

**ATTORNEY-GENERAL**  
**v**  
**RATNAYAKE AND ANOTHER**

COURT OF APPEAL  
FERNANDO, J.  
EDIRISURIYA, J.  
C.A.(PHC) 20/2001  
PHC PANADURA 52/99  
M.C.PANADURA 55347  
OCTOBER 4 and 31, 2002

*Penal Code – S. 316 – Certificate of Non-settlement from Mediation Board not tendered – Accused discharged – Referred to Mediation Board – Non settlement certificate missing from Record – Discharged – Fresh action instituted – Criminal Procedure Code S. 2, 3, S. 188(3) – Does this amount to an acquittal? – Appeal not lodged – Should the Court of Appeal act in Revision ?*

The two accused respondents were charged in case No. 4419, M.C.Kesbewa under s. 316 Penal Code, on 2.7.97, it was found that the Certificate of non settlement from the Mediation Board had not been tendered, and the court made order to refer to the Mediation Board, "till then the accused being discharged". The case was reopened after the certificate had been tendered. When it was called on 25.12.95, for trial, the accused were discharged again, as the non-settlement certificate could not be found in the Record.

Subsequently the prosecution filed case No. 55347. The accused objected stating that they had been discharged twice and therefore it amounted to an acquittal. The Magistrate rejected this objection. The High Court acting in Revision, set aside the order.

The Attorney-General moved in Revision.

**Held :**

- (i) It is clear that, the trial court has conditionally released the two accused, subject to the condition that the case be re-opened when the non settlement certificate is available. It is not a discharge under S.188(3).
- (ii) The second discharge is also erroneous – Court should have called for another copy of the certificate.
- (iii) Importance of the issue and the injustice caused to the virtual complainant warrant intervention by Revision.

**APPLICATION** in Revision against the Order of the High Court of Panadura.

*P.P. Surasena S.C.*, for petitioner

*Saliya Peiris with Upul Kumarapperuma* for respondent.

June 17, 2003

**RAJA FERNANDO, J.**

This is an application for revision filed by the Attorney-General to set aside the order of the learned High Court Judge dated 07.11.2000 wherein the High Court Judge acting in revision has set aside the order of the Magistrate. 01

When the application for revision was taken up learned counsel for the respondents took up a preliminary objection that the petitioners have failed to exercise their right of appeal against the order and therefore unless exceptional grounds are shown the Court of Appeal should not exercise their powers of revision. Having considered the importance of the issue raised by the petitioners and the injustice caused to the virtual complainant we think this is a fit case in which the revisionary jurisdiction of this court should be exercised. 10

The 1st and 2nd accused petitioners-respondents were charged in the Magistrate's Court of Kesbewa in case No. 44119 under section 316 of the Penal Code.

When the case came up for trial on 02.07.97 it transpired that the certificate of non-settlement from the mediation board was not tendered to court and accordingly the accused were discharged. The journal entry of 02.07.97 reads "Ordered to refer to the mediation board, till then the accused are discharged." 20

Journal entry of 13.11.97 indicates that the case was reopened after the non-settlement certificate has been tendered.

When the case was called on 25.12.98 for trial the accused have been again discharged as the non-settlement certificate could not be found in the record.

Subsequently the prosecution has filed case No. 55347 against the accuseds. Counsel for the accuseds then raised the objection that there had been two discharges earlier and therefore in terms of section 188(3) of the Code of Criminal Procedure Act it amounted to an acquittal. The learned Magistrate has rejected the submission of the accuseds and the accuseds have moved to revise this order in the High Court. 30

The High Court of Panadura acting in revision has revised the order of the learned Magistrate and acquitted the accused.

This application is to revise the order of the High Court.

On behalf of the state it was submitted that in the first instance when it was brought to the notice of court that the non-settlement certificate has not been filed the learned Magistrate could not have discharged the accused as the court did not have jurisdiction to adjudicate upon the matter. 40

On behalf of the accused-petitioner-respondents it was submitted that according to section 2 of the Criminal Procedure Code a discharge means the discontinuance of criminal proceedings against an accused and therefore the first discharge was a proper discharge as contemplated under the Criminal Procedure Code.

When one carefully examines the Order of the learned trial judge made on 02.07.97 it is clear that the learned Magistrate has conditionally released the accused petitioners-respondents subject to the condition that the case be reopened when the non-settlement certificate is available. 50

සමථ මණ්ඩලයට යොමු කිරීමට නියම කරමි. එතෙක් විත්තිනරුවන් මුද් නැරීමට නියම කරමි.

By this order criminal proceedings against the accused was not discontinued but only stayed until the non-settlement certificate is filed after the matter was referred to the mediation board.

Therefore it is our view that the order of the learned Magistrate made on 02.07.97 does not fall within the definition of a discharge contemplated under section 188(3) of the Code of Criminal Procedure. 60

When the case was re-opened on 13.10.97, the non-settlement certificate has been tendered to court – *vide* journal entry of 13.10.97 where it stated:

“ව.වෘ විමර්ශණ ද.ශය මගින් ඉදිරිපත් කරන ලද මෝසම මත අද දින කටා කර ඇත. සමථ මණ්ඩල වාර්තාවද මේ සමඟ ගොනු කර ඇත. වූදිනට සහ පැය. 10ට පිතාපී නිකුත් කරන්න. විභාගය - 17.12.97”

On 26.2.98 when the case came up for trial the journal entry records thus:

“සමට මණ්ඩල නිරවුල් නොකිරීමේ වාර්තාව නවු පොතෙහි දක්නට නැත. දෙපාර්ශවයේ සටහන් ගොනු කරන්න. විත්තිය නිදහස් කරමි.”

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This order of the learned Magistrate is clearly erroneous.

On 13.10.97 the certificate of settlement has been tendered to Court. If on the 26.02.98 the Certificate was not found in the record it is the responsibility of court. Once a document is tendered to court it has to be kept in the custody of court and the court cannot shift that responsibility to others.

If the certificate of non-settlement was missing from the case record as it seems to have happend here the court should have called for another copy of the non-settlement certificate and proceeded to trial.

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Therefore we find the discharge of the accused by the learned Magistrate on 26.02.98 erroneous.

Hence it is our conclusion that there had been non discharge of the accused-petitioner-respondents either on 13.10.97 or on 26.02.98.

Therefore the order of the learned High Court Judge of 07.11.2000 holding that there had been two discharges is set aside and we affirm the finding of the learned Magistrate that the Orders made on 13.10.97 and 26.02.98 do not amount to discharge under section 188(3) of the Code of Criminal Procedure and direct the learned Magistrate to proceed to trial in M.C. Case No. 55347 against both accused.

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The application for revision is accordingly allowed.

The Registrar is directed to send copies of the Order to the High Court of Panadura and the Magistrate's Court of Kesbewa.

**EDIRISURIYA, J.** - I agree

*Application allowed*

*Magistrate directed to proceed to trial in MC 55347 against both accused.*