

PERIMBARAJAH
v.
OFFICER-IN-CHARGE, MINOR COMPLAINTS SECTION,
POLICE STATION, WATTALA.

COURT OF APPEAL.
H. W. SENANAYAKE, J.
C.A. APPLICATION NO. 424/93.
M.C. WATTALA NO. 272/B.
AUGUST 27, 1993.

Children and Young Persons Ordinance – (Cap. 23) Section 35 – Committal to certified school – Education Ordinance, sections 43 and 45 – Duty of parent – Magistrate’s duty.

The child Sathasivam 13 years and 6 months old was working as a domestic servant in the household of Mr. & Mrs. J. N. Jayaweera and was produced in Court on 8.4.93 under section 34 of the Children and Young Persons Ordinance. The Magistrate handed over the child to Jayaweera on 8.4.93 on Rs. 1000/- personal bail to attend Court on 20.4.93 with the petitioner Sathasivam Perimbarajah. They attended Court on this day but the Magistrate did not question the petitioner whether he could maintain the child Sathasivam but

instead ordered the child to be kept at the Children's Home, Pannipitiya and called for a report from the Probation Officer on 27.4.93. After considering the report but without making any inquiries from the petitioner, the Magistrate ordered the child to be sent for a period of three years to the Certified School at Maggona..

Held:

(1) In terms of section 43 of the Education Ordinance it is the duty of the parent to see that the child attends school till he reaches the age of 14 years.

(2) Action was not taken to prosecute the parent under section 45(1) of the Education Ordinance although the child had not been sent to school for the last 7 years.

(3) There was a duty cast on the Magistrate to make inquiries and find out from the petitioner whether he was in a position to maintain the child Sathasivam. The child had not committed any offence; there was no evidence to indicate he had fallen into bad association or was exposed to moral danger or that he was beyond control. It was the duty of the Magistrate to find out whether the parent was fit to exercise care or was not exercising proper care over the child. This was a breach of the principles of natural justice.

(4) The order made by the Magistrate was harsh as there was no offence committed by the child. The Magistrate should have acted under section 35(1) (c) of the Children and Young Persons Ordinance.

APPLICATION for revision of the order of the Magistrate of Wattala.

B. Rajapakse with *Y. Kodituwakku* for petitioner.

M. I. Hadi S.C. for complainant-respondent and as *amicus curia*.

Cur. adv. vult.

September 09, 1993.

H. W. SENANAYAKE, J.

This is an application to revise an order made by the Learned Magistrate on 27.4.93 where he had ordered the petitioner's eldest child Sathasivam to be placed under section 35 of Children and Young Persons Ordinance to be sent to the Certified School in Maggona for a period of three years.

Briefly the facts relevant to this application were that Sathasivam who was thirteen years and six months old was found allegedly to be working as a domestic servant in the household of Mr. and Mrs. J. N. Jayaweera of No. 11, Kuda Edanda Road, Wattala and was produced by the O.I.C. on 8.4.93 in terms of section 34 of the

Children and Young Persons Ordinance. The Learned Magistrate on 8.4.93 handed over the child to the said Jayaweera on a thousand rupees personal bail and had informed Jayaweera to come to Court on 20.4.93 with the petitioner. On 20.4.93 the Petitioner was present. The Learned Magistrate had not questioned the Petitioner whether he was able to maintain or look after the child Sathasivam but on that date he had ordered the child to be kept till 27.4.93 in the Childrens Home, Pannipitiya and he had also called for a probation report from the Probation Officer on 27.4.93. After considering the probation officer's report without making inquiries from the petitioner had ordered the child to be sent for a period of three years to the Certified School of Maggona.

The State Counsel conceded that there was no prohibition in law to a young person being employed as a domestic servant. Section 34(1) (a) reads as follows: "A child or young person, who, having no parent or guardian or a parent or a guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad association, or exposed to moral danger or beyond control or (b) child or young person (who falls within i, ii, iii, iv) requires protection". The child Sathasivam does not fall within 34(1) (b) of the said section nor could one say that he had been kept as a domestic with the Jayaweera's as he was falling into bad association or exposed to moral danger or beyond control. According to the Interpretation Ordinance, section 38, "child" means a person of under 14 years.

The Education Ordinance (Chapter 381), section 43 reads as follows "Where a parent of a child not less than 5 and not more than 14 years is resident on an estate he shall cause the child to attend a school. Section 45(1) deals with the penal provision to punish a parent who contravenes the provisions of section 43". In terms of this section it is the duty of the parent to see that the child attends school till he reaches the age of 14 years. According to the probation report filed in this case the child Sathasivam had only attended school for a period less than 1 year and thereafter he had not attended school but has been playing cricket which has now become a national pastime and quarrelling with the neighbours' children, but no action had been

taken by the Education Department or its Officers to enforce and prosecute the parent under section 45(1) of the Education Ordinance. According to the report filed by the probation officer the child Sathasivam has not attended school for the last 7 years. There was a duty cast on the Magistrate to make inquiries and to find out from the petitioner whether he was in a position to maintain the child Sathasivam. The child has not committed any offence; there was no evidence to indicate he had fallen into bad association or was exposed to moral danger or that he was beyond control; therefore it was the duty of the Learned Magistrate to find out whether the parent was fit to exercise care or was not exercising proper care. In my view this was a breach of the principles of natural justice. The petitioner was present in Court and he was represented by an attorney-at-law but the record does not show if any question been asked from the petitioner about his ability to exercise proper care.

In my view the order made by the Learned Magistrate on 27.4.93 was harsh as there was no offence committed by the child Sathasivam. The document C filed in Court established that the petitioner is in receipt of Rs. 2850/- a month. According to the probation report filed by the probation officer the gross income of the family was Rs. 2800/-; it is true no doubt that with the present cost of living the parent would find it difficult to give the children the best of things but that does not mean that they cannot supply the basic needs and care for the children. Employing a person under 14 years is not an offence if he is looked after and given proper care. The parent would be contravening section 43 of the Education Ordinance and not the person who keeps the child as a domestic servant.

I quash the order of the Learned Magistrate and direct the Magistrate to act under section 35(1) (C). The child Sathasivam would be reaching 14 years according to document A on 23 September this year.

I direct the Registrar of the Court of Appeal to issue a certified copy of this order on payment of usual charges to the Petitioner.

Magistrate's order quashed.