

1953

Present : Gratiaen J.

N. SEEVARATNAM, Appellant, and K. M. P. GOPALASAMY
Respondent

S. C. 677—M. C. Jaffna, 22,647

*Absence of complainant—Acquittal of accused—Power of Magistrate to cancel order—
Right of appeal if cancellation is refused—Criminal Procedure Code, ss. 194,
336.*

An order of acquittal entered under section 194 of the Criminal Procedure Code may be cancelled if the complainant subsequently satisfies the Magistrate that his absence was due to a genuine misunderstanding as to the date fixed for his appearance.

An appeal can be preferred as of right against an order refusing to vacate an order of acquittal passed under section 194 of the Criminal Procedure Code.

APPEAL from an order of the Magistrate's Court, Jaffna.

M. M. Kumarakulasingham, with *J. C. Thurairatnam*, for the complainant appellant.

S. Sharvananda, for the accused respondent.

Cur. adv. vult.

May 15, 1953. GRATIAEN J.—

The complainant-appellant in this case instituted criminal proceedings in the Magistrate's Court of Jaffna charging the accused-respondent with criminal breach of trust or in the alternative criminal misappropriation of various sums of money, and also with falsification of accounts. The learned Magistrate, after recording some evidence, decided to try the case summarily in the exercise of the discretion vested in him under sec. 152 (3) of the Criminal Procedure Code.

On 19th March, 1952, the trial was, by consent of parties, postponed—so the record reads—for 23rd April, 1952. On that date, however, the complainant, the accused, and their legal representatives were all absent, and the Magistrate accordingly made an order “discharging the accused”. This order must in the context be construed as an order of acquittal made in terms of sec. 194 of the Criminal Procedure Code.

On 28th April, 1952, the complainant attended the Magistrate's Court and learnt what had taken place on the earlier date. He promptly filed a motion and affidavit applying that the Magistrate should, in terms of the proviso to sec. 194, cancel the order of acquittal made on 23rd April, 1952. The complainant's affidavit purports to excuse his absence in

Court on 23rd April, 1952, by explaining that there had been a genuine misunderstanding on his part and on the part of his lawyers as to which date had been precisely fixed by the Magistrate for the continuation of the trial. Indeed, the failure of the accused himself to attend the Court on the 23rd April seems *prima facie* to lend colour to the assertion that there had been some such misunderstanding.

The learned Magistrate made an order in chambers refusing that application to restore the case to the trial-roll—because, in his opinion, the explanation given in the complainant's affidavit was "not sufficient". With respect, I disagree. If the explanation offered for the complainant's absence be true, there were clearly good grounds for applying the proviso to sec. 194. In my opinion the learned Magistrate should have issued notice on the accused to show cause why the application of the complainant should not be allowed on the grounds set out in his affidavit dated 28th April, 1952, and an *inter partes* inquiry should have been held in order to decide whether the explanation offered was in fact true. The learned Magistrate's order refusing to vacate the previous order of acquittal was in my opinion premature, and I allow the appeal. The record must now be returned to the Magistrate's Court with a direction that he should deal with the complainant's application on the lines previously indicated by me. If the learned Magistrate, after due inquiry is satisfied that the complainant's excuse for his failure to attend the Court on 23rd April, 1952, is true, the previous order of acquittal must be vacated, and the trial of the accused must proceed according to law. If, on the other hand, the complainant's explanation is rejected, the order of acquittal will stand.

I must refer in conclusion to a preliminary objection which was raised on behalf of the accused regarding the constitution of this appeal. Mr. Sharvananda argued that the appeal against the learned Magistrate's refusal to vacate his previous order of acquittal under sec. 194 of the Code is in effect an appeal against the acquittal itself, and therefore requires the prior sanction of the Attorney-General in terms of sec. 336. I do not agree. Sec. 194 provides for an acquittal without trial under very special circumstances, and the proviso vests jurisdiction in the Magistrate himself to cancel the order at the instance of the defaulting complainant in appropriate circumstances. A refusal to apply the proviso is a final order against which an appeal lies to the Supreme Court. Sec. 336 applies in my opinion only to orders of acquittal made by a Magistrate after trial under the provisions of sec. 190 of the Code, or by a District Judge after trial under sec. 210 or 214.

This question was considered by Soertsz J. in *Junaid v. Jayawardena*¹ and his judgment indicates that he was inclined to the same view that I have taken. He found himself embarrassed, however, by an earlier judgment of Shaw J. in *Somasunderam v. Kadiravelu Chetty*². He therefore suggested, "without deciding the point", that the more prudent course for an appellant in the position of a complainant who was dissatisfied with a Magistrate's refusal to vacate an order passed under sec. 194 was to obtain the sanction of the Attorney-General.

¹ (1935) 15 *Law Rec.* 114.

² (1916) 3 *C. W. R.* 315.

As Soertsz J. points out, Shaw J.'s judgment in *Somasunderam's case* (supra) was clearly made *per incuriam* in that he had failed to observe that the proviso to sec. 194 substantially enlarged the rights of defaulting complainants under the earlier Criminal Procedure Code of 1883. The judgment of Shaw J. in *Mourant v. Seera* ¹ shows that the effect of the proviso to sec. 194 had subsequently been brought to his notice.

If a complainant seeks to obtain the unnecessary sanction of the Attorney-General to an appeal in a case such as the present, he might well be faced with the substantial objection that his appeal has been preferred out of time. The correct view, I think, is that an appeal can be preferred as of right against an order refusing to vacate an order of acquittal passed under sec. 194.

Appeal allowed.
