

ATTORNEY - GENERAL
v.
SIRIPALA

COURT OF APPEAL,
P.R.P. PERERA, J. AND W.N.D. PERERA, J.,
C.A. 218/90 and C.A. 219/90,
M.C. NEGOMBO 1479/89 AND 1480/89.
JUNE 01, 12, 22, and 27, 1990

Narcotics – Heroin – Offence under Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance – Jurisdiction of Magistrate – Detention under S. 82(3) of the Poisons, Opium and Dangerous Drugs Ordinance.

The effect of the new Section 54A and Section 54B is to provide a more severe penalty on conviction by the High Court but these sections can under no circumstances be construed to mean that they have vested in the High Court exclusive jurisdiction to try the various offences created by the Ordinance. The fact that the report filed by the Officer-in-Charge of the Police Narcotics Bureau in the Magistrate's Court alleged the commission of offences under S. 54A and S. 54B cannot wipe out the jurisdiction of the Magistrate who is empowered by the Statute to try summarily the offences created by the Ordinance.

Cases referred to :

(1) *Attorney-General v. Punchi Banda [1986] 1 Sri L.R. 40, 45.*

APPLICATION in Revision of the orders of the Magistrate of Negombo.

J. Charles for accused-respondent,
Hector Yapa, Deputy Solicitor-General with *Malalgoda*, State Counsel for petitioner.

Cur. adv. vult.

April 20, 1990

P. R. P. PERERA, J.

The accused-respondent (hereinafter referred to as the respondent) together with another suspect M. Dharmakaran, were produced before the Magistrate of Negombo on 15.11.89, on a report under Section 82 (2) of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984. The report alleged that Dharmakaran was detected on 14.11.89, at the Katunayake International Airport, with 1,197 grammes of a substance suspected to be heroin in his possession-offences punishable under Section 54A, of the said Ordinance.

According to this report, the respondent had aided and abetted Dharmakaran in committing the offences set out above, and had thus committed an offence punishable under Section 54 B of the said Act. The Police, also sought an order of detention in terms of Section 82 (3) of the said Ordinance, and the learned Magistrate made order permitting the detention of the respondent in Police custody for the purpose of investigation, until the 21.11.89.

On 21.11.89, the Officer-in-Charge of the Police Narcotics Bureau produced the Respondent in the Magistrates Court and filed a further report in terms of Section 82 (4), of the said Ordinance, and moved that the suspect be remanded to Fiscal's custody, and informed the Magistrate that he was seeking the advice of the Attorney-General regarding this case, under the provisions of Section 393 (5) of the Criminal Procedure Code. The learned Magistrate then remanded the respondent to the custody of the Fiscal up to the 04.12.89, and ordered that a further report be filed on that date.

On 04.12.89, an order has been made by the Magistrate to call this case on 08.12.89, and on this date, defence Counsel had raised the objection that the Magistrate had no jurisdiction to make an order remanding a suspect who is alleged to have committed offences under Section 54 A, and Section 54 B, of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984. The learned Magistrate having heard oral submissions of defence Counsel and State Counsel, had also afforded the parties an opportunity of filing written submissions. Thereafter, the learned Magistrate on 31.01.90, made his order upholding the objection raised by the defence and purported to discharge the respondent presumably acting under the provisions of Section 115 (2) of the Criminal Procedure Code subject to certain conditions.

The present application of the Attorney-General, is to have this order of the learned Magistrate set aside by way of revision. Deputy Solicitor-General, Hector Yapa, who appeared in support of this application contended that this order was manifestly erroneous, and was in contravention of the provisions of Section 83 of this Ordinance, and that it has been made without due regard to the provisions of Section 82 of the Ordinance which empower a Magistrate to act under the provisions of the Code of Criminal Procedure Act, No. 15 of 1979.

Defence Counsel submitted that the Magistrate had no jurisdiction to make an order remanding a suspect who is alleged to have committed

offences under Section 54 A and Section 54 B of this Ordinance as amended. Counsel invited the attention of the Court to the relevant reports filed by the Officer-in-Charge of the Police Narcotics Bureau, in the Magistrate's Court, where it is alleged that the respondent has committed offences under Section 54 B, of the Poisons, Opium and Dangerous Drugs Ordinance. Counsel contended that in the present state of the law, a Magistrate has neither the jurisdiction to try the suspects, nor to inquire into the commission of these offences, so that an order to remand a suspect in such a situation would be to act outside the jurisdiction vested in the Magistrate by law. Counsel also urged that there was no specific provision in this Ordinance as amended which authorised a Magistrate to make an order for remand in respect of the Accused Respondent.

In this connection it is necessary however, to bear in mind that the reports filed by the Officer-in-Charge of the Police Narcotics Bureau, also disclose that the respondent may have abetted Dharmakaran in the Commission of one or more of the following offences : -

- (a) Possession and consumption of dangerous drugs prohibited by Section 52 of this Ordinance ;
- (b) The manufacture of any dangerous drug prohibited by Section 53 of this Ordinance ; and
- (c) The sale, administration or the procuring of a dangerous drug prohibited by Section 54 of this Ordinance.

Indeed, Section 78 (3) specifically provides that every person who attempts to commit or abets the commission of an offence, against this Ordinance, shall be guilty of the same offence and in terms of Section 78 (5), all these offences are triable summarily by a Magistrate. According to this section, these offences are also triable by the High Court on indictment in which case, heavier penalties have been imposed (*Vide* Section 78 (5) (a) and (b) of the Ordinance.)

It is significant, that these offences created under the original Poisons, Opium and Dangerous Drugs Ordinance, have not been repealed by the amending Act No. 13 of 1984. Having regard to the facts of this case what is relevant is that Section 54 A and Section 54 B, of the amending Act imposes the death penalty or life imprisonment in respect of certain offences like trafficking, import or export, and possession of certain dangerous drugs inclusive of heroin over certain

specified quantities, and has introduced more severe penalties where the quantity was less than the specified amount on conviction by the High Court. The effect of the new Section 54 A, and Section 54 B, therefore is to provide a more severe penalty" on conviction by the High Court" and, in my opinion, these two sections can under no circumstances be construed to mean that they may have vested in the High Court exclusive jurisdiction to try the various offences created by this Ordinance.

On an examination of the relevant provisions of the Ordinance which have been set out above, it is clear that one of the objectives the Legislature sought to achieve by this amendment is to vest a wider discretion in the prosecuting authorities either to indict the offender under Section 54 A or Section 54 B, or to indict the offender under the earlier provisions of the original Ordinance in the High Court, or to charge such a suspect in the Magistrate's Court, depending on the circumstances of each case. (*Vide* Section 78 (5) of the Ordinance). It is therefore in my view erroneous to hold that the amending Act has taken away the jurisdiction vested in the Magistrate under the Poisons, Opium and Dangerous Drugs Ordinance, and has vested exclusive jurisdiction in the High Court to try such offences.

It must be stressed that the mere fact that the report filed by the Officer-in-Charge of the Police Narcotics Bureau in the Magistrate's Court alleged that the fact disclosed the commission of offences under Section 54 A and 54 B, cannot wipe out the jurisdiction of the Magistrate who is empowered by the statute to try summarily the offences created by this Ordinance.

It has been observed in *Attorney-General v. Punchi Banda* (1) that when suspect is produced before a Magistrate, with a definite allegation, that he has committed an offence which such Court has jurisdiction, either to inquire into or try, proceedings are automatically instituted in terms of Section 136 (1) of the Criminal Procedure Code. What a Magistrate should do thereafter are clearly spelt out in Section 142 (2) of the Code, where the offences are triable summarily, the Magistrate is obliged to act under Section 182 (1) and frame a charge against the accused. The proviso to Section 142 (2), however provides that if the Magistrate is of opinion that the offence cannot be adequately punished by a Magistrate's Court, he shall

forthwith stop proceedings and forward the record of the case to the Attorney-General, and abide by his instructions.

The proper course therefore in my opinion which the Magistrate should have adopted in the circumstances in this case, is to have proceeded with the present case in accordance with the provisions laid down in the Criminal Procedure Code as provided for in Section 82 (4) of this Ordinance as amended by Act No. 13 of 1984. Having regard to the facts of this case, there was absolutely no justification for the learned Magistrate to have acted under the provisions of section 115 (2) of the Code, as he has purported to do, and discharge the respondent in this case. The course of action adopted by the learned Magistrate in the instant case is by no means permissible in law.

I hold therefore, that having regard to the statutory provisions set out above, the learned Magistrate was in manifest error when he purported to discharge the accused-respondent subject to certain conditions on the ground that he had no jurisdiction in law to make an order for the further remand of the accused-respondent. I therefore set aside the order of the learned Magistrate dated 31.01.90, discharging the accused-respondent, and make order that the accused be committed to fiscal custody forthwith.

The next question that arises for determination is whether the Magistrate had jurisdiction to enlarge the accused-respondent on bail. The answer to this question is certainly in the negative. Section 83 (1) specifically provides that no person suspected or accused of an offence under Section 54 A, or Section 54 B, of this Ordinance, shall be released on bail except by the High Court in exceptional circumstances. Mere suspicion that such an offence has been committed therefore would suffice to attract the provisions of Section 83 (1). It is also provided in Section 82 (4) that upon the conclusion of the investigation or upon the conclusion of the period of detention whichever occurs first, such person shall be produced before the Magistrate and subject to the provisions of Section 83 of this Ordinance, the provisions of the Code of Criminal Procedure Act, No. 15 of 1979, shall apply to and in relationship with such person.

Counsel for the accused-respondent at the commencement of the argument, agreed to abide by the order made in this case in M. C. Negombo case 1480/89 - C. A. 219/90, as the same matters are

canvassed in that application as well. I therefore make order setting aside the order of the learned Magistrate dated 31.01.90, in M. C. Negombo Case No. 1480/89, and direct that the accused-respondent be committed to fiscal's custody forthwith.

Both applications bearing Nos. C. A. 218/90, and C. A. 219/90 are allowed.

W. N. D. PERERA, J.— I agree.

Applications allowed
