In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

CA PHC 108/2010
HC Anuradhapura Revision 34/2010
MC Anuradhapura 866

Abubackerge Jaleel, Nelugollakada, Rathmalgaha Wewa

CLAIMANT-PETITIONER-APPELLANT

Vs

OIC,

Anti-Vice unit, Police Station, Anuradapura

COMPLAINANT- RESPONDENT-RESPONDENT

Hon Attorney General, Colombo

2ND RESPONDENT-RESPONDENT

1. Sherif Moul 2. M K Jalaeel

ACCUSED-RESPONDENT-RESPONDENTS

Before: A W A Salam, J (P/CA) and Sunil Rajapakse,J

Counsel: Upali A Gunaratna, PC with Mahesh Wakishta for the Claimant-Petitioner-appellant and Anoopa De Silva SSC for the Complainant-Respondent-Respondent and Hon Attorney General.

Argued on: 21.02.2014 and 25.06.2014.

Decided on : 26.08.2014

A W A Salam, J (P/CA)

The accused-respondent-respondents (hereinafter referred to as the "accused") were allegedly charged in the Magistrate's Court for causing cruelty to animals, and transport of cattle.

Under Section 3C of the Animals Act as amended by Act No 46 of 1988, transport of cattle is an offence, which would inevitably necessitate confiscation proceedings both in respect of the animals[1] and the vehicle, resulting in complex factual and legal issues; but no such permit as provided for in Section 3 is necessary to transport sheep, goat, pig or poultry which are brought under Part IV of the Act dealing with "Trespass of animals" and in such an event no confiscatory steps would entail either in respect of the vehicle or the animals.

Under Section 136 (1) (b) of the Code of Criminal Procedure Act (hereinafter referred to as the "Code") institution of proceedings in a Magistrate's Court (in addition to certain other modes) takes place upon the presentation of a written report complaining of the commission of an offence. The proceedings in this case had begun with the complainant-respondent-respondent filing a report under Section 136 (1) (b) of the Code complaining that the accused had

[1] Confiscation of animals was introduced by Animals Act amendment No 10 of 2009

committed the offence of causing cruelty to animals and transporting them without a permit.

Once a report is filed under Section 136 (1) (b) of the Code, the next step is to ascertain under Section 182 of the Code as to whether there is sufficient ground for proceeding against the accused and in the event of the opinion being favourable to the prosecution, the Magistrate shall frame a charge against the accused. Once the charge is framed, the Magistrate he shall read it to the accused under 182 (2) and ask him if he has any cause to show why he should not be convicted.

Magistrates usually do not frame charges themselves in each every case but accepts the draft charge which is tendered by prosecuting party. Yet in law, it is the charge framed by the Magistrate from the time it is accepted.

Under Section 182 (2) the Magistrate asks the accused whether he has any cause to show as to why he should not be convicted. In response to it, if the accused makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence. (Section 183)

Even though the Magistrate is said to have explained to the accused the charges framed against them, admittedly no charge sheet is found in the original record or in the docket maintained by the High Court.

In Tissera Vs Foster (1891) 9 SCC at page 173, a full bench ruled that framing of a charge is a fundamental requirement. The decision was followed in Perera Vs Cooray (1912) 7 Weerakoon's Report at page 20, Goonawardena Vs Babun (1908) 4 ACR 141 and in Andiris Appu Vs Nicolas (1902) 3 Brown's Report at page 144.

The development of the Law relating to framing of charges was discussed at length by Bertram CJ in the celebrated judgment in Cooray Vs James Appu reported in 22 New Law Report 206. The judgment at page 213, states as follows...

> Quote;- The Legislature, deliberately departing from the previous practice, had declared that in every summary trial, when once the Court has decided to undertake it, there shall be from the commencement a definite written charge, which should be read to the accused, specifying precisely what he has to meet. This charge may be the subject of reference at any point in the trial, and must be the basis of any ultimate consideration of the case by the Court of Appeal. Such a provision may well be regarded as of so fundamental and all-pervading a character, that its non-observance ought not to be treated as a mere irregularity. No doubt there may be cases in which the facts may be so simple, the issues so plain, and the charge so

inevitable that it cannot make the smallest difference to the accused whether a written charge is read to him or not. Nevertheless, it is easy to see that some provisions may in the intention of the Legislature be of the very essence of the proceedings, while others may be in the nature of formalities. The existence of a deliberately framed written charge is obviously a condition which may well be so regarded, whatever the circumstances of the particular case- Unquote.

In Ebert Vs Perera (23 NLR 362) [Full Bench] Ennis, De Sampayo, and Schneider JJJ. held that when proceedings were instituted under Section 148 (b) of the Criminal Procedure Code, 1898, (which corresponds except a slight negligible variation to the present 136(1s) (b) in the Code of Criminal Procedure Act) on a written report to the Magistrate that the accused had committed an offence and the Magistrate endorsed on the report "charge read from the report, there was an omission to frame a charge, and that the irregularity was not covered by Section 425.

Besides, the failure to adhere to the legal requirement of having to charge the accused by the Magistrate himself after making up his mind that there is sufficient grounds to proceed against him vitiates any conviction irrespective of any question of prejudice caused to the accused. (Vide Goonawardena Vs Babun 1908 1 SCD 84, Deonis Vs Charles 1915 4 Bal.N.of C 53, Dunuvila Vs Sinno 1915 3 Bal. N. of C 50, De Silva Vs Davit Appuhamy 1919 7 CWR 19)

The judgments cited above clearly points to the total absence of a written charge (as is the case in the instant appeal), ought not to be treated as a mere irregularity. The right to know the charge is a fundamental requirement. It is a magisterial duty which cannot be delegated to the police. Whether there is sufficient ground to proceed against the suspect is in the hands of a judicial officer who is expected to address his mind judiciously. If the duty of framing the charge is to be entrusted to others the purposive approach to Section 182 will be rendered nugatory. The practice of explaining the accusation from the plaint is an incurable irregularity which shatters the basis of the conviction and should undoubtedly shock the conscience of the Court as well. It may well be a conviction entered per incuriam, if it is entered in ignorance of the provisions of the Code or the *ratio decidendi* on the matter.

In Abdul Sameem V. The Bribery Commissioner 1991 1 SLR 76, this Court considered the consequences of the failure to frame a charge. The case of Abdul Sameem concerns the institution of proceedings under Section 136(1) (b) of the Code, on a written report by the Bribery Commissioner to the Magistrate that the accused committed certain offences under the Bribery Act. The accused appeared on summons. The Magistrate adopted the said report by placing a seal. It was held that that there was a failure to frame a charge by the Magistrate as required under Section 182(1) and read it to accused as contemplated under Section 182(2). It was specifically held that the failure to frame a charge, as required under Section 182(1) is a

violation of a fundamental principle of criminal procedure, and is not a defect curable under Section 436 of the Code of Criminal Procedure Act No. 15 of 1979. **Quite significantly, the Court whilst appreciating the pressures on time and the large volume of work the Magistrate's Courts are called upon to handle, nevertheless held that it is important, that rights the of the accused are safeguarded and that they are brought to trial according to accepted fundamental principles of criminal procedure.** [Emphasis added]

In the case of Godage and Others Vs. Officer-In-Charge, Police Station, Kahawatte - Sri Lanka Law Reports- 1992 - Volume 1, at page 54, a similar question was considered by this Court which decided the duty of the Magistrate under Section 182 of the Code of Criminal Procedure Act as being imperative whilst endorsing the view expressed by Dr Asoka Gunawardena J in the case of Abdul Sameem (supra). In Godage(supra) the learned Magistrate convicted the accused but there was no charge found in the case record. Following the authority in the case of Abdul Sameem(supra), Ismail, J set aside the conviction in appeal after 11 years.

Thus it would be seen that framing of a charge to give validity to a criminal prosecution or subsequent conviction is absolutely indispensable. The absence of a charge is fatal to the validity of the trial and conviction as well. This principle has been exhaustively

discussed in Abdul Sameem (supra) in reference to a long line of decided authorities including a full bench decision.

In the case of Upali Indrathilake Amadoru Vs. Officer-in-Charge, Special Criminal Investigation Unit, Police Station, Wennappuwa (S.C. Appeal No. 12A/2009- S.C. Spl. L.A. No. 332/2008) the Supreme Court pointed out that that only after the charges are read to an accused can a verdict be given, WHETHER ON ADMISSION OF THE ACCUSED or after a trial. The correct framing of charges, therefore, is an indispensable prerequisite to the issuance of a verdict, as it is on these charges that the Accused is to tender his plea and the Court is to consider whether to proceed to trial. (Emphasis added to indicate the relevance of the principle to this appeal)

It is important that no case should be regarded as unimportant. However, trivial it may be in the estimation of the bench, to the parties involved, particularly the accused, even a prosecution concerned with committing a compoundable offence or even a lesser offence may be more important to him than any of his other affairs.

The very fact that the rubberstamp having been place on the reverse of the plaint demonstrates the absence of a charge sheet. The rubberstamp placed on the reverse of the plaint reads that the accused was explained the charge even though there were two accused in the case. The rubberstamp placed confirms that only one

charge had been explained out of the two. Assuming that there was a valid charge sheet, yet one cannot find out which accused has been called upon to show cause against being convicted. Further, the accused had been imposed a fine of 30,000/- only but it is not clear which accused had been fined.

As against the imposition of a fine of Rs 30,000/- on one of the accused, how the registry collected Rs 30,000/- each from both accused remains a mystery. There is no evidence that both accused had pleaded guilty to the charge either. According to the rubberstamp placed, only one accused had pleaded guilty. This clearly shows as to why only Rs 30,000/- has been imposed on one accused. Had one of the accused had remained silent without pleading to the charge, then the charge against him would have required positive proof. If the accused who pleaded guilty was not the driver, then no confiscation could have taken place.

For purpose of ready reference the relevant Journal entry as it appears from the impression of the rubberstamp is copied below....

වෝදනා පත්‍රයෙන් චූදිතයාට[2] කියවා දෙමි. "මම වරදකරු"[3] යැයි චූදිත[4] ප්‍රකාශ කර සිටි. ඔහුගේ[5] ප්‍රකාශය අනුව ඔහු වෝදනාවට[6] වැරදිකරු බව

[2] Singular

[3] Singular

[4] Singular

[5] Singular

[6] Singular

මම තීරණය කරමි. ..... 30,000/-[7] දඩ මුදලක් නියම කරමි. දඩය නොගෙවිවොත් 6[8] බ/වැ සහිත ..... නියම කරමි.

This being the set up that prevailed at that time, I am hopeful that the rubberstamp which had been affixed on to the reverse of the report, is now re-done with the deletion of the Sinhala equivalent "I am guilty/ I am not guilty" which phrase presupposes that that the Magistrate knew as to what exactly the statement of the accused was going to be in response to the charge. Instead, the phrase "I am guilty/ I am not guilty" may be taken out from the rubberstamp and left blank for the Magistrate to fill the blank in his own handwriting thus making an attempt to record as nearly as possible the very statement of one or more of the accused, in compliance of the requirement of Section 183 of the Code.

On a perusal of the details found in the impression of the rubberstamp one is at a loss to understand for which offence the fine has been imposed. If it is under the Cruelty to Animals Act which is the 1st charge the maximum fine that can be imposed is Rs 100/- and no more. If the fine of Rs 30000/- had been imposed for count 1, then the imposition of the fine is illegal.

[7] Singular

[8] Not specified the days month or Not specified the days, month or year

It is to be noted that even under the Increase of fines Act No 12 of 2005 the fine that can be imposed with regard to the offence of Cruelty to Animals has not been increased.

The maximum fine the court can impose in respect of transport of cattle without permit is Rs 50000/-.

The learned Senior State Counsel has contended that it is not open to the complainant-petitioner-appellant to impugn the conviction now as both accused have failed to do so in their own rights. I regret my inability to endorse this contention as being the correct proposition of the law.

An order of confiscation is in fact a punishment which is imposed in addition to the ordinary punishment imposed on the offender. However, if the vehicle used in the commission of the offence belongs to a third party, it is confiscated only after the third party is afforded an opportunity of being heard.

The confiscation of the vehicle has to be based on a conviction which is acceptable in law. If there is no conviction, then there is no confiscation. In other words, a valid conviction is a condition precedent to proceed to call upon the owner of the vehicle, if he is not the offender, to explain himself.

An accused cannot be said to have been lawfully convicted in the absence of a charge framed by the Magistrate in terms of Section 182 (1), explained under Section 182 (2) and his statement recoded under 183 of the Code.

The legal question raised by the learned Senior State Counsel revolves round the *locus standi* of the claimant-petitioner-appellant to challenge the conviction when the accused have not elected to challenge the same. It has to be borne in mind that an order of confiscation of property whether movable or immovable leads to deprivation of property rights of a citizen. Inasmuch as the Court has to approach the issue relating to the liberty of the subject by giving a strict interpretation of the Provisions of the law and the same approach has to be aimed at resolving the issues relating to the legality of the confiscation orders as well, since the confiscatory Provisions in any enactment though it may not be strictly called a draconian measure, yet it has such a draconian flavour.

Under Section 317 (2) an appeal lies even after tendering an unqualified admission of guilt and been convicted by Magistrate's Court, if such an appeal is preferred on a matter of law. Accordingly, the accused in this case had a right of appeal on a matter of law. The accused have neither appealed nor invoked the revisionary powers of the High Court to have their conviction set aside. As a matter of fact it is a moot question whether the accused can now move in revision to

have the conviction set aside on the basis that delay does not stand in the way of revision of an illegal order made without jurisdiction.

Even then the claimant-petitioner-appellant has every right to challenge the conviction on any ground permitted in law, as his property rights are intrinsically interwoven with the alleged conviction of the accused. In the circumstances, I am of the opinion that the claimant-petitioner-appellant has made out a strong case backed by exceptional circumstances warranting the invocation of the revisionary powers of the High Court against the order of confiscation made by the learned Magistrate. When the legality of the conviction of the accused is such which cries out for remedial action and once it is brought to the notice of Court as to the magnitude of the illegality, this Court cannot turn a blind eye and affirm the order of confiscation.

In terms of Section 3A where any person is convicted of an offence under Part III or any regulations made thereunder, any vehicle used in the commission of such offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting Magistrate, to confiscation but, in any case where the owner of the vehicle is a third party, no order of confiscation shall be made, if the owner proves to the satisfaction of the Court that he has taken all precautions to prevent the use of such vehicle or that the vehicle has been used without his knowledge for the commission of the offence.

In this case the question of calling upon the owner to show cause against the vehicle being confiscated does not arise as there had been no conviction acceptable in law.

Even assuming that the owner of the vehicle was under a duty to show cause against a possible order of confiscation, I find it difficult to accept the basis on which the learned Magistrate has entered an order for confiscation on the merits of the inquiry. It was the evidence of the owner that he had given instructions to the employee (driver) not to engage the lorry for any other purpose other than to transport items which do not require a permit. The testimony of the owner has not been discredited under cross-examination. There has been no previous instance where the driver has been charged for similar offence. When someone is under a duty to show cause that he has taken all precautions against the commission of similar offences, I do not think that he can practically do many things than to give specific instruction. The owner of the lorry cannot be seated all the time in the lorry to closely supervise for what purpose the lorry is used.

The learned Magistrate has stated that since the driver has been employed on a permanent basis by the owner he has to take the responsibility arising from the transportation of cattle. If this be the case, a Government Servant such as a Minister, and Member of Parliament, a Judicial Officer may employ a driver reposing confidence in him and allow him to drive the vehicle on his behalf in his absence. If he, in doing so contravenes the law which gives rise to

an order of confiscation of the vehicle, then however much the owner comes forward and says that he gave instructions not to make use of the vehicle for illegal purposes, by reason of the fact that he is on the monthly payment the vehicle has to be confiscated. This approach does not appear to be reasonable and acceptable in law. In an inquiry of this nature, all what the owner has to prove is that he took every measure to ensure that the vehicle is not used for illegal purposes.

Another reason which led to the confiscation of the vehicle by the learned Magistrate was the absence of corroborative evidence of the owner. I do not think that the law casts a duty on the owner to corroborate the evidence when he is required to show cause against a possible confiscation.

The evidence of the owner in that respect has not been contradicted or shown to be lacking any credit worthiness. This is the 1st offence if at all the accused is alleged to have committed. There is no evidence to show that the owner of the vehicle has continued to employ the driver after the commission of the offence. In the circumstances, guided by the explanation given by the owner, I do not think an order of confiscation of the vehicle is justifiable.

As such, the confiscation cannot be allowed to stand for 4 reasons. They are as follows...

1. There is no valid conviction of the accused and therefore the owner cannot be called upon to show cause against a possible confiscation.

2. As there is no valid conviction the confiscation cannot stand on its own.

3. Assuming the owner was under a duty to show cause his evidence cannot be simply rejected.

4. The fact that the accused was in the permanent employment of the owner per se does not give rise to an automatic confiscation.

As such the confiscation order made by the learned Magistrate is set aside and the appeal allowed.

President/Court of Appeal

Sunil Rajapakse, J

I agree.

Judge of the Court of Appeal

TW/-