IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1990.

SC Appeal No: 109/2017

Leave to Appeal No: SC/SPL/LA/245/16

High Court Case No: HC Kandy- 41/2015

Magistrate Court No:M.C. Theldeniya 80953

Officer in Charge,

Police Station,

Wattegama.

COMPLAINANT

vs.

Puwakgahakumbure Gedara William Wijesinghe,

120A, Kudugala Road,

Wattegama.

ACCUSED

AND BETWEEN

Puwakgahakumbure Gedara William Wijesinghe,

120A, Kudugala Road,

Wattegama.

ACCUSED-APPELLANT

Vs

1. Attorney-General
   Attorney-General's Department,
   Colombo 12.

RESPONDENT

2. Officer in Charge,
   Police Station,
   Wattegama,

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Puwakgahakumbure Gedara William Wijesinghe,

120A, Kudugala Road,

Wattegama.

ACCUSED-APPELLANT-PETITIONER

Vs

1. Attorney-General
   Attorney-General's Department,
   Colombo 12.

RESPONDENT-RESPONDENT

2. Officer in Charge,
Police Station,
Wattegama,

COMPLAINANT-RESPONDENT-RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J**
A.H.M.D. NAWAZ, J AND
A.L SHIRAN GOONERATNE, J

COUNSEL : A. S. M. Perera, PC with P. Kumarawadu for the Accused-Appellant- Appellant
Induni Punchihewa, SC for the Respondent-Respondent

WRITTEN SUBMISSIONS : Respondent-Respondent on 14th January 2020
Accused-Appellant-Appellant on 29th October 2017

ARGUED ON : 24th February 2022

DECIDED ON : 28th September 2022

S. THURAIRAJA, PC, J.

The Accused-Appellant-Petitioner, namely Puwakgahakumbure Gedara William, ("Hereinafter referred to as the "Accused") filed application before this Court preferring Appeal against order by the High Court of Kandy dated the 13th October 2016.

This Application precedes from a Plaint filed by the Complainant-Respondent-Respondent, the Officer in Charge of the Wattegama Police Station, (hereinafter referred to as the "Complainant" at the Magistrate Court of Theldeniya which contained the following 3 charges against the Accused:

a) A charge under Section 177 of the Penal Code, that the Petitioner being a person who was legally bound to state the truth on any subject to a public servant, namely SI./ Upali Chandrasiri of the Wattegama Police, refused to answer the questions demanded of him.
b) A charge under Section 344 of the Penal Code, that the Petitioner obstructed a public servant, namely, the said SI./ Upali Chandrasiri from performing duties, and
c) A charge under Section 186 of the Penal Code, that the Petitioner threatened a public servant, namely the said SI./ Upali Chandrasiri, of injury

At the conclusion of the trial, judgment had been delivered on 24th July 2015 finding the accused guilty of the first and second count and acquitting him on the third count. The Accused was sentenced on 07th August 2015 imposing fines of LKR 100 on the first count, and LKR 1500 on the second count.

Being aggrieved by the same, the Accused had preferred appeal to the High Court of Kandy to have the judgment of the Magistrate set aside. After hearing submissions of both parties, the Learned High Court Judge delivered order on 13th October 2016 dismissing the appeal and affirming the Judgment of the Magistrate.

The Accused appears before this Court seeking both above judgments to be set aside on the grounds set out in the Petition dated 23rd November 2016. On 02nd June 2017, Court was inclined to grant Leave to Appeal on the following question of law upon hearing both counsel in support of their respective cases;

"Has the prosecution complied with the provisions contained in Section 135(1)(a) of the Criminal Procedure Code in obtaining the sanction of the Hon. Attorney General before filing plaint under Section 177 of the Penal Code"

In ascertaining the same, the facts and circumstances of this application are as enumerated below.

The Facts

The facts of the case as per the evidence led by the prosecution are such that a complaint had been made on 7th January 2001 by the virtual complainant Chandani Wijayanthimala Ekanayake against the Accused that the Accused had failed to return some jewellery which he had taken from her and that the Accused was then required to attend an inquiry into such complaint on 15th January 2007.

As such the evidence of the six witnesses was called by the prosecution, namely two police officers; SI./ U.G.R. Mudiyanselage Upali Chandrasiri and PS/5942 T. Mudiyanselage Thilakaratne Bana, the complainant; Chandani Wijayanthimala Ekanayake, the complainant's sister; Roshini Ekanayake and two persons who witnessed the encounter, namely Herath Pahala Gedara Abeyratne and P.G. Yasarathne Banda.

As per the narration of facts by SI Upali Chandrasiri, as supported by the statements of PS Thilakaratne Banda, SI Upali Chandrasiri had commenced inquiring into the said complaint against the Accused relating to the misappropriation of some jewellery and cash belonging to the complainant. He states that at the time the appellant used offensive language on him, obstructed the performance of his duties and the Accused attempted to squeeze his own neck.

H.P Abeyratne and P. Yasarathne Banda had been present at the Wattegama Police on the relevant day for matters unrelated to the present application. The former

states that at the time, 30 to 40 persons were present at the police station and that when the relevant inquiry relating to the Accused was taken up, the Accused used offensive language and attempted to squeeze his own neck, upon which he had been taken inside the police station. The evidence of the latter corresponds with the same narration of facts and he identified the Accused as the person who behaved in such a manner.

The narration of facts as per the Accused is such that he had attended the inquiry on 15th January 2007 with his Attorneys at Law, who had left the police station subsequent to making representations to SI Upali Chandrasiri and being given the indication that he needed to record a statement from the Accused. The Accused states that when he attempted to sit on a chair nearby for the purpose of making said statement, SI Upali Chandrasiri and PS Tillakaratne had inquired from him as to who asked the Accused to sit and had severely assaulted him, notwithstanding the accused having indicated to the police that he was being treated for a heart condition at the time. He further states that he was thereafter locked up and was later produced the Teldeniya Magistrate on a B Report.

The Accused took up the position that at the time the Accused was asked to attend the said inquiry on 15th January 2007, there had been no complaint recorded against him. On behalf of the Accused, evidence was led to the effect of corroborating this stance by one M.G. Jayawardena, one Kumari Abeyratne who was the translator of the MC Panwila and Chief Inspector Samarakoon Mudiyanselage Jayantha in that the Complaint had been made against the Accused only on the date of inquiry, the 15th January 2007, itself.

At the conclusion of the trial the Hon. Magistrate delivered judgment finding the Accused guilty on the 1st and 2nd counts as enumerated above and acquitted him on the 3rd count. Upon appeal to the High Court of Kandy (Central Province) being set aside, this Court granted Leave on the following singular question of law, which I will

reiterate and endeavour to address without disturbing the findings of the lower courts in terms of the substantive matters beyond the following particular question of law:

> *"Has the prosecution complied with the provisions contained in Section 135(1)(a) of the Criminal Procedure Code in obtaining the sanction of the Hon. Attorney General before filing plaint under Section 177 of the Penal Code"*

Compliance with the Sections of the Code of Criminal Procedure Act

The ground of appeal stems from the first charge against the Accused being under Section 177 of the Penal Code. Section 177 of the Penal Code pertains to the refusal of any person legally bound to state the truth on any subject to any authorised public servant refusing to answer such questions demanded of him. The maximum sentence as under the same provision is of simple imprisonment for a maximum term of six months, or with a maximum fine of Hundred Rupees or with both. While the contents of this provision are of little concern to the question of law at hand, it becomes pertinent as under Section 135 of the Code of Criminal Procedure Act No.15 of 1979 as amended, which states as follows:

> *"(1) Any court shall not take cognizance of -*
>
> > *(a) any offence punishable under sections 170 to 185 (both inclusive) of the Penal Code except with the previous sanction of the Attorney-General or on the complaint of the public servant concerned or of some public servant to whom he is subordinate;"*

As such, in order for any complaint under Section 177 of the Penal Code to be made, the previous sanction of the Attorney General or the Complaint of a public servant or the complaint of some public servant who is his superior is required. As such, it is clear that any one of such; the sanction or either complaints, would suffice to fulfil this requirement.

The Accused argues that the above provision has not been complied with, leading to a patent lack of jurisdiction in the instant case. The Accused enumerates that there is no sanction of the Attorney-General, which is a fact that is not contested by the Respondents. As such, the Accused interprets the term "complaint", which is a prerequisite as per the above provision in the absence of such sanction, to exclude the procedure followed by the Respondents.

The Accused examines the first and second subsections of Section 136 of the Code of Criminal Procedure Act to afford an interpretation to the term "complaint". The relevant portion of Section 136 have been reproduced below for ease of reference:

> *"(1) Proceedings in a Magistrate's Court shall be instituted in one of the following ways: -*
>
> > *(a) on a complaint being made orally or in writing to a Magistrate of such court that an offence has been committed which such court has jurisdiction either to inquire into or try:*
> >
> > *Provided that such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant; or*
> >
> > *(b) on a written report to the like effect being made to a Magistrate of such court by an inquirer appointed under Chapter XI or by a peace officer or a public servant or a servant of a Municipal Council or of an Urban Council or of a Town Council; or ....."*

Accordingly, the Code of Criminal Procedure identifies complaints made orally or in writing separately from written reports to the Magistrate of such court by a public servant. It is the Accused's position that owing to the same, the mere filing of a B report by the Respondent is insufficient to fulfil the requirements as a report can be distinguished from a complaint, and the B report squarely falls within the definition of a "report" as opposed to a "complaint" as is required under Section 135. On this

interpretation, the Respondent disagrees in that the B report indeed amounts to a complaint as is required under the aforementioned provisions.

To substantiate the same, the Accused appears to rely on the case of **R.P Wijesiri Vs. the Attorney General 1980 2 SLR 317**, wherein an indictment was presented to the High Court of Kandy under Section 480 of the Penal Code and the preliminary objection of non-compliance with Section 135(1)(f) of the Code of Criminal Procedure was raised. In this particular case there was no previous sanction of the Attorney-General nor was there a complaint to the effect, as such the Preliminary objection was upheld in that the High Court lacked competence.

However, it must be noted that the case of Wijesiri can be distinguished from the present case as the charges levelled in the two cases are drastically different in nature, secondly the applicable provision of the Code of Criminal Procedure in that case was Section 135(1)(f) whereas Section 135 (1)(a) is being considered at present. The requirements of complaint and sanction under Section 135 (1)(f) vary from that of Section 135(1)(a) and therefore different standards and procedure are expected in instances falling within the scope of either provision. As per Section 135(1)(f) sanction is required "with" a complaint, whereas Section 135 (1)(a) requires the sanction of the Attorney general or the complaint of the public servant concerned or their superior.

Despite the above, the views of Hon. Ranasinghe J in relevance to the concept of sanction and complaint are notable in relation to the instant case. Hon. Ranasinghe J examined the objects and reasons for the requirement of the Attorney General's "sanction" set out in Section 147 of the previous Code (which is the counterpart of Section 135 of the present Code) as are set out in **Dias Commentary on the Ceylon Criminal Procedure Code at. p. 381**, quoting:

> *"the object of such legislation is two-fold, viz (1) to prevent the process of the Criminal Courts from being prostituted for the purpose of harassing an enemy by way of revenge or out of spite, and (ii) to enable the authorities to*

discourage false and vexatious cases, and to keep under control the number of prosecutions by requiring some public officer or Court to examine the facts of the case before a prosecution is sanctioned. Such legislation is a 'precautionary measure, in order to prevent frivolous or otherwise undesirable proceedings by private persons' - R v Meera Saibo"

As quite aptly framed above, the purpose of the legislation in terms of Section 135 is to discourage malicious prosecution and to mitigate the filling of any unnecessary cases through having a preliminary process of scrutiny by either public officials in the specified capacity or the Attorney General prior to bringing a matter to the attention of the relevant competent court. This acts as a measure of safeguarding persons accused of the offences specified without the intervention of Courts.

As such, Section 135 can be distinguished from Section 136. Section 135 outlines conditions necessary for initiating proceedings in terms for the prosecution of certain Penal Offences whereas Section 136 differs in scope as it pertains to the method of initiation of proceedings before the Magistrate's Court. As such, Section 136 does not refer to any specific offences, outlines a different procedure from that of Section 135, and even forms part of a different chapter (Chapter XIV) as opposed to Section 135 (Chapter XII), thus it exists to serve different occasions than that of Section 135.

For this reason, I find that the interpretation of complaint or report cannot be specifically drawn from Section 136 when the Code of Criminal Procedure clearly provides for an interpretation of this term in Section 2, which is reproduced as follows for ease of reference:

""complaint" means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence; "

It must be noted that despite an interpretation of "report" not being provided in Section 2, the relevant sections referring to reports have outlined the prerequisites of the required reports in those sections itself as necessary.

In reference to the above interpretation in conjunction with the mentioned requirement for complaints under Section 135, all that would be required is a written or oral allegation made to the Magistrate by the public servant concerned or a public servant to whom he is subordinate, made with the view of taking action action under the Code that some person, whether known or unknown, has committed an offence.

In the instant case, the person is identified as the person who is alleged to have committed an offence. It is my view that by the B report bearing no. B 44/2007, dated 01.01.2007 by the Complainant; the Officer in Charge of Wattegama Police station who is the superior officer of the concerned public officer in the instant case, a written complaint has indeed been made to the Magistrate with the view of taking action under the Code by a public officer to whom the concerned police officer is subordinate. The report outlines the related incident and the relevant surrounding circumstances and includes the offences allegedly committed in sufficient detail. As such I find the prerequisites of Section 135 (1)(a) have been fulfilled in the present instance.

While I am of the view that the above enumerated reasons suffice to satisfy the Question of Law at hand concisely, I wish to further address relevant points raised by both parties in order to comprehensively address this matter.

In substantiating their position, the Respondent relies on Section 39 of the Judicature Act No.02 of 1978 in order to state that the petitioner is not entitled to object at this point in proceedings as any objections must have been raised prior. Section 39 of the Judicature Act is reproduced as follows for ease of reference:

" Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party

shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter:

Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."

The Respondent is of the position that as the Accused has only raised this objection before this Court and has not made any endeavour to assert the same either before the Magistrate or the High Court, this application cannot be entertained. The Accused adopts the stance that as non-compliance with Section 135 (1)(a) of the Code of Criminal Procedure amounts to a patent lack of jurisdiction which may be raised at any point in proceedings, there was no reason for the Accused to take cognisance of Section 39 of the Judicature Act.

As per Section 39 of the Judicature Act, any objection must be raised at the earliest possible opportunity and the failure of this amounts to a waiver wherein the court is considered to have jurisdiction over the action. However, it is commonly accepted that in instances where it is a patent lack of jurisdiction, objection to jurisdiction can be taken at any time in proceedings as was held in **Baby V Banda (1999) 3 Sri L R 416.**

The landmark Judgement of **Beatrice Perera Vs The Commissioner of National Housing 77 N.L.R. 361 at p. 366,** distinguished between "patent" and "latent" lack of jurisdiction as follows:

"Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A

Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects ; the first mentioned of these is commonly known in the law as a ' patent' or ' total' want of jurisdiction or a defectus jurisdictionis and the second a ' latent' or ' contingent' want of jurisdiction or a defectus triationis. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. ***In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction****; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature;* ***the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable****. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction..."*

(Emphasis Added)

This approach has been adhered to and further developed by this Court as in the case of **Kekul Kotuwage Don Aruna Chaminda v Janashakthi General Insurance Limited and others SC Appeal No. 134/2018 (SC minutes dated 09.10.2019)** wherein a wealth of cases both before this Court itself as well as before

the Court of Appeal was acknowledged in terms of determining a question of jurisdiction in the same case.

Given all expressed above, in the instance that non-compliance with Section 135 is considered a patent lack of jurisdiction, the juncture at which the objection to jurisdiction is raised becomes an irrelevant consideration in contrast to it being a latent lack of jurisdiction.

In order to ascertain the nature ascribed to want of sanctions, cases as **Kanagarajah v The Queen (1971) 74 NLR 378** considered the previous opinions of Hon. Mosley S.P.J. in **Brereton v. Ratranhamy (1940) 42 NLR 149** pertaining to Section 425 of the previous Code of Criminal Procedure, which was identical to Section 537 of the Indian Criminal Procedure Code. A long line of decisions of the Privy Council and of the Supreme Court of India had held that the absence of a complaint or sanction as required by certain provisions is a defect which vitiates the proceedings and is not an irregularity curable under s. 537 of the Indian Criminal Procedure Code.

In the case of **In re Subramaniam A. I. R. (1957) Madras 442 at 446,** , Ramaswami, J. stated that:

> *" The 'want' of a complaint as required by law will affect the 'competency' of a magistrate to deal with a case and is not a curable error. The ' want' of a sanction required under any provision of law will similarly affect the competency of the Court and is not curable under this Section. But quite different would be irregularities in sanctions granted and in such cases irregularities in sanctions will be curable to the extent permissible under s. 537 Cr. P. C.*
>
> *Thus* ***a sharp distinction is drawn between initiation of proceedings without sanction as required by the sections and irregularities in sanctions granted****, the former being a defect which vitiates the proceedings*

ab initio and not an irregularity curable under s. 537 Cr. P. C. and the latter sharing that of other irregularities of a like nature being curable to the extent laid down in s. 537 Cr. P. C. ***To sum up, want of sanction cannot be cured but irregularities in sanctions can be cured***."

(Emphasis Added)

To clarify in considering the relevance of decisions based on the previous Code of Criminal Procedure, similarly to Section 436 of the present Code, Section 425 of the previous Code of Criminal Procedure provided that no judgment of a Court of competent jurisdiction shall be reversed on appeal on account, inter alia, of the want of any sanction required by section 147, unless such error, omission, irregularity, or want has occasioned a failure of justice. It must be noted that Section 147 (a) of the previous Code of Criminal Procedure Code is similar to Section 135 (1)(a) of the present Code.

Thereinafter the case of **Kanagarajah v The Queen (1971) 74 NLR 378** indicated that a non-compliance with requirements such as are contained in the current Section 135(1) would not only taint a preliminary inquiry in the Magistrate's Court where such an inquiry is held with a view to a committal for trial before a higher Court, but it would also render the High Court not competent to have proceedings in respect of such an offence. As such, a complete want of sanction or complaint would amount to a patent lack of jurisdiction that may be raised before this Court despite not having been considered before the Magistrate Court or the High Court previously.

In invoking Section 436 of the Code of Criminal Procedure, even if it were an event of a want of sanction under Section 135, it is stated that:

"Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account –

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice."

As such the occasioning of a failure of justice owing to such lack of sanction must be present in order to reverse or alter the judgment made in the instant case. As it stands the sentencing of the Accused found the Accused guilty of the first and second count and acquitting him on the third count, imposing fines of LKR 100 on the first count, and LKR 1500 on the second count. The Maximum sentence allowed under Section 177 is punishment which may be simple imprisonment for a term which may extend to six months, or with fine of one hundred rupees or with both. In the given circumstances a fine of One Hundred Rupees is not intended to hinder the Accused monetarily in any sense and I believe it is an entirely justified penalty for the crime he is convicted of under Section 177.

Given that Section 135 solely pertains to the first count, the sentencing and fine under the second count is not a relevant consideration before this Court. As a complaint has been made in the form of a B report, a sanction is not necessary to the filing of the present case before the Magistrate and the requirements under Section 135 (1)(a) have been sufficiently fulfilled, as such there is no necessity occasioning the invoking of this provision in the instant case nor is there a failure of justice occasioned by a lack of sanction, or by the non-revision of the decisions of the lower courts.

In the instant case I find that the B report bearing no. B 44/2007, dated 1st January 2007 by the Complainant; the Officer in Charge of Wattegama Police station amounts to compliance with Section 135 (1)(a) of the Code of Criminal Procedure and

I find no justifiable grounds to set aside the judgment delivered by the Magistrate Court on 24th July 2015 or the order by the High Court of Kandy dated the 13th October 2016 dismissing the appeal, as there is no failure of justice warranting the exercise of Section 436 of the Code of Criminal Procedure. As such, I find this Appeal dismissed and I order cost of Ten Thousand Rupees to be paid by the Appellant.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT

A.L SHIRAN GOONERATNE, J

I agree.

JUDGE OF THE SUPREME COURT