

1960 Present : Basnayake, C.J., and H. N. G. Fernando, J.

ATTORNEY-GENERAL, Appellant, and PARANAVITHANA,
Respondent

S. C. 72/59—D. C. (Crim.) Galle, 16304

Criminal procedure—Trial on indictment—Absence of Crown Advocate—Incapacity of Court to discharge the accused—Appeal from District or Magistrate's Court—Power of Supreme Court to order Crown to pay costs—Criminal Procedure Code, s. 352.

Where, on the date of trial upon an indictment, the accused is present but there is no one to represent the Attorney-General, the Court has no power to make an order discharging the accused.

Although section 352 of the Criminal Procedure Code saves a law officer of the Crown from being condemned in costs it does not save the Crown from an order to pay costs.

¹ (1959) 60 N. L. R. 313.

² 6 Cr. Appeal Repts. 159 at p. 165.

APPEAL from an order of the District Court, Galle.

V. S. A. Pullenayegum, Crown Counsel, for Complainant-Appellant.

C. S. B. Kumarakulasingham, for Accused-Respondent.

March 2, 1960. BASNAYAKE, C.J.—

The accused, Somapala Paranavithana, was indicted on a charge punishable under section 459 of the Penal Code before the District Judge of Galle. On the day fixed for the trial the accused was present and was represented by a proctor, and the Crown Advocate appeared for the Attorney-General. The accused pleaded not guilty to the indictment which was read to him. The Crown Advocate then asked for a postponement of the trial as a witness who was material for the prosecution was attending the Supreme Court and was unable to be present in Court on that day. Counsel for the accused had no objection and the trial was postponed for 15th October 1959 and the Crown Advocate applied for summons on the witness who was absent.

On the 15th October 1959 the accused was present and his proctor appeared for him, but there was no one to represent the Attorney-General. The proctor for the accused thereupon moved that the accused be discharged, and the learned District Judge made the following order:— “I discharge the accused”.

It is submitted on behalf of the appellant that this order is one that learned District Judge could not have made. We are of the opinion that there is no provision of the Code under which the learned District Judge had power to make the order he made in this case. We therefore set aside the order of the learned District Judge and send the case back to the lower court with a direction that the accused be tried on the indictment served on him.

As the accused had to incur expense for no fault of his by retaining a lawyer to appear for him on the date on which counsel for the Attorney-General was absent, we think that this is eminently a case in which we should order the Crown to pay the costs of the accused. Learned counsel for the appellant states from the Bar that the costs incurred by the accused on the 15th October 1959 are 60 guineas. We therefore order the Crown to pay to the accused the sum of 60 guineas and also the costs of the hearing of this appeal which we fix at 25 guineas.

After this judgment had been dictated Crown Counsel appeared and asked for our indulgence to make further submissions in respect of the order to pay costs. We afforded him an opportunity of doing so. He relied on the proviso to section 352 of the Criminal Procedure Code. That section empowers this Court to award costs in all proceedings under Chapter XXX but saves the Attorney-General and the Solicitor-General from being condemned in costs. We are unable to regard that proviso as saving the Crown from an order to pay costs. It protects the two law officers of the Crown from being condemned in costs personally. A similar protection is afforded by section 462 of the Civil Procedure Code which provides that no writ against person or property shall be issued against the Attorney-General in any action brought against the Crown or in any action in which he is substituted as a party defendant.

H. N. G. FERNANDO, J.—I agree.

Case sent back for trial.

