1950 *Present :* **Dias S.P.J. and Swan J.**

ATTORNEY-GENERAL, Applicant, *and* PODISINGHO, Respondent

S. C. 187—Application for revision in M. C. Kandy, 7,020

Revision—Power of Supreme Court to act in revision in criminal cases whether or not an appeal lies—Effect of delay—Sentence—Imprisonment till rising of Court—Irregular—Courts Ordinance (Cap. 6), s. 37—Criminal Procedure Code (Cap. 16), ss. 15A, 15B, 338 (2), 356, 357.

The sentence imposed by a Magistrate was less than the minimum punishment prescribed by statute and was, therefore, irregular and not sanctioned by law. The Attorney-General did not appeal, although he had the right to do so under section 338 (2) of the Criminal Procedure Code. After the time limit for appeal elapsed, but in circumstances where it could not be said that there was unusual delay, he made application to the Supreme Court for the revision of the sentence.

Held, that the powers of revision of the Supreme Court are wide enough to embrace a case where an appeal lay but was not taken. In such a case, however, an application in revision should not be entertained save in exceptional circumstances, such as, (*a*) where there has been a miscarriage of justice, (*b*) where a strong case for the interference of the Supreme Court has been made out by the petitioner, or (*c*) where the applicant was unaware of the order made by the Court of trial.

The Attorney-General v. Kunchihambu (1945) 46 N. L. R. 401 distinguished.

Held further, that an order of "imprisonment till the rising of the Court" is irregular. The effect of sections 15A and 15B of the Criminal Procedure Code is to abolish "imprisonment till the rising of the Court" or any imprisonment for a term which is less than seven days. An offender may, however, be "detained" until the rising of the Court, such rising being not later than 8 p.m.

APPLICATION to revise a sentence passed by the Magistrate's Court, Kandy. This case was referred by Dias S.P.J. to a Bench of two Judges.

H. A. Wijemanne, Crown Counsel, with *S. S. Wijesinha, Crown Counsel*, for the Attorney-General.

T. W. Rajaratnam, for the accused respondent.

Cur. adv. vult.

July 5, 1950. DIAS S.P.J.—

This is an application by the Attorney-General for the revision of the sentence passed by the Magistrate on the accused respondent, P. Podisingho.

1——J. N. A 98321-1,042 (6/50)

The charge against him was that on December 17, 1949, at the Kandy Municipal Elections he applied for a ballot paper in the name of another person, to wit, G. W. James Perera, and that he thereby committed the offence of "personation" punishable under s. 78 (1) of the Local Authorities Elections Ordinance, No. 53 of 1946. The respondent having pleaded guilty to this charge, the Magistrate convicted and sentenced him to pay a fine of Rs. 50 and to be imprisoned until the rising of the Court.

The seriousness of offences of personation was pointed out by Howard C.J. in *Attorney-General v. Sinnathamby* [1] when he said "I agree..... that personation is a very serious offence, and that the sentences passed by the Magistrate are not only inadequate, but farcical". In the present case, the Attorney-General submits that not only is the sentence totally inadequate and farcical, but also that it is illegal.

Section 78 (1) of the Local Authorities Elections Ordinance, No. 53 of 1946, provides that on conviction after summary trial the personator "shall be liable to rigorous imprisonment for a term not exceeding one year, or to a fine *not less than two hundred and fifty rupees* and not more than one thousand rupees, or to both such imprisonment and such fine". It is, therefore, clear that the Legislature did not treat this offence in any spirit of levity. For reasons of public policy the summary punitive jurisdiction of the Magistrate was not only enhanced, *but a minimum sentence of fine was also imposed.* It is conceded by counsel for the respondent that one part, at least, of the sentence imposed by the Magistrate is not in accordance with the law.

A preliminary objection, however, was raised by counsel for the respondent. He contends that the Supreme Court cannot and should not entertain this application by the Attorney-General. As this question is one of practical importance, and as the decision in the case of *Attorney-General v. Kunchihambu* [2] appeared to be inconsistent with other decisions of the Supreme Court, and as there are similar cases in which the Attorney-General has moved in revision to enhance the sentences passed by this Magistrate on personators who pleaded guilty, I considered that this case merited reference to a Bench of two Judges.

The matter has now been fully argued. Two questions emerge for consideration—(*a*) Has the Supreme Court in this case power to revise the sentence passed by the Magistrate? and (*b*) if so, is this a case in which the Supreme Court ought to interfere?

The powers of the Supreme Court to revise any order made by a Judge of inferior jurisdiction are to be found in s. 37 of the Courts Ordinance, and ss. 356 and 357 of the Criminal Procedure Code.

Section 356 provides that the Supreme Court may call for and examine the record in any case, whether already tried, or pending trial in any Court for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed therein, or as to the regularity of the proceedings of such Court. Section 357 provides that in cases where the record has

[1] *(1948) 49 N. L. R. 385.* [2] *(1945) 46 N. L. R. 401.*

been called for under s. 356 "or which otherwise comes to its knowledge", the Supreme Court may *in its discretion* exercise any of the powers conferred by ss. 346, 347 and 348, that is to say, order the arrest of the accused, commit him to prison pending the disposal of the case in revision, or admit him to bail—s. 346, direct that further inquiry should be made, order a new trial, direct him to be committed for trial, or pass sentence on him according to law, alter the verdict maintaining the sentence, or without altering the verdict, increase or reduce the amount of the sentence, or the nature thereof—s. 347, take fresh evidence in the Supreme Court or direct it to be taken by any Judge of a District Court or Magistrate's Court—s. 348.

It will be seen, therefore, that when acting in revision in a criminal case, the Supreme Court can act *ex mero motu*, or be moved by some person who is dissatisfied with the conduct of the proceedings, or the order made in a Court of inferior jurisdiction. Section 358 makes it clear that no party has any right to be heard either personally, or by pleader, before the Supreme Court when exercising its powers of revision, provided the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader. The only limitations imposed on the powers of the Supreme Court in revision are—(*a*) that no order shall be made to the prejudice of an accused person in revision unless he has been afforded the opportunity of being heard either personally or by an advocate in his own defence—s. 357 (2), and (*b*) the Supreme Court acting in revision may not convert a finding of acquittal into one of conviction—s. 357 (3).

Except in those cases where the Supreme Court of its own knowledge calls for the record under s. 356, some person must bring the alleged irregularity committed in the lower Court to the notice of the Supreme Court. This is usually done by the party complaining against the order by filing a motion and affidavit. This motion is supported by counsel, and the proceedings at that stage are *ex parte*. If the Judge considers that a *prima facie* case has been made out calling for the exercise of revisional powers, he will direct that the record be called for, and at the same time direct that notice of the application should be served on the other party and to any other person affected. It has been held that a case may come " to the knowledge " of the Supreme Court while an appeal is being argued as in *Soysa v. Punchirala* [3], *Clara v. Pedrick* [4].

In the course of time, a body of case law has been evolved in regard to the principles on which the Supreme Court should act when disposing of an application in revision—particularly, in cases where the Supreme Court has been moved by an aggrieved party.

Most of the decided cases are judgments of single Judges. The leading case is *R. v. Noordeen* [3] where Wood Renton J. laid it down that s. 357 (1) "invests the Supreme Court with full power in all criminal cases. I do not think that that power is at all limited to those cases in which either an appeal lies or, for some reason or other, an appeal has not been taken. I hold without hesitation that as a matter of law it extends to

[1] *(1885) 1 S. C. R. 199.* [2] *(1900) 1 Browne at p. 215.*

[3] *(1910) 13 N. L. R. at p. 117.*

cases in which the Attorney-General has refused to sanction an appeal from an acquittal, provided that proper materials have been laid before the Court to call for its exercise ". This case has been consistently followed in the later cases. In *Ossen v. Excise Inspector Ponniah* [1] Dalton J. said : " It was urged that this Court should not deal with a matter in revision when leave to appeal had been refused by the Attorney-General. The nature of the *onus* that rests upon the applicant who comes before this Court for the purpose of inviting it in effect to override the deliberate refusal of the Attorney-General to sanction an appeal, is referred to by Wood Renton J. in *R. v. Noordeen* (*supra*). If, however, he makes out a *strong case* amounting to a *positive miscarriage of justice in regard either to the law or to the Judge's appreciation of the facts, this Court will deal with the matter* ". In *Punchi Mudiyanse v. Jayasuriya* [2] Howard C.J. laid it down that the powers of revision of the Supreme Court under s. 357 of the Criminal Procedure Code are not limited to cases where there is no appeal, or where no appeal has for some reason not been taken. In *Muttukrishna v. Hulugalle* [3] a Bench of two Judges considered the scope of s. 37 of the Courts Ordinance in regard to the revisional powers of the Supreme Court. The question was whether an order made by a District Judge in an application made under s. 133 of the Companies Ordinance could be revised by the Supreme Court. The Court, while approving of the principle laid down by *R.v. Noordeen* (*supra*), namely, that the Supreme Court has power to act in revision in all *criminal* cases whether or not an appeal lies, it was held that in the matter then under consideration, revision would not lie. It is to be noted, however, that *R. v. Noordeen* (*supra*) has been approved by a Bench of two Judges. In *Wickremasinghe v. Fay* [4] Moseley J. in following *R. v. Noordeen* (*supra*) said that the *onus* on the applicant was a heavy one, when he moved to revise an order of acquittal where the Attorney-General had refused to sanction an appeal. It was incumbent on him to prove *a positive miscarriage of justice*. Finally in *Perera v. Muthalib* [5] Soertsz J. held that the revisionary powers of the Supreme Court are not limited to those cases in which no appeal lies or in which no appeal has for some reason been taken. *The Court would exercise those powers where there has been a miscarriage of justice owing to the violation of a fundamental rule of judicial procedure.*

The question arises whether this decision of Soertsz J. is in conflict or inconsistent with his later decision in *Attorney-General v. Kunchihambu* (*supra*). It is therefore necessary to examine in some detail the facts of the latter case.

It appears that a provision of the Control of Prices Regulations, 1942, made the imposition of a term of imprisonment imperative when the convict *had a previous conviction*. It is clear from the judgment of Soertsz J. that, after the Magistrate had convicted the accused and imposed the sentence, the prosecuting Price Control Inspector brought it to the notice of the Magistrate that the accused had a previous conviction. The Magistrate, however, imposed no sentence of imprisonment. The Attorney-General moved in revision to enhance the sentence, and Soertsz J. refused

[1] *(1932) 34 N. L. R. at p. 52.*
[2] *(1940) 41 N. L. R. 431.*
[3] *(1942) 43 N. L. R. 421.*
[4] *(1943) 44 N. L. R. 369.*
[5] *(1944) 45 N. L. R. 412.*

to interfere. What is the *ratio decidendi* of that case? Soertsz J. held (*a*) that the order of the Magistrate was appealable by the Attorney-General under s. 338 (2) of the Criminal Procedure Code, (*b*) that the error of the Magistrate was an error of law and not of fact, (*c*) that a sentence is a part of the judgment, (*d*) that the Supreme Court has a discretion as to whether or not a particular order should be revised. Soertsz J. declined to exercise that discretion in favour of the Crown because, after the Magistrate had imposed the sentence of fine, he was belatedly informed of the previous conviction, and (*e*) Soertsz J. also indicated that there appeared to have been delay in making the application in revision. Soertsz J. said "*For these reasons* I refuse to exercise my discretion, and I reject the application for an alteration of the sentence". With great respect, I assent to the reasons given by Soertsz J. That case, however, has a limited application, and is clearly distinguishable from the facts of the present case. In the present case, the Legislature has imposed a minimum punishment, which does not depend on whether the convict has or has not a previous conviction. I am unable to hold that there has been any unusual delay in bringing this case to the notice of this Court. As was pointed out by Wendt J. in *Corea v. Girigoris Appu*[1] "A distinction should be drawn between the case of an acquittal and that of a conviction with an inadequate sentence, and also between the sentence of a District Court in which the Attorney-General directly prosecutes by one of his officers, and that of a Magistrate's Court, of which the Attorney-General has not, as a rule, any direct cognizance". It is a matter of common knowledge that before the Attorney-General moves to revise the order made by a Magistrate, the prosecuting public officer has to obtain a certified copy of the proceedings. He then makes a report to his superior officers who, after considering the matter, communicates with the Attorney-General. The case has then to be considered by a Crown Counsel who may be on circuit at the other end of the Island. The case may thereafter have to be considered by the Law Officers, after which the application in revision is filed. All this must take some time. In the case before us the conviction took place on February 28, 1950, and the application in revision was filed on April 22, 1950. It is impossible to hold that there has been any avoidable delay in this case in filing this application so as to cause the slightest prejudice to the respondent.

At first sight it would appear that the case of *Attorney-General v. Samarakoon*[2] is decisive of this matter. In that case it was laid down that where there has been a conviction and a lawful sentence, the Attorney-General has no right of appeal for enhancement of punishment; and that he should move in revision. That case laid down a proposition of sound law at the date it was decided. At that date the Attorney-General could only appeal against an acquittal. By Ordinance No. 19 of 1930 s. 2, s. 338 (2) of the Criminal Procedure Code was amended[3] and the Attorney-General was given the right to appeal "against any

[1] (*1908*) *11 N. L. R. at p. 332.*

[2] (*1910*) *14 N. L. R. 5.*

[3] This amendment was necessitated by the decision in *Nona v. Wijesinghe* (1926) 29 N. L. R. 43 and *Nonis v. Appuhamy* (1926) 27 N. L. R. 430.

judgment or final order pronounced by a Magistrate's Court or District Court in any criminal case or matter", and he was given twenty-eight days within which to prefer an appeal. The *ratio decidendi* of *Attorney-General v. Samarakoon (supra)* [1], therefore, does not apply to the present case. The Attorney-General in the present case had the right to appeal against this admittedly irregular sentence. Not having done so, should this Court refuse to deal with the matter in revision? The answer to this question will be found in the cases which I have cited earlier. The powers of revision of the Supreme Court are wide enough to embrace a case where an appeal lay but which for some reason was not taken. I agree with the observations of Akbar J. in *Inspector of Police, Avissawella v. Fernando* [2] that in such cases an application in revision should not be entertained save in exceptional circumstances. In my view such exceptional circumstances would be (*a*) where there has been a miscarriage of justice, (*b*) where a strong case for the interference of this Court has been made out by the petitioner, or (*c*) where the applicant was unaware of the order made by the Court of trial. These grounds are, of course, not intended to be exhaustive.

It is quite clear that the sentence of fine imposed by the Magistrate is not sanctioned by law. Learned Crown Counsel argues that the order that the respondent should be "imprisoned till the rising of the Court" is equally open to objection. It is, therefore, necessary to consider this submission.

Section 2 of Ordinance No. 47 of 1938 added two new sections to the Criminal Procedure Code, namely, sections 15A and 15B. Section 15A provides that —

"Notwithstanding anything in this Code, the Ceylon Penal Code, or any other written law to the contrary, no Court shall sentence any person to imprisonment, whether in default of payment of a fine or not, for a term which is less than seven days".

Section 15B (which was amended by Ordinance No. 59 of 1939, s. 2) reads. "Any Court may, in any circumstances in which it is empowered by any written law or other law to sentence an offender to imprisonment, whether in default of payment of a fine or not, in lieu of imposing a sentence of imprisonment, order that the offender be *detained* in the precincts of the Court until such hour on the day on which the order is made, not being later than 8 p.m. as the Court may specify in the order".

These sections were considered in the unreported case of *325 M. C. Kurunegala 40,284 (S. C. M., May 6, 1948)* when Canekeratne J. altered a sentence of "imprisonment for a day" to one of "detention in the precincts of the Court till 4 p.m. on the day on which the appellant appears in Court after the return of the record to the Magistrate's Court". I agree with Crown Counsel that the effect of ss. 15A and 15B of the Criminal Procedure Code is to abolish "imprisonment till the rising of the Court" or any imprisonment which is "less than seven days". Therefore, there is force in the contention that the order of the Magistrate in imprisoning

[1] *(1910) 14 N. L. R. 5.* [2] *(1929) 30 N. L. R. 452.*

the respondent till the rising of the Court is technically irregular. Had he ordered the respondent to be "*detained*" until the rising of the Court, such rising being not later than 8 p.m., the order would have been in accordance with the provisions of s. 15B. This Court, however, is faced with an order of the Magistrate which is partly quite illegal and partly irregular.

I am of opinion that the Attorney-General's application for enhancement of sentence is entitled to be heard and decided on its merits. The question, then, is whether this is a case in which this Court ought to exercise its powers of revision ?

I am clearly of opinion that it should. The Magistrate should have been aware, not only of the imperative provisions of s. 78 (1) of the Local Authorities Elections Ordinance, No. 53 of 1946, and of ss. 15A and 15B of the Criminal Procedure Code, but also of the fact that both the Legislature and this Court have regarded the offence of personation at elections as being an extremely serious one. In spite of these facts, the Magistrate has thought fit either through ignorance, or because he did not agree with the Legislature or this Court, to treat the offence of personation as a venial offence. In my opinion there has been a miscarriage of justice calling for the interference of this Court. Following the words of Soertsz J. in *Perera v. Muthalib* (*supra*)[1] I hold that this is a case where there has been a miscarriage of justice owing to the violation of a fundamental rule of judicial procedure, viz., that a Magistrate must obey the law.

I desire to point out that in exercising its powers of revision this Court is not trammelled by technical rules of pleading and procedure. In doing so this Court has power to act whether it is set in motion by a party or not, and even *ex mero motu*. A Judge of this Court has power to call for a record and in proper cases to revise the order of a Court of inferior jurisdiction. In doing so, of course, this Court will act on the principles laid down by learned Judges in the past. Whether the application in revision has been irregularly brought before this Court or not, once an irregularity has "come to the knowledge" of this Court, it can in a proper case act on such knowledge. I cannot agree with the submission of learned counsel for the respondent that "The law was made for man, and not man for the law". If that means anything, learned counsel would have this Court to stand by powerless, while illegal orders are made by Magistrates and District Judges. That is a proposition to which I am unable to assent.

I quash the sentence imposed by the Magistrate and in lieu thereof I direct that the accused respondent should pay a fine of Rs. 250 and to be detained till the Court rose on February 28, 1950. In default of payment of the fine, I sentence the respondent to undergo rigorous imprisonment for a term of three months. The Magistrate will, I have no doubt, consider on its merits any application for time in which to pay the fine.

SWAN J.—I agree.

Application allowed.

[1] *(1942) 45 N. L. R. 412.*