

GREENA FERNANDO
V.
TECKLA SAPARAMADU

COURT OF APPEAL.

P.R.P. PERERA, J.,

C.A. No. 203/84 - M.C. KANUWANA 58534.

MARCH 22, 1990.

Criminal Procedure - Public Nuisances - Obstruction to water course - Conditional order - Order absolute - Duty to begin evidence - Code of Criminal Procedure Act, No. 15 of 1979, ss. 98 and 101.

A report in terms of section 98(1) of the Code of Criminal Procedure Act, No. 15 of 1979, was filed against the original appellant and fifth respondent alleging obstruction of a water course. The Magistrate made a conditional order directing the appellant and sixth respondent not to interfere with the water course and to allow it to take its original course. The fifth respondent agreed to comply with the order. The appellant sought to have the order set aside under s. 98(2) of the Code of Criminal Procedure Act. The Magistrate took evidence directing the appellant to begin. Having taken evidence the Magistrate made conditional order absolute in terms of section 101(3) of the Code. The appellant complained of prejudice in being directed to begin and relied on the Indian provisions.

Held:

1. The Indian provisions are different from the provisions in our Code of Criminal Procedure.
2. In proceedings commenced under s. 98(1) the Magistrate is obliged to make a conditional order in the first instance only if he considers it necessary having regard to a report filed under that section and on taking such evidence (if any) if he thinks fit.

Section 98(2) requires a person against whom such order is made, if he is dissatisfied with such to move to have it set aside or modified in the manner provided.

Section 101(1) lays down the procedure to be followed when such party appears in Court and moves to have the order set aside or modified. This section makes it mandatory for the Magistrate to take evidence in the matter. A judicial investigation must be held and after it, if the court thinks that the conditional order is not reasonable and proper in view of the circumstances of the case, it will either rescind it entirely or modify its terms so as to bring it into conformity with the requirements of the case. In the latter event the order so modified will be made absolute and the provisions of section 102 and section 103 of the Code will become applicable.

If however the court upon the evidence led, considers the defendant has not been able to meet the case against him, the original conditional order will be made absolute and then too sections 102 and 103 will apply to such order absolute.

The party who moves to have the conditional order set aside or modified must in the first instance adduce evidence to show that the order is not reasonable and proper.

The Magistrate here followed the correct procedure.

Cases referred to:

- (1) *King Emperor v. Hingu* 1909 31 All. 453.
- (2) *Bhura v. Tara Singh* 1926 49 All. 270.
- (3) *Emperor v. Abdul Careem* 1927 49 All. 453.

APPEAL from order of the Magistrate of Kanuwana.

D.W. Abeykoon with *D.R. Ashok* and *N. Jayawardena* for 5th Respondent –Appellant.

J.C. Weliamuna for substituted 1st Respondent–Respondent.

B. Aluvihare, State Counsel, for Complainant–Respondent.

Cur.adv.vult.

June 04, 1990.

P.R.P. PERERA, J.

The complainant–respondent filed a report in terms of section 98(1) of the Code of Criminal Procedure Act, No. 15 of 1979, in the Magistrate's Court of Kanuwana, against the original appellant and the fifth respondent to the present appeal alleging that they obstructed a water course that went across a road and their respective gardens. Thereupon the learned Magistrate made a conditional order dated 08.09.82, directing the appellant and the sixth respondent not to interfere with the water course and to allow it to take its original course. The fifth respondent agreed to comply with this order. The appellant however sought to have this order set aside in terms of section 98(2) of the Code of Criminal Procedure Act. On 15th September, 1982, the appellant moved to have the conditional order set aside. The learned Magistrate having taken evidence under the provisions of section 101(1), of the Code, delivered his order on 04th July, 1984, making the conditional order Absolute, in terms of section 101(3), of the Code. The present appeal is against this order.

The sole ground of appeal upon which Counsel for the appellant relied was that the Magistrate had misdirected himself on the question as to which party should "begin" in the proceedings under section 101(1). The Magistrate had made order in the instant case that the appellant should begin. It was the contention of Counsel, that this order had caused serious

prejudice to the appellant's case, and was not in accord with the law. Counsel complained that the Magistrate had adopted a wrong procedure in these proceedings by directing the appellant to begin.

It was Counsel's contention that the provisions of our Code and the Criminal Procedure Code of India, were identical on this matter, and that therefore Courts in this country as a matter of practice have recourse to the decisions of the Supreme Court of India on matters that have not been authoritatively decided by the Courts of Sri Lanka. The position in India, according to Counsel, in proceedings of this nature, was that the complainant it was who has to start proceedings by adducing evidence and then the party showing cause may produce his own evidence if so advised. He cited a passage in support of this proposition from Ratanlal and Thakore on the Criminal Procedure Code, 9th edition at page 96, which reads as follows :-

"The complainant has to start proceedings by adducing evidence, and then the party showing cause may produce his own evidence, if so advised. When this is done, but not before, the Magistrate can make the conditional order Absolute, if he finds sufficient reason for doing so."

This position is borne out by several decisions of the Indian Supreme Court vide *King Emperor v. Hingu* (1), *Bhura v. Tara Singh* (2) and *Emperor v. Abdul Careem* (3).

Before however applying the interpretation placed by the Indian Courts on this particular provision, it will be necessary to consider whether the wording of the two sections are in identical terms. The relevant sections of the two Codes are therefore reproduced below:-

- (a) Section 138(1) of the Indian Code, which is the provision equivalent to section 101 reads as follows :-

"If the person against whom an order under section 133 is made, appears and shows cause against the order the Magistrate shall take evidence in the matter *as in a summons case*."

- (b) Section 101(1) of the Sri Lankan Code however, is in the following terms:

"If such person appears and moves to have the order set aside or modified the Magistrate shall take evidence in the matter."

On a comparison of these two sections, it is seen that they are not identical in their terms. There is no requirement in section 101(1) in our Code for the Magistrate to take evidence in such matter as in a summons case, as is required by section 138(1) of the Indian Code.

Sohony in his work on the Criminal Procedure Code of India, 1973, 18th ed. at page 1039, states thus:

“Since evidence has to be recorded as in a summons case, the provisions of section 254 of the Code of Criminal Procedure will apply, and the Magistrate should first hear the complainant and take all such evidence as he may produce, and then the evidence of the other side.”

Further, according to the definition given by Ratanlal, on the Criminal Procedure Code, 13th ed. “A summons case”, means a case relating to an offence. The two sections are therefore not identical in their terms.

I am therefore of the opinion that the construction placed upon section 138(1) of the Indian Code on this particular matter would not be helpful in deciding this question. The Indian case law on this particular matter would not be helpful in this regard.

In terms of section 101(1) of our Code, where a person against whom a conditional order is made, moves to have such order set aside or modified, the Magistrate is directed to take evidence on the matter. If the Magistrate is satisfied that the order is not reasonable and proper, he shall either rescind the same or modify such order (vide section 101 (2)). Further, in terms of section 101(3) if the Magistrate is not so satisfied the order shall be made Absolute.

In this context it is relevant also to note that in proceedings commenced under section 98(1), the Magistrate is obliged to make a conditional order in the first instance only if he considers it necessary having regard to a report filed under that section, and on taking such evidence (if any) if he thinks fit. Section 98(2) requires a person against whom such order is made, if he is dissatisfied with such order to move to have it set aside or modified in the manner hereinafter provided.

Section 101(1) lays down the procedure to be followed when such party appears in Court and moves to have the order set aside or modified. This section makes it mandatory for the Magistrate to take evidence in the

matter. The Magistrate therefore, must necessarily proceed to hold a judicial investigation and call for evidence. If after such investigation the Court thinks that the conditional order is not "reasonable and proper" in view of the circumstances of the case, it will either rescind it entirely or modify its terms so as to bring it into conformity with the requirements of the case. In the latter event the order so modified will be made Absolute and the provisions of section 102 and section 103 of the Code will become applicable.

If however the Court upon the evidence led on either side considers that the defendant has not been able to meet the case against him, the original conditional order will be made Absolute, and in this case too the provisions of sections 102 and 103 will apply to such order Absolute.

On a consideration of the relevant provisions and the scheme of the Code of Criminal Procedure Act, No. 15 of 1979, it would appear to be clear that the party who moves to have the order set aside or modified must in the first instance adduce evidence to show that the order is not reasonable and proper. Vide section 101(2). If however the Court upon evidence led on either side in the course of the inquiry considers that the defendant has not been able to combat the case against him the original conditional order will be made Absolute.

In my opinion the learned Magistrate has acted in accord with the above provisions of the Code of Criminal Procedure Act, in the instant case. There is no doubt that the Magistrate has afforded an opportunity to all the parties to adduce evidence, and has arrived at his finding having given due consideration to the material placed before him.

Having regard to the provisions of section 98 and section 101 of the Code of Criminal Procedure Act, I hold that the procedure adopted by the learned Magistrate calling upon the appellant to begin in the present case is in accord with the provisions laid down in the Code. I therefore affirm the order of the learned Magistrate and dismiss the appeal.

Appeal dismissed.