1968 *Present :* **Weeramantry, J.**

P. V. VELU, Petitioner, *and* VELU (son of Ramasamy) and another, Respondents

S. C. 125/68—Application in Revision in M. C. Kurunegala, 51908

Revision—Case of alleged murder—Non-summary proceedings—Discharge of accused by Magistrate and Attorney-General—Whether it can be set aside by Supreme Court in revision—Attorney-General's powers and functions in this respect—Criminal Procedure Code, ss. 162, 163, 347, 357, 388, 391.

A Magistrate discharged the accused persons at the conclusion of the non-summary proceedings relating to a charge of murder. The petitioner in the present application in revision asked that the order of discharge be set aside and that the respondents be committed to stand their trial in the Supreme Court.

Held, that the proper remedy of the petitioner was to seek the intervention of the Attorney-General in terms of section 391 of the Criminal Procedure Code. In such a case, if the Attorney-General refuses to intervene, the Supreme Court would not exercise its powers in revision unless a positive miscarriage of justice would result.

APPLICATION to revise an order of the Magistrate's Court, Kurunegala.

N. Balakrishnan, for the petitioner.

Cur. adv. vult.

April 10, 1968. WEERAMANTRY, J.—

This is a most unusual application, in which this Court is asked to review an order of a Magistrate discharging two accused persons in a murder case after non-summary proceedings. The applicant asks that the order of discharge be set aside and that the respondents be committed to stand their trial in the Supreme Court.

I understand from Mr. Balakrishnan, though it is not so specifically averred in the petition, that the Attorney-General has been interviewed in regard to this discharge and has refused to interfere.

There is no doubt that this Court has very wide powers in revision and that these may be exercised in cases where the record of proceedings is called for by this court or where a matter otherwise comes to the knowledge of this Court. Section 357 of the Criminal Procedure Code contains express provision to this effect. Read with section 347 this provision would entitle this court in revision, as in appeal, to alter or reverse any order in respect of which relief is sought from this court.

But do these provisions enable this court to set aside an order of discharge and require a Magistrate to commit to this court an accused person whom he has discharged ?

Commitment to this Court is a duty imposed on Magistrates by section 163 if they consider the evidence sufficient to put the accused on his trial. Discharge of an accused person where the Magistrate considers the evidence against the accused insufficient to put him on his trial is likewise rendered obligatory by section 162.

When a Magistrate discharges an accused person under the provisions of this latter section the appropriate though not perhaps the exclusive authority for reviewing this order is the Attorney-General, who, in terms of section 391, may direct the commitment of such accused to the court nominated by him or order the Magistrate to re-open the inquiry and give such instructions with regard thereto as appear requisite. It should also be observed that in the converse situation of a commitment when the Attorney-General is of opinion that there is not sufficient evidence to warrant it, the Attorney-General is by section 388 given a corresponding power of quashing such commitment.

Although, then, this Court may in theory have the power to revise an order of discharge made by a Magistrate, the Court would in so doing be entering upon a field where, to say the least, another authority, namely the Attorney-General, enjoys a concurrent jurisdiction.

The difficulties resulting from such a situation became clearly apparent in the case of *The King v. Noordeen*[1] where the Attorney-General pointed out that an order made by this Court

[1] *(1910) 13 N. L. R. 115.*

in similar circumstances would be a mere *brutum fulmen* since it would be open to the Attorney-Gentral to enter a *nolle prosequi* at any stage of the subsequent proceedings.

It becomes apparent therefore that the undoubted powers of this Court to revise any order in its discretion, including as was pointed out in *The King v. Noordeen* such an order as an order of discharge, must only be exercised, if it will be exercised at all, in the most extra-ordinary cases where a positive miscarriage of justice would otherwise result. In view however of the Attorney-General's powers and functions in this respect, there can be no doubt that through their exercise such cases of positive miscarriage of justice will not arise. The subject is therefore not lacking in a remedy against orders of discharge or commitment with which he is dissatisfied, and in the result it ought never to be necessary for this Court to be called upon to exercise its powers. The fact however that this Court does enjoy such powers cannot be controverted and has been assumed on more than one occasion[1].

I should also make reference to the recent case of *The Attorney-General v. Don Sirisena alias Michael Baas*[2] where a Divisional Bench had occasion to review the scope of the sections of the Criminal Procedure Code relating to commitment by a Magistrate. In this case it was held that the Attorney-General clearly had the power in the case of an order of discharge made in the exercise or purported exercise of the power conferred by section 162 (1), to give him subsequent directions for commitment under section 391. A Magistrate's refusal to comply with such directions was held in that case to be unlawful. It was further observed that the powers of the Attorney-General which have been described as *quasi* judicial, have traditionally formed an integral part of our system of Criminal Procedure and that the Attorney-General is vested with a measure of discretion which is rendered effective by his statutory power to secure that inquiries under Chapter 16 will terminate in a manner determined in the exercise of that discretion. Into the sphere where this discretion is exercised it is not the province of this Court to enter save for the gravest cause and I may add that in the present case no cause whatever has been made out, for the Magistrate would appear in a considered order to have

[1] *The King v. Noordeen, supra ; Attorney-General v. Kanagaratnam (1950) 52 N. L. R. 121 at 125.*

[2] *(1968) 70 N. L. R. 347.*

given his careful attention to all the features of the evidence and to have set out compelling reasons in support of the order of discharge which he made.

The application is accordingly refused.

It only remains for me to record my appreciation of the assistance rendered to me by Dr. Colvin R. de Silva and Mr. M. M. Kumarakulasingham, who made available to me at my request the benefit of their fund of knowledge and experience of our criminal law, in what seemed to me to be an application for the exercise of this Court's powers in an unprecedented way.

Application refused.