

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

In the matter of an application for mandate in the nature of a writ of Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka and section 319 of the Code of Criminal Procedure Act No. 15 of 1979

Court of Appeal case no. CA/Writ/277/2017

M.C. Kandy case no. 773/17

Segusahib Mohamed Aswer
No.01, Habarana Road, Ganewalpola,
Kekirawa.

Petitioner

Vs.

1. Hon. Galan Silva,
The Learned Magistrate,
Magistrate's Court, Kandy
2. Magistrate's Court, Kandy
3. The Hon. Attorney General,
Attorney General's Department,
Colombo 12

Respondents.

Before : L.T.B. Dehideniya J. (P/CA)
: Shiran Gooneratne J.

Counsel : A. Mohamed Farook for the Petitioner.

Argued on : 10.10.2017

Decided on : 30.10.2017

L.T.B. Dehideniya J. (P/CA)

This is an application for a mandate in the nature of a writ of mandamus against the Magistrate Kandy to compel him to accept a private plaint filed by the Petitioner.

The Petitioner had obtained a loan facility from a financial institute. The Petitioner states that the finance company had offered the loan on the interest rate of 15% but later it had been increased to 26% without his consent and knowledge. The Petitioner further stated that he had requested for a certified copy of the loan agreement and the mortgage bond several times but the financial institution has neglected or failed to issue a copy. Under these circumstances the Petitioner filed papers to institute a criminal action, a charge punishable under section 400 of the Penal Code, in the Magistrate Court Kandy but the learned Magistrate has refused to issue summons on the basis that he was not satisfied to proceed with regard to the charge against the accused as per section 139(1) of Criminal Procedure Code. The petitioner's contention is that the learned Magistrate should have called the witnesses and form the opinion whether to issue summons or not.

Under section 139(1) the Magistrate has to form an opinion as to whether there is a reason to issue summons. The section 139 reads thus;

139.

(1) Where proceedings have been instituted under paragraph (a) or paragraph (A) or paragraph (c) of section 136 (1) and the

Magistrate is of opinion that there is sufficient ground for proceeding against some person who is not in custody -

(a) if the case appears to be one in which according to the fourth column of the First Schedule a summons should issue in the first instance, he shall, subject to the provisions of section 63, issue a summons for the attendance of such person;

(b) if the case appears to be one in which according to that column a warrant should issue in the first instance, he shall issue a warrant for causing such person to be brought or to appear before the court at a certain time:

Provided that -

(i) the Magistrate may in any case, if he thinks fit, issue a summons in the first instance instead of a warrant;

(ii) in any case under paragraph (a) or paragraph (b) of section 136 (1), the Magistrate shall, before issuing a warrant, and may, before issuing a summons, examine on oath the complainant or some material witness or witnesses; and

(iii) in any case under paragraph (c) of section 136 (1), the Magistrate shall, before issuing process, record a brief statement of the facts which constitute his means of knowledge or of the grounds of his suspicion, as the case may be.

(2) Where proceedings have been instituted under paragraph (f) of section 136 (1), the Magistrate shall forthwith examine on oath or affirmation the person who has brought the accused before the

court and any other person who may be present in court able to speak to the facts of the case:

Provided that such examination shall not be necessary where the Magistrate has before him a report of the facts of the case or a complaint in writing has been filed.

(3) Where proceedings have been instituted under paragraph (e) or paragraph (f) of section 136 (1), the Magistrate shall issue a summons for the attendance of the person named in the warrant or complaint, or a warrant for causing such person to be brought or to appear before the court at a certain time, according as the fourth column of the First Schedule provides that the case is one in which a summons or a warrant should issue in the first instance

Under sub section (1) (a) (ii) of this section it is not mandatory for the magistrate to examine witnesses before issuing summons; it is the discretion of the magistrate in considering the circumstances. If the learned Magistrate can form an opinion, on the papers itself, that there is no reason to issue summons to an accused person named in a private plaint filed by an individual, that opinion will not change by calling the witnesses. If there is a reason to frame charges according to the plaint filed, then only the necessity to call the witnesses to ascertain whether the summons should be issued or not will arise. If the Magistrate is of the opinion on the plaint itself that no offence disclosed, it is not necessary to call witnesses.

In the present case the Petitioner's allegation is that the financial institute did not issue a copy of the loan agreement and the mortgage bond. It does not constitute a criminal offence. It is a civil transaction. The Petitioner has marked the offer letter as P 1. Under the heading "interest" the offer made is "15% p. a. payable monthly and subject to

fluctuation at the discretion of the Commercial Credit and Finance PLC”
The financial institute had retained the discretion to alter the interest under this clause. Therefore the consent of the Petitioner is not required for any fluctuation of the interest. The Learned Magistrate very correctly formed the opinion not to proceed with the charge.

I see no reason to issue notice.

Notice refused and the application dismissed.

President of the Court of Appeal

Shiran Gooneratne J.

I agree.

Judge of the Court of Appeal