

NEIL FERNANDO
v.
RANJITH COORAY AND OTHERS

SUPREME COURT

G. P. S. DE SILVA, CJ.,

WADUGODAPITIYA, J. AND

GUNASEKERA, J.

S.C. APPEAL NO. 46/97

H.C. NO. 639/96

MC KALUTARA NO. 51054/95

JULY 24, SEPTEMBER 7, 21, 23, 1998

Appeal – Abatement of nuisance – Sections 98 (1) and 101 of the Code of Criminal Procedure Act – Order of the Magistrate under section 101 of the Act – Right of appeal from such order – Section 320 (1) of the Act – Appeal to the High Court – Section 4 of Act, No. 19 of 1990.

The appellant was a funeral undertaker who in the course of his business had to embalm corpses. The respondents made a report to the Magistrate in terms of section 98 (1) of the Code of Criminal Procedure Act to the effect that the appellant's business had caused pollution and environmental hazards. The Magistrate after due inquiry made an order under section 101 of the Act directing the appellant that he may carry on his business subject to certain conditions issued by the Deputy Director of the National Health Institute for ensuring that such business would not pollute the environment or cause a public nuisance. The respondents appealed to the High Court in terms of section 320 (1) of the Code of Criminal Procedure Act read with section 4 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. The High Court held that there was no right of appeal but acting in revision, set aside the order of the Magistrate.

Held:

1. There is a right of appeal to the High Court from the order of the Magistrate made in terms of section 101 of the Code of Criminal Procedure Act.
2. In an inquiry under section 101 of the Act the Magistrate is not bound to hear oral evidence. He may base his order on affidavits which is permitted by section 415 of the Act.
3. The High court erred in taking into account extraneous matters not supported by evidence to set aside the order of the Magistrate.

Cases referred to:

1. *Bakmeewewa, Authorized Officer of the People's Bank v. Konarage Raja* (1989)1 Sri LR 231.
2. *Forrest v. Leefe* – 13 NLR 119.
3. *Saram v. Seneviratne* – 21 NLR 190.
4. *Sandarasegara v. Sinnatamby* – 25 NLR 139.
5. *Nair v. Costa* – 28 NLR 385.
6. *Greena Fernando v. Teckla Saparamadu* – (1990) 1 Sri LR 270.

APPEAL from the judgment of the High Court.

Faiz Musthapha, PC with *Gaston Jayakody* for the appellant.

Mohan Peiris with *Ms. Nuwanthi Dias* for the respondents.

Cur. adv. vult.

January 14, 1999.

GUNASEKERA, J.

The complainant petitioners-respondents filed a report marked 'P1' before the Magistrate, Kalutara, dated 3.4.95 under the provisions of section 98 (1) of the Code of Criminal Procedure Act intimating that the respondent-respondent-appellant who has been carrying on business as a funeral undertaker at premises bearing Nos. 451 & 453, Galle Road, Kalutara, under the name and style of "Mahinda Florists" was committing a public nuisance by channelling impure and contaminated water utilised for the purpose of washing cadavers in the process of embalming and from permitting noxious vapours of formalin to emanate into the atmosphere thus contaminating the air which was detrimental to the health of the complainants and the other members of the public and sought an Order to prevent the commission of the said nuisance. The learned Magistrate after considering the report on being satisfied *prima facie* that the said acts complained of by the complainants by reason of their being injurious to the health of the community made a conditional Order prohibiting the respondent petitioner- appellant from embalming and discharging the contaminated water to the drain on the main road till 25.4.95 (vide 'P2').

On 6.4.95 the respondent-appellant filed a statement of objections together with an affidavit and the documents marked V1 to V11 in terms of section 98 (2) of the Code of Criminal Procedure Act and for the reasons stated therein moved that the conditional Order made by the Magistrate be set aside. After hearing counsel for the respondent-appellant the learned Magistrate suspended the conditional Order 'P2' made on 3.4.95 and since the complainants were absent, directed that the complainants should appear in Court on 25.4.95. On that day after hearing submissions made by counsel on behalf of both parties the learned Magistrate reserved his Order. By Order 'P5' dated 18.5.95 the learned Magistrate set aside the conditional Order made on 3.4.95 and made order permitting the respondent-appellant to carry on the function of embalming at the said premises subject to the conditions set out in letter V5 dated 31.1.87 issued by the Deputy Director (Field Services) of the National Health Institute. The conditions being:

- (1) that the respondent-appellant should ensure that contaminated water in washing dead bodies and cadavers should not be permitted to flow on to the drain on the main road and
- (2) that the parts removed from the cadavers in the process of embalming should be systematically disposed of.

Aggrieved by this Order of the learned Magistrate the complainants respondent-respondents preferred an appeal to the High Court of the Western Province holden at Kalutara in terms of section 320 (1) of the Code of Criminal Procedure Act read with section 4 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990. This appeal so filed was transferred to Panadura and from there to Colombo. After a consideration of the submissions made by Counsel on behalf of the parties the learned High Court Judge of the Western Province by his judgment 'P7' dated 29.10.96 acting in revision set aside the Orders made on 6.4.95 & 18.5.95 and restored the conditional Order made on 3.4.95.

It is against the said Order of the learned High Court Judge that the respondent-appellant made an application for Special Leave to

appeal. Upon a consideration of the submissions made, this Court by its Order dated 1.4.97 granted Special Leave to appeal on the following questions only :

- (1) Does the judgment of the High Court represent an unwarranted interference with the Order of the Magistrate's Court.
- (2) Is there a right of appeal to the High Court from the said Order.

I think it would be pertinent to deal with the 2nd question on which Special Leave to Appeal was allowed before considering the 1st question raised. In considering the question as to whether there is a right of appeal to the High Court from an Order made by a Magistrate in terms of section 101 of the Code of Criminal Procedure Act one has necessarily to consider the provisions relating to appeals from the Magistrate's Court which are set out in chapter XXVIII of the Code of Criminal Procedure Act specially sections 316 to 320. Section 316 states "that an appeal shall not lie from any judgment or Order of a criminal court except as provided for by this code or by any other law for the time being in force". A right of appeal is provided for in section 320 (1) which states that "subject to the provisions of sections 317, 318 & 319 any person who shall be dissatisfied with any judgment or final order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the Court of Appeal (now to the High Court, after the 13th Amendment to the Constitution) against such judgment for any error in law or in fact. . ."

An examination of this provision clearly shows that the right of appeal is restricted to *any judgment or final order pronounced by any Magistrate's Court in a criminal case or matter*. The question for determination then is as to whether an Order made under section 101 of the Code of Criminal Procedure Act can be said to be a final order made in a criminal case or matter?

It was the contention of Mr. Mustapha learned President's Counsel who appeared for the appellant that chapter IX of the Code of Criminal Procedure Act which dealt with public nuisances vested a special jurisdiction in the Magistrate's Court as distinguished from its ordinary criminal jurisdiction and therefore an Order made under this chapter would not attract the general right of appeal set out in section 320 (1) as that section applies only to orders made in the exercise of the ordinary criminal jurisdiction of the Magistrate's Court. Learned President's Counsel cited the case of *Bakmeewewa, Authorised Officer of the People's Bank v. Konarage Raja*⁽¹⁾ in support of this contention.

In the said case a previous owner of certain premises applied to the People's Bank for redemption of his land under provisions of the Finance Act, No. 11 of 1963 as amended by the Finance and Ceylon State Mortgage Bank (Amendment) Law No. 16 of 1973. After inquiry the People's Bank determined that the premises should be acquired and upon a vesting Order made by the Finance Minister under section 72 (2) the premises vested absolutely in the Bank free from all encumbrances. The appellant being the Authorised Officer of the People's Bank being unable to obtain possession of the premises applied to the District Court under section 72 (7) for an order for delivery of possession by way of summary procedure under chapter 24 of the Civil Procedure Code as stipulated by section 72 (8). Accordingly, the District Court entered an *order nisi* and despite the objections of the respondent entered order absolute on 28.11.83. The respondent appealed and pending the appeal the Bank's Authorised Officer moved for execution. The respondent filed papers for a stay of execution under section 763 (2) of the Civil Procedure Code. The District Judge on 30.7.84 rejected the application for stay of execution holding (a) that there was no right of appeal and (b) that the order for delivery of possession was not a final order and that leave to appeal had not been obtained.

In appeal the Court of Appeal set aside the order of the District Judge and directed him to hear the application for stay of execution. An appeal was taken to the Supreme Court and it was held by the

Supreme Court that the jurisdiction exercised by the District Court under sections 72 (7) and (8) of the Finance Act as amended is a special jurisdiction and that there is no right of appeal from an order made in the exercise of such jurisdiction unless a right of appeal is expressly provided for in the Act. Hence the District Court had no jurisdiction to entertain an application for stay of execution pending appeal under section 763 (2) of the Civil Procedure Code.

I am unable to agree with the contentions of learned President's Counsel that sections 98 to 105 of the Code of Criminal Procedure Act confers a special jurisdiction to a Magistrate's Court which is *sui juris*. In my view these sections provide for a summary procedure to be adopted by a Magistrate's Court for the removal or abatement of nuisances and the provisions relating to appeals in chapter 28 should be applicable in regard to these sections as well. An examination of section 261 of the Penal Code shows that a public nuisance is considered to be an offence entailing penal consequences and in my view an order made under section 101 of the Code of Criminal Procedure Act is an appealable order attracting the provisions of section 320 of the said Code.

The question as to whether an appeal lies against an order made under section 109 of the Criminal Procedure Code which is identical in terms to the provisions in 101 of the Code of Criminal Procedure Act came up for consideration in the case of *Forrest v. Leefe*⁽²⁾. In the said case the Magistrate made a conditional order under section 105 of the Criminal Procedure Code (which is identical in terms to section 98 of the Code of Criminal Procedure Act), requiring the appellant to forthwith remove his cooerage from the vicinity of the Magistrate's Court at Galle or to appear and show cause as to why the order should be modified or set aside. The appellant duly appeared and showed cause, evidence was taken and the Magistrate after hearing the appellant and the complainant made the order absolute. An appeal was taken against the order made, making the conditional order absolute under section 109. The respondent's counsel took a preliminary objection that no appeal lies. After considering the arguments of counsel Hutchinson, C.J. with Middleton, J. agreeing

overruled the preliminary objection and held that an appeal lies against an order absolute made under section 109 of the Criminal Procedure Code.

In the course of the judgment His Lordship the Chief Justice stated that : "the judgment pronounced by the Magistrate in this case dealt with the evidence, decided that the appellant's cooperation was a public nuisance, and decided against his plea of right to continue it, and ordered him to remove it; it did in fact dispose of all the questions in dispute, and all that remained to be done was to enforce the order and . . . also to punish the appellant if he disobeyed it. I nevertheless think that this is an appeal against a judgment. The Magistrate heard evidence, dealt with it and decided all the questions on law and fact which were raised, and thereupon made an order in accordance with his findings. In ordinary language he gave judgment; his statement of reasons and his findings and his order constitute his judgment. I think, therefore, that the preliminary objection should be overruled".

Middleton, J. in the course of his judgment stated as follows : The first point in this case was whether an appeal would lie, it being contended for the respondent that the order was not a final one. The question as to whether it was a judgment was not referred to in the argument. It is clear I think that the decision appealed from is a judgment within the meaning of section 306 (1) of the Criminal Procedure Code. It becomes, therefore, appealable under section 338 of the Criminal Procedure Code.

For the reasons stated I hold that there is a right of appeal to the High Court from the order marked 'P5' dated 18.5.95 of the learned Magistrate made in terms of section 101 of the Code of Criminal Procedure Act.

The following cases, *Saram v. Seneviratne*⁽³⁾, *Sandrasegara v. Sinnatambay*⁽⁴⁾, *Nair v. Costa*⁽⁵⁾ are some of the cases in which appeals had been preferred against orders made under 109 of the Criminal Procedure Code and the case of *Greena Fernando v. Teckla*

Saparamadu⁽⁶⁾ is one in which an appeal had been taken in respect of an order that have been made under section 101 of the Code of Criminal Procedure Act.

The other question that remains for determination is as to whether the judgment of the High Court represents an unwarranted interference with the order of the Magistrate's Court.

It was submitted by learned counsel for the appellant that the learned High Court Judge having wrongly held that there was a right of appeal from the Magistrate's Order which was sought to be impugned inexplicably purported to act in revision to set aside the Order of the learned Magistrate made in terms of section 101. It is the contention of the learned counsel that the learned High Court Judge erred in interfering with the Order made by the Magistrate inasmuch as no circumstances exists for such intervention and it is based on a misconception of the facts and the law. According to the appellant the conditional Order 'P2' made on 3.4.95 by the learned Magistrate was consequent upon a consideration of the report marked 'P1' filed before him unsupported by any affidavit.

It was contended that the appellant as permitted by section 98 (2) appeared before the learned Magistrate and moved to have the conditional Order set aside having filed a statement of objections 'P3' along with his affidavit together with documents 3 1 to 3 11 and since the complainants were absent that the learned Magistrate temporarily suspended the conditional Order made on 3.4.95 after hearing submissions of counsel made on his behalf and directed the complainant to be present on 25.4.95. On that day after a consideration of the objections filed and the contents of the supporting affidavit of the appellant and the documents furnished in support thereof and the submissions made by the counsel for the parties reserved his order and by his order 'P5' dated 18.5.95 the learned Magistrate set aside the conditional Order and made order permitting the appellant to continue with his business subject to the conditions set out in 3 5.

It was submitted that the learned High Court Judge erred in law when he set aside the Order of the learned Magistrate dated 18.5.95 on the basis that there was no evidence before the Magistrate for his consideration for him to have set aside the conditional Order. It is contended by learned counsel that the affidavit filed by the respondent-appellant along with his statement of objections 'P3' constituted evidence which had been acted upon by the learned Magistrate to have varied the conditional Order made in terms of section 98 (1) and relied on the provisions of section 415 of the Code of Criminal Procedure Act which authorised the learned Magistrate to have acted upon the said affidavit.

The learned High Court Judge in his judgment at page 19 appears to have taken the view that when section 101 of the Code "requires the Magistrate to take evidence in the matter" that the evidence should be oral evidence which should be recorded in the manner set out in section 273 of the Code of Criminal Procedure Act where the evidence of each witness should be taken down in writing by the Judge or in his presence or hearing or under his personal direction or supervision which had not been complied with by the Magistrate and for that reason holds that the Order made on 18.5.95 was not in compliance with the law.

An examination of the Order dated 18.5.95 marked 'P5' which was sought to be impugned before the High Court indicates that the learned Magistrate had in fact considered the statement of objections and the evidence of the respondent-appellant produced by way of his supporting affidavit to vary the conditional Order.

This being so I am of the view that there has been sufficient compliance with the provisions of section 101 of the Code of Criminal Procedure Act.

It was further submitted by learned counsel for the appellant that the learned Judge of the High Court has adverted to matters that were never in evidence before him when he set aside the Order of

the learned Magistrate and was in grave error in taking into consideration extraneous matters. Learned counsel drew our attention to page 15 of the judgment where the learned High Court Judge observed as follows:

"I am unable to accept that there is a system where arterial embalming can be done by the use of a syringe only without removing the brain, the lungs, the heart, the stomach, and the intestines, for ordinarily these organs are removed and swabs of cotton wool dipped in formalin is placed in the cavity and is sutured and if the said organs are not removed the body begins to stink."

I have perused the brief carefully and find that there is no evidence on record to support the above findings of the learned High Court Judge and therefore I agree with the contention of the learned counsel that the learned High Court Judge had erred in taking into account extraneous matters to set aside the Order of the learned Magistrate and the consideration of these extraneous matters in my view, constitutes an *unwarranted interference with the Order of the learned Magistrate*.

For the reasons stated I am of the view that the judgment of the learned High Court Judge should be set aside. Accordingly, I allow the appeal and set aside the judgment of the learned High Court Judge dated 29.10.96 without costs and affirm the Order of the learned Magistrate 'P5' dated 18.5.95.

I may add this judgment should not be considered to be a bar to the respondent to pursue with his action L3464 already pending in the District Court of Kalutara.

DE SILVA, CJ. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal allowed.