

1958

Present : Weerasooriya, J.

THE ATTORNEY-GENERAL, Applicant, and S. LINGAM
CHETTIAR, Respondent

S. C. 236—Application in Revision in M. C. Ratnapura, 65908

Criminal procedure—Accused convicted per incuriam—Power of Magistrate to vacate conviction and sentence on same day—Power of Supreme Court to restore, in revision, the finding of conviction—Criminal Procedure Code, ss. 188 (1), 306 (1) (4), 357 (3).

The proviso to section 306 (4) of the Criminal Procedure Code does not always enable a Magistrate who has convicted an accused person *per incuriam* to reverse the judgment on a consideration of matters that come to light before he adjourns for the day.

On June 17, 1958, the accused was convicted on his pleading guilty to the charge framed against him. Later, in the course of the same day, it was pointed out to the Magistrate that the Emergency Regulation under which the accused was charged had been rescinded. Thereupon the Magistrate vacated the earlier order convicting the accused as having been made *per incuriam*, and discharged the accused. The plea of guilty had not been withdrawn by the accused at the time when the Magistrate made the second order discharging the accused.

Held, that the proviso to section 306 (4) of the Criminal Procedure Code could not be construed as sanctioning the second order made by the Magistrate purporting to rectify the earlier order.

Held further, (i) that in view of the provisions of section 188 (1) of the Criminal Procedure Code the Magistrate had no power to make the order discharging the accused as long as the plea of guilty stood.

(ii) that the power of the Supreme Court to restore, in revision, the conviction and sentence was not contrary to the provisions of section 357 (3) of the Criminal Procedure Code.

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

Ananda Pereira, Crown Counsel, for the Attorney-General in support.

No appearance for the accused-respondent.

July 17, 1958. WEERASOORIYA, J.—

In this case the accused was charged on the 3rd June, 1958, with having on that day committed a contravention of an Emergency Curfew Order made under regulation 17 of the Emergency (Miscellaneous Provisions and Powers) Regulations published in *Government Gazette Extraordinary* No. 11,322 of the 27th May, 1958. To this charge the accused pleaded not guilty and the trial was fixed for the 17th June, 1958, on which date the accused withdrew the plea and pleaded guilty. On that plea the learned Magistrate convicted the accused and sentenced him to pay a fine of Rs. 500 in default to 3 weeks' simple imprisonment.

This order of the Magistrate is signed by him and constitutes the judgment in the case. It would appear that later in the course of the day certain representations were made to the Magistrate by Counsel for the accused in consequence of which the Magistrate made the following order:—

“ Mr. Wirasekera for the accused brings to my notice that the regulation under which the accused is charged today has been rescinded by the order published in *Government Gazette* of 7.6.58 (Emergency Order No. 2).

I cannot find any saving provision in respect of offences committed before the date of the latest regulation.

The position is that the regulation under which the accused has been charged has been rescinded.

I vacate my order sentencing the accused to pay a fine of Rs. 500 in default sentencing the accused to a term of three weeks' S. I., as having been made *per incuriam*.

I discharge the accused.”

The present application has been made on behalf of the Attorney-General in respect of the two orders made by the Magistrate on the 17th June, 1958. Under section 306 (1) of the Criminal Procedure Code a judgment in a criminal case is required to be written by the District Judge or Magistrate who heard the case and to be dated and signed by him in open Court at the time of pronouncing it. Section 306 (4) provides that when a judgment has been so signed it cannot be altered or reviewed by the Court which gives such judgment, but there is a proviso which allows a clerical error to be rectified at any time and *any other error* to be rectified before the Court rises for the day.

No authority was cited to me as to the meaning of the words “ any other error ” in the proviso. Apparently the Magistrate thought that in the circumstances brought to his notice after he had pronounced judgment convicting the accused, the conviction amounted to an error which he could have rectified before he adjourned for the day. If this view is correct it would necessarily follow that in every case where a judgment of conviction, or even of acquittal, has been pronounced it is open to a Magistrate to reverse the judgment on a consideration of matters that came to light after the judgment, provided he does so before he adjourns for the day. I find it difficult, however, to construe the proviso to Section 306 (4) as sanctioning such a procedure. In the case of *Marambe Kumarihamy v. Perera*¹ the accused was convicted and sentenced in the first instance to pay a fine. But after the judgment had been signed by the Magistrate he learnt that the accused had certain previous convictions. Thereupon the Magistrate struck out of the record the sentence previously passed and proceeded to impose a term of imprisonment. De Sampayo, J., held that the second sentence was not in order, and he restored the original one.

¹ (1919) 6 C. W. R. 325.

In the present case the conviction of the accused proceeded on his plea of guilty. That plea had not been withdrawn even at the time when the Magistrate made the second order discharging the accused. Section 188 (1) of the Criminal Procedure Code requires that on such a plea being tendered the Magistrate shall record a verdict of guilty and pass sentence according to law. I do not see how in view of these provisions the Magistrate could have made the order discharging the accused as long as the plea of guilty stood.

I accordingly quash the second order of the Magistrate by which he purported to vacate the sentence passed on the accused and to discharge him. The position, therefore, will be that the judgment of the Magistrate convicting the accused on his plea and sentencing him to pay a fine of Rs. 500 in default to three weeks' simple imprisonment will stand and the proceedings will be remitted to the Magistrate so that effect may be given to the judgment and sentence. I do not think that the order I have made is contrary to the provisions of section 357 (3) of the Criminal Procedure Code.

As the accused pleaded guilty to the charge, no appeal lies against his conviction, and any difficulty as regards the computation of the appealable period consequent on my order will, therefore, not arise. It will, however, be open to the accused to take such other action as he may be advised if he wishes to canvass the correctness of his conviction.

Application allowed.
