

1971

*Present : Alles, J.*

A. P. DINGIRI BANDA, Appellant, and A. GOMEZ (Public Health Inspector), Respondent

*S. C. 558/70, with Application in Revision 651/70—M. C.  
Kuliyapitiya, 35889*

*Housing and Town Improvement Ordinance (Cap. 268)—Sections 5, 13 (1), 13 (2)—  
Contravention of s. 5—Plea of guilt—Accused warned and discharged—Applica-  
tion therefor for demolition of the unauthorised building—Maintainability—  
Duty of Magistrate to exercise discretion.*

A plea of guilt amounts to a conviction for the purposes of section 13 (2) of the Housing and Town Improvement Ordinance, even if the accused has been warned and discharged in terms of section 325 of the Criminal Procedure Code.

When an application for a mandatory order for the demolition of an unauthorised building is made under section 13 (2) of the Housing and Town Improvement Ordinance, it is the duty of the Magistrate to exercise his discretion before he makes an order for the demolition of the building.

**A**PPPEAL, with application in revision, against an order of the Magistrate's Court, Kuliyapitiya.

*P. Somatilakam*, with *B. Bodinagoda*, for the accused-appellant and petitioner.

*Lakshman Kadirgamar*, for the complainant-respondent.

*Cur. adv. vult.*

February 28, 1971. ALLES, J.—

The accused-appellant in this case was charged under the Housing and Town Improvement Ordinance (Ch. 268) with having erected or caused to be erected a semi-permanent building with planks within the administrative limits of the Narammala Town Council without plans, drawings and specifications approved in writing by the Chairman of the Council, in contravention of Section 5 of the said Ordinance and thereby committing an offence punishable under Section 13 (1) of the said Ordinance.

On 2nd December 1967 the appellant moved to withdraw his former plea of not guilty and pleaded guilty to the charge. The Magistrate thereupon warned and discharged the appellant and ordered him to pay Rs. 5 to charity which sum he duly paid.

Over two years later, on 5th March 1970, the present Chairman of the Council moved Court to issue a mandatory order under Section 13 (2) of the Ordinance for a demolition of the building. Notice was issued on the appellant for 27th April 1970 and on 19th May 1970, Counsel on

behalf of the appellant stated that he had cause to show against the demolition. At the inquiry on 3rd June 1970, Counsel for the appellant submitted that there was no conviction as contemplated under Section 13 (2) of the Ordinance since the appellant had been dealt with under Section 325 of the Criminal Procedure Code. It was also his submission that the plea of guilt was erroneously made. On 13th June 1970 the learned Magistrate considered further submissions of Counsel and held, following the decision of Garvin J. in *Vandersmagt v. Pompeus*<sup>1</sup>, that the plea of guilt tendered by the appellant amounted to a conviction under Section 13 (2) of the Ordinance. The learned Magistrate thereafter issued a mandatory order on the appellant to demolish the building within four months, failing which the Chairman of the Town Council was authorised to do so.

I am in agreement with the decision of Garvin J. that a plea of guilt amounts to a conviction for the purposes of Section 13 (2) of the Housing and Town Improvement Ordinance. Counsel's submission on this point therefore fails. However, the further point has been raised by Counsel for the appellant that the learned Magistrate in this case has not exercised his discretion before making the order for the demolition of the building. In the case of *Vandersmagt v. Pompeus* (supra), before Garvin J. dismissed the appeal, he considered the merits of the case and held that the learned Magistrate had correctly exercised his discretion before ordering the demolition of the building. As far as I have been able to ascertain from the proceedings in the present case there is nothing to indicate that the Magistrate had exercised any discretion before issuing the mandatory order for the demolition of the building. Counsel for the appellant has urged before me that the discretion that has to be exercised under Section 13 (2) is not an absolute discretion flowing from a conviction under Section 13 (1), but one in which the Magistrate must consider the merits of the case and has cited several authorities in support—21 N. L. R. 473; 27 N. L. R. 83; 7 C. W. R. 27 and 109. In *Bartholomeusz v. Fernando*<sup>2</sup> Schneider J. has held that the word "may" in Section 13 (2) has not the force of the word "shall" but is merely permissive. In *Bartholomeusz v. Perera*<sup>3</sup> Sampayo J. said—

"The mandatory order asked for is not a matter of course. The accused person has the right to show cause against it and the magistrate is bound to exercise his discretion."

Sampayo J. followed the decision of the Calcutta High Court in *Abdul Samad v. Corporation of Calcutta*<sup>4</sup> that it is discretionary with the Magistrate to pass an order for demolition or not. Said Sampayo J.—

"It was maintained, however, at the argument of this appeal, that if the Municipal Council was satisfied as to the necessity or expedience of demolition, the magistrate himself has no discretion in the matter. The same argument was addressed to the Calcutta

<sup>1</sup> (1926) 4 *Times* 61.

<sup>2</sup> (1919) 7 C. W. R. 109.

<sup>3</sup> (1919) 7 C. W. R. 109 at p. 111.

<sup>4</sup> (1905) 1 L. R. 33 Calcutta 287.

High Court in the above case but without success. I venture to agree with the decision on that point. The question is then whether in the circumstances of this case the magistrate has exercised his discretion properly. As a matter of fact he exercised no discretion whatever, and I must therefore consider the circumstances myself."

The learned Judge thereupon proceeded to consider the circumstances of the case before him and held that the appellant ought not to be compelled to demolish the building in question.

In the present case too, there is nothing to indicate that the Magistrate exercised any discretion whatever in making the order of demolition. The appellant in his connected application for revision of the Magistrate's order (S. C. 651/70) has stated that he demolished a portion of the building which encroached on the street lines and pleaded guilty to the charge in respect of the rest of the building. Having regard to the long delay in the application for a mandatory order to demolish the building, one may fairly assume that the building in question did not constitute an injury or obstruction to the public and that the Council have not been inconvenienced in any way by the presence of the unauthorised building. The learned Magistrate should have probed the reason for the delay and investigated the sudden urge of the Council to take action against the appellant. This would necessarily have called for the exercise of his discretion under Section 13 (2). Since this has not been done, I set aside the Magistrate's order and direct that the case be remitted to the Court below for a consideration of the merits of the case before deciding whether the demolition order should be made effective or not.

*Case sent back for further proceedings.*

