

1975 Present: **Walgampaya, J. Rajaratnam, J. and  
Vythialingam, J.**

**GUNASENA, Petitioner and THE ATTORNEY-GENERAL  
Respondent**

*S. C. 435/74 M. C. Nuwara Eliya, Case No. 50249*

**Administration of Justice Law—S. 77 (3)—Power of the Director of Public Prosecutions to order the discharge of a suspect before the receipt of the report—Validity of the order—Effect of S. 82 (1)—Order not a final order.**

S. 77 (3) of the Administration of Justice Law provides that “upon the report of any investigation being forwarded to the Director of Public Prosecutions, the Director shall, after considering the material submitted to him :

- (a) indict the suspect for trial before a High Court or a District Court of appropriate jurisdiction, or
- (b) order the discharge of the suspect, who, if he is in custody in connection with the offence investigated, shall be released therefrom. Before acting under this subsection, the Director may, if he considers it expedient to do so, direct further investigations to be made in regard to any matter which may be specified.”

Where, before the receipt of the report contemplated in section 77 (3), the Director of Public Prosecutions ordered the discharge of a suspect detained on a charge of murder,

*Held :*

The order discharging the suspect is valid. The Director need not have waited for a report on the investigations as contemplated in S. 77 (3). It is sufficient if he had examined the record of the investigations.

*Held further :*

The order made by the Director of Public Prosecutions is not a final order, for it is open to the Attorney-General to act if new material is available under S. 82 (1) of the Administration of Justice Law. It is also open to the petitioner to make representations to the Director of Public Prosecutions and furnish additional material for his information.

## APPLICATION in revision.

*S. K. Sangakkara with Lal Wijenaike and W. M. G. Wijekoon,* for the petitioner.

*R. S. Wanasundera, Acting Attorney-General with Ian Wikremanayake, Director of Public Prosecutions ; Priyantha Perera, Senior State Counsel ; and Tivanka Wickremasinghe, State Counsel,* for the respondent.

*Cur. adv. vult.*

April 2, 1975. WALGAMPAYA, J.—

This is an application in revision made under Sections 11 and 354 of the Administration of Justice Law No. 44 of 1973, in respect of Magistrate's Court, Nuwara-Eliya, case No. 50,249.

In her petition and affidavit dated 7th May, 1974, the petitioner submitted to this Court that on 15th April, 1974, the Officer-in-Charge of the Agarapatana police station, Mr. D. F. W. A. Silva, filed a report under Section 75 (1) of the Administration of Justice Law No. 44 of 1973, in the Magistrate's Court, Nuwara-Eliya, case No. 50,249, and asked for an order to detain one P. A. D. N. Basnayake for committing the murder of Heratge Gunasena who was the legal husband of the petitioner.

The petitioner stated that on 13th April, 1974, at 8.15 p.m. when her husband was at home, watcher Sinniah came and informed him that he was wanted by the Superintendent, Basnayake, at the factory with the checkroll. The deceased then left and subsequently the petitioner was informed that her husband had been shot by Basnayake.

The petitioner further stated that there was ill-feeling between Basnayake and her husband in proof of which position she has handed over certain documents to the police.

The petitioner stated that she had certain witnesses who could speak to the circumstances in which her husband sustained his fatal injuries.

Further, according to the report under *Section 75 (1)* of the Administration of Justice Law filed in this case by the police, Basnayake has admitted to the police that he shot the petitioner's husband. Basnayake was produced by the police before the Nuwara-Eliya magistrate on 15th April, 1974 and he was remanded till 30th April, 1974 as the Coroner had returned a verdict of homicide.

The gravamen of the averments in the petition and affidavit are that while the said Basnayake was on remand the Director of Public Prosecutions had visited Nuwara-Eliya on 24th April, 1974 and sent a letter to the Magistrate, Nuwara-Eliya, ordering him to discharge the suspect. The petitioner states in her affidavit that there is no authority in law for the Director of Public Prosecutions to visit a police station to examine the record of an investigation in a case which is not triable by the Magistrate until the police on their own complete investigations and send a report to him under *Section 77 (1)(b)* of the Administration of Justice Law.

On receipt of the letter from the Director of Public Prosecutions on 24th April itself the learned Magistrate discharged the suspect as requested. The petitioner's position is that it was an illegal order unwarranted by law.

Further the petitioner states that the procedure adopted by the Director of Public Prosecutions had deprived her of producing witnesses before the Magistrate, although she had retained an Attorney-at-Law to watch the interests of the deceased on 30th April, 1974.

Annexed to her application the petitioner has filed two documents marked P1 and P2. P1 is an affidavit of one *Jayatilleka* wherein he states, inter-alia, that he was acting Factory Officer of Braemore Estate, Agarapatana and on 13th April, 1974 at about 8.15 p.m. when he was still on duty the Superintendent, Basnayake, dealt a blow on his face with the butt of a gun and he fell down and was subsequently warded at the Agarapatana hospital. Then he heard the report of a gun, and in view of an alleged statement by Basnayake saying: "Jayatilleka, don't come out, I will shoot you also" he locked himself up in his house. He further states in his affidavit that he was aware that there was displeasure between the field officer, the deceased, Gunasena and Basnayake.

P2 is a copy of a report made to Court by Inspector Silva of the Agarapatana police station under *Section 75 (1)* of the Administration of Justice Law. It states, *inter alia*, that the Superintendent of Braemore Estate, had complained on 13th April, 1974 that as there were frequent thefts of tea from the estate factory, he used to visit that place regularly and on 13th April, 1974 at 8.45 p.m. he saw unnoticed by the others the assistant tea-maker Jayatilleke, driver Piyadasa, and the *deceased Gunasena* with a bag full of tea. He got out and held the three of them. They were about to assault him, and in the exercise of the right of private defence he waved the gun he had in his hand, the gun struck Jayatilleka's face and when the deceased was about to strike him with an iron rod he fired at him. He took the injured man to the Agarapatana hospital and as his condition was serious he had been transferred to the Nuwara Eliya hospital where he had died. He then recorded all available statements and arrested Basnayake on a charge under *Section 296* of the Penal Code. He moved for the remand of Basnayake till the 30th of April, 1974.

When this matter came up first on 10th May, 1974 before a Bench of which Justice Wijayatilleke was the President, the President of the Court had made an order that notice should be issued to the Attorney-General, and the record called for from the Magistrate's Court, Nuwara Eliya. That order was made in consequence of submissions made by Mr. Sangakkara, Counsel for the petitioner that the report contemplated under *Section 77 (1) (b)* of the Administration of Justice law which the Officer-in-Charge of the police station of investigation has to forward to the Magistrate had not been received by the Magistrate. Therefore, the question arose whether the Director of Public Prosecutions had the necessary jurisdiction to act under *Section 77 (3)* of the Administration of Justice Law.

The main argument adduced by Counsel for the petitioner was that the letter written by the Director of Public Prosecutions to the Magistrate of Nuwara Eliya stating: "Police have completed inquiries into the above case. I have examined the record of investigations and am satisfied that there are no grounds for proceeding against the suspect. He may be discharged from custody," was not an order which the Director of Public Prosecutions could have made under *Section 77 (3)* of the Administration of Justice Law, and was therefore *ultra-vires*.

Section 77 (3) states as follows: "Upon the report of any investigation being forwarded to the Director of Public Prosecutions, the Director shall, after considering the material submitted to him :

(a) indict the suspect for trial before a High Court or a District Court of appropriate jurisdiction, or

(b) order the discharge of the suspect, who, if he is in custody in connection with the offence investigated shall be released therefrom. Before acting under this sub-section, the Director, may, if he considers it expedient to do so, direct further investigations to be made in regard to any matter which may be specified."

The main question, therefore, is whether the Director of Public Prosecutions should have waited for a report of investigations as contemplated in Section 77 (3) referred to above, before he gave the order to the Magistrate to discharge the suspect.

It is my view that the Director of Public Prosecutions need not necessarily have waited till the report reached him. It is sufficient if, as in this case, he has examined the record of investigations. Furthermore, according to the affidavit filed by Mr. Silva, Inspector of Police, Agarapatana, dated 16th June, 1974, there is a statement that, "on the 23rd April, 1974 I forwarded certified copies of the information book extracts together with a report in terms of Section 77 (1) of the Administration of Justice Law to the Assistant Superintendent of Police, Nuwara-Eliya, to be forwarded to the Director of Public Prosecutions. On 30th April, 1974 I proceeded to the Magistrate's Court of Nuwara-Eliya in connection with this case as the suspect was to be produced by the jail authorities before the Magistrate on that date. I intended to file a report in terms of Section 77 (1) of the Administration of Justice Law before the Magistrate on that day. However, I found that the Magistrate had already discharged the suspect upon an order made by the Director of Public Prosecutions on the 24th day of April, 1974, and the Magistrate informed me so. In the circumstances, I felt that it was not necessary for me to file a report in terms of Section 77 (1) of the Administration of Justice Law in Court as the matter had reached a finality."

This averment in the affidavit of the Inspector is prima facie proof that the report contemplated in Section 77 (3) of the Administration of Justice Law was ready on the 23rd of April, and in my view the Section contemplated a report and it was presumably perused by the Director of Public Prosecutions. It cannot,

therefore, he said that the letter sent by the Director of Public Prosecutions to the Magistrate was *ultra vires*, or that it was not in conformity with the provisions of Section 77 (3).

Further, Section 77 (2) (a), states: "If, however, for reasons to be recorded by him the Magistrate considers it expedient to detain a suspect in custody pending the consideration of the aforesaid report by the Director of Public Prosecutions, he may, by warrant addressed to the Superintendent of any Prison, authorise the detention of the suspect for a period not exceeding three months in the aggregate."

That paragraph strengthens me in the view that the ultimate decision for the release or otherwise of the suspect is with the Director of Public Prosecutions. I am, therefore, of the view that the order of the Director of Public Prosecutions conveyed by letter dated 24th April, 1974 to the Magistrate, Nuwara-Eliya, was in conformity with the provisions of Section 77 (3).

During the course of the argument, the Attorney-General informed Court that the order made by the Director of Public Prosecutions and conveyed to the Magistrate is not a final order, for the Attorney-General will act if new material is available, and he has powers under Section 82 (i) of the Administration of Justice Law to so act. Further, the Attorney-General has submitted that it is open to the petitioner to make representations to the Director of Public Prosecutions and furnish additional material for his information.

The Attorney-General also assured Court that State Counsel will assist in the Magistrate's Court of Nuwara-Eliya, when the charge of theft against the deceased, Jayatilleka and Piyadasa, in Magistrate's Court, Nuwara-Eliya, case No. 50250 is taken up for trial.

The application in revision is refused.

RAJARATNAM, J.— I agree.

VYTHIALINGAM, J.—I agree.

*Application refused.*