

1951

Present : Swan J.

C. P. JAYEWARDENA, Appellant, and G. D. P. DHARMARATNA
(Inspector of Police), Respondent

S. C. 1,173—M. C. Colombo, 18,941

Withdrawal of charge by complainant—Duty of Magistrate to acquit accused—Information Book—Use of it to frame additional charges—Criminal breach of trust—A necessary ingredient—Penal Code, s. 392—Criminal Procedure Code, ss. 122 (3), 195.

Where a prosecuting officer moved to withdraw a pending summary case on the advice of the Attorney-General—

Held, that in such a case, if the Magistrate is satisfied that sufficient grounds have been shown, he is obliged, under section 194 of the Criminal Procedure Code, to permit the withdrawal of the case.

Held further, that the offence of criminal breach of trust cannot be committed in respect of an article which has been rejected and is valueless. In such a case, the accused cannot be said to have acted dishonestly.

Obiter : Section 122 (3) of the Criminal Procedure Code does not entitle a Magistrate to use the Information Book to frame additional charges against an accused person.

APPPEAL from a judgment of the Magistrate's Court, Colombo.

H. V. Perera, K.C., with *G. E. Chitty*, for the accused appellant.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 17, 1951. SWAN J.—

In this case the appellant was charged by the Borella Police under Section 370 of the Penal Code with theft of six packets of cat-gut, property in possession of the Government, valued at Rs.15, alternatively under Section 392 with Criminal Breach of Trust of the said packets.

Before the trial the prosecuting Inspector moved to withdraw the charge alleging that he was making the application as he "had been directed to do so as the Attorney-General, who originally directed the Police to file plaint in the above case, has after consideration thought it advisable to deal with this matter Departmentally".

The application was made by way of a written motion dated 24th August, 1951. On this motion the learned Magistrate made the following order :—

"Support on Bench giving reasons for this application."

When the case was called on the Bench, Mr. J. M. H. Toussaint, A. S. P., supported the application reiterating the grounds set out in the motion.

The learned Magistrate informed the A. S. P. that "sufficient grounds should be shown" and re-fixed the matter for hearing. On the next date Mr. Toussaint again appeared in support of the motion and stated:—

"The Attorney-General on further consideration has advised the Police to withdraw this case as there is not sufficient evidence to prove that the cat-gut in question was serviceable, or that the cat-gut was removed for the purpose of sale. Therefore no value can be attached to the cat-gut."

The learned Magistrate then made order refusing the application, stating that he was not satisfied that sufficient grounds had been shown.

In my opinion no better grounds could have been shown than that the application to withdraw the case was made on the advice of the Attorney-General. But the learned Magistrate resolutely and obdurately refused to be satisfied. In the course of his order the learned Magistrate made the following observation:—

"Even if sufficient grounds are shown the discretion still lies with this Court whether it would permit a withdrawal of this case."

Section 195 of the Criminal Procedure Code provides as follows:—

"If a complainant, at any time before judgment is given, in any case under this chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw the case, the Magistrate *may* permit him to withdraw the same and shall thereupon acquit the accused, but he shall record his reasons for doing so.

Provided, however, that nothing herein contained shall be taken to extend the powers of a Magistrate to allow the compounding of cases under the provisions of Section 290."

In the context the words "the Magistrate *may*" only mean "it shall be lawful for the Magistrate to" and nothing more. It is not correct to say that if the grounds are sufficient the Magistrate has a further choice in the matter. The sufficiency of the grounds may be within the discretion of the Magistrate but, if the grounds are sufficient, he is not merely empowered to permit the withdrawal of the case but obliged to do so. When a power is granted to a judicial officer to do a certain thing for a person for whose benefit the power is to be exercised, that power may make it his duty to exercise that power when called upon to do so.

The case then took a curious turn. The learned Magistrate charged the accused afresh. The fresh charge appears in Summary Form 1B and involves certain new matter, namely, that the accused committed theft or, alternatively, breach of trust of "one B. D. Yale G. 5020 syringe with two needles, two bulbs of strychnine hydrochloride, two bulbs of emetin hydrochloride and a bottle containing carminative mixture".

From what source the learned Magistrate obtained the material upon which he framed the added charges one is unable to gather. If he obtained it by looking into the Information Book I would say it was highly improper. Section 122 (3) of the Criminal Procedure Code tells us when a criminal Court may send for the statements made to a Police officer or inquirer, adding that the Court "may use such statements or

information, not as evidence in the case but to aid it in such inquiry or trial". I do not think that the section gives a Magistrate the right to use the Information Book to frame additional charges against an accused person.

The matter of the application to withdraw the case was revived in another guise on 24th September, 1951. Mr. Chitty appearing for the accused submitted that as the Attorney-General had directed the Police to withdraw the prosecution the provisions of Section 195 of the Criminal Procedure Code did not apply and that the English Law was applicable in view of Section 6. The learned Magistrate then made an order in which he dealt with the powers of the Attorney-General to enter a *Nolle prosequi*, observing that there was no corresponding provision as regards summary trials by Magistrates. In the course of his order he made the following remark :—

“ It is reasonable, therefore, to presume that the Legislature intentionally omitted giving the Attorney-General such a power in a summary trial.”

I wonder if the learned Magistrate realized that this was not a summary trial pure and simple, that it was a case in which he assumed jurisdiction as District Judge. However, the propriety and correctness of his second order cannot be questioned. He had already made order refusing the complainant's application to withdraw the case, and the accused could not canvass that order by bringing up the same matter in another form.

After trial the learned Magistrate acquitted the accused of the additional charges which he himself had thought fit to frame, and, in respect of the original charges made by the Police, convicted the accused of attempting to commit breach of trust of 6 packets of cat-gut. One is tempted to say “ the mountain hath laboured and brought forth a mouse ”.

Learned Crown Counsel did not seek to support the conviction. In my opinion the conviction cannot stand. The essential element of criminal breach of trust has not been established, namely, that the accused acted fraudulently and dishonestly with intent to cause wrongful gain to himself or wrongful loss to the Department. The cat-gut in question was, according to the accused, material that had been rejected by the surgeons and therefore unserviceable. He took the 6 packets because he regarded them as of no value. Dr. R. B. Perera, a witness for the defence, said that unserviceable cat-gut, like old X'Ray films, were “ just thrown away ”. Dr. G. Cooke, a witness for the prosecution, admitted that whereas in the case of any Government article that has to be condemned a Board of Survey is necessary, with regard to consumable articles such as drugs and suture-gut a Board of Survey was not necessary. “ If they are rejected by the Surgeon,” he said, “ there is an end of the matter.” The learned Magistrate appears to have thought that the accused may have taken good cat-gut from stock and not rejected cat-gut that was valueless. There is absolutely no evidence to justify this speculation.

I set aside the conviction and acquit and discharge the accused.

Appeal allowed.