

1955

Present : Basnayake, A.C.J.

IN RE JAYAKODY

*S. C. 605—Application for Revision in M. C. Avissawella, 13,990**Summons to produce a document or thing—Duty of Court to hear evidence first—Criminal Procedure Code, s. 66 (1).*

Where a Magistrate, purporting to act under section 66 (1) of the Criminal Procedure Code, issued summons on an accused person requiring him to produce a particular elephant before the Court—

Held, that before an order under section 66 of the Criminal Procedure Code is made, the evidence on which the Magistrate forms the opinion that it is necessary or desirable that a particular document or thing should be produced before the Court should be on the record. After such material is placed before the Court it should weigh such evidence and make the order.

¹ *Maxwell's Interpretation of Statutes (21st Ed.)*.

² *Medical Ordinance, No. 2 of 1935*.

³ *(1906) 1 Chancery 179*.

⁴ *Indigenous Medical Ordinance, No. 17 of 1911*.

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

H. V. Perera, Q. C., with M. M. Kumarakulasingham, for 2nd Accused-Petitioner.

G. E. Chitty, with A. S. Vanigasooriyar, for Complainant-Respondent.

September 5, 1955. BASNAYAKE, A.C.J.—

This is an application for the revision of an order made by the learned Magistrate in proceedings for criminal breach of trust against two persons named L. Don Karthelis Appuhamy and W. H. Jayakody. The allegation in the plaint was that Karthelis Appuhamy, the 1st accused, committed criminal breach of trust of an elephant valued at Rs. 7,000 and that the 2nd accused aided and abetted the 1st accused in the commission of that offence.

On the very day that the plaint was filed and summons ordered on the accused, the learned Magistrate made the following order regarding the production of the animal :—

“ Issue summons for 14.10.54 and notice 2nd accused under section 66 of the Criminal Procedure Code to produce animal on that day ”.

As summons had not been served by 14th October it was re-issued and made returnable on 28th October. On that date the accused appeared and pleaded not guilty to the charge ; but the elephant was not produced. The learned Magistrate thereupon made the following order :—

“ Call case on 11.11.54 regarding custody of the elephant and question of security. Elephant to be produced on that date ”.

On 11th November the Proctor for the accused contended that the learned Magistrate had no jurisdiction to order the elephant to be produced. After hearing Counsel for the prosecution the learned Magistrate made the following order :—

“ I do not think that I could go back on my earlier order even assuming that it was done without jurisdiction. My own view is that the case cited by Mr. Jacolyn does not apply in this case ”.

“ For these reasons I direct that the animal be produced in Court on 25.11.54 ”.

Learned Counsel for the petitioner submits that the learned Magistrate has no power to make the order he made.

Section 66 (1) of the Criminal Procedure Code provides that whenever any Court considers that the production of any document or other thing is necessary or desirable for the purpose of any proceedings under the Code by or before such Court, it may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons.

• It is clear from the sub-section that no order can be made thereunder unless the Court considers that the production of a particular document or thing is necessary. A Court can consider that the production of any document or thing is necessary or desirable only upon material properly placed before it.

Here there is no material on the record to show why it was necessary or desirable that the elephant should be produced for the purpose of trying the charges against the accused. In the absence of such material the order of the learned Magistrate cannot be sustained. Before an order under section 66 of the Criminal Procedure Code is made, the evidence on which the Magistrate forms the opinion that it is necessary or desirable that a particular document or thing should be produced before the Court should be on the record. After such material is placed before the Court it should weigh such evidence and make the order.

I set aside the order of the learned Magistrate directing the production of the elephant at the present stage of the proceedings leaving it open to him to make such an order should it become necessary or desirable to do so upon evidence placed before him at any future stage of the trial. The record should go back so that the proceedings which were interrupted by this application may now be continued.

Order set aside.

