ABDUL SAMEEM
V
THE BRIBERY COMMISSIONER

COURT OF APPEAL
A. DE Z. GUNAWARDENA. J,
C. A. NO. 1/90
M. C. COLOMBO NO. 87884/1
SEPTEMBER 05, 1990 AND OCTOBER 09, 1990

Criminal Procedure - Accused appeared in Court on summons - Failure by Magistrate to frame Charge - Whether defect curable - Code of Criminal Procedure Act No. 15 of 1979 - Sections 139(1), 182(1), 182(2), and 436.

The proceedings were instituted under section 136(1)(b) of the Code of Criminal Procedure Act 15 of 1979, on a written report by the Bribery Commissioner to the Magistrate that the accused had committed two offences under the Bribery Act. The accused appeared on summons. The Magistrate adopted the said report by placing a seal.

Held:

(i) 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).

(ii) 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.

Per Gunawardana J., "Furthermore whilst appreciating the pressures on time and the large volume of work the Magistrate's Courts are called upon to handle, it is nevertheless important, that rights of an accused person are safeguarded and that he be brought to trial according to accepted fundamental principles of criminal procedure."

Cases referred to:

(1) *Ebert* v.*Perera* 23 NLR 366
(2) *T. S ntosan Nadar* V. *The Attorney-General* 79(2) NLR 1/2
(3) *Fernando* V. *The Attorney-General 2* Sri Kantha Law Reports 1
(4) *State* V. *Piyasena 3* Sri Kantha Law Reports 86
(5) *Godawela Ralalage Dingiri Banda* V *The Attorney-General* 1986 2 Sri Kantha Law Report 356.

APPEAL from conviction by Magistrate's Court of Colombo.

Ranjit Abeysuriya P.C. with *D.P.S. Jayawardena* and *Achala Wengappuli* for accused - appellant.

Miss I. Demuni State Counsel for Attorney-General

Cur. adv. vult.

January 16, 1991.

A. DE Z. GUNAWARDENA J.

The accused-appellant was charged in the Magistrate's Court of Colombo with having committed the following offences:-

(1) That on or about Sept. 22, 1987 at Kurunegala, the accused-appellant being a public servant, to wit, a Grama Sevaka, accepted a sum of Rs. 15/- as a gratification from one C.H. Hajirine, for the performance of an official act, an offence punishable under section 19(b) of the Bribery Act.

(2) That at the time and place aforesaid and in the course of the same transaction, the accused-appellant, being a public servant, as aforesaid, accepted a sum of Rs. 15/- as a gratification from the said Hajirine, an offence punishable under section 19(C) of the Bribery Act.

After trial the accused-appellant was acquitted on count 1 and convicted on count 2 and sentenced to one year simple imprisonment, which was suspended for a period of 5 years, and a fine of Rs. 500/-. This appeal is from the said conviction and sentence.

The learned Counsel for the accused-appellant submitted that the learned Magistrate has failed to comply with the provisions of section 182 of the Code of Criminal Procedure Act No. 15 of 1979, in that the learned Magistrate has failed to frame a charge against the accused-appellant and read such charge to the accused-appellant. It must be noted that in this case the accused-appellant had appeared in Court on 23.06.1988 upon summons being served on him. However, the learned Counsel for accused-appellant contended that, the provision in section 182 of the Code of Criminal Procedure Act No. 15 of 1979 does not make a distinction between accused persons brought before the Court on summons or warrant and accused persons brought before Court without such summons or warrant. In order to appreciate the change brought about by section 182 of the Code of Criminal Procedure Act No. 15 of 1979 I would quote the two sections. The section of the Criminal Procedure

Code, (1898) which is the equivalent of section 182 of the present Code) reads as follows:-

Section 187

(1) Where the accused is brought before the Court otherwise than on a summons or warrant the Magistrate shall after the examination directed by section 151 (2), if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against the accused.

(2) In cases where the accused appears on summons or warrant it shall not be necessary to frame a charge but the statement of the particulars of the offence contained in the summons or warrant shall be deemed to be the charge and the provisions of this Code as to the amendment and alteration of charges shall apply to the same accordingly.

(3) The Magistrate shall read such charge or statement, as the case may be, to the accused and ask him if he has any cause to show why he should not be convicted:

Provided that in all cases in which a prosecution commenced on a written report under section 148(1)(b), and such report amended if necessary by the Magistrate, discloses an offence punishable with not more than three months' imprisonment or a fine of fifty rupees, it shall be lawful for the Magistrate to read such report, amended if necessary, as a charge to the accused and ask if he has any cause to show why he should not be convicted.

Act No. 15 of 1979 states:-

Section 182

(1) - where the accused is brought or appears before the Court the Magistrate shall if there is sufficient ground for proceeding against the accused, frame a charge against the accused.

(2) The Magistrate shall read such charge to the accused and ask him if he has any cause to show why he should not be convicted.

Thus under the present law the following changes are discernible.

(a) There is no distinction made in regard to the requirement for the

Court on summons or warrant, or is brought before Court without suchprocess. This change has been effected by adding the words "or appears", and by the omission of the words" otherwise than on a summons or warrant," which were found in section 187(1).

(b) The requirement for the Magistrate to examine on oath the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case has also been done away with, under section 182(1). This has been effected by the omission of the following words which were there in section 187(1), viz. "after the examination directed by section 151(2), he is of opinion that."

In the light of the above changes made to section 187(1), the subsection (2) and the proviso to subsection (3) of the said section have been omitted. Consequentially, the words "or statement as the case may be, "in sub-section (3) of the said section have also been deleted.

The resulting position is that under the provisions of said section 182 there is now no distinction between an accused person appearing on summons or warrant or brought before Court without such process. In both instances a charge has to be framed by the Magistrate, if there is sufficient ground for so doing. In addition, the requirement for the Magistrate to examine on oath the person who brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case, has also been done away with.

Under section 139(1) of the Code of Criminal Procedure Act No. 15 of 1979 the Magistrate is required if he "is of opinion that there is sufficient ground for proceeding against some person who is not in custody" to issue a summons or warrant as the facts of the case warrant. Thus the Magistrate is required to form an opinion as to the sufficiency of the grounds for proceeding against a person at the stage the summons or warrant is issued. It may be noted here that the words " is of opinion" have been omitted in the said section 182(1) and merely states "if there is sufficient grounds for proceeding against the accused. "It may be that since the Magistrate has already formed an "opinion that there is sufficient ground for proceeding against the accused, "when the summons or warrant was issued that the words "is of opinion" have been omitted. However, the fact remains that both at the stage of the issue of summons or warrant and at the time the accused is brought or appears before Court it is necessary that there must be "sufficient ground for proceeding

against the accused." Thus in a case where the accused appears before the Court on summons or warrant the Magistrate is required to satisfy himself that there are grounds for proceeding against the accused on two occasions viz. once at the stage where the summons or warrant is issued and later when a charge is to be framed upon his appearance. However, in a situation where accused is brought before Court without summons or warrant, then the Magistrate is required to satisfy himself only once; that is, when a charge has to be framed, upon his being satisfied that there is sufficient ground to proceed against the accused. These are the peculiarities of the law, as it stands today, which the draftsman seems to have overlooked. Under the earlier law this situation was avoided by the provision in section 187(2) which permitted the statement of particulars in the summons or warrant to be adopted as the charge.

The underlying principle in the said requirement, is that, an independent judicial mind is required to assess the sufficiency of the material available against the accused even before summons or warrant is issued in one instance and in any event before a charge is framed. This is a very salutary and a fundamental feature of our Criminal Procedure which would ensure the protection of the liberty of the subject. It is in that light that we have to view the validity of the objection taken by the learned Counsel for accused-appellant, that failure to frame a charge would vitiate the conviction of the accused-appellant.

It appears from a perusal of the record in this case that the learned Magistrate has mechanically adopted the report filed by a Bribery Department official, both at the stage of issue of summons, and also at the time the plea was recorded. The first journal entry at page 5 of the record shows, that an entry had been made giving the notice returnable date i.e. 23.6.88, and the learned Magistrate has initialled it. On the notice returnable date when the accused-appellant appeared in Court, a seal which is not decipherable, had been placed, and the case had been fixed for trial. The learned State Counsel submitted that the said rubber seal contains the following information:-

(a) the charge was read to the accused from the charge sheet/plaint/ report.
(b) the accused pleaded not guilty.
(c) a date was fixed for trial.
(d) summons were issued to the witness for the date, for which the case is fixed for trial.

The learned Counsel for the accused-appellant argued that even if the contents of the seal as alleged by the learned State Counsel is conceded, it does not prove that a charge had been framed by the learned Magistrate as required by the imperative provisions of section 182(i). It is important to point out here that the words used are "the Magistrate **shall**" (emphasis mine) frame a charge against the accused.

The learned State Counsel further contended that the document found at the end of the record at pages 51 and 52, is evidence of sufficient compliance with the provisions of section 182(1). In that document the word "නිවැරදිකරු" (not guility) had been written and apparently initialled by the learned Magistrate with the date 6/23. However, upon an examination of the said document it is clear that it is an exact copy of the report filed in this case by the Bribery Commissioner which appears at pages 4 and 5 of the record. It is significant to note that the said document which the learned State Counsel, alleges to be equivalent of the charge sheet, itself states that it is a report made by the Bribery Commissioner to the Court in terms of section 134(1)(b) (it should be section 136(1) (b)) of the Code of Criminal Procedure Act No. 15 of 1979). The only difference is that the original report appearing at pages 4 and 5 of the record is signed by the Bribery Commissioner himself and the said document at pages 51 and 52 is initialled by an official on behalf of the Bribery Commissioner, which also goes to show that the said document is a document prepared by the Bribery Commissioner's department, which ought not be the case if it is a charge sheet containing the charges framed by the learned Magistrate. This leads us to the inference that the learned Magistrate has failed to frame the charges having satisfied that there are reasonable grounds to do, as required under section 182(1), instead had adopted a document which has been submitted to Court by a Bribery Commissioner's Department official. Thus the contention of the learned State Counsel that the learned Magistrate has complied with the imperative provisions of section 182(1), fails. The direct effect of non compliance with section 182(1) is that it becomes practically impossible to comply with provisions of section 182(2), which requires that the charge must be read to the accused. Because, when there is in fact no charge framed by the learned Magistrate, then there is no question of reading it to the accused. Hence there is non-compliance with section 182(2) also, in the instant case.

Now the question to be considered is, what is the effect of such non-compliance. In the old Ceylon Criminal Procedure Code No. 3 of 1883, section 483 provided that a finding or sentence should not be invalid

merely on the ground that no charge was framed unless there was an actual miscarriage of justice. However, this provision was omitted in the Criminal Procedure Code No. 15 of 1898. The section 494, which provided for curing irregularities of the charge was retained as section 425 of the Criminal Procedure Code No. 15 of 1898. The section 425 of the Criminal Procedure Code No. 15 of 1898 is at present substantially enacted as section 436 of the Code of Criminal Procedure Act No. 15 of 1979. Hence at present there is no express provision directly dealing with the failure to frame a charge by the Magistrate. The learned State Counsel, however sought to argue that provisions of section 436 are wide enough to cover this situation as well.

In this regard I would like to refer to the following passage of Ennis J., in the full bench decision, in ***Ebert*** **vs.** ***Perera*** (1):

> "The terms of section 425 so far as necessary for consideration in this case are:-
> "subject to the provision hereinbefore contained no judgement... shall be reversed or altered on appeal . . . on account of any error, omission or irregularity **in** (my emphasis) the . . . charge"
>
> An omission of the charge altogether is not covered by this section, which relates to omissions "in" the charge. Moreover, the section is expressly made subject to the earlier provisions of the Code, among which is the provision in the provisio to section 187 allowing a report to be read as a charge within the limits set out by the proviso.
>
> I would add that the formulation of the charge or statement in a summons or warrant on a review of the facts by an independent person is, in my opinion, a fundamental principle in our criminal procedure as now laid down in the Code of 1898, and the proviso in section 187 was necessary to make the slightest departure from it lawful."

Having stated so, Ennis J went on to hold that the failure to frame a charge is fatal to the conviction.De Sampayo J. and Schneider J. agreed with the said finding.

De Sampayo J. in a separate judgement emphasised that it is a fundamental principle that there should be a definite charge and that the law imposes

that duty on the Magistrate to frame a charge. De Sampayo J. considering the question whether section 493 of the old Code (1883) was dropped because section 425 of the Code of 1898 was sufficient to cover the case of omission of the charge, at page 367, stated thus,

> "But that cannot be, because what section 425 provides is not for the case of omission of the charge, but of omission in the charge. That is to say, an omission, for instance, of the necessary particulars in the charge may be regarded as an irregularity which may be cured by the application of section 425, if no prejudice has been thereby occasioned to the accused. But the entire absence of a charge, where the Magistrate ought to have framed one, is not a mere irregularity which may be overlooked under section 425, but is a violation of the essential principle generally governing criminal procedure and vitiates a conviction."

Malcolm Perera J. with Tittawela J. agreeing with him in the case of ***T. Santhosan Nadar*** **vs.** ***The Attorney-General*** (2) followed the said dicta of Sampayo J. and quashed the conviction in the said case, where there was an omission to frame a charge.

In ***Fernando*** **vs.** ***The Attorney-General*** (3) where a seal was placed, and no charge sheet was found in the record, as in the instant case, Seneviratne J. held that there was a failure to frame a charge, which vitiated the conviction. Seneviratne J. followed the above decision in the case of the ***State*** **vs.** ***Piyasena*** (4) and held that not framing a charge in a criminal trial is a breach of a fundamental principle of criminal procedure and set aside the conviction and sentence and ordered a fresh trial.

Thus it is seen that all the aforesaid authorities have held that the omission to frame a charge is a breach of a fundamental principle of criminal procedure and that such failure is fatal to a conviction. Furthermore it had been pointed out that the provision of section 425 of the Code of 1898, is not sufficient to cover such a defect, as it deals with the case of irregularities in the charge and not a situation where there is a total absence of a charge.

The learned State Counsel also cited the case of ***Godawela Ralalage Dingiri Banda*** **vs.** ***The Attorney-General*** (5). The Counsel for the

accused had argued in that case that his client had not been properly charged, because there was no charge sheet indicating that charges were framed by the learned Magistrate as required under section 182(1). The learned Magistrate in his judgement has stated that accused was charged in accordance with the plaint, which inferentially would mean that the learned Magistrate had not framed a charge as required under section 182(1), but had read the charge from the plaint. However, as explained earlier there is no provision in law as at present, to read the charge from the plaint.

Goonewardena J. in his judgment has stated:-

"The question then is whether as in the case before us the absence of such a charge reduced to writing as appears to be the requirement of section 182 of the Code of Criminal Procedure Act No. 15 of 1979 invalidates the trial. Upon a careful consideration of the circumstances and being mindful of the actual day to day working of Magistrate's Courts, I venture to state that the answer to that question should be in the negative unless the failure to reduce the charge to writing occasioned also a failure of justice. In the case before us it cannot I think be said that there was such a failure of justice."

The learned Counsel for the accused-appellant in his written submissions dealing with the above judgment has stated that,

"This is a decision the authority of which is impaired by the failure of the Court to give consideration to the several previous decisions of the Supreme Court including the full bench decision in 23 NLR 362. It is my submission that this decision should not therefore be followed".

On a perusal of the said judgment, it is apparent that the authorities that I have reviewed earlier have not been considered in the said judment. Therefore there is substance in the said submission of the learned Counsel for the accused-appellant.

Furthermore whilst appreciating the pressures on time and the large volume of work the Magistrate's Courts are called upon to handle, it is nevertheless important, that rights of an accused person are safeguarded, and that he be brought to trial according to accepted fundamental principles of criminal procedure. In that context it would be appropriate

to note that, the matter to be decided is a legal issue and the legal consequences that flow from it. The previous authorities which I discussed above, have rightly approached the problem from that perspective. I am persuaded by their reasoning and am inclined to the view 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. Therefore, in view of the earlier finding I have made, that the learned Magistrate has failed to frame a charge in terms of section 182(1), in the instant case, this conviction cannot stand. Hence I would allow the appeal of the accused-appellant. Accordingly I hereby set aside the conviction and sentence of the accused-appellant and remit the case for a trial *de novo* before another Magistrate, in the Colombo Magistrate's Court.

Appeal allowed.
Case sent back
for trial de novo.