

1943

Present : Wijeyewardene J.

ALWIS, Appellant, and FERNANDO, Respondent.

816—*M. C. Colombo, 628.*

Supreme Court—Powers in revision—Appeal from conviction—Power to discharge accused under Criminal Procedure Code, Sec. 325—Courts Ordinance, s. 37.

Where, on an appeal from a conviction by a Magistrate, the Supreme Court is of opinion that the accused should be dealt with under section 325 of the Criminal Procedure Code the Court has power under section 37 of the Courts Ordinance to direct the Magistrate to discharge the accused conditionally under that section of the Criminal Procedure Code.

THIS was an application for revision of a conviction by the Magistrate of Colombo.

S. Saravanamuttu, for applicant.

E. L. W. Zoysa, C.C., for complainant, respondent.

January 26, 1943. WIJEYWARDENE J.—

The accused was charged with having committed criminal breach of trust in respect of a sum of Rs. 140 entrusted to him by his employer. The accused was convicted on his pleading guilty to the charge and sentenced to 3 months' rigorous imprisonment.

According to an affidavit of the accused filed in this court, the accused is a lad of seventeen years with no previous convictions and an uncle of the accused has replaced the amount lost by the employer. The employer himself has filed an affidavit stating that he found the accused "strictly honest" during the four years the accused was employed under him and expressing his willingness to re-employ the accused. The counsel appearing for the Crown does not dispute the correctness of these statements.

No doubt, the offences committed by the accused cannot be considered as trivial; but it appears as if the accused has succumbed to sudden temptation and committed a thoughtless, rather than a criminal act. One of the important objects of punishment is the reformation of the offender and it is very essential that magistrates should not lose sight of this object when dealing with youthful offenders with a previous good record. It is not very desirable that a young lad of 17 years with no previous conviction should be sent to prison and turned into a social outcast. I think that this is a case where the magistrate should have exercised the

¹ 43 N. L. R. 436.

² 43 N. L. R. 421.

discretion vested in him by section 325 of the Criminal Procedure Code and given the young lad a chance of reforming himself instead of sending him to prison early in his life.

The question, however, arises whether this court could make such an order under section 325 when exercising its revision powers in a case where the Magistrate has convicted the accused and sentenced him to a term of punishment. In dealing with a matter in revision this court could, by virtue of section 357 of the Criminal Procedure Code, exercise the appellate powers conferred by section 347 of the code. Now section 347 enacts that this court may—

(b) in an appeal from a conviction—

- (i) reverse the verdict and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction or committed for trial or
- (ii) alter the verdict maintaining the sentence or with or without altering the verdict increase or reduce the amount of the sentence of the nature thereof.

(c) in an appeal from any other order, alter or reverse such order. Clearly the present case does not fall under section 347 (c) as that sub-section refers to an appeal from an order other than that of acquittal or conviction. Could it be dealt with under section 347 (b)? Under section 347 (b) (i) if I “reverse the verdict” I cannot order the accused to enter into a bond. Under section 347 (b) (ii) I could only alter the verdict and increase or reduce the amount of the sentence or alter the nature of the sentence. I find it difficult to hold that I would be acting under section 347 (b) if I set aside the conviction and order the accused to enter into a bond.

I find that a similar difficulty arose in India regarding the exercise by an Appellate Court of the powers conferred by section 562 of the Indian Code of 1898 corresponding to section 325 of our code. In *Narayanswami Naidu v. Emperor*¹ White C.J. and Subramania Aiyar J. found it possible to meet the difficulties created by section 423 of the Indian Code (corresponding to section 347 of our code) by stating—

“We do not think it was the intention of the Legislature by the use of the words ‘Court before whom he is convicted’ in section 562, Criminal Procedure Code to limit the power of making orders under that section to the court of first instance.”

I may add that the Indian Code was subsequently amended in 1923 by giving the power in express terms to the High Court to make an order of this nature when dealing with a matter by way of revision.

Without adopting the same line of reasoning as in *Narayanswami Naidu v. Emperor* in construing section 325 of our code, it is possible I think, for this court to invoke the powers under section 37 of the Courts Ordinance and make an order under section 325 of our code and I do not think that in doing so this court will be acting contrary to the provisions of section 357 of the Criminal Procedure Code.

¹ (1906) 29 Madras 568.

I would therefore set aside the conviction *pro forma* and remit the proceedings to the Magistrate with a direction to him to discharge the accused conditionally under section 325 of the Criminal Procedure Code on the accused entering into a bond in such a sum and with such sureties as the Magistrate may consider adequate. The bond will provide for the accused appearing for conviction and sentence when called on at any time within 2 years.

Set Aside.

