PERERA
v.
OFFICER IN CHARGE, SCIB, KALUTARA

COURT OF APPEAL.
YAPA, J.,
U. DE Z. GUNAWARDANA, J.,
CA (PHC) NO. 18/97.
HC KALUTARA NO. 26/97.
MC KALUTARA NO. 64677/95.
OCTOBER 1, 1998.

Supreme Court Rules – Rule 3 – Consequence of Non-compliance – Affidavit not in order – Technical objection – Code of Criminal Procedure Act, No. 15 of 1979 – SS. 185, 186, 314, Discharge or Acquittal – Autrefois acquit – Discharge or Acquittal – When could the plea be taken – Does withdrawal amount to acquittal?

The petitioner was first charged in case No. 6195 with committing the offences of Cheating, Criminal Breach of Trust and Criminal Misappropriation. At a subsequent stage of the case, the 1st respondent informed Court that Police were not proceeding with the case. The accused then was discharged. However, later the respondent instituted proceedings 64677/95 for the same offence based on the same facts and the case was fixed for trial. On the trial date, the accused-petitioner took up the position that it was not possible to proceed with the case without setting aside the earlier order of discharge and further that the court had no jurisdiction. These objections were overruled. The accused-petitioner thereafter sought to revise the said order and the High Court holding that, the Affidavit filed by the accused-petitioner was defective rejected the Application.

Held:

(1) The objection that was upheld by the High Court was of a very technical nature without considering the merits. In the circumstances the Court of Appeal could go into the merits of the case.

(2) A close examination of s. 189 of the Code of Criminal Procedure Act makes it clear that there should be sufficient grounds for permitting the withdrawal of the case, and the Magistrate thereafter would be in a position to acquit the accused after recording reasons.

(3) In the present case, it is seen that the case has not been withdrawn and further the Court had not recorded any reason to show that the case had been so withdrawn.

"the contention that when the Police stated that they were not willing to proceed with the case, the police by such conduct were withdrawing the case is unaccepted."

(4) The order of discharge that was made by Court was made without going into the merits of the case for the reason that no evidence had been led by that stage.

Per Yapa, J.

It is to be observed that for an accused person to be able to sufficiently raise the plea of *autrefois acquit* as provided by s. 314 the accused should have been freed and acquitted in the instituted proceedings or trial."

APPLICATION in Revision from the Order of the High Court of Kalutara.

Cases referred to:

1. *Kiriwantha and Another v. Navaratne* – [1990] 2 Sri L.R. 393.
2. *De Silva and Others v. L. B. Finance Co., Ltd.* – [1993] 1Sri L.R. 371.
3. *Fernando v. Excise Inspector, Wennappuwa* – 60 NLR 227.
4. *Y. M. Premadasa v. J. E. A. Assen – (Inspector of Police)* – 60 NLR 451.
5. *Solicitor-General v. Aradiel* – 50 NLR 233.
6. *Gunaratne v. Hendrick Appuhamy* – 52 NLR 43.
7. *Fernando v. Inspector of Police* – 47 NLR 399.
8. *De Silva v. Jayatilake* – 67 NLR 169.
9. *Veerappan v. Attorney-General* – 72 NLR 361.

Dhammika Jayanethi for petitioner.

Jayantha Jayasuriya, SSC for respondents.

Cur. adv. vult.

August 16, 1999.

HECTOR YAPA, J.

In this application accused-petitioner (hereinafter referred to as the petitioner) is seeking to revise the order of the learned High Court Judge dated 03.12.1997. The petitioner was first charged in Magistrate's Court of Kalutara, in case No. 6195 by the complainant-respondent (hereinafter referred to as the respondent) with committing the offences of cheating, criminal breach of trust and criminal misappropriation of tube valves worth Rs. 200,000 on 27.07.1987. At a subsequent stage of the case, namely on 11.12.1995, the respondent informed court that the police were not proceeding with the case and thereafter the learned Magistrate discharged the petitioner. However, on 01.01.1996 the respondent instituted proceedings against the petitioner in case No. 64677/95 for the same offences based on the same facts and the case was fixed for trial. On the trial date learned counsel who appeared for the petitioner raised two preliminary objections. First objection was that, it was not possible to proceed with the case without setting aside earlier order of discharge and the second objection was that the court had no jurisdiction to proceed with the trial, since the petitioner had already being discharged by the Magistrate. The learned Magistrate overruled the said objections on 21.07.1997 and decided to proceed with the trial. The petitioner thereafter made an application to the High Court of Kalutara seeking revision of the said order dated 21.07.1997. Learned High Court Judge after hearing the petitioner's revision application, by his order dated 03.12.1997 dismissed the said application.

It would appear from the High Court Judge's order that the petitioner's application had been dismissed *in limine* upholding a technical objection raised by learned State counsel, that the affidavit filed by the petitioner was defective and therefore there was a failure by the petitioner to comply with Rule 3 of the Court of Appeal (Appellate Procedure) Rules 1990. The present application of the petitioner is to revise the said order of the learned High Court Judge dated 03.12.1997.

At the hearing of this application, it was submitted by learned counsel for the petitioner that the learned High Court Judge failed to consider the merits of the case, but decided it on a mere technicality, holding that the petitioner had failed to comply with the rules of court by not submitting a proper affidavit. Learned counsel contended that the defect in the affidavit filed by the petitioner, namely that he affirmed to the facts, instead of taking an oath as he was bound to do as a Catholic, was factually correct. However, he submitted that it did not warrant the dismissal of the application, for the reason that in the present case all the documents that were required by rule 3 of the Court of Appeal (Appellate Procedure) Rules 1990 were submitted to Court by the petitioner. Therefore, there was no default on the part of the petitioner which would deprive the High Court Judge from properly adjudicating the issues involved. Counsel further submitted that it was unnecessary for the High Court Judge to have recourse to the affidavit to adjudicate on the merits of the application, since the affidavit did not introduce any fresh material. Therefore, counsel contended that the High Court Judge should have exercised his discretion by adjudicating on the merits of the application rather than dismissing it on a mere technicality.

In support of his submission the learned counsel cited the case of *Kiriwanthe and Another v. Navaratne and Another*[1] where Justice Fernando in the course of his judgment had stated as follows: "the weight of authority thus favours the view that all rules (Rules 46, 47, 49, 35) must be complied with, the Law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the court, to be exercised after considering the nature of the default as well as the excuses or explanation thereof, in the context of the object of the particular rule". Learned counsel also referred to the case of *De Silva and Others v. L. B. Finance Ltd.*[2]. In that case one of the points raised was that the affidavit was invalid for the reason that the "jurat" did not contain the fact of affirmation. It was also contended in that case that strict compliance with the provisions of section 438 of the Civil Procedure Code was essential and that the wording in section 438 of the Civil Procedure Code brings in Form 75 in the

first schedule to the Civil Procedure Code, that the affidavit must be in accord with form 75. In that case Chief Justice G. P. S. de Silva has held that an affidavit was valid in spite of the fact the "jurat" did not contain the fact of affirmation and further that the compliance with form 75 in the schedule to the Civil Procedure Code was not essential. The Chief Justice in the course of his judgment further stated as follows: "on a fair reading of the entirety of the impugned affidavit it seems to me that the preliminary objection taken was of a technical nature and the Court of Appeal was in error in upholding it".

On a consideration of the authorities cited by counsel for the petitioner, it would appear that the learned High Court Judge had upheld a preliminary objection of a very technical nature without considering the merits of the petitioner's application. Therefore, in my view, under normal circumstances this case should be sent back to the High Court to make an order on the merits of the case. However, having regard to the other legal question raised by learned counsel for the petitioner in this application and the long delay that may result by sending this case where the offences were committed on 27.07.1987 to the High Court, it would be proper in the interests of justice to consider the merits of the case and to decide this application in this court itself. Further, such consideration of the merits in this case would satisfy the concerns expressed by learned counsel for the petitioner, that the learned High Court Judge failed to consider the merits of the application and had dismissed it on a mere technicality.

Therefore, when considering the merits of the case, the central issue to be decided here is whether the Magistrate was lawfully entitled to proceed with the trial on the 2nd information filed by the respondent despite the earlier order of discharge. It was the contention of the learned counsel for the petitioner that section 314 of the Code of Criminal Procedure Act, No. 15 of 1979 applied to the facts in this case and therefore the plea of *autrefois* acquit was available to the petitioner. Section 314 (1) of the Code of Criminal Procedure Act provides as follows:

"A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence

shall while such conviction or acquittal remain in force not be liable to be tried again for the same offence nor on the same facts for any other offence . . .".

The counsel submitted that after a period of about five years since the filing of the 'B' report the Magistrate had discharged the petitioner in MC Kalutara case No. 6195 on 11.12.1995 consequent to the respondent informing the Magistrate that the police did not wish to continue proceedings against the petitioner. It is seen from the journal entry dated 11.12.1995 that petitioner had been discharged by the Magistrate after recording that the police did not wish to proceed with the case. Thereafter, proceedings were reinstituted by the respondent against the petitioner on 01.01.1996 in the MC Kalutara case No. 64677/95 for the same offences based on the same facts. Learned counsel sought to argue that the petitioner was in fact acquitted by the Magistrate on 11.12.1995 in case No. 6195 for the reason that, when the respondent on 11.12.1995 stated that the police did not wish to proceed with the case, the respondent in effect was withdrawing the case against the petitioner and that the said withdrawal amounted to an acquittal in terms of section 189 of the Code of Criminal Procedure Act.

Section 189 of the Code of Criminal Procedure Act 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. . . " A close examination of this section makes it clear that there should be sufficient grounds for permitting the withdrawal of the case and the Magistrate thereafter would be in a position to acquit the accused after recording reasons. In the present case it is seen that the case has not been withdrawn and further the learned Magistrate had not recorded any reason or reasons to show that the case had been so withdrawn. Therefore, the contention of counsel that when the police stated on 11.12.1995 that they were not willing to proceed with the case, the

police by such conduct were withdrawing the case is unacceptable. In these circumstances the submission of counsel that there was a withdrawal of the case by the police on 11.12.1995 which amounted to an acquittal in terms of section 189 of the Code of Criminal Procedure Act is without any merit and therefore this submission should fail.

Learned counsel for the petitioner further submitted that the plea of *autrefois acquit* can be taken in respect of an order of acquittal made otherwise than on merits of the case. In support of this contention he cited the following cases: *Fernando v. Excise Inspector, Wennappuwa*[3]; *Y. M. Premadasa v. T. E. R. Assen (Inspector of Police)*[4]; *Solicitor-General v. Aradiel*[5] and *Gunaratne v. Hendrick Appuhamy*[6]. In those cases even though it has been stated that the plea of *autrefois acquit* can be taken in respect of an order of acquittal made otherwise than on the merits of the case, the facts and circumstances in those cases are clearly distinguishable and would have no application to the present case. Besides, in the present case there has been no order of acquittal and in addition there has been no substantial reason or ground for the order of discharge of the petitioner except that the police have stated that they did not wish to proceed with the case. Further, it is relevant to note that in those cases cited by learned counsel, evidence had been led and the prosecution case had even been closed before the accused were acquitted or discharged for various reasons such as the charge was defective or the accused had been charged under the wrong statute or the summons were defective or that the accused had been charged under a repealed Ordinance.

Learned counsel for the respondents, however, contended that on a perusal of the journal entries filed by the petitioner it is very clear that the said order of discharge that was made on 11.12.1995, was not made on a trial date. Counsel submitted that the case was called on 11.12.1995 to receive the report of the EQD as seen from the previous journal entry dated 02.10.1995. Further, learned Magistrate had neither referred to the section under which the order of discharge was made, nor had he given any reasons for his order. Therefore, what is clear from the journal entry dated 11.12.1995 is that, on the

said date the respondent had informed court that the police did not wish to proceed with the case. In addition it is seen that no evidence had been led before the court by that stage. Therefore, learned counsel for the respondents submitted that the order of discharge that was made by the Magistrate was made without going into the merits of the case for the reason that no evidence had been led by that stage. In the circumstances counsel submitted that it was not possible to contend that the petitioner had been tried by court at that stage as required by section 314 of the Code of Criminal Procedure Act.

It is to be observed here that for an accused person to be able to successfully raise the plea of *autrefois acquit* as provided in section 314 of the Code of Criminal Procedure Act, he (accused) should have been tried and acquitted in the initial proceedings or the trial. In support of this contention learned counsel for the respondents cited the case of *Fernando v. Inspector of Police*[7]. In that case the accused had been discharged by court because the prosecuting officer had not led any evidence at the trial owing to the absence of the principle witness. Accused was subsequently prosecuted again by the same officer for the same offence and on the same facts and the court held, that the plea of *autrefois acquit* was not available to the accused and that a decision upon the merits was essential for a valid plea of *autrefois acquit.* The same proposition was adopted by three Judges of the Supreme Court in another case cited by counsel for the respondent in *De Silva v. Jayathilake*[8] despite several judgments of single Judges who have expressed a contrary view. In that case it was also stated 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. Learned counsel also cited the case of *Veerappan v. the Attorney-General*[9] where the Privy Council held that the defence of *autrefois acquit* cannot succeed where an order of discharge made without going into merits but made solely on the counsel for the prosecution stating that the prosecution was not adducing any evidence against the accused and there was no indication that the

accused was called upon to plead to the charge. In such a case it cannot be said that the appellant (accused) was ever put in peril on the first occasion. It would appear, therefore, in the present case all that had happened was merely getting the accused to plead to the charge.

On a consideration of the material referred to above, it is very clear that the present case had not even been fixed for trial before the Magistrate and the question of deciding the mérits of the case was never reached. In other words there was no occasion at all which involved any adjudication of the innocence of the accused (petitioner). The mere reading of the charge could not be construed as putting the accused in peril. Therefore, the contention of the counsel for the petitioner that the petitioner is entitled to succeed in the plea of *autrefois acquit* has no merit and therefore should fail.

In the circumstances, we direct the High Court to refer this case to the Magistrate who should proceed with the trial against the petitioner and conclude the case expeditiously.

U. DE Z. GUNAWARDANA, J. – I agree.

High Court directed to refer case to the Magistrate's Court to proceed with the trial.