IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Special Leave to Appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka from the judgment of the Revision Application bearing No. P.H.C. (A.P.N.) 35/08 of the Court of Appeal.

S.C. Appeal No. 12A/2009

S.C. Spl. L.A. No. 332/2008

H.C. Chilaw Revision Application No. 36/04

Court of Appeal – P.H.C. (A.P.N.) 35/08

Upali Indrathilake Amadoru.

Accused-Petitioner-Petitioner-Appellant

Vs.

1. Officer-in-Charge,
Special Criminal Investigation Unit, Police Station,
Wennappuwa.

Complainant-Respondent-Respondent-Respondent

2. Hon. Attorney General,
Attorney General's Department, Colombo 12.

Respondent-Respondent-Respondent

.

BEFORE : **Ms. S. TILAKAWARDANE.J**

RATNAYAKE.J &

SURESH CHANDRA.J

COUNSEL : Dulindra Weerasuriya with Sanjaya Gunasekara

for the Accused-Petitioner-Petitioner-Appellant.

S. Kularatne, S.S.C., for the A.G.

ARGUED ON : 18/01/2011

DECIDED ON : 05/05/2011

Ms. Tilakawardane, J.

The Accused-Petitioner-Petitioner-Appellant (hereinafter referred to as the Appellant) has sought Leave to Appeal from the decision of the Court of Appeal dated the 11th November 2008 whereby the Court of Appeal upheld the Judgment of the High Court of Chilaw. This Court granted Special Leave to Appeal on 3rd March 2009 on the following two questions of law.

(i) Was the Order dated 11th September 2002 given by the Magistrate's Court of Marawila in Case No. 60172 under Section 186 of the Criminal Procedure Code or under the proviso thereof?

(ii) If the said Order was made in terms of the proviso to Section 186 is that tantamount to acquittal in terms of Section 314 of the Criminal Procedure Act?

On 24th October 2001, charges of cheating, criminal misappropriation and criminal breach of trust in terms of sections 403, 386 and 389 of the Penal Code respectively, were filed against the Appellant in the Magistrate's Court of Marawila. Employed at Ceylinco Insurance Company as an insurance agent, the Appellant was alleged to have induced the fraudulent issuance of cheques in his favour by an insurance policy holder. The Appellant pleaded not guilty to these charges, and maintained his innocence in response to a subsequent amendment and re-filing of the charges on 11th September 2002.

As his principle defense, the Appellant submitted that the charges lodged against him were procedurally invalid, given that the party filing the complaint – the insurance policy holder in whose name he had allegedly forged checks – had not sustained any loss .It was at this juncture that the Magistrate's Court Ordered (i) the plaint to be quashed while reserving the right for a fresh plaint to be filed and (ii) the release of the Petitioner.

Subsequently on 2nd July 2003, the Officer-In-Charge of the Special Investigations Unit of the Wennapuwa Police filed a report under Section 136(1) (b) of the Code of Criminal Procedure Act 15 of 1979, charging the Appellant with cheating and criminal misappropriation and, furthermore, cited an accountant of the Ceylinco Insurance Company as a witness. The charges were read to the Petitioner who once again pleaded not guilty. The matter proceeded to trial and the evidence of one witness was called.

The Prosecution amended the charges with permission of the Court on 8th September 2004, to which the Appellant raised an objection, that the Order of 11th September 2002 quashing the plaint and Ordering his release amounted to an acquittal and, therefore, continuation of the said trial stood in violation of Section 314 of the Code of Criminal Procedure Act No. 15 of 1979. This objection was overruled by the Learned Magistrate by his Order dated 15th September 2004. The Appellant sought unsuccessfully to set aside this Order in his Application for Revision to the High Court of the North Western Province, holden in Chilaw and the Court of Appeal.

The Appellant seeks to have this said Orders set aside on the basis that the original Order made on 11th September 2002 amounted to an acquittal and the pending charges could not be proceeded with as it violated the provisions of 314 of the Code of criminal procedure act adverted to above.

It has to be appreciated that that there is a distinction between the two Orders that could be made in terms of this section , the former amounting to a mere discharge and the latter, an Order made under the proviso, is one that should be characterized as one providing for acquittal. As evidence for establishing the Proviso as the basis for the issue of the Order, the Appellant has submitted a somewhat confusing comparative analysis of the present Penal Code versus its prior iterations. While this analysis adequately serves to establish the parallels between the main clause and proviso of section 186 and provisions of the older law, it fails to actually substantiate his assertion that the Magistrate's determination of the defective nature of the charges necessarily leads to a conclusion that the Magistrate's Order was written in terms of the Proviso. Interestingly, the Appellant's suggestion that the

language of the Order mandates this conclusion is in opposition to his own suggestion that this Court not be governed by the specific 'phraseology' used by the Learned Magistrate used in making the Order.

Addressing the distinction sought to be drawn by the Appellant, the Respondent-Respondent-Respondent argues primarily on two correlated points, namely that (i) a full analysis of the context in which the Order was issued is required to properly determine the intended statutory basis of the document, and that (ii) guiding this interpretation is settled principal of law that a verdict cannot said to have been granted in the absence of properly formed charges.

In considering this it is relevant to consider that the summary trial in criminal procedure is initiated by the framing of charges and, therefore, one of the first tasks of a Magistrate is to ascertain whether there is sufficient ground to frame a charge against the accused as set out in section 182(1) of the Code of Criminal Procedure Act referred to above. On reading the charge to the accused, if the latter makes a statement amounting to an unqualified admission, the Magistrate has a mandatory obligation in terms of section 182(1) of the said Act to record a verdict of guilty and pass sentence according to the law. If the accused withdraws his admission with leave of the Court, the Magistrate shall proceed to trial as if a conviction has not been entered. If no such admission is tendered, the Magistrate will in terms of section 183(1), (2) of the said Act, inquire as to whether the accused is ready for trial and, if so, proceed to try the case. If, however, the accused is not ready for whatever reason, the Magistrate holds discretion to postpone or proceed with the trial, and the accused's claim of insufficient or lack of readiness will not prevent the Magistrate from taking evidence of the prosecution and of any other witnesses of the defense as are available.

When the above is considered in light of the provision for Procedure on Trial set out in section 184 of the Act, it becomes clear that only after the charges are read to an accused can a verdict be given, whether on admission of the accused or after a trial. The correct framing of charges, therefore, is an indispensable prerequisite to the issuance of a verdict, as it is on these charges that the Accused is to tender his plea and the Court is to consider whether to proceed to trial.

This logical conclusion is further substantiated by the provisions of Sections 185 and 187 of the said Act, which define the power of the Magistrate to issue a verdict. Section 185 provides that the Magistrate shall, if after taking evidence for the prosecution and defense and such further evidence (if any) as he may on his own motion cause to be produced,

record a verdict of acquittal if he finds the accused not guilty. If the Magistrate does indeed find the accused guilty, he is to record a verdict of guilty, pass sentence upon him according to law and record such sentence. Section 187 of the Penal Code further clarifies the nature of verdict, providing that if an offense proved against the accused by the facts is different than the one specified in the charge, the Magistrate can convict the accused of the offense that has been proven but may do so only after framing a charge and reading and explaining the same to the accused. A plain reading of these Sections leads unequivocally to the conclusion that *at least some deliberation on the merits of the case* must have taken place before a verdict can be reached. We are of the opinion that the Court of Appeal correctly concluded that the earliest stage at which a Magistrate has the power to acquit or convict is after the taking of evidence in the abovementioned manner. (*vide* also L.I.C. de Silva v V.M.P. Jayatillake 67 NLR 169).

The reason why the framing of a charge is prerequisite to an actual verdict but not simply to discharge is evident in Chapter XVI of the said Code of Criminal Procedure Act, Chapter XVI which establishes that the purpose of "the Charge" is to indicate the offense with which the accused is charged. (Vide Sections 164 and 165). Where there is no charge framed in terms of the law, the Court cannot acquit the accused simply because the Court cannot know - nor can the accused be adequately noticed of – what offense he is to be regarded as acquitted. If the offense for which he was acquitted is not known, there is effectively nothing preventing him from being tried again for the same offense, which is an affront to the finality of an acquittal and the rights of the accused. In respect of the need for properly framed charges, the Penal Code allows for as many amendments to charges as is necessary and at any time before Judgment is pronounced; such alteration can be in the form of a substitution or addition of a new charge. (Vide section 167(1)). The only occasion in which an alteration will disrupt the proceeding of a trial is when the alteration, in the opinion of the court, is likely to prejudice the accused in his defense or the prosecutor in the conduct of the case, in which case, the court may either direct a new trial or adjourn the trial for such period as may be necessary. (Sections 168 and 169).

Apart from the clear intent of the legislators to disallow the issuance of a verdict where no evidentiary proceedings are available from which to be able to deduce guilt or innocence, the court has implicitly confirmed this by a confirmation of the inverse, holding that a challenged Order will be deemed to be a verdict only when the context of the situation reveals an intent to adjudicate. In Perera v Officer in Charge, SCIB, Kalutara (1999) 3 SLR 407 this court found that the unwillingness of the police in proceeding with a case did not amount to a withdrawal mandating acquittal as required under Section 189 of the Penal

Code, because an acquittal could not be given where the intention was a mere discontinuance of proceedings as opposed to conclusion, adjudication or determination of proceedings. In De Silva v. Jayatilake 67 NLR 169, the court held that "while it was open to a Magistrate for reasons stated to discharge an accused in terms of section 191, (vide section 186 of the Code of Criminal Procedure Act) such discharge can amount only to a discontinuance of the proceedings against that accused and does not have the effect of an acquittal. An acquittal under section 190 (vide section 185 of the Code of Criminal Procedure Act) means an acquittal on the merits". As further basis for arriving at this decision, this Court referred to Veerappan v. the Attorney-General 72 NLR 361, where the Privy Council held that the defence of *autrefois acquit* cannot succeed where an Order of discharge was made without going into merits, in a set of circumstances analogous to the instant case.

The Appellant has submitted that the cases of Fernando v Excise Inspector, Wennappuwa 60 NLR 227 and Premadasa v. T. E. R. Assen (Inspector of Police) 60 NLR 451 support his claim that the issuance of an acquittal does not require an inquiry into the merits of a case. While these cases can be broadly read to make this point, such a reading is, to this Court, unacceptably simplistic. The importance of these cases cannot stand simply for the fact that discharge Orders were characterized as acquittals without due attention to the reason which underlay the decision to make such a characterization. In Fernando, the Court chose to characterize an Order of Discharge in terms of section 191 (succeeded by Section 186 of the Code of Criminal Procedure Act) as a substantive verdict of acquittal due to the fact that the accused raised objection to it *only after the Prosecution completed its lead of the evidence and the defence effectively closed his case*, reasoning that a decision to release at such a point in the case would have to be for, all intents and purposes, one based on the merits of the case. In Premadasa, charges against the accused were discovered to be improperly formulated *only after the Prosecution had closed its evidence*, and although the Order given was one of discharge, the principle of *autrefois* acquit was held to apply. The objective of the respective courts hearing these cases was quite clear, namely that a finding of discharge would be both procedurally onerous to the Appellant as well as a violation of his/her right to finality of proceedings.

While this reasoning is apparent in several cases (*vide* Don Abraham v Christoffles 55 NLR 135, Edwin Singho v. Nanayakkara (61 NLR 22) ; Peter v. Cotelingam 66 NLR 468), the case of Fernando v Rajasooriya 47 NLR 399 provides a particularly succinct explanation of it. In this case , the accused asserted that his discharge in a prior case due to an inability of the Prosecuting Officer to lead evidence barred his conviction on the principle of *autrefois*

acquit. Making reference to Sumangala Thero v. Piyatissa Thero (1937) 39 NLR 265, the Soertz, J., explained that:

> *… the Magistrate has the power to control the trial by discharging the accused if he is of the opinion that it would serve no useful purpose to proceed any further with the case or, if he prefers to make an Order of acquittal, he should be able to rule out any other evidence available to the prosecution for some good reason pertaining to the admissibility or relevancy of evidence. In such a case, there is a decision upon the merits and such a decision is essential for a valid plea of autrefois acquit. This view is supported by good authority. Spencer Bower relying upon many decisions of the English Courts, to which he makes reference, observes as follows in his treatise The Doctrine of Res Judicata at pages 32 and 33 : "Thus the dismissal of a summons, complaint or charge by a Court of summary jurisdiction, if expressly stated by the Court, or shown by evidence properly receivable to have proceeded upon a consideration of the merits, is a judicial decision of the innocence of the alleged offender …But where the dismissal did not purport to have been or, was not in fact, founded upon a consideration of the merits even in the largest and most liberal sense of that somewhat elastic expression, it is not deemed to involve, or necessarily to involve, any adjudication of the innocence of the accused."*

Finally, to the language of Section 186 of the Penal Code – the section at issue in this case –we find it to be quite clear that the procedure laid down by the provision was designed in contemplation of the rationale detailed above. Section 186 reads as follows:

> *Anything herein before contained shall not be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, but he shall record his reasons for doing so;*
>
> *Provided that, if the Magistrate is satisfied, for reasons to be recorded by him, that further proceedings in the case will not result in the conviction of the accused, he shall acquit the accused.*

The Main Clause indicates that discharge of the accused can take place at "any previous stage of the case", which when read together with the abovementioned sections (sections 182, 183, 184, and 185etc), effectively refers to any time before the case has proceeded to trial, before evidence was taken, before a plea was given by the accused and before even charges have been framed. Defined to encompass such portion of a case, a discharge cannot amount to a determination of the rights of the parties because no adjudication has taken place and is to be given before any deliberation on the merits has taken place. It is for this reason that such a decision by the Magistrate must be accompanied by a declaration of the basis for such a determination. The Proviso on the other hand, serves to vest the Magistrate with a mandatory obligation to acquit the accused in the event he is satisfied of the impossibility of conviction, and while doing so, more restrictively delineates the threshold

after which such acquittal can be made. Qualification of the word “proceedings” with the word “further” requires a presumption that some level of proceedings has been undertaken. A proceeding can only be considered a “further” or otherwise subsequent proceeding if it follows a prior one.

While this Court does not choose to promulgate a rule as to precisely when in the timeline of a case a discharge is to be seen as an adjudicative action and not a mere discontinuance of proceedings – it would be inappropriate to deprive the Magistrate of the discretion he is afforded by the Code of Criminal Procedure Act on this point – the relevant statutory provisions and pertinent case law on the matter as detailed hereinabove warrants a conclusion that, as a matter of law, an Order for release given in the absence of any *opportunity* to consider the merits of a case cannot be considered an adjudicative action and *autrefois acquit* cannot apply, regardless of the particular word that may be ascribed to the release. Whether a release is deemed a “dismissal” or “discharge” or some other term, the fact that no evidentiary basis exists from which a court can draw a reasoned conclusion is alone dispositive of the matter. Accordingly, we find that the Court of Appeal correctly viewed the discharge in the case before us to amount to simply a discontinuance of proceedings and not a verdict of acquittal and, as such, hold that the Order could not have been made pursuant to the Proviso of Section 186. That the Magistrate reserved the right to file a fresh plaint when making this Order removes any trace of doubt that the order was intended to simply affect the Appellant’s release incidental to a discontinuance of proceedings.

Having determined the inapplicability of Section 186 upon the Order in dispute, the Appellant’s second question of law is rendered untenable. However, we take the opportunity to briefly provide some clarity on whether releases issued under the Proviso of Section 186 fall within the purview of Section 314(1) of the Penal Code. Section 314(1) provides:

> *A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence while such conviction or acquittal remains in force not be liable to be tried again for the same offence nor on the same facts for any other offence.*

The word “tried” – the operative word of this section – finds meaning in Section 5 and Section 184 of the Code of Criminal Procedure Act referred to above. Section 5 provides that all offenses (under the Penal Code or any other Law) are to be (i) investigated, (ii) inquired into and (iii) tried and otherwise dealt in accordance with the provisions of the Code of Criminal Procedure Act referred to above. The nature of these three phases of an allegation of an offense in the context of a summary procedure is found in Section 184 which stipulates

that if a Magistrate proceeds to try the accused, there is a mandatory obligation to take all such evidence as is produced by the prosecution or the defense. The effect, then, of the operative language of Section 314(1) as informed by the abovementioned sections is to make clear that if a person is to have been considered "tried" for purposes of Section 314, the opportunity for both sides to produce some evidence to support their respective stances has to have been available. Given the earlier determination that acquittals under the Proviso require some level of evidentiary proceeding to have taken place, and that an opportunity for leading evidence is inherent to Section 314(1) definition of "tried", it necessarily follows that an acquittal under the Proviso of Section 186 does not fall within the ambit of Section 314.

For the aforesaid reasons the Appeal is refused and the judgment of the Court of Appeal is affirmed. No costs.

JUDGE OF THE SUPREME COURT

RATNAYAKE.J

I agree.

JUDGE OF THE SUPREME COURT

SURESH CHANDRA.J

I agree.

JUDGE OF THE SUPREME COURT

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