

ELAL JAYANTHA

v.

OFFICER-IN-CHARGE, POLICE STATION, PANADURA

COURT OF APPEAL.

SENEVIRATNE, J. (PRESIDENT, C/A) AND JAYALATH, J.

C.A. 254/83-M.C. PANADURA No. 40404.

SEPTEMBER 25, 1985.

Nuisance—S. 98 (1) (b), (98) (2) and 436 of Code of Criminal Procedure Act—Procedure—Failure to follow correct Procedure—Irregularity causing no failure of justice (s. 436 of Code of Criminal Procedure Act).

On receiving a report by Police that appellant was committing a nuisance to the neighbours by working a metal crushing machine which emitted a deafening noise and dust carrying particles of metal thus creating a health hazard the Magistrate held an inquiry and made a finding that in fact a nuisance had been created.

Held —

(1) Although the Magistrate correctly held that a nuisance was created the procedure he followed was wrong.

(2) The correct procedure would have been for the Magistrate, after satisfying himself of the facts or upon such evidence as he thinks fit to admit, to make a conditional order requiring the removal of the obstruction or nuisance. Thereafter it would be open to the party against whom the conditional order had been made to move the Court to have the order set aside or modified.

(3) Although the correct procedure had not been followed yet no substantial prejudice had been caused nor a failure of justice occasioned. Further four years had elapsed and sending the case back would cause hardship.

(4) Magistrates should adhere to the provisions of the Code and not deliberately disregard them.

APPEAL from judgment of the Magistrate of Panadura.

Accused-appellant not present — not represented.

Anura B. Meddegoda, S.C. for Attorney-General.

October 18, 1985.

SENEVIRATNE, J. (President, C/A)

The Officer-in-Charge, Police Station, Panadura filed a report in the Magistrate's Court, Panadura on 27.7.81 informing the Court that—

- (1) One Mantri Vithanilage Beatrice Silva, a witness in this case complained to the police that from 22.7.81 the respondent to the report Gamage Don Elal Jayantha was working a stone metal crushing machine which created a public nuisance.

On this complaint the police made inquiries and found that the working of this metal crushing machine "was injurious to the health and physical comfort of the community", and moved Court to issue an Order prohibiting the respondent from creating this nuisance. On this report the learned Magistrate issued notices on both respondent Beatrice Silva, the virtual complainant, and the respondent to the report Gamage Don Elal Jayantha. It appears that the respondent evaded summons for some time and warrant was issued against him. Ultimately both parties on whom notices were issued were present in Court on 9.6.82, and the learned Magistrate fixed the matter for inquiry. At this stage I must note that the journal entries described both Beatrice Silva and Elal Jayantha as accused. In any case Beatrice Silva cannot be an accused in respect of this report, and Elal Jayantha cannot also be an accused, and should have been best described as the respondent as the report filed by the police came within the terms of section 98(1)(b) of the Code of Criminal Procedure Act No. 15 of 1979.

After the matter was fixed for inquiry the learned Magistrate proceeded to hear same as an inter partes trial in which there were two parties, the virtual complainant Beatrice Silva and the respondent (called the accused) Elal Jayantha. Several witnesses gave evidence to substantiate the complaint of the nuisance. The respondent did not give evidence, but led the evidence of several witnesses to rebut the police case that he was creating a nuisance.

After hearing evidence of both sides the learned Magistrate properly directed himself by stating that in respect of this report filed by the police he had firstly to decide whether the respondent Jayantha was creating a public nuisance, and whether his acts were "injurious to the health or the physical comfort of the community". The learned Magistrate on the material before him quite correctly found that the

respondent was creating a public nuisance, and further that the act committed by him, the working of this metal crushing machine which created a deafening noise and emitted dust carrying pieces of metal was injurious to the health of the public and to their physical comfort. The public who were affected, the learned Magistrate holds were those living as immediate neighbours in relation to the spot at which this machine worked. In addition to this evidence there was also the evidence that the machine was operated without obtaining a licence from the local authority, and that even the Medical Officer of Health of the area had informed the Local Authority that the working of this machine should be stopped. The Court agrees with the finding of the learned Magistrate that this was an instance in which section 98(1)(b), Code of Criminal Procedure Act applied, and order should be made to remove the nuisance.

There is one glaring defect in those proceedings, which defect the Magistrate himself was aware as set out in his Order, and which the Magistrate chose to deliberately ignore. The procedure adopted for hearing this report filed by the police contravened the provisions of Chap. IX, Code of Criminal Procedure Act No. 15 of 1979.

Section 98(1) in as follows:—

“Whenever a Magistrate considers on receiving a report or other information and on taking such evidence (if any) as he thinks fit—

(b) that any trade . . . injurious to the health or physical comfort of the community be suppressed or removed or prohibited.”

“Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance to remove such obstruction or nuisance”.

Thus, it is quite clear that the Chap. IX, under which this report was made to Court required the Magistrate to preliminarily satisfy himself in terms of section 98(1) of the Code, and then to make a conditional order. After such conditional order is made section 98(2) operates, which section is as follows:—

“Any person against whom a conditional order has been made under subsection (1) may appear before the Magistrate . . . and move to have the order set aside or modified in manner hereinafter provided”

It is quite clear that the learned Magistrate did not consciously adopt this procedure. In the first paragraph of the learned Magistrate's Order dated 25.4.1983, it is stated as follows:-

.....මෙලක් පවත්වා ගෙන යාමෙන් ඇයට සහ අපල්වාසිත්ව පිටාවත් සහ ගරීර සොබාදාව අහිතකර බවට පොලීසිය විසින් කරන ලද පරීක්ෂණ වලින් අනාවරණය වූ නිසා එම ගල්වෙල ඉවත්කර ගැනීමට අපරාධ විධාන සංග්‍රහයේ 98(1) (අ) වෙති වගන්තිය අනුව නියෝගයක් නිකුත් කරන ලෙස ඉල්ලමි. ඒ අනුව මා විසින් මේ පිළිබඳව මුල් අවස්ථාවේ කොන්දෙසි සහිත නියෝගයක් නොකොට තවුච්චේ සාක්ෂි විගාහ කොට තීරණය කිරීමට අදහස් කරන ලදී.

This paragraph cited above shows that the learned Magistrate has deliberately overlooked and contravened section 98(1) and 101(1) of the Code. These provisions are skin to an interlocutory order issued in a like instance in civil procedure.

The question now is whether due to this irregularity of procedure these proceedings should be allowed to stand. Learned State Counsel submitted that the proceedings should stand as no prejudice whatsoever has been caused to the respondent-appellant, that in fact he had been benefited by the nature of these proceedings. The respondent-appellant has neither complained in the Magistrate's Court nor in his petition of appeal regarding the procedure adopted at the inquiry, contravening the provisions of Chap. IX of the Code.

In this instance I have carefully considered whether the proceedings should be quashed in view of this irregularity in the proceedings. The report of the police complained about a public nuisance caused in July 1981. Thus, over 4 years have now passed since this public nuisance was created. The fact that this Court is considering the regularity of the proceedings 4 years after the proceedings began must be taken into consideration in deciding whether to quash the proceedings. Further, in this instance, there is overwhelming evidence that a public nuisance was created, and even if the proceedings are quashed, in view of the material before Court, this Court will have to order a fresh inquiry. Due to these considerations while asserting that the proceedings are grossly irregular, in this particular instance the Court is not quashing the proceedings as the irregularity has not occasioned a failure of justice - 436 of the Code of Criminal Procedure Act. This ruling is given only on the facts and circumstances of this particular case, and should not be considered as a licence to Magistrates to boldly disregard the procedural provisions of the Code of Criminal Procedure Act.

JAYALATH, J. - I agree.
Appeal dismissed.