

(IN REVISION.)

1941

Present : Nihill J.

DE SILVA *v.* DE SILVA.

M. C. Galle, 29,418.

Discharge of accused—Payment to charitable fund as a condition of discharge—Criminal Procedure Code, s. 325 (1).

A Magistrate has no power to direct an accused to make a payment to a charitable fund as a condition of his discharge under section 325 (1) of the Criminal Procedure Code.

THIS was an application for revision.

M. C. Abeyewardene, for accused, appellant.

C. P. J. Kurukulasuriya (with him *Gilbert Perera*), for respondent.

Cur. adv. vult.

October 21, 1941. NIHILL J —

This is a petition for revision in a non-appealable matter. The learned Magistrate I think rightly regarded the incident which gave rise to these proceedings as a trivial one, but certain parts of his verdict and sentence cannot be sustained. The petitioner who is a Village Headman was charged with criminal intimidation, insult, and wrongful restraint under sections 486, 484, and 332 of the Penal Code. He was found not guilty under section 486, guilty under section 484, and, as the Magistrate described it "in a technical sence" guilty under section 332. This phrase is no doubt meant to convey the Magistrate's view of the triviality of the offence committed under section 332 but it is not a

¹ 28 N. L. R. 292.

happy one as there can be no distinction in law between technical and actual guilt. With regard to the verdict there was evidence on which the Magistrate could find an offence proved under section 332 and this part of his verdict is sustainable. With regard to section 484 however the evidence did not prove the particulars of the insult as set out in the charge. Here it was alleged that the petitioner insulted the complainant-respondent by using the words "Rascal, son of a whore, I will break your ribs, you better do what you can by joining with the tillers of the soil, &c." Neither the complainant nor his witness, H. B. Kirthisena, deposed to the use of the word "Rascal, son of a whore" which cannot be said to be an immaterial part of the insult alleged. In fact it was the insult, since the remainder of the words complained of as a threat to cause grievous hurt were more relevant to the charge of intimidation under section 486. It is not necessary for me to consider whether the abuse used by the petitioner gave the complainant such provocation that he must have intended or knew it to be likely that the complainant would be provoked to commit a breach of the peace, because the evidence falls short of proving that the insult alleged was ever uttered. The Magistrate was therefore not justified in finding the petitioner guilty of an offence under section 484 and that part of the verdict must be set aside.

There remains to be considered the sentence imposed by the learned Magistrate from which a point of some interest arises. The Magistrate chose to deal with the petitioner under section 325 of the Criminal Procedure Code which, having regard to the character and antecedents of the accused and the general circumstances surrounding the incident, he was fully justified in doing. In discharging the accused however he made the following order:—"I direct the accused to send a sum of Rs. 10 to the Gloucester Fund. On doing so the accused will be discharged". Although the point was not pleaded specifically by the accused in his petition for revision it has been taken by his Counsel and I am bound to consider whether the learned Magistrate had the power to direct such a payment to a charitable fund and to make such payment a condition of his discharge.

Under the section a Magistrate can (a) discharge an offender and admonish him or (b) discharge an offender conditionally on his entering into a recognizance to be of good behaviour and to appear for conviction and sentence-if called upon within a specified period not exceeding three years. In addition he may (c) order the payment of costs and within certain limits damages for injury or compensation for loss. Section 326 mentions also various conditions which can be attached to recognizances entered into under Chapter XXVI. None of these expressed powers and conditions can I fear be stretched to include a payment to a War or Charitable Fund and reluctantly therefore I am compelled to quash this part of the Magistrate's order also.

The effect of this revision therefore is to affirm the verdict of guilty of an offence under section 332, to quash the verdict of guilty under section 484 and to direct the Magistrate to discharge the accused after such admonishment as he may think fit to give.

I should not like this order to be considered as prohibiting Magistrates from suggesting to offenders dealt with under section 325 that they should make a voluntary contribution to a War Fund. A Magistrate can well do this and could point out to the offender that such action on the offender's part might relieve him perhaps of the necessity for making an order as regards costs.

I am not disposed however to allow this petitioner to benefit financially by my revision and I accordingly further direct the Magistrate under section 325 (3) to order the petitioner to pay Rs. 10 as costs of the proceedings in the Magistrate's Court.

Varied.
