1944 *Present:* **Soertsz J.**

PERERA *v.* PUNCHI APPUHAMY *et al.*

669-670—M. C. Negombo, 38,294.

Supreme Court—Power to make an order under chapter 26 of Criminal Procedure Code—Criminal Procedure Code, s. 347.

The Supreme Court has power under section 347 (b) of the Criminal Procedure Code to make an order under Chapter 26 of the Code in the exercise of its jurisdiction in appeal or in revision.

APPEAL from a conviction by the Magistrate of Negombo.

M. T. de S. Amaresekere, K.C. (with him *H. W. Jayawardene*), for the first accused, appellant.

A. C. Alles, C.C., for the complainant, respondent.

Cur. adv. vult.

February 9, 1944. SOERTSZ J.—

Having regard to the character, antecedents, and age of the appellant, an Ayurvedic Physician some 57 years old, in good practice for many years, and with nothing against him till he succumbed to this temptation under strong pressure, it would appear, by his co-accused, I have decided to accede to the appeal made to me to give the appellant the benefit of the provisions of Chapter 26 of the Criminal Procedure Code.

The question, however, arises whether it is competent for me on appeal to make an order under that chapter, or whether the proper course is to send the case back to the magistrate with a direction to him to make an order under it. This question confronted my brother Wijeyewardene J. in the case of *Fernando v. Alwis*[1] which came before him on an application for revision. In that case the accused had been convicted on his own plea of the offence of criminal breach of trust and had been sentenced to a term of 3 months' rigorous imprisonment. Wijeyewardene J. was of opinion that the case was one to be dealt with under Chapter 26, but, *dubitanter*, if I read his judgment aright, took the view that he would not be justified by section 347 (*b*) of the Criminal Procedure Code, if he himself set aside the conviction and ordered the accused to enter into a bond. Accordingly, he proceeded to make the following order:—

> " I would, therefore, set aside the conviction *pro forma* and remit the proceedings to the Magistrate with a direction to him to discharge the

[1] *44 N. L. R. 221.*

accused conditionally under section 325 . . . . on the accused entering into a bond in such a sum and with such sureties as the Magistrate may consider adequate. The bond will provide for the accused appearing for conviction and sentence when called on at any time within two years.''

If I may say so, with great respect, it appears to me that when Wijeyewardene J. made that order he did just what he doubted he could do. He set aside the conviction and ordered the accused to enter into a bond, and all that remained for the Magistrate to do was to communicate the order to the accused and to give him an opportunity to carry it out. It is of no material consequence that the conviction was set aside *pro forma* or that amount of the bond and the number of sureties were left in the discretion of the Magistrate. If it was competent for this Court to direct that the bond should operate for two years, and that the accused should appear if called on within that period, it was equally competent for it to fix the amount of the bond, and the number of sureties, if it chose to do so. But suppose Wijeyewardene J. carried his doubt to its logical conclusion and sent the case back without any directions, in order that the Magistrate might consider the applicability of chapter 26 to the facts of the case, then it would have been open to the Magistrate to say that he did not think the case was an appropriate one for the chapter and in the result the opinion of this Court that it was such a case would be ineffective. If, however, the case is remitted to the Magistrate with a direction to him to apply chapter 26, it seems to me that that would be to compel the Magistrate to exercise not his discretion but ours.

In my opinion section 347 (*b*) amply authorises this Court to make an order under chapter 26 on appeal. It provides *inter alia* that '' at the hearing of the appeal the Court may . . . . in an appeal from a conviction alter the verdict maintaining the sentence or with or without altering the verdict increase or reduce the amount of the sentence or the nature thereof ''. Although it seems to me that there is a slight confusion of verbs in the concluding part of the sentence in that as it stands it implies an '' increase '' or '' reduction '' of the '' nature '' of the '' punishment '', when '' alter '' would have been the more appropriate verb to be applied when dealing with the *nature* of the punishment, yet the meaning is quite clear.

The section leaves it open to this Court to *alter the verdict* only, or *to leave the verdict as it stands* and to (*a*) *increase the amount* or (*b*) to *reduce the amount* of punishment or (*c*) *alter the nature* of the punishment. When this Court acts under chapter 26, it must leave the verdict as it stands for a verdict of guilty, that is to say, that the charge has been proved is the foundation for the application of chapter 26 but it *alters the nature* of the sentence or punishment.

Section 357 of the Criminal Procedure Code gives this Court the same powers in revision except that it enacts that this Court may not convert an order of acquittal into one of conviction. For these reasons I would deal with the accused myself and direct that he shall be released on his entering into a bond in a sum of Rs. 500 with two sureties to be of good behaviour and to appear for sentence at any time within two years on

being called on to do so. He will also pay Rs. 150 as compensation to the complainant and Rs. 100 as costs of the proceedings. If these conditions are not fulfilled within three weeks of the record going back the conviction and sentence will stand.

The appeal of the other appellant is dismissed.