

1978 Present : Malcolm Perera, J. and Tittawella, J.

T. SANTHOSAN NADAR, Third Accused-Appellant
LEELAWATHIE WIJESINGE, Claimant-Appellant

and

THE ATTORNEY-GENERAL, Respondent

S.C. 354-355/76—M.C. Chilaw 48346

Administration of Justice Law, No. 44 of 1973, section 166(1)—Accused brought to Court otherwise than on a summons or warrant—Failure by Magistrate to frame charge—Whether defect curable.

Where an accused is brought before a Magistrate's Court otherwise than on a summons or warrant it is mandatory that a charge should be framed by the Magistrate. The failure to do so cannot be cured.

Case referred to :

Ebert v. Perera, 23 N.L.R. 212.

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

V. S. A. Pullenayagam, with *S. Gunasekera* and *G. Balasubramaniam*, for the 3rd accused-appellant.

H. W. Jayewardene, Q.C., with *M. Kangasunderam*, for the owner of the car.

Cur. adv. vult.

August 18, 1978. MALCOLM PERERA, J.

The 3rd accused-appellant and two others were charged in the Magistrate's Court of Chilaw, with having on 13.12.75, harboured and transported in car bearing distinctive No. 1 Sri 5507 three persons named R. Pandi Nadar, N. Mahalingam Nadar and P. Ponraj, whom they knew had illegally entered into Sri Lanka in breach of sections 9 and 10 read with section 15, Chapter 351, and thereby committed an offence punishable under section 45-A (1) (b) of Chapter 351 as amended by section 5 of Act No. 68 of 1961.

After trial the learned Magistrate acquitted the 2nd accused. He however convicted the 1st accused and the 3rd accused-appellant. The 1st accused was sentenced to a term of 2 years' rigorous imprisonment suspended for 5 years and was also ordered to pay a sum of Rs. 3,000 as State costs. The 3rd accused-appellant was sentenced to a term of 2 years' rigorous imprisonment.

According to the prosecution version, on receipt of certain information a police party led by Inspector Ratnayake, proceeded to the Deduru-Oya bridge on 13.12.75 and waited in ambush. At about 5.20 p.m. car bearing No. 1 Sri 5507 came from the direction of Puttalam. On the signal of the police party, the car was brought to a halt. The 2nd accused who was acquitted was at the driving wheel, and the 1st accused was seated on the seat next to the driver's seat. In the rear seat sat the appellant together with the alleged illegal immigrants.

The six persons were taken into custody and brought to the police station. On 14.12.75 the three accused were remanded. The other three persons were kept in a detention camp by the Controller of Immigration.

On 23.12.75 the three accused persons were brought to Court. On this day plaint was filed together with the sanction of A.S.P. to prosecute. The journal entry of this day reads :

Charged from report. Each accused states " I am not guilty."

Mr. Pullenayagam submits that the learned Magistrate has failed to frame a charge against the accused and therefore there has been no legal trial.

Section 166 (1) of the Administration of Justice Law reads as follows :

" Where the accused is brought before the Court otherwise than on a summons or warrant the Magistrate shall, after examining on oath the person who has brought him before Court and any other person who may be present in Court able to speak to the facts of the case, if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge."

This provision of law, which is similar to section 187 (1) of the Criminal Procedure Code, requires the Court to frame a charge, where the accused is brought before it otherwise than on a summons or warrant, if there is sufficient ground to proceed against the accused.

In this case the accused was not brought before Court either on a summons or a warrant, and therefore it was mandatory on the Magistrate to have framed a charge. The failure to do so cannot be cured. In the Full Bench case of *Ebert v. Perera*, 23 N.L.R. 362, De Sampayo, J. said :

"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."

In the present case the omission to frame a charge is in my opinion fatal to the conviction. I would accordingly quash the convictions of the 1st and 3rd accused and remit the case for a trial *de novo* before another Magistrate.

In view of my order made above, I set aside the order of the learned Magistrate forfeiting the car bearing distinctive registration No. 1 Sri 5507. The custody of the said car is to be entrusted to the registered owner Leelawathie Wijesinghe upon the said Leelawathie Wijesinghe furnishing such security as shall be determined by the Magistrate and upon such other conditions and

terms as he shall think it fit to impose. However the said registered owner shall produce the car in Court on all dates of trial and on all other days required by the learned Magistrate. If any one or more of the conditions are violated the bond shall be cancelled and the car kept in the custody of the Court.

TITTAWELLA, J.—I agree.

Convictions quashed.

