

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

In the matter of an application for  
Revision in terms of section 265 of  
the Code of Criminal Procedure Act  
No. 15 of 1979 read with Article  
138 (1) of the constitution

C.A.(PHC) APN 277/2005

HC/RA /199/2000

J. L.B.Kothelawala and 2 others  
13, Dickman's Lane,  
Colombo 4.

**Accused Petitioners**

**Vs**

Daya Ranjith Senanayake,  
No.9, Erin Place,  
Colombo 8.

**Complainant Respondent**

Before : W.L.Ranjith Silva, J. & A.W.A.Salam, J.

Counsel: Romesh de Silva PC with Sugath Caldera for the Accused Petitioner  
Petitioner.

C.V.Vivecananthan with Ms. Pancy. N. Joseph for the Respondent

W.Sub: 22-02-2011, 30-03-2011

Decided: 01-07-2011

**W.L.Ranjith Silva, J.**

This is an application for revision of the order dated 2-11-2005 made by the Learned High Court judge of Colombo wherein the Learned High Court Judge held that the 1<sup>st</sup> -3<sup>rd</sup> Accused Petitioners Petitioners, hereinafter sometimes referred to as the Petitioners were not, as a matter of right, entitled to be heard prior to the High Court reaching a decision to complain to the Magistrate's Court against the Petitioners in terms of Se.135-136(1) (f) of the Code of Criminal Procedure Act for giving false evidence in proceedings held before that Court.

To understand the issues before this Court it would be pertinent to have some knowledge of the background facts that gave rise to the proceedings in the Magistrate's Court culminating in this Court by way of a revision application.

The Complainant Respondent Respondent hereinafter sometimes referred to as the Respondent was the complainant in the Fort Magistrate's Court in case number 53466 in terms of section 136 (1) (a) of the Code of Criminal Procedure Act. He instituted this action against the Petitioners and two others, in the Magistrate's Court accusing them of committing the offences of Criminal Misappropriation, Criminal Breach of Trust and Abatement and Conspiracy to commit such offences, punishable under and in terms of section 113 (b) read with sections 386 and 102 of the Penal Code,.

The Learned Magistrate having perused the written complaint, the petition, the affidavit and documents annexed thereto and having entertained oral evidence of the Respondent and the submissions of the President's Council on behalf of the Respondent and being satisfied that there were sufficient grounds to proceed against the Petitioners and the other four accused, made order on the 24th of November 2000 issuing summons on the Petitioners and the other two accused, returnable on 19th of January 2001.

The Petitioners, without appearing in the Magistrate's Court on 19<sup>th</sup> January 2001, invoked the jurisdiction of the High Court in case number HC/RA/199/2000 by way of petition and affidavit, praying *inter alia* to set aside the said order of the Learned Magistrate dated 22<sup>nd</sup> of November 2000 on the ground that there were no sufficient grounds to proceed against them. In the said proceedings the Respondent filed statement of objections, documents and an affidavit dated 27 February 2001. A counter affidavit was filed by the 1<sup>st</sup> Accused Petitioner on 22<sup>nd</sup> May 2001. In paragraph 5 of that counter affidavit the 1<sup>st</sup> Accused Petitioner has sworn to as follows;

“Answering averments contained in paragraph 5 of the said affidavit, I state that consequent to investigations made by the officers of the Criminal Investigation's Department, the Complainant Respondent and his Secretary were arrested and produced before the Learned Magistrate, Colombo Fort.”

“I further state that the said case is now pending in the said Court. The complainant Respondent and the other suspect have been released on bail.”

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused petitioners by their respective affidavits dated 23<sup>rd</sup> May 2001 associated themselves with the affidavit of the first accused petitioner dated 22<sup>nd</sup> of May 2001.

The Respondent's position was that he had never been arrested nor had at any time been produced before any court in any case and that he was not released on bail as referred to in paragraph 5 of the said affidavit of the first accused Petitioner dated 22<sup>nd</sup> of May 2001.

The Respondent filed a motion dated 30<sup>th</sup> July 2002 in the High Court of Colombo praying *inter alia* that the Petitioners be charged and punished for Perjury under and in terms of section 190 of the Penal Code. The complainant's application was that under and in terms of section 135 of the Criminal Procedure Code, the High Court of

Colombo may complain to the Magistrate's Court of Colombo that the Petitioners have committed perjury and therefore must be tried and punished for Perjury by the Magistrate's Court.

However the court did not allow this application and the Respondent filed another motion together with his affidavit and once again moved court to act under section 135 (1) (c ) and the court made order directing the said motion be supported on 9<sup>th</sup> of October 2002 and in terms of the said order the motion was supported on 9<sup>th</sup> of October 2002.

The court allowed the application and directed the registrar to tender a draft complaint in terms of section 190 of the Penal Code and also directed to issue notice on the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Accused Petitioners.

The Petitioners made two applications C.A. No.2030/2002 and C.A.Revision N0.2031/2002 to the Court of Appeal against the said order of the Learned High Court judge dated 9 of October 2002 but in both these applications the Petitioner's did not take up the position that the Petitioners should have been heard before the Court decided to take action in terms of section 135 (1) (c) of the Code of Criminal Procedure Act.

The Court of Appeal dismissed the aforesaid applications and the Petitioners thereupon invoked the jurisdiction of the Supreme Court in S.C. Spl.L.A.Nos.292/2003 and 297/2003 and the Supreme Court made the following order.

### **The Supreme Court order**

Of consent the Supreme Court made *inter alia* the following orders.

- a) the present Judge presiding in court number 4 could commence proceedings *de novo* on the complaint made by the Complainant Respondent;
- b) the present Judge would be at liberty to consider the matter afresh;
- c) the findings made by the Court of Appeal and the former Judge would not be in any way binding on the Judge;
- d) the order dated 9 of October 2002 of the High Court is set aside *pro forma* without prejudice to the rights of parties.

On a perusal of this order it is apparent that the Supreme Court refrained from making any adverse order against the Respondent or from granting any relief to the Petitioners, as prayed for in their petition. The Supreme Court did not order that the Learned High Court Judge could not entertain such a complaint under and in terms of section 136 (1) (c) of the Criminal Procedure Code without hearing the Petitioners, instead directed the Learned Judge presiding in court number 4 to commence proceedings *de novo* on the complaint made by the Complainant Respondent.

After the said order of the Supreme Court a motion was filed on 6th January 2005 to enable the Counsel to support the application on 10th January 2005 inviting the High Court to make a complaint to the Magistrate's Court in terms of section 135 (1) (c) and (2) of the Code of Criminal Procedure Act. At this stage the President's Counsel appearing on behalf of the petitioners made oral submissions and tendered written submissions against this application. The Respondent objected to this procedure and took up the position that the petitioners cannot and should not be heard either by themselves or through their lawyers before the High Court decided to take action against the petitioner's under and in terms of section 135 (1) and section 136 (1) (c) of the criminal procedure code.

**Issue that had to be decided by the High Court**

Whether the High Court in the circumstances of this case should have permitted the Petitioner's to be heard prior to deciding whether or not to complain to the Magistrate's Court that the Petitioner's have committed perjury under and in terms of Sections 136 (1) (f) and 135(1) ( c).

The Counsel for the petition in his written submissions urged before this court the following grounds;

- a) that this court is *functus officio* and cannot hear any further application;
- b) that in any event there is no falsity in the averments contained in the counter affidavit filed of record in the High Court
- c) that there is laches on the part of the complainant in making this application
- d) that the application has been made *mala fide* in that this application reflects a long standing enmity of the complainant towards the accused Petitioner's consequent to the accused Petitioner's terminating the services of the Complainant Respondent.

The Counsel for the petitioner in his submissions made a gallant attempt to show that a complaint under section 135(1) (c) could be made only in continuing judicial proceedings and not after the proceedings were over. But this is an unwarranted restrictive interpretation as I find that nowhere in the particular section it is stated that such complaint could be made only during the continuance of a judicial proceeding. If one were to apply this narrow interpretation then it could be tantamount to restricting and curbing judicial discretion and judicial power vested in the court. What is necessary is that the act to have been committed during the course of a judicial proceeding, whether the judicial proceedings are alive and continuing or over and terminated. I hold that it is not necessary that a particular court should come to a conclusion or entertain an opinion that a false statement has been made whilst the

matter is in progress or is being argued. Even at a subsequent stage if the court becomes aware of such a false statement that Court must have the right and the jurisdiction to take cognizance of that matter.

According to section 135 (2) of the criminal procedure code if the Learned High Court Judge is satisfied on the evidence and documents placed before him that there are grounds to proceed against then, the Court would in terms of section 135 (2) make a complaint which shall be in writing under the hand of the registrar of the court and would take other necessary steps in terms of section 135 (3) and or section 136 (2) read with section 387 (1) of the said Act. Further in terms of section 182 (1) of the Code of Criminal Procedure Act, after receiving such a complaint, the learned magistrate had the jurisdiction to frame the charges and hear the case and the accused would be entitled to be heard only at that time and not before that otherwise it would be tantamount to a situation where an accused will have the opportunity to have a second bite of the same cherry.

Counsel for the Petitioner contended that in the event a complaint is made by the High Court, the high court may cause the accused to be arrested and sent him before the Magistrate's Court having jurisdiction in the matter and therefore the court is obliged before arriving at such a far reaching decision to make a complaint under Sec. 135 of the Code of Criminal Procedure Act, to hear the accused or such other person. In this regard I would like to refer to the relevant provisions of the law.

**Sec.135 (1) (c)**

any Court shall not take Cognizance of any offence punishable under sections 190, 193, 196, 197, .....etc of the Penal Code when such offence is committed in or in relation to any proceedings in any court except with the previous sanction of the Attorney General or on the complaint of such Court.

**Sec.135 (3);**

Where complaint is made by a court such court may cause the accused to be arrested and sent in custody before the Magistrate's court having jurisdiction.

With the greatest respect to the President's Counsel appearing for the Petitioner, I cannot agree with him. In this regard I would like to refer to and draw an analogy to the provisions of section 63(1) of the Code of Criminal Procedure Act.

**Section 63 of the Code of Criminal Procedure Act reads as follows;**

63 (1); Court may in any case in which it is empowered by this court to issue a summons for the appearance of any person other than a Juror issue, after recording its reasons in writing warrant for his arrest-

a).....etc,

According to this section there is no duty cast on the judge to hear the accused or any other person against whom process is being issued, prior to the issue of the warrant of first instance although it carries dire consequences.

There are numerous other occasions where complaints are lodged without giving the accused or the suspect a right to be heard before such complaints are made. Any member of the public could voluntarily give information to the police in certain matters. At the time of receiving such information there is no requirement of law that before recording such information the suspect should be heard by the police. There are situations where a report made to a magistrate may not be preceded by a first complainant. If an offence is committed in the precincts of a police station and in the presence of the officers of the police station then the Officer in Charge of the police station can make a complaint to court even without recording a first complaint in such an event the accused is not given the right to be heard before the police officer makes his complaint to court



In terms of section 136 (1) (c) of the Criminal Procedure Code, proceedings can be instituted upon the knowledge or suspicion of a Magistrate. This section permits another Magistrate to hear the case. The accused is not given the right to be heard before the proceedings are instituted.

In terms of section 136 (1) (e) proceedings can be instituted upon a warrant under the hand of the Attorney General. The accused would not be heard at all before the preparation of the warrant or before the warrant is filed in the court.

In similar vein it is not necessary ,in my opinion, that a hearing should be afforded to the petitioner's before the High Court decided to complain to the Magistrate's Court under section 135 (1) and 136 (1) (f) of the Code of Criminal Procedure Act.

For the reasons adumbrated by me in the foregoing paragraphs of my order I find that there is no merit in this application for revision and as such I dismiss this application for revision. I make no order for costs.

Application for Revision dismissed.

**JUDGE OF THE COURT OF APPEAL**

**I agree**

**A.W.A.Salam, J.**

**JUDGE OF THE COURT OF APPEAL**