

GODAGE AND OTHERS
v.
OFFICER-IN-CHARGE, POLICE STATION, KAHAWATTE

COURT OF APPEAL

ISMAIL, J.

C.A. 324 - 328/80;

M.C. PELMADULLA 19275

02 MAY 1991

Criminal Procedure - Duty of Magistrate to frame charge - Code of Criminal Procedure Act, No. 15 of 1979, Section 182.

Held :

It is an imperative duty of the Magistrate to frame a charge and read it out to the accused. Failure to do so is fatal to the conviction.

Cases referred to:

(1) *Sameen v. The Bribery Commissioner* (1991) 1 Sri LR 76.

(2) *Karunatileke v. O.I.C., Police Station, Aranayake*. C.A. 196/83 - M.C. Mawanella No. 15256 - Minutes of the Court of Appeal 28.6.1998.

APPEAL from conviction by the Magistrate of Pelmadulla.

D. S. Wijesinghe, P.C. with *Nihal Somasiri* for accused-appellants.

S. Rajaratnam, S.C. for Attorney-General.

Cur adv vult.

16th January, 1992.

ISMAIL, J.

This is an appeal against the conviction and the sentence imposed on each of the accused-appellants in the Magistrate's Court of Balangoda. Learned President's Counsel for the appellants submitted, firstly, that the conviction entered should be quashed as the learned Magistrate had failed to frame charges against each of the accused in compliance with the mandatory provisions of section 182 of the Code of Criminal Procedure Act, No. 15 of 1979. Both Counsel then tendered written submissions relating to this preliminary matter.

It appears from the record that A. X. C. Motha of the Kahawatte Police Station instituted proceedings in the Magistrate's Court, on a written report dated 2.5.1979, in terms of section 163(1)(b) of Chapter II of the Administration of Justice Law No. 44 of 1973, alleging the commission, on or about 6.4.1979, of offences under sections 434, 410 and 369 of the Penal Code by the following accused.

1. Kirimadugoda Durayalage Piyasena
2. Sinhalage Tillekeratne
3. Kirimadugoda Durayalage Gunapala and
4. Rambanditaladurage Daniel alias Matara.

The Magistrate had made this endorsement on the report, "Issue summons for 5.6.79". There is no journal entry relating to the issue of summons nor is there an indication as to whether the accused were present on 5.6.79. But according to the first journal entry of 25.6.79, it appears that the first three accused were present while the fourth accused had been absent. The Magistrate had ordered fresh summons on him for 18.9.1979. On this date all four accused were present. The Magistrate had then, apparently on the application of the police to add another accused to the list by way of an amended plaint, fixed 25.9.79 as the date for this purpose. On 25.9.79, an amended report was filed by an officer of the Kahawatte Police Station, in terms of section 136(1)(b) of the Code of Criminal Procedure Act No. 15 of 1979, which had by then come into operation, alleging that the five accused named therein had committed offences under sections 140, 144, 434/146, 410/146 and 369/146 of the Penal Code. The following are the five accused named therein.

1. Kithsiri Dayawansa Sunil Godage
2. Kirimadugoda Durayalage Piyasena
3. Sinhalage Tillekeratne
4. Kirimadugoda Durayalage Gunapala and
5. Ranbanda Taladurage Daniel alias Matara.

The 2nd to the 5th above-named accused were the four accused named in the original report filed while the 1st accused named above is an added accused. The journal entry of this date refers to this amended plaint and states that Kithsiri Dayawansa (1st accused) has been added as an accused. The case was then fixed to be called next on 2.10.79 on which date it appears that all five accused were present. But according to the journal entry of this date the order of the accused in the list had been changed. The added accused K. D. Sunil Godage, who was the 1st accused in the list in the amended plaint and in the previous journal entry was now made the 5th accused, while the 2nd to the 5th accused in the previous journal entry were made the 1st to the 4th accused. The following note also appears in this journal entry "states (they are) not guilty". The trial was then fixed for 10.12.79.

It appears from the record that according to a subsequent journal entry of 19.5.80 and in the journal entries thereafter, the order of the accused in the list was corrected and brought in line with the order of the accused as listed in the amended plaint. But it is to be noted that this was not the order of the accused that prevailed on 2.10.79 when the endorsement had been made to the effect that the accused had pleaded not guilty.

It is the submission of the learned Counsel for the accused appellants that there was a total failure on the part of the learned Magistrate to comply with the provisions of section 182 of the Code of Criminal Procedure Act, which read as follows:

182(1). "where the accused is brought or appears before Court the Magistrate shall if there is sufficient ground for proceeding against the accused, frame a charge against the accused.

(2). The Magistrate shall read such charge to the accused and ask him if he has any cause to show why he should not be convicted."

He further submitted that no charge had been framed or read out at all either from a charge sheet or on the basis of the plaint (report) or the amended plaint (amended report). There is no charge sheet at all. There are two plaints and the order of the accused in the list according to the journal entry of the date on which the plea appears to have been recorded does not fit the order of the accused in the list in either of the plaints filed.

Learned State Counsel in reply submitted that a charge sheet is not an essential requirement of the law as it now stands while the fact that the plea had been recorded and that the accused participated at the trial at which they were represented by Counsel show that they were aware of the charges that had been levelled against them. He has also submitted that although section 182 requires the Magistrate to frame a charge against the accused and read it to him and ask him if he has any cause to show why he should not be convicted there is no legal requirement that such matters be recorded.

However, from a perusal of the record it is quite apparent that no charges have been framed against each of the accused and read out to them. In *Sameen v. The Bribery Commissioner* ⁽¹⁾, Gunawardena, J. held after a review of the earlier authorities that the failure to frame a charge as required under section 182(1) of the Code of Criminal Procedure Act is a violation of a fundamental principle of criminal procedure and is fatal to the conviction. It is not a defect curable under section 436 of the Code of Criminal Procedure Act. Learned State Counsel has pointed out that the judgment of this Court in *G. P. Karunatileke v. O.I.C., Police Station, Aranayake* ⁽²⁾, was not considered in *Sameen v. The Bribery Commissioner*. It was held on the facts of that case that there was a sufficient compliance with the provisions of section 182 Code of Criminal Procedure Act. This judgment does not lend support to the submissions on the law made by the learned State Counsel and are therefore not entitled to succeed. I am however in respectful agreement with the views expressed by Gunawardena, J. in *Sameen v. The Bribery Commissioner* and, in the circumstances, I hold that the conviction of the accused-appellants entered about eleven years ago cannot stand.

Accordingly the appeal is allowed and I hereby set aside the conviction entered and the sentence imposed on the accused-appellants.

Appeal allowed.

Accused acquitted
