MALINIE GUNARATNE, ADDITIONAL DISTRICT JUDGE, GALLE

v.

ABEYSINGHE AND ANOTHER

COURT OF APPEAL.
S. N. DE SILVA, J. (P/CA)
RANARAJA, J.
C.A. REV. APPLN. NO. 279/93
M.C. MATARA CASE NO. 73137
AUGUST 30 1994

Criminal Law – Issue of summons in a private plaint – Sections 136(1) (a) and 139 (1) Code of Criminal Procedure Act, No. 15 of 1979 – Is judicial officer a public officer? – Sections 19 and 215 of the Penal Code.

Held:

When a private plaint is filed, section 139 (1) requiries a Magistrate to form an opinion as to whether there is "sufficient ground for proceeding against some person who is not in custody". The opinion to be formed should relate to the offence, the commission of which, is alleged in the complaint or plaint filed under Section 136(1). The words "sufficient ground" embraces both the ingredients of the offence and the evidence of its commission. Since the opinion relates to the existence of sufficient ground for proceeding against the person accused, the material acted upon by the Magistrate should withstand an objective assessment. The proper test is to ascertain whether on the material before Court, *prima facie*, there is sufficient ground on which it may be reasonably inferred that the offence alleged in the complaint or plaint has been committed by the person who is accused of it.

Where the allegation that the plea of the complainant was incorrectly recorded as a plea of guilt was not borne out by the entries in the record, no summons should have issued.

A 'public servant" as defined in S. 19 of the Penal Code includes a judicial officer within the meaning of S. 215 of the Penal Code.

APPLICATION against the order of the Magistrate's Court, Matara.

H. L. de Silva, P.C with *K. W. Kulatunga* and *Mrs. Yamuna Balasuriya* for petitioner.

D. W. Abeykoon, P.C. with *Ms. Shamini Jayaweera* for complainant-respondent.

Ms. P. Mahindaratne, S.C. for A.G.

Cur adv vult.

October 14, 1994.
S. N. SILVA, J., P/CA

This is an application in revision from the order dated 9-3-1993 made by the learned Magistrate in the above case.

The accused-petitioner was at the time material to the charge in the above case functioning as the Magistrate of Matara. The complainant-respondent was a person against whom proceedings were taken by the Deputy Commissioner General of Inland Revenue for recovery of a sum of Rs. 104,925/- due as income tax and penalty from him, in case No. 55077/M.C. Matara.

The proceedings for recovery upon the certificate filed by the Inland Reveue Department were taken before the accused-petitioner. The charge in the above case is that on 25.4.1991 the accused-petitioner being a public servant committed an offence punishable under section 215 of the Penal Code by knowingly framing an incorrect record in case No. 55077, intending or knowing it to be likely that such act would cause loss or injury to the complainant. Proceedings have been instituted by way of a "private plaint" in terms of section 136 (1) (a) of the Code of Criminal Procedure Act, No. 15 of 1979.

Learned Magistrate hearing the matter decided to take the evidence of the complainant prior to issuing summons. At that stage counsel made an application to appear on behalf of the accused-petitioner which was refused by the learned Magistrate on the basis that summons has not been issued. Evidence of the complainant was thereafter recorded on 13.1.1993 and several questions were asked from the complainant as to the charge by the learned Magistrate. Thereafter he made a request to the H'ble Attorney-General to nominate a State Counsel to appear in the case to assist the Court in considering whether a Magistrate (the accused) is a public servant within the meaning of section 215 of the Penal Code. It has to be noted at this stage that the definition of the words "public servant" contained in section 19 of the Penal Code provides that the words denote every judge as well. Therefore, the matter on which learned

Magistrate wanted the assistance of a State Counsel could easily have been resolved by looking at this definition in the Penal Code. Be that as it may, on 9.3.1993 State Counsel did not appear and learned Magistrate noted that the H'ble Attorney-General has not shown any concern for his request and recorded further that since a judicial officer is involved he should decide the matter on a full hearing of evidence and submissions of both parties. On that basis learned Magistrate directed that summons should issue on the accused-petitioner by the order that is challenged in this application.

Learned President's Counsel appearing for the accused-petitioner submitted the following grounds for our consideration in support of this application filed in revision :

(1) that in terms of section 139 (1) of the Code of Criminal Procedure Act, No.15 of 1979 the Magistrate may issue warrant or summons as the case may be, only where he is of opinion that there is sufficient ground for proceeding against a person who is not in custody. It is submitted that the learned Magistrate has not given his mind to this requirement before directing the issue of summons and that summons has been issued on extraneous considerations;

(2) that the charge as stated in the complaint filed and the charge sheet annexed to it does not disclose necessary particulars as to an offence under section 215 of the Penal Code and that in any event there is no incorrect entry in the record in case No. 55077 made by the accused petitioner on 25.4.1991 as stated in the charge, disclosed in the evidence of the complainant:

(3) that in any event the evidence given by the complainant as recorded does not warrant summons being issued on the accused-petitioner since it does not disclose any incorrect entry made by the accused-petitioner in case No. 55077 as to constitute an offence under section 215 of the Penal Code.

We have now got down the original records in case No. 55077 and 73137 referred above. At the time submissions were made both learned Counsel had access to these records.

As regards the first ground urged by learned President's Counsel it is seen that section 139 (1) of the Code of Criminal Procedure Act empowers a Magistrate to proceed against a person not in custody against whom proceedings are instituted by way of a "private plaint" only where he is of opinion that there is sufficient ground for such action. The opinion has to be formed on verifiable material that is adduced before the Magistrate and which should be assessed objectively. It is obvious that the learned Magistrate required the complainant to give evidence in view of the need to form his opinion on the matter. However, having recorded the evidence he has decided to issue summons on extraneous considerations as submitted by learned President's Counsel. He has recorded that since the accused is a judicial officer, justice must be seen to be done and that the case should be decided only on evidence adduced by both parties and the submissions made by them. The fact that the accused is a judicial officer may or may not be relevant to the question whether there is sufficient ground for proceeding in the matter, on the facts. However, by being a judicial officer the accused cannot be placed at a more disadvantageous position. Learned Magistrate should properly have addressed himself not to the broad considerations stated in his order but to the charge filed by the complainant, the case record (which is alleged to have been incorrecity framed) that was before him and the evidence of the complainant. I have to note that he has failed to address himself to any of these matters in forming his opinion as provided in section 139 (1). Therefore the first ground urged by learned President's Counsel should succeed and counsel for the complainant-respondent did not seek to support the order of the learned Magistrate as being in compliance with section 139 (1).

Section 139 (1) requires a Magistrate to form an opinion as to whether there is sufficient ground for proceeding against some person who is not in custody. I am of the view that the opinion to be formed should relate to the offence the commission of which is alleged in the complaint or plaint filed under section 136 (1). The words "sufficient ground" embraces both, the ingredients of the offence and the evidence as to its commission. The use of the word opinion does not make the action of the Magistrate a purely subjective exercise. Since the opinion relates to the existence of

sufficient ground for proceeding against the person accused, the material acted upon by the Magistrate should withstand an objective assessment. I am of the view that the proper test is to ascertain whether on the material before Court, *prima facie*, there is sufficient ground on which it may be reasonably inferred that the offence as alleged in the complaint or plaint has been committed by the person who is accused of it. In this case the learned Magistrate has set off on the right track by calling for the record which is alleged to have been incorrectly framed and recording the evidence of the complainant. But, in making the impugned order to issue summons, he has deviated from it and acted on extraneous considerations without applying the proper test as stated above.

As regards the second ground urged by learned President's Counsel I have to note that on the date as alleged in the plaint and the charge that is 25.4.1991, no entry has been made by the accused-petitioner in case No. 55077 which is alleged to be incorrect. On that day journal entry 10 has been made where the accused-petitioner has merely made order to forward the record to the High Court on the appeal that had been filed by the complainant on 24.4.1991. In giving evidence the complainant has not stated that there is anything incorrect in this entry of the accused. The evidence as recorded of the complainant is a rambling account of several matters that are not directly referable to the charge. It appears that the allegation is that the accused recorded incorrectly that the complainant has pleaded guilty whereas in fact no such plea was tendered. He has stated that the incorrect entry was made in order to have the petition of appeal filed by him rejected. In the course of making submissions before this Court, we requested learned counsel appearing for the complainant to indicate to us the incorrect entry as alleged by the complainant. At that stage learned counsel indicated that the incorrect entry is the rubber stamp affixed appearing on the left hand top corner of page 5 of the record. This rubber stamp is the one ordinarily placed in Magistrate's Court cases where an accused pleads guilty to an offence read out to the accused from the summons or the charge sheet and is sentenced on the basis of that plea. Learned counsel submitted that the accused should take responsibility for what is contained in the rubber stamp since her initial appears as Magistrate within the stamp itself.

I note that the impugned stamp appears in the journal entry made on 3.4.1991. There is no evidence whatsoever to support the allegation in the plaint that the incorrect entry was made on 25.4.1991. The complainant appears to have suggested in evidence that his rubber stamp was placed after he filed the petition of appeal on 24.4.1991. However, a mere perusal of the entry on 3.4.1991 clearly indicates that the rubber stamp had been placed at the time the accused-petitioner made the journal entry of 3.4.1991 which runs into 1 1/2 pages. In page 4 where the journal entry commences in the writing of the accused-petitioner the script is from the left hand side to the right with a relatively small margin on the left. In page 5 where the rubber stamp has been placed it is seen that the script commences from the middle of the page avoiding the area covered by the stamp and goes to the right. This clearly shows that the accused had made the entry in her own handwriting at a time when the rubber stamp had been placed by an officer of Court. What is most significant is that in the handwritten entry of the accused there is no record that the complainant has pleaded guilty to the charge. For that matter the question of pleading guilty does not arise in a proceeding of this nature which is for recovery of taxes due on a certificate. In these circumstances I hold that the particulars with regard to the date of commission of the alleged offence as appearing in the charge filed by the complainant is incorrect and in any event the necessary particulars as to the commission of the alleged offence are not disclosed in the charge.

The last matter urged by learned President's Counsel relates to the merits of the case, that is whether there is sufficient ground that warrant further proceedings against the accused-petitioner. As noted above in relation to the second ground the allegation as to the incorrect entry relates to the rubber stamp placed in the case record where it is stated that the accused has pleaded guilty to the charge. I have already observed that the question of pleading guilty to a charge does not in any event arise in this matter. However, I shall briefly deal with the relevant entries in order to consider whether further proceedings are warranted on the grounds urged by the complainant.

When recovery proceedings against the complainant were instituted by the Inland Revenue Department summons was issued

on the complainant for 5.12.1990. On that day the complainant appeared and sought an adjournment, possibly to appeal to the Commissioner-General of Inland Revenue. The adjournment was granted up to 23.1.1991 on which day an application for a postponement was made on behalf of the complainant upon filing a medical certificate. Another medical certificate was filed on the next day being 6.2.1991. On 13.3.1991 the complainant was absent and the matter was adjourned finally for 20.3.1991. It appears that on 20.3.1991 a further adjournment was sought on behalf of the complainant who was present. The Magistrate (the accused-petitioner) granted a final adjournment up to 3.4.1991.

On. 3.4.1991 the complainant was present represented by an Attorney-at-Law who sought time to show cause against the recovery of taxes. The Magistrate recorded this application and refused it stating that recovery has already been adjourned and no further time can be given to show cause. She has also recorded that one H. U. Gunasiri who represented the Deputy Commissioner of Inland Revenue submitted that the full amount in the certificate should be recovered. On that basis she recorded that the complainant should pay the full amount due and in default sentenced the complainant to 6 months imprisonment. The foregoing entries have been made in the writing of the accused-petitioner. It is significant that there is no record that the complainant pleaded guilty to any charge. It is further recorded that later the Attorney for the complainant moved for permission to pay the sum due in instalments. The accused-petitioner has recorded this application and directed that Rs. 14,925/- should be paid as the first instalment and the balance to be paid in instalments of Rs.10,000/-. She has further recorded that the complainant and the officer of the Inland Revenue Department agreed to this order. The first instalment was to be paid on 24.4.1991. The foregoing entries have been made in her handwriting and it is not alleged that any of these entries as constituting the proceedings of 3.4.1991 are incorrect.

The allegation is that the contents of the rubber stamp are incorrect. Learned counsel for the complainant submitted that the amount of the fine is entered in the space provided for that purpose within the rubber stamp and the Magistrate by placing her initial

beneath the rubber stamp should take responsibility for what appears in the rubber stamp. I am not inclined to accept this submission. A comprehensive entry has been made by the Magistrate in her own writing recording correctly what took place in Court on 3.4.1991. It is apparent that the rubber stamp has been placed by an officer of court and the Magistrate has placed her initial on that stamp solely because the total fine payable is recorded only in that place. As noted above, the question of pleading guilty to a charge does not arise in these proceedings. Therefore, the presence of the rubber stamp which purports to state that the accused has pleaded guilty to the charge is irrelevant and not applicable to the proceedings of the case. The complainant has suggested that the rubber stamp was placed for the purpose of depriving him of his right of appeal. This is a totally erroneous impression formed by the complainant. These are recovery proceedings and the complainant does not in any event have a right of appeal. The question of depriving the complainant of a right of appeal by placing the rubber stamp does not arise. In any event, what is operative is the comprehensive entry made by the Magistrate in her own handwriting. There is nothing incorrect in this entry. On a perusal of the record in case No. 55077, which according to the "private plaint" filed is alleged to have been incorrectly framed by the accused-petitioner and the evidence of the complainant. I am of the view that there is no material on which it could be reasonably inferred that the accused-petitioner committed an offence under section 215 of the Penal Code. Accordingly I set side the order dated 9.3.1993 and direct that no further proceedings be taken on the complaint filed by the complainant-respondent.

DR. R. B. RANARAJA, J. – I agree.

Order to issue summons set aside.