1971 *Present :* Weeramantry, J., and Thamotheram, J.

K. A. POTMAN, Petitioner, *and* THE INSPECTOR OF POLICE, DODANGODA, Respondent

*S. C. 594/70—Application in Revision in M. C. Kalutara, 40691*

*Revision—Criminal appeal—Dismissal for want of appearance—Subsequent application in revision—Power of Supreme Court to grant relief.*

An appeal was filed against a conviction entered by a Magistrate's Court. The appellant was unrepresented and the appeal was considered by the Court and dismissed. The present petition for relief by way of revision was filed thereafter in respect of the same case.

*Held,* that although the Supreme Court would be extremely hesitant and cautious before it makes any order in revision which is contrary to an order which it has already made upon appeal, relief would be granted in a case of an obvious error of fact based on an all important item of evidence not having been brought to the notice of Court at the hearing of the appeal.

APPLICATION to revise an order of the Magistrate's Court, Kalutara.

*Aloy Ratnayake,* for the accused-petitioner.

*Chulapathmendra Dahanayake,* Crown Counsel, for the complainant-respondent.

*Cur. adv. vult.*

January 2, 1971. WEERAMANTRY, J.—

The accused-petitioner was charged with committing criminal trespass by entering a land in the occupation of one H. A. Gunadasa with intent to commit mischief and also with the destruction of three buildings, tiles and some cement slabs which were on this land. The learned Magistrate found the accused guilty on both counts and sentenced him to a term of six months' rigorous imprisonment on each count and a further fine of Rs. 100 on count two.

An appeal was filed against this conviction. The appellant was unrepresented and the appeal was considered by court and dismissed. This petition for relief by way of revision was filed thereafter.

At the hearing before us it was demonstrated to us that the order of the learned Magistrate could not be sustained for a reason which had not been brought to the notice of this Court at the time the appeal was dismissed. Briefly this reason is as follows :

The accused-petitioner was the holder of a writing from one Danoris, the father of Gunadasa. Gunadasa on giving evidence himself admitted that the land belonged to his father. This writing which has been marked

D1 states that Danoris conveyed all right, title and interest in the land and all plantations, household articles, timber, cement slabs and all other things on the land and all the buildings and household articles to the accused-petitioner for a sum of Rs. 450.

This writing is an informal writing and though it is of no force or effect in law it shows that when the accused entered the land and dealt with the materials thereon he was doing so under the authority of the owner. It was a complete answer to the criminal charge.

The main issue before the learned Judge was therefore the authenticity of the document P1, for the position of Danoris who was called as a prosecution witness was that the contents of this writing took him by surprise. He admitted his signature but stated that the document was represented to him by the accused to be only a writing to the effect that the property was being entrusted to the accused for the purpose of being looked after until the return of Danoris' son from hospital.

The main reason which would appear to have weighed with the learned Judge when he concluded that Danoris did not know the contents of the document, was that the document apparently took Danoris by surprise and that he expressed astonishment when the contents of the document were explained to him in Court. In fact this reaction of surprise so attracted the notice of the learned Judge that he has caused a record of it to be made at the time the witness was giving evidence and has made a particular point of it in his judgment.

There exists, however, upon the record a conclusive piece of evidence which demonstrates that Danoris' apparent astonishment in Court was a mere pretence ; and had the learned Judge given his attention to this, there is no doubt he would have reached a different conclusion.

I refer to the evidence of the Grama Sevaka, Samarasinghe, another prosecution witness, who stated that a few days after the alleged offence, when he met Danoris, Danoris did not make a complaint to him but told him that the accused had obtained a writing from him purporting to transfer this land to the accused. Danoris well knew therefore long before he gave evidence what this document contained and no further proof was necessary of the falsity of the position of surprise taken up by him in Court.

This conclusive piece of evidence was not brought to the attention of my brother Thamotheram who dismissed this appeal and my brother is strongly of the view that the failure to notice this demonstration of the falsity of Danoris' evidence goes to the root of the entire case.

No further reason is needed to indicate how an observation of this piece of evidence would have reversed the result of this case but it may be noted also in passing that one of the witnesses to the document is another son of Danoris, one Hendrick. It is highly unlikely that if the accused

successfully perpetrated this fraud upon the father. he should also choose a son as a witness and should have been successful in perpetrating a fraud on the son as well.

Upon our attention being drawn to this piece of evidence, learned Crown Counsel as well has very rightly stated that he does not attempt to support the conviction.

The next question is whether since we are satisfied that the verdict of the learned Magistrate should not stand, the dismissal of the appeal operates as a bar to our dealing with this matter in revision. This court would no doubt be extremely hesitant and cautious before it makes any order in revision which is contrary to an order which this Court itself has made upon appeal, but there would appear to be a precedent for orders of this kind where the original order is based upon a manifest error.

Shaw, J. acting in revision in D. C. Batticaloa 8301[1] varied an order he had made in appeal on the basis that his earlier decision was undoubtedly wrong and made *per incuriam*. Shaw, J. was relying on a judgment of Wood Renton, C.J. in *Police Officer of Mawella v. Galapatta*[2] where Wood Renton, C.J. observed that it appeared to him that the powers of the Supreme Court were sufficiently wide to enable him to interfere by way of revision and to set aside as having been made *per incuriam* the order dismissimg the appeal.

In *Ehambaram & Another v. Rajasuriya*[3] Nagalingam, J. held that where the object of an application in revision was in fact to re-argue a case already decided the court cannot and could not entertain such application. He referred to the decision of Wood Renton, C. J. and Shaw, J. to which I have referred and distinguished them as in the case before him the judgment made in appeal had been pronounced after counsel had been fully heard on behalf of the accused and in their petitions the petitioners were seeking to controvert some of the opinions expressed by the Supreme Court in its judgment on appeal as having been made *per incuriam*. He further observed that the Court in delivering the judgment in appeal had not expressed its views *per incuriam* and that these views represented one line of thought upon certain disputed questions of fact which were debated at the Bar.

The present case is clearly different from the case before Nagalingam, J. for this is a case of an obvious error of fact based on an all important item of evidence not having been brought to the notice of Court at the hearing of the appeal. In fact Nagalingam, J. observed in dismissing the application before him that this Court had modified or even vacated judgments pronounced in appeal when apprised of the fact that the Court had erred in regard to an obvious question of fact or of law.

[1] *(1921) 23 N. L. R. 475.*

[2] *(1915) 1 C. W. R. 197.*

[3] *(1947) 34 C. L. W. 65.*

In the recent case of *Nanhamy v. Ranawana*[1] Sansoni, J. refused to reconsider an order made in appeal upholding the contention of Crown Counsel that there is no power to reinstate a criminal appeal which has been dealt with. This was based on a judgment of Basnayake, J. in the case of *Elosingho v. Joseph*[2] to the effect that this Court had no power to reinstate a criminal appeal which had been dismissed in the absence of the appellant. It may be noted that in the case before Basnayake, J. it was not even suggested that the order was one made *per incuriam,* and the principle emerging from those two cases was different from that in issue before us, namely that this Court has no power to reinstate an appeal which had been dismissed in the absence of the appellant.

Having regard to the special circumstances of this case and the fact that the power of this Court in revision to correct or modify an order it has made in appeal appears to have been accepted over a long period of time, we think this is an appropriate case for the exercise of these powers. We accordingly act in revision and quash the conviction and acquit the accused.

THAMOTHERAM, J.—I agree.

*Application allowed.*