

GUNAWARDENA
v.
OFFICER-IN-CHARGE, KAHAWATTA POLICE

COURT OF APPEAL.
ABEYWARDENA, J. AND P. R. P. PERERA, J.
C.A. 307/83.
M.C. PELMADULLA 40863.
JULY 16 AND 17, 1986.

Contempt of court—S. 388 of Code of Criminal Procedure Act—Charge—Necessity to inform accused of charge.

No person should be punished for contempt of court which is a criminal offence unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him. A formal charge is not necessary but he must be told of the matter.

Cases referred to:

- (1) *Mohotta v. Pula—(1878) 2 SCC 8.*
- (2) *In re Pollard—(1868) 16 ER 47; 5 Moore N.S. III.*
- (3) *Daniel Appuhamy v. The Queen—(1962) 64 NLR 481, 484 (P.C.).*
- (4) *Senanayake v. Kirihamy et al—2 CWR 65.*
- (5) *Rex v. Amadoru—(1911) 14 NLR 481.*
- (6) *Cheng Hang Kui v. Pigott—1909 AC 312.*

APPEAL from conviction by the Magistrate of Pelmadulla.

L. H. Arulanandan, S.C. for the Attorney-General.

Accused-appellant absent and unrepresented.

Cur. adv. vult.

August 28, 1986.

PERERA, J.

The Kahawatta Police filed a report in the Magistrate's Court of Pelmadulla, on 10.9.1983, seeking an order under section 81 of the Code of Criminal Procedure Act, directing certain persons to execute a

bond to keep the peace. The learned Magistrate issued notice on the parties on this date returnable on 3.10.1983. On 3.10.1983 the Magistrate re-issued notice returnable on 24.10.1983. On 24.10.1983, the parties were present, and the learned magistrate ordered the parties to show cause, if any on 14.1.1984, against the making of such order.

The journal entry dated 24.10.1983, bears out that the 2nd respondent M. E. D. Perera who was present in court when this case was called, addressed the court in a threatening manner and asked that he be given a date. The magistrate observes that his conduct was in contempt of the court, as he made certain utterances in a loud tone in an agitated manner. The magistrate has fined the suspect a sum of Rs. 200 for contempt of court, purporting to act under section 388 of the Code of Criminal Procedure Act. The suspect has been directed to show cause against the application for an order under section 81 on 16.1.1984. He has also been ordered to pay the fine imposed under section 388 on the same date. This appeal is against the order of the magistrate made under section 388 of the Code of Criminal Procedure Act.

The proceedings of 24.10.1983 referred to in the journal entry set out above contains the observations of the learned magistrate. In brief the magistrate states that she has imposed a fine of Rs. 200 under section 388 of the Code of Criminal Procedure Act against the appellant, in view of the latter's conduct which was in contempt of the court. The magistrate observes that the appellant conducted himself in this manner in the presence of other members of the public present in court. The appellant had been informed through the interpreter that he should be respectful when he addressed court. As the appellant had persisted in conduct that was disrespectful to the court, the magistrate had, at one stage ordered court officials to remove him from the court. The Magistrate states that the words uttered and the conduct of the appellant was in contempt of court as they were of a nature which tended to bring the court into disrepute and ridicule. In the circumstances the Magistrate has purported to deal with the appellant under the provisions of section 388 of the Code of Criminal Procedure Act No. 15 of 1979.

Before considering the question whether the conduct of the appellants in fact constituted contempt of court, it is necessary for this court to consider whether the learned Magistrate had adopted the correct procedure before sentencing him under section 388 of the Criminal Procedure Code. Interpreting section 381 of the old Criminal Procedure Code, (section 388 of the present Code), the Supreme Court in *Mahotta v. Pula* (1) observed thus:

"It may be useful here to remark that the Privy Council not long ago in *Re Pollard* (2) affirmed the elementary and well established principle that 'no person would be punished for contempt of court which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him'."

This case has been quoted with approval in *Daniel Appuhamy v. The Queen* (3). It is clear from the decision in *Daniel Appuhamy v. The Queen* (*supra*) (3) that a formal charge is not necessary but the suspect must specifically be told of the matter on which he is to be punished.

I find further support for this proposition in *Senanayake v. Kirihamy et al* (4).

I am conscious of the fact that in section 388, the present Code of Criminal Procedure Code Act has omitted the provisions of section 381 (2) (of the former Criminal Procedure Code), which provided thus:

"In every such case the court shall record in the proceedings the facts constituting the offence, *with the statement (if any) made by offender* as well as the finding and sentence and shall forthwith transmit a copy of such record to the Supreme Court so that the Supreme Court may, if it thinks fit, exercise its power of revision".

The absence of provision to this effect in the present Act however does not in my view dispense with the requirement to afford the offender an opportunity to show cause when the court purports to deal with him under section 388.

It may also be relevant in this instance to consider the observations of the Supreme Court in *Rex v. Amadoru* (5) where the Supreme Court examined the procedure, a court should adopt in dealing with a person under section 440 of the Criminal Procedure Code (section 449 of the present Act), which is also a provision which empowers a court to deal with an offender summarily for perjury in open court. This section in my view vests an original court with a jurisdiction which is similar to that which is envisaged in section 388 of the Criminal Procedure Code. In *Rex v. Amadoru (supra)* (5), Woodrenton, J. stated thus:

"I have thought it right to say a few words as to the decision of the Privy Council (in *Cheng Hang Kui v. Pigott* (6))...because it gives me another opportunity of insisting, on the authority of the Privy Council itself on the paramount importance of courts of first instance seeing that no man is convicted under such statutory provisions, like section 440 (section 449 of the present Code), till he has had some opportunity of defending himself".

It seems to be settled law that a suspect charged with contempt must be given an opportunity to show cause. I have perused the proceedings in this case but find that the learned Magistrate in this case has failed to inform the appellant of the specific offence charged against him and has deprived the appellant of an opportunity of answering it.

In the circumstances I am of the view that it is desirable to remit this case for a fresh trial, in accordance with the proper procedure. I therefore set aside the conviction and sentence imposed in this case and acquit the accused—appellant and remit this case to the Magistrate's Court of Pelmadulla for a re-trial in accordance with the proper procedure.

ABEYWARDENA, J.—I agree.

Conviction set aside and case sent back for re-trial.