[IN THE COURT OF APPEAL OF CEYLON]

1972 *Present :* **Fernando, P., Sirimane, J., Samerawickrame, J., and Siva Supramaniam, J.**

K. VELAYUTHAN, Appellant, *and* The Hon. A. C. A. ALLES, Respondent

APPEAL No. 6 OF 1972, PRIVY COUNCIL APPEAL No. 26 OF 1971

*S. C. 186/65—M. C. Nuwara Eliya, 30012*

*Contempt of Court—Conditional order made by a court—Subsequent application by the party affected, or his Proctor, to make the order unconditional—Whether it amounts to contempt of Court—Allegation of offence of contempt of Court—Requirement of a specific charge or a rule* nisi.

An Assize Judge made order on September 21, 1970, that a motor car which was a production in a case heard by him earlier on August 21, 1966, should not be delivered to the person who claimed it as owner except upon certain conditions. On November 11, 1970, a Proctor who was retained by the claimant submitted a motion to the same Judge for an order that, in view of the fact that the criminal case had been finally disposed of by the Court of Criminal Appeal on November

12, 1966, the car be delivered to the claimant unconditionally. Thereupon the Judge directed the Proctor to " appear before him and support the application on November 22, 1970 ". When the Proctor duly appeared on November 22, he was forthwith called upon to show cause why he should not be dealt with for contempt of Court. He was then found guilty of the offence and sentenced to pay a fine as the Judge considered that the application for an unconditional delivery of the car was in direct violation of the earlier conditional order made by him and was an attempt to mislead the Court.

*Held*, that the application to Court to make an order different from the order it had already made could not be said to have been in *violation* of that order. The person affected by the order of September 21, 1970, could not be denied the opportunity of requesting the Court to vary that conditional order. Much less could a Proctor appearing for that person and presenting a motion to Court to the same effect be guilty of contempt of Court.

*Held further*, that a person should not be punished for contempt of Court unless a charge is formulated either specifically or in the form of a rule *nisi*.

APPEAL against a conviction for contempt of Court.

*D. R. P. Goonetilleke*, with *U. D. M. Abeyesekera* and *Sarath Dissanayake*, for the appellant.

*V. S. A. Pullenayegum*, Deputy Solicitor-General, with *R. Abeysuriya*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

March 9, 1972. FERNANDO, P.—

The appellant, who is a proctor of the Supreme Court, had been successful in obtaining from their Lordships of the Judicial Committee of Her Majesty's Privy Council special leave to appeal from a conviction entered against and a sentence of a fine of Rs. 250 imposed upon him by the respondent who was on November 22, 1970, the presiding judge at the Criminal Sessions of the Supreme Court for the Midland Circuit at Kandy.

Before the appeal could be heard by the Judicial Committee, the Court of Appeal Act No. 44 of 1971 came into operation on November 15, 1971, and the duty of disposing of the appeal devolved on this Court in terms of Section 19 of the said Act.

The proceedings which led to the conviction of the appellant are somewhat unusual and we would briefly summarise them below :—

At a trial upon indictment before the Supreme Court in proceedings numbered S. C. 186/1965, five persons were convicted on August 21, 1966 on charges of unlawful assembly and robbery and were sentenced to imprisonment. Their appeals to the Court of Criminal Appeal were dismissed on November 12, 1966.

When a criminal trial is concluded, it is usual for the Clerk of Assize, after appeal, if any, has been concluded, to obtain an order from the Assize Court for the disposal of the productions remaining in the custody of the Court itself or of the Fiscal. Two motor cars had been produced by the police in Court and were lying in the custody of the Fiscal. The trial Judge had made an order that both cars do remain in the custody of the Fiscal "as another person concerned in the robbery is still absconding."

Upon this appeal, we are concerned only with one of the two cars. The absconding accused was not one of the accused who stood his trial in proceedings No. S. C. 186/1965. Indeed, the police had not been successful in arresting him at all, and we are informed that he has not been arrested up to date. Two persons, named Raman and Seenivasagam respectively, both claimed to be the owners of the car we are concerned with here. Each of them made applications to the Assize Court for the release of the car to him, and these applications were considered on December 12, 1968 by the then Assize Judge (Weeramantry J.) who stated that, in view of the long delay that had already occurred, it would be appropriate to release the car subject to the owner entering into a bond for the production of the car at short notice. There were certain other proceedings also in the Assize Court in relation to these same applications, but we need not refer to them here as they have no direct bearing on this appeal. We need only refer to the proceedings of February 18, 1969, when the judge functioning as the Assize Judge that day made an order that, as there was a dispute over ownership of the car between Raman and Seenivasagam, the car do remain in the custody of the fiscal until one or the other of these two persons furnishes sufficient material on which the Court could consider it desirable to release the car.

Seenivasagam instituted a civil action (D. C. Colombo Case No. 70443/M) against Raman, and was successful in obtaining an order from the District Court of Colombo on August 28, 1970, that the latter do hand over possession to him of the car, together with a sum of Rs. 600 and costs.

On the same day, namely August 28, 1970, Seenivasagam signed a motion (witnessed by the appellant) stating that he was the owner of the car, and annexed thereto a certified copy of the decree in the District Court case and prayed for a direction to the Fiscal to deliver the car to him. On September 20, 1970 the respondent who was again functioning as the Assize Judge of the Midland Circuit made order as follows :—

> "The car may be delivered to Seenivasagam after the appealable period in D. C. 70443/M has elapsed. If an appeal is filed, delivery of the car will have to await the result of the appeal. When the car is delivered to Seenivasagam, he should be directed to enter into a bond in compliance with Justice Weeramantry's order and should be prepared to produce the car within 24 hours in Court if necessary. He should also be directed not to dispose of the car without the permission of the Court."

On November 11, 1970 the appellant forwarded an affidavit of Seenivasagam made the same day and, as proctor for Seenivasagam, moved for an order that "the car be delivered to Seenivasagam unconditionally" as the above criminal case "has been finally disposed ofby Your Lordships' Court." On receipt of these papers, the respondent directed the appellant to "appear before him and support the application on November 22, 1970." A copy of the notice to the appellant was also sent to Seenivasagam requesting him to appear in Court on the same date.

The appellant duly appeared on November 22, 1970, and the record reads that Mr. S. N. Rajadurai instructed by the appellant appeared in support of the application for the release of the car. In answer to the respondent's question whether the application was for an unconditional handing over of the car, counsel replied in the affirmative. The respondent then inquired whether that was not in direct violation of the order of the Court. He added that the order was quite clear and inquired whether any cause can be shown why the person who submitted the application should not be dealt with for contempt of Court. Counsel stated that the appellant meant no disrespect to Court; but, on the question whether the application was not in direct violation of the order of Court being repeated, answered that it was. Notwithstanding this answer of Counsel, we entertain some difficulty in understanding how an application to Court to make an order different from the order it has already made can be said to be in *violation* of that order.

The learned Judge appears to have considered that the motion presented by the appellant contained two "mis-statements". One of the alleged mis-statements, to use the learned Judge's own words, was the expression "to order the Deputy Fiscal to deliver the said car unconditionally." The other was allegedly constituted when the motion recited that the case had been finally disposed of.

Averments to the same effect as the alleged mis-statements are to be found in the affidavit of Seenivasagam, and the appellant, in embodying these averments in the motion he had to present to Court, was doing nothing more than relying on his client's affidavit. When Seenivasagam and his proctor the appellant moved the Court "to be pleased to order that the car be delivered unconditionally" they were both doing something they were entitled in law to do, namely, to move that the Court do vary its order of September 20, 1970. The learned Judge appears to have considered that an attempt to obtain an unconditional delivery of the car was an attempt to mislead the Court.

An intentional misleading of a Court, particularly by a proctor, who is an officer thereof, whereby the Court may be led into making an order which it would not have made but for such a misleading may, no doubt in certain circumstances, be dealt with as a contempt of Court. In an application made to the High Court of Allahabad for revision of an order of a Sessions Judge, the accused represented that they were in jail and

moved that they be released on bail. The Court reduced the punishment to the sentence of imprisonment already undergone, whereas in fact the accused had been on bail throughout except for one day. The Court held that the accused were guilty of contempt of Court inasmuch as they made misrepresentations which misled the Court into believing that they were in jail even at the time of the application. See *Mumtaz v. Chhutwa* [1].

In the case before us, the appellant was inviting the Court to make an unconditional order. That was in direct response to the order of Court dated September 21, 1970. The Court was aware that the order made by it was one subject to a condition. A person affected by the order cannot be denied the opportunity of requesting the Court to vary that conditional order. He is certainly not guilty of a contempt of Court in doing so. Much less can a proctor appearing for that person and presenting a motion to Court to the same effect be guilty of contempt. In regard to the second " mis-statement ", the criminal case referred to both in the appellant's motion and in Seenivasagam's affidavit was a case that had been tried on indictment and concluded. That case was finally disposed of when the appeals made to the Court of Criminal Appeal were dismissed. The statement was therefore technically accurate.

The order made by the Judge on September 21, 1970 did contain a reference to Seenivasagam entering into a bond to ensure production of the car in Court at short notice. The appellant stated to Court that, when he signed the motion to Court, he was not aware that any further criminal proceedings were contemplated. He relied on the averments in Seenivasagam's affidavit. It is unnecessary to consider whether he should himself have verified the accuracy of his client's averments. We do not think any kind of a deception of the Court was in the mind of the appellant. The motion was presented to the very judge who had made the conditional order. Moreover, it was indeed the same judge who had presided at the trial.

We were satisfied at the hearing of the appeal that the conviction of the appellant for the offence of contempt of Court could not be sustained, and we made order at its conclusion setting aside the conviction and sentence, stating that our reasons for our order would be set down later. While we have set out those reasons above, we would like to add that no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence be distinctly stated and an opportunity of answering it be given to him.—See *In re Pollard* [2].

[1] *A. I. R. (1940) All. 386.* [2] *(1868) L. R. A. C. (P. C.) 106.*

In the proceedings reviewed by us, no attempt was made to formulate a charge either specifically or in the form of a rule *nisi*. Indeed, the appellant came to Court upon a notice to him on a direction of the learned Judge to support the application for an order that the car be delivered unconditionally. When he appeared, he was not called upon to support the application but was forthwith called upon to show cause why he should not be dealt with for contempt of Court. If it had been the intention of Court to deal with any question of contempt of Court, it would have been more appropriate to have served a rule *nisi* on the appellant. Had that course of action been pursued, the ingredients of the offence of contempt of Court would have been prominent in the minds of all concerned, and we venture to think that a conviction of the appellant may not even have resulted.

*Appeal allowed.*