1952 *Present:* **Nagalingam S.P.J., Gratiaen J. and Pulle J.**

THE ATTORNEY-GENERAL, Applicant, *and* SRI SKANDARAJAH, Respondent

S. C. 595—IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS ON P. SRI SKANDARAJAH, CHIEF MAGISTRATE, COLOMBO

Criminal Procedure Code—Non-summary inquiry—Assumption by Magistrate of summary jurisdiction—Power of Attorney-General to give instructions to Magistrate in summary proceedings—Meaning of term "inquiry"—Section 152 (3), 390 (2).

After a Magistrate, during a non-summary inquiry relating to an indictable offence, has assumed summary jurisdiction under section 152 (3) of the Criminal Procednre Code, the Attorney-General has no power under section 390 (2) of the Code to direct the Magistrate to discontinue the summary proceedings and take non-summary proceedings. The power of the Attorney-General to give instructions to a Magistrate is limited to non-summary inquiries under Chapter 16 of the Code and does not extend to trials either of summary offences or of non-summary offences in respect of which the Magistrate has assumed jurisdiction under section 152 (3).

THIS was an application for a writ of *mandamus* to compel the Chief Magistrate of Colombo to carry out certain instructions issued to him by the Attorney-General.

H. W. R. Weerasooriya, Acting Solicitor-General, with *T. S. Fernando*, *R. A. Kannangara* and *N. T. D. Kanekeratne*, Crown Counsel, for the Attorney-General.—The Attorney-General took action under section 390 (2) of the Criminal Procedure Code. He had the right to intervene and give instructions as to the inquiry even though the proceedings before the Magistrate was a trial. The inquiry need not necessarily be a pending inquiry. It could be an inquiry relating to the proceedings whether pending or not. The present Code of Criminal Procedure enlarged the powers given to the Attorney-General by the earlier Code of Criminal Procedure Ordinance, No. 3 of 1883, as amended by Ordinance No. 8 of 1896. The view of Middleton J. in *Silva v. Silva* [1] sets out the correct view.

S. Nadesan, with C. Manohara, for the accused parties noticed.—The word "inquiry" in section 390 means a proceeding under Chapter XVI of the Criminal Procedure Code. One must read section 390 in the context of the other sections in the Code. The only basis on which the Attorney-General could have called for the record was that there was an "inquiry or trial". In this case there could be no question of an inquiry that was pending. There were only certain preliminary proceedings. But these did not constitute an inquiry under Chapter XVI of the Code. There is

[1] *(1904) 7 N. L. R. 182.*

no doubt that in section 390 the word " inquiry " contemplated a non-summary inquiry under Chapter XVI. In section 390 (1) the words " or trial " were added, but the " inquiry " mentioned in section 390, sub-sections 1 and 2, still contemplated an inquiry under Chapter XVI.

The Attorney-General called for the record, not because there was an inquiry under Chapter XVI, but because there was a trial. It is one thing for the Attorney-General to give directions regarding an inquiry, but it is a totally different proposition to say that the Attorney-General could give instructions as to whether one is to have a trial or an inquiry. The view of Wendt J. in *Re application of V. C. Vellavarayam* [1] is erroneous as it is based on the Indian Code. Further, the inquiry must be an existing inquiry, because the only record that could be called for under section 390 is in a case in which an inquiry " has been or is being held." There is a fundamental difference in principle between instructions regarding the conduct of an inquiry and the conduct of a trial. The Attorney-General could not interfere with a matter that was essentially a function of the Magistrate. If there was an inquiry he could give instructions; not otherwise.

H. W. R. Weerasooriya, in reply.—The word " inquiry " should not be limited in meaning to an inquiry which had already commenced. It might also refer to an inquiry which may commence.

Cur. adv. vult.

February 11, 1952. NAGALINGAM S.P.J.—

A writ of *mandamus* is applied for in these proceedings by the Attorney-General to compel the Chief Magistrate of Colombo to carry out certain instructions issued by him acting under the provisions of section 390 (2) of the Criminal Procedure Code.

The circumstances giving rise to this application briefly are: A report under section 148 (1) (*b*) was presented to the learned Magistrate by an Inspector of Police charging certain persons with having committed offences punishable under section 480 of the Penal Code. The learned Magistrate directed the issue of summons to the accused persons and on the day they appeared examined one of the principal witnesses for the prosecution and made order in the presence of Crown Counsel that he had decided to hear the case in his capacity as Additional District Judge in terms of section 152 (3) of the Code. After having made the order, the learned Magistrate charged the accused, recorded their pleas and set down the case for trial. At this stage the Attorney-General called for the record of the proceedings and, purporting to act under section 390 (2) of the Code, instructed the learned Magistrate (1) to discontinue the summary proceedings and (2) to take proceedings under Chapter 16 of the Criminal Procedure Code against the accused. When the case was taken up on the day fixed for trial, the learned Magistrate communicated to Counsel for the defence the instructions he had received, whereupon defence Counsel challenged the regularity, if not the legality, of the instructions issued by the Attorney-General. After hearing

[1] *(1903) 7 N. L. R. 116.*

arguments on the point the learned Magistrate held that it was not competent for the Attorney-General to give instructions in case of a summary trial, which was the character of the proceedings before him, and directed the trial to proceed. Virtually, therefore, the learned Magistrate's order amounted to a refusal to comply with the instructions of the Attorney-General, and hence the application of the latter to this Court.

The controversy thus raised centres round the proper construction to be placed upon section 390 (2) of the Criminal Procedure Code.

The first question is, does the term " inquiry " in this sub-section extend to all proceedings of whatever nature before a Magistrate? Mr. Nadesan appearing on behalf of the accused persons by reference to the title to various Chapters of the Code as well as to the language used in various sections therein pointed out, confining his argument to Magistrate's Courts, that the Code classifies under three separate categories the proceedings therein: (1) inquiry, that is, a non-summary inquiry under Chapter XVI, (2) trial, that is, a summary trial under Chapter XVIII, and (3) proceedings, that is, steps taken or investigations made by a Magistrate which do not fall under either of the categories of trials or inquiries.

It is to be observed that the reference to the third category of proceedings was made by Mr. Nadesan, as at one stage of the argument it was suggested on behalf of the Crown, that the action or steps taken by a Magistrate in order to determine whether he should assume jurisdiction under section 152 (3) may properly fall under the designation of an inquiry in the sense of an inquiry under Chapter XVI, and Mr. Nadesan contended that the proper term to be applied to the steps taken by a Magistrate anterior to his determining the question whether he should act under section 152 (3) or not would properly be termed " proceedings " even as that term is used in the title to Chapter XV of the Code.

Mr. Nadesan submitted that the term " inquiry " in section 390 (2) is used in contradistinction to the terms " trial " and " proceedings ", and properly signifies a non-summary inquiry under Chapter XVI of the Code, so that, according to him, neither a summary trial before a Magistrate nor proceedings which result in a Magistrate assuming jurisdiction under section 152 (3) fall within the designation of " inquiry " in sub-section 2 of section 390.

Mr. Nadesan also challenged the correctness of the *obiter dicta* in the cases of *re application of V. C. Villavarayan for a Writ of Prohibition* [1] and *Silva v. Silva* [2], where the view was expressed that the term " inquiry " in section 390 (2) was wide enough to include a summary trial.

In regard to these *obiter dicta* the learned Solicitor-General took up first of all the position that he claimed the benefit of the views expressed in these cases but stated that it was not necessary for the purpose of the present case for him to contend that an inquiry included a summary trial under this sub-section. In view, however, of the distinction drawn in the Code itself in various places as pointed out by Mr. Nadesan, the

[1] *(1903) 7 N. L. R. 116.* [2] *(1904) 7 N. L. R. 183.*

learned Solicitor-General subsequently conceded that the term " inquiry " in section 390 (2) properly designates only a non-summary inquiry under Chapter XVI.

Mr. Nadesan's next contention was that if this is the proper meaning to be attached to the term, there was in fact no inquiry before the Magistrate in the sense of a non-summary inquiry and therefore the Attorney-General had no power of direction under this sub-section in the circumstances of this case, for it was said by Mr. Nadesan, and it was not denied by the learned Solicitor-General, that by the Magistrate having made order that he had decided to assume jurisdiction as a District Judge under section 152 (3) and by his taking the pleas of the accused persons and setting down the case for trial a summary trial had commenced before him and that was the only matter pending before him at the time the record of the proceedings was called for by the Attorney-General.

The argument on behalf of the Crown was in these circumstances narrowed down to one contention, which was formulated as follows: that the word " inquiry ", though properly referable to a non-summary inquiry under Chapter XVI of the Code, would embrace not only an existing or concluded inquiry but also one that may be said to lie dormant in the womb of the future.

The sub-section enables the Attorney-General to give such instructions as he may consider requisite " with regard to *the inquiry* to which such proceedings relate ". It will be seen that it is the definite article " the " that is prefixed to the word " inquiry " in this sub-section and not the indefinite article " an ". The learned Solicitor-General urges that no special significance attaches to the use of the definite article. There are other sections of the same Chapter where the indefinite article is prefixed to the word " inquiry " while in yet other sections the definite article is used. It seems to me that it is not without a due sense of appreciation of the effect of their use that the draftsman has employed the definite and indefinite articles in the way he appears to have done. " The inquiry " in this sub-section refers to the inquiry that has been or is being held before a Magistrate and referred to in sub-section 1 of section 390. This sub-section, it will be noticed, divides all inquiries before a Magistrate into two classes, (1) inquiries that have been held, that is to say, held and concluded. (2) inquiries that are yet being held before him, that is to say, pending before him. There is no other third class of inquiries contemplated under this sub-section, such as, for instance, inquiries to be commenced in the future; so that, when sub-section 2 refers to " the inquiry " the inquiry must fall under either one or the other of the above two classes and not to one yet unborn.

The learned Solicitor-General sought to reinforce his argument that the term " inquiry " included one in the future as well by formulating this question: Would it be competent or not for the Attorney-General to call for the record of proceedings in which an inquiry is being held by a Magistrate in respect of, say, a charge of robbery, and to direct the Magistrate to discontinue the proceedings in respect of the charge of robbery and to direct him to commence an inquiry in respect of the offence of murder? The answer, no doubt, to this question was intended to be in the affirmative, and I think that is the correct answer.

The argument was then put forward that, if that be so, the inquiry into the charge of murder being an entirely new one and having its origin in the direction given by the Attorney-General and which could in no sense have been regarded as one that had either been concluded or been pending before the Magistrate, the propriety of the Attorney-General giving directions in regard to an inquiry that was not *in esse* at the time the record was called for was thereby admitted; and if thus an inquiry non-existent at the time the proceedings were called for could be initiated properly by the Attorney-General, there could equally be no objection to an inquiry being ordered by the Attorney-General in regard to proceedings in a summary trial in which there neither had been nor was a non-summary inquiry.

I do not think this result flows. In the former case, the instructions of the Attorney-General relate to the non-summary inquiry which was pending before the Magistrate, for by his directions the Attorney-General merely moulds the existing non-summary inquiry from one of a particular character into, true, that of an entirely different character, but nevertheless the instructions are in regard to *an inquiry* that was before the Magistrate. In the latter case there was and is no non-summary inquiry before the Magistrate at all, and what the Attorney-General purports to do in this latter case is really tantamount to his converting a summary trial into a non-summary proceeding by interfering with the progress of a summary trial.

Another point of view was put forward on behalf of the Crown by laying stress on the phrase " to which such proceedings relate ", which qualifies the words " the inquiry ". It was urged that although there may have been no inquiry under Chapter XVI in respect of any particular proceeding before a Magistrate, nevertheless, where an inquiry under Chapter XVI is for the first time suggested by the Attorney-General, that would come within the category of inquiries to which such proceedings relate. This may be so. But in such a case the instructions would be not in regard to an inquiry but in relation to or in respect of proceedings before the Magistrate's Court irrespective of whether there was an inquiry or not. The sub-section, however, enacts that instructions should be in regard to the inquiry and not in regard to the proceedings. I do not therefore think that this argument is of any assistance.

A third line of argument was attempted based on the historical development of the legislation. In the earlier Criminal Procedure Code (Ordinance No. 3 of 1883) there was no provision for a Magistrate to try summarily a case triable by a District Judge. In 1896, however, the Ordinance was amended by Ordinance No. 8 of that year, whereby, by section 1 thereof provision was made for the first time that in cases where the same officer is both the Police Magistrate and the District Judge in a particular area then it should be lawful for the Magistrate to try summarily cases ordinarily triable by a District Court. He, however, was not called upon to give any reason for adopting a summary trial and, in fact, as observed in the case of *Silva v. Silva* [1] " nothing was left to the discretion of the Magistrate as to which of these cases (cases triable by District Courts) he might try ".

[1] *(1904) 7 N. L. R. 183.*

By section 4 (*a*) of the abovesaid amending Ordinance power was conferred on the Attorney-General to call for the proceedings in every case in which an inquiry or trial was being held under section 1 thereof. It should be observed that the effect of this was to enable the Attorney-General to call for proceedings in which a non-summary inquiry was being held as well as those in which the Magistrate has assumed jurisdiction to try summarily offences ordinarily triable by a District Judge. The Attorney-General, it will be noticed, was therefore not given power to call for proceedings where there was a summary trial proper, that is to say, a trial relating to an offence within the ordinary jurisdiction of a Police Magistrate.

Sub-section (*b*) of section 4 of the amending Ordinance then proceeded to provide that in respect of any case forwarded to him under sub-section (*a*) the Attorney-General could exercise all or any of the powers conferred upon him by Chapters XVI and XX of the Code of 1883. Chapter XVI of that Code related to non-summary inquiries and Chapter XX to powers of the Attorney-General, corresponding in the main to Chapters XVI and XXXV respectively of the present Code. Neither in Chapter XVI nor in Chapter XX of the old Code was any power vested in the Attorney-General to give instructions in regard to a trial. Both these Chapters, insofar as they refer to matters considered in this case have application to powers in regard to non-summary inquiries.

The section particularly emphasised by the learned Solicitor-General for the purpose of his argument was section 253 of the Code of 1883, but as it will be essential to consider the two preceding sections too, I shall set out all three sections:—

> 251. Every police magistrate shall, whenever required so to do by the Attorney-General, forthwith transmit to the Attorney-General the proceedings in any case in which an inquiry has been or is being held before the police court of such magistrate, and thereupon such inquiry shall be suspended in the same and the like manner as upon an adjournment thereof.
>
> 252. Whenever, in the course of any inquiry before a police court, the police magistrate of such court shall consider the case one of doubt or difficulty, or that there are peculiar circumstances connected therewith, or he shall be in doubt as to whether an accused person should be committed or not, he may, in his discretion, transmit the proceedings on such inquiry to the Attorney-General, in order that the Attorney-General may give such instructions in the case as to him shall appear requisite.
>
> 253. It shall be competent for the Attorney-General, upon the proceedings in any case being transmitted to him, under the provisions of the two last preceding sections, to give such instructions with regard to the inquiry to which such proceedings relate as he may consider requisite; and thereupon it shall be the duty of the police magistrate to carry into effect, subject to the provisions of this Code, the instructions of the Attorney-General, and to conduct such inquiry in accordance with the terms of such instructions.

It will be seen that sections 251 and 252 both relate exclusively to non-summary inquiries; so that, when section 253 before to proceedings that are transmitted to him under the provisions of these sections, the proceedings are limited to non-summary inquiries. As a result of section 4 (*b*) of the amending Ordinance conferring upon the Attorney-General all or any of the powers conferred by, to take the same section, namely, section 253, even in regard to a summary trial held by a Police Magistrate in respect of a non-summary offence, the Attorney-General was vested with powers of interference in this class of summary trials. His powers would have therefore extended to directing the stay of a summary trial and the commencement of non-summary proceedings in regard to it.

The learned Solicitor-General contends that in these cases any exercise of his powers by the Attorney-General could only be justified if the directions given by him to a Magistrate to start non-summary proceedings in respect of a summary trial can be referred to the word " inquiry " in section 253, in other words, that the term " inquiry " here must embrace an inquiry non-existent at the date the proceedings are called for by the Attorney-General.

A decision in regard to this point is beset with the same difficulties that confront one in settling the main question that arises in these proceedings ; but I am of the view that it is not by virtue of any special significance that may have been attached to the term "inquiry ", as contended by the learned Solicitor-General, that the Attorney-General exercised his right of interference in summary trials held by a Magistrate in respect of non-summary offences, but because under sub-section (4) (*b*) that Attorney-General was empowered to exercise any of the powers conferred by Chapters XVI and XX, even in respect of trials of non-summary offences conducted by a Magistrate.

Furthermore, it seems to me that if one contrasts section 390 (2) of the present Code with section 4 (*b*) of the amending Ordinance of 1896, the difference in phraseology tends to support the view that by the present Code the Legislature has divested the Attorney-General of the former power he had of giving directions in respect of trials held by a Magistrate in respect of non-summary offences. The learned Solicitor-General did not contend that even under the present Code the Attorney-General's powers can be said to extend to summary trials other than those held by virtue of the powers conferred by section 152 (3). It would be seen that, as stated earlier, under the amending Ordinance of 1896 the powers of the Attorney-General were limited to calling for records of trials which were held by a Magistrate in respect of offences ordinarily triable by a District Judge and did not extend to records of trials in which the Magistrate had his sole and exclusive jurisdiction. Under section 390 (1) of the present Code the powers of the Attorney-General have been much widened by empowering him to call for records even of trials of cases properly triable only by a Magistrate. While the Legislature did thus enlarge his powers in regard to calling for the proceedings, it clearly curtailed his right to give instructions by confining the instructions to inquiries alone by omitting the word " trial " in section 390 (2); if the

Legislature had omitted any reference to inquiries in sub-section (2), then there can be no doubt that the position of the Attorney-General would have been greater than under section 4 (*b*) of the amending Ordinance of 1896, for it could successfully then have been argued that the power of giving directions by the Attorney-General was intended to include both trials of non-summary offences held by him by virtue of section 152 (3) as well as trials of summary offences proper, that is to say, those within the ordinary jurisdiction of a Magistrate. The omission of the word " trial " when express reference is made to inquiries in section 390 (2) is significant and can only lead to the inference that the Legislature deliberately intended an alteration of the powers of the Attorney-General.

In this view of the matter, even a historical consideration of the legislation on the subject does not assist the view of the Crown. I am therefore of opinion that the power of the Attorney-General to give instructions to a Magistrate is limited to non-summary inquiries under Chapter XVI and does not extend to trials either of summary offences or of non-summary offences in respect of which the Magistrate may have assumed jurisdiction under section 152 (3).

In view of the foregoing reasons, I reach the conclusion that the instructions given by the Attorney-General to the Chief Magistrate of Colombo were *ultra vires*. In these circumstances, the application is refused.

GRATIAEN J.—

I agree that *mandamus* does not lie, and that the application must be refused.

Section 390 (2) of the Code does not in my opinion confer upon the Attorney-General any supervisory control over a Magistrate who, being also a District Judge, has in the exercise of his discretion assumed jurisdiction under section 152 (3) to try an offence summarily in accordance with the procedure laid down in Chapter 18. In the present case the proceedings under Chapter 18 had already commenced; the pleas of both the accused persons had been duly recorded, and it was therefore the plain duty of the learned Magistrate to proceed with the summary trial according to law. It does not lie within the province of the Law Officers of the Crown thereafter to give any directions or instructions obedience to which would have the effect of divesting the Magistrate of a summary jurisdiction which he had lawfully assumed. It seems to me that the language of section 390 (2) is too clear and unambiguous to permit of reference to the historical development of the Attorney-General's statutory powers as a guide to interpretation.

If, in the opinion of the Attorney-General, a Magistrate had wrongly or improperly exercised his judicial discretion in any particular case the only remedy available, as the law now stands, is to make an appropriate application for the intervention of this Court by way of appeal or revision. Section 390 (2) confers upon the Attorney-General wide supervisory control over the conduct of non-summary

proceedings, but none in respect of summary trials. In England, a Magistrate is expressly precluded from assuming, without the express consent of the Director of Public Prosecutions, summary jurisdiction to try indictable offences in cases in which the Director has taken over the conduct of the prosecution. In this country, however, the Attorney-General enjoys no such power of veto. In my opinion, it is very desirable that the provisions of section 152 (3) of the Criminal Procedure Code should be amended in this as well as in certain other respects.

PULLE J.—

I agree for the reasons stated by my brethren in their judgments that the application fails.

Application refused.