate after taking the evidence from the complainant on oath have stated in his order that after considering the evidence led before him he is satisfied that there is sufficient grounds to issue summons on the appellants. Although the learned Magistrate has not

proceeded to give reasons in detail for the decision he arrived, in this case immediately after the evidence of the complaint had been led stated that he had considered the evidence given by the complainant and that he is satisfied that there was evidence to proceed with the application made by the complainant. One cannot say that the learned Magistrate has totally failed to consider the evidence given by the complainant in this case. There is no doubt that the learned Magistrate has considered the evidence given by the complainant in this case , though he had stated in a summery manner that he considered the evidence that was led before him and was satisfied with that evidence. Therefore this court cannot agree with the submissions made by the learned counsel for the appellants that the learned Magistrate has failed to apply his mind to the facts of this case and the law applicable thereto.

There is no dispute that the only evidence that was led in this case against the 1st appellant was a letter sent by mr. Vitharana that was copied to the 1st petitioner appellant. This court is of the view that there wasn't sufficient material placed before the learned Magistrate to issue summons on the 1st petitioner-appellant. Therefore I set aside the order made by the learned Magistrate to issue summons on the 1st petitioner appellant and discharge the 1st petitioner-appellant from the proceedings in the Magistrate's Court of Fort No 60390.

JUDGE OF THE COURT OF APPEAL

W.R.L.SILVA, J.

I agree

JUDGE OF THE COURT OF APPEAL