

1953

Present : H. A. de Silva J.

MALLIS SILVA, Petitioner, and I. D. USUPH, Respondent

S. C. 370—Application in revision in M. C. Hambantota, 15,761

Criminal Procedure Code—Section 289—Absence of accused on date of trial—Postponement—Power of Court to award costs in favour of complainant.

The accused was absent on the date of trial and was not represented by counsel or proctor. The Magistrate re-fixed the trial for another date and, purporting to act under section 289 of the Criminal Procedure Code, ordered the accused to pay to the complainant a certain sum as costs of the day.

Held, that under section 289 of the Criminal Procedure Code a Magistrate has no power to order an accused person to pay costs to the complainant when an adjournment of the trial becomes necessary or advisable.

APPPLICATION to revise an order of the Magistrate's Court, Hambantota.

A. H. C. de Silva, with *A. K. Premadasa*, for the accused petitioner.

S. H. Mohamed, for the complainant respondent.

H. A. Wijemanne, Crown Counsel, with *N. T. D. Kanakarathne*, Crown Counsel, for the Attorney-General, *amicus curiae*.

Cur. adv. vult.

August 18, 1953. H. A. DE SILVA J.—

This matter comes up in revision. The question that comes up for decision in this case is whether under section 289 of the Criminal Procedure Code the Court is empowered to order costs of the day against the accused on an adjournment of the trial. As the matter is of some importance, I sought the assistance of the Attorney-General. Crown Counsel representing the Attorney-General has kindly assisted the Court at the argument.

It would appear that on the 21st June, 1951, when this case came up for trial before the Magistrate the complainant Mallis Silva was present and the accused was absent. The complainant was represented by his counsel, Mr. Azeez, instructed by his proctor. The accused was not represented by counsel or proctor. He sent a medical certificate to the effect that he was unfit to attend Court on that day, owing to ill-health, whereupon counsel for the complainant challenged the medical certificate and objected to an adjournment of the trial. The learned Magistrate, having recorded the evidence of a witness called by counsel for the complainant, re-fixed the trial for the 31/8/51, and ordered the accused to pay to the complainant a sum of Rs. 250 as costs of the day. The learned Magistrate has purported to act under section 289 of the Criminal Procedure Code, when he made that order.

Section 289 empowers the Court to postpone the commencement of or adjournment of any inquiry or trial if from the absence of a witness or any other reasonable cause it becomes necessary or advisable to do so. The section further says that the Court may from time to time order a postponement or adjournment on such terms as it thinks fit for such time as it considers reasonable and may remand the accused if in custody or may commit him to custody or take bail in his own recognizance or with sureties for his appearance.

Two local authorities bearing on this point have been cited to me at the argument. Sir Thomas de Sampayo J., in *Paul v. Sinniah Kangany*¹, held that a Magistrate had no power to order an accused to pay the costs of the complainant's attendance at Court. De Sampayo J. observed thus :

“ The ‘ terms ’ here referred to obviously do not include payment of the costs to one side or the other, but purely to such conditions as are referred to in the subsequent part of the section. There is no authority.

¹ 5 *Ceylon Weekly Reporter* 143.

for a Criminal Court ordering costs to be paid by one side or the other except such costs as Crown costs and compensation, which are mentioned in section 197, for bringing a frivolous or vexatious case. The order is beyond the powers of the Police Court, and is therefore set aside.”

In the case considered by Sir Thomas de Sampayo J., the accused was present in Court and was represented by a Proctor on the date of trial. The accused's Proctor took objection to the jurisdiction of the Court, and for that purpose the evidence of two witnesses who were not present in Court was found necessary, and the case was adjourned for the purpose.

In the present case under consideration the accused was absent, and he was not represented by a pleader. The other local case that was cited before me was *Sabapathy v. Tharmalingam*¹; there de Kretser J. held that a Police Magistrate had power in granting an adjournment of a case to order costs to be paid by a party on whose application the adjournment was made. De Kretser J. did not follow the decision in *Paul v. Sinniah Kangany* (supra), though that case was cited before him. He has referred to certain Indian cases when arriving at his decision.

Learned Counsel for the accused-petitioner has argued that the law as laid down in *Paul v. Sinniah Kangany* (supra) was correct and should be followed. He draws the attention of the Court to the omission of the words “as to costs” after the words “on such terms” in section 289 of the Criminal Procedure Code. He argues that “such terms” in that section clearly refers to the words which have been used in the latter part of section 289 (1) of the Criminal Procedure Code. The terms contemplated there, he argues, may be the placing of the accused on bail in his own recognizance or with sureties for his appearance, if he is not already on bail, or if he is on bail, he may cancel bail, &c. In *Sabapathy v. Tharmalingam* (supra) the costs were ordered to be paid by the complainant to the accused, but de Kretser J. drew no distinction between the complainant and the accused in the application of the provisions of section 289 of the Code.

This matter has been considered by the Indian Courts. The section of the Indian Penal Code which corresponds to our section is section 344. Sohoni's Code of Criminal Procedure, 14th Edition at page 680, deals with the question of the payment of costs by an accused on an adjournment being granted. The learned commentator has referred to three Indian cases and summarised the principles laid down therein as follows :—

“where the accused was absent at the date of hearing and he was not represented by any pleader or counsel, the adjournment of the case is altogether unnecessary, since the Court could not proceed with the trial or record evidence in the absence of the accused. Under such circumstances, costs of the adjournment could not be awarded

¹ (1938) 40 N. L. R. 79.

against the accused person, as it is entirely opposed to the spirit of conducting criminal trials to impose such terms on the accused, even while granting adjournments for his benefit and at his request.”

The simple test one has to apply in a case of this nature is, what is the Court's duty when an accused is absent on the date of trial? It is obvious that no evidence can be recorded either at the trial or at the inquiry, where special provision is not made therefor, in the absence of the accused. The trial in a criminal case cannot proceed in his absence. That being so, the Court has got to adjourn the trial or inquiry and order a warrant upon the accused in order to secure his attendance and if he is already on bail to issue a notice on him and/or his surety, if any, to show cause why the bail bond should not be cancelled or forfeited.

In certain sections of our Criminal Procedure Code special provision has been made for the payment of costs, vide sections 253 (b), 325 (3), 194 and 352.

Some of the Indian authorities afford guidance for the interpretation of section 289 of the Criminal Procedure Code, vide *Brown v. Chanda Singh*¹, where it was held that it would be entirely opposed to the spirit of section 344 that a Magistrate would pass orders awarding costs of adjournment against the accused who was absent on the date of hearing. In *Gulam Singh and another, accused, v. Inder Singh and others*², it was held that an order for costs against an accused person who was not present and who was unrepresented was unjustified when an adjournment was necessary. The learned Judge who decided this case has followed the ruling in *Brown v. Chanda Singh* (supra).

Learned Crown Counsel who assisted me in this matter has supported the argument urged by learned counsel for the accused-petitioner, and cited to me various Indian authorities which have a direct bearing on this matter. He has argued that the correct principle has been laid down by the Indian Courts. He has referred me to *Gulam Singh and another v. Inder Singh and others* (supra), and *Mohan Lal Saraji v. Mohini Mohan Das*³. The interpretation and the reasoning in the Indian cases are in accord with our local case, *Paul v. Sinniah Kangany* (supra).

I am of opinion that on a correct interpretation of section-289 of our Criminal Procedure Code, a Magistrate is not empowered to order an accused person to pay costs to the complainant, when an adjournment of the trial has become necessary or advisable.

The order of the Magistrate dated 21st June, 1951, condemning the accused to pay Rs. 250 to the complainant is set aside, and if the costs have been already paid, same will be returned to the accused.

Order set aside.

¹ 4 *Criminal Law Journal*, p. 78.

² *The Criminal Law Journal of India*, Vol. 36, p. 101.

³ 1948 A. I. R. (Calcutta) Vol. 35, p. 194.