

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

In the matter of an Appeal under
Article 154P (6) of the Constitution of
the Democratic Socialist Republic of
Sri Lanka.

M.A.A.D.J.N. Munasinghe,
Public Health Inspector,
Walpola Kanda.

Complainant

C.A. Case No: CA (PHC) 292/2006

P.H.C. Kurunegala Case No:
HCR 35/2006

M.C. Kurunegala Case No: 26570

Vs.

The Manager,
Ceylon Cold Stores Ltd.,
No. 01, Justice Akbar Mawatha,
Colombo 02.

Accused

AND BETWEEN

The Manager,
Ceylon Cold Stores Ltd.,
No. 01, Justice Akbar Mawatha,
Colombo 02.

Accused-Petitioner

Vs.

M.A.A.D.J.N. Munasinghe,
Public Health Inspector,
Walpola Kanda.

Complainant-Respondent

The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

AND NOW BETWEEN

The Manager,
Ceylon Cold Stores Ltd.,
No. 01, Justice Akbar Mawatha,
Colombo 02.

Accused-Petitioner-Appellant

Vs.

M.A.A.D.J.N. Munasinghe,
Public Health Inspector,
Walpola Kanda.

**Complainant-Respondent-
Respondent**

The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent-Respondent

BEFORE : K. K. Wickremasinghe, J.
Mahinda Samayawardhena, J.

COUNSEL : Anil Silva, PC with AAL R. Deviligoda for
the Accused-Petitioner-Appellant
Nayomi Wickremasekara, SSC for the
Respondent-Respondents

ARGUED ON : 16.01.2019

WRITTEN SUBMISSIONS : The Accused-Petitioner-Appellant
– On 10.08.2018
The Respondent-Respondents – On
17.06.2019

DECIDED ON : 26.07.2019

K.K.WICKREMASINGHE,J.

The accused-petitioner-appellant filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of North Western Province holden in Kurunegala dated 12.09.2006 in Case No. HCR 35/2006 and seeking to set aside the order of the Learned Magistrate of Kurunegala dated 28.07.2006 in Case No. 26570.

Facts of the case:

The accused-petitioner-appellant (hereinafter referred to as the ‘appellant’) was charged in the Magistrate’s Court of Kurunegala for having manufactured and distributed a bottle of Ginger Beer with a bent straw inside and thereby committed an offence punishable under section 18(1)(a) read with section 2(1)(b) of the Food Act No. 26 of 1980. The productions were produced in the Magistrate’s court on

14.08.2003 whereas the offence was committed on 13.08.2003. The Learned Magistrate called for a Government Analyst's Report of the productions on 14.08.2003 and the said report was produced in the Court on 28.10.2004. The Government Analyst's Report mentioned that an examination of the contents of the bottle revealed the presence of a straw and pale yellow turbid liquid. It was further mentioned that there was no evidence for any tampering of the stopper.

Upon receiving the Government Analyst's Report, on 28.10.2004, the Public Health Inspector (hereinafter referred to as the 'respondent') had informed the Learned Magistrate that a complaint would be filed in the Magistrate's Court. Accordingly the complaint and a charge sheet were filed on 07.01.2005 and the appellant was noticed. In the charge sheet, the appellant was named as the Manager, Ceylon Cold Stores LTD. On 25.02.2005, one P. D. Sugathapala appeared on behalf of the Ceylon Cold Stores LTD and on 04.03.2005, the charge sheet was read to the said representative of the appellant. He pleaded not guilty to the charge. Thereafter the case was fixed for trial on 20.05.2005. The appellant raised a preliminary objection that the proceedings cannot be maintained as it had not been instituted against a natural or juristic person but against a non-existing person. Both parties had made submissions on this matter and on 22.07.2005, the Learned Magistrate fixed the case for trial dismissing the preliminary objection. The appellant preferred an application for revision, against the said order dated 22.07.2005, to the Provincial High Court of Kurunegala under case No. HCR 66/2005. The Learned High Court Judge affirmed the order of the Learned Magistrate and dismissed the said application without issuing notices to the respondents.

Thereafter, the case was again fixed for trial in the Magistrate's Court on 11.11.2005. However, the dates were moved by both parties in three occasions due

to non-availability of the prosecution witnesses and the appellant. Therefore the trial was not commenced. The appellant, on 16.06.2006, raised a preliminary objection in terms of section 20(1) of the Food Act. The Learned Magistrate overruled the said objection under section 39 of the Judicature Act, by the order dated 28.07.2006.

Being aggrieved by the said order dated 28.07.2006, the appellant preferred an application for revision to the Provincial High Court of North Western Province holden in Kurunegala. The Learned High Court Judge had dismissed the application on 12.09.2006, without issuing notices to the respondent, stating that the preliminary objection was raised after the matter was fixed for trial.

Being aggrieved by the said dismissal, the appellant filed this appeal.

The Learned President's Counsel for the appellant contended that the complaint was filed only on 07.01.2005 (Page 119 and 125 of the brief), after the prescribed three months period, as stated in section 20 of the Food Act.

The Learned SSC for the respondents contended that the appellant was not entitled to raise an objection to the jurisdiction after pleading not guilty to the charge. It was further argued that the appellant did not raise this objection on the basis of prescription until the trial was fixed and dates were moved in several occasions.

I observe that as per section 20(1)(b) of the Food Act as amendment by Act No. 20 of 1991, a prosecution for an offence under the Act shall not be instituted "after the expiration of three (3) months from the date of detection of that offence or where sampling is done, from the date of sampling". In the instant case, the complaint was filed on 07.01.2005, nearly after one and a half years of detection of offence. In the said complaint, it was mentioned that the complaint has been filed in terms of section 136(1)(b) of the Code of Criminal Procedure Act. Both the Learned

Magistrate and the Learned High Court Judge, was of the view that failure to raise the said preliminary objection as early as possible should be considered as a waiver on the part of the appellant.

The Learned SSC for the respondents submitted following cases in support of her contention;

1. **Sunanda Pathiraja V. OIC, Police Station, Kalutara North [CA (PHC) 181/2014 – Decided on 31.05.2019]**
2. The case of **Navaratnasingham V. Arumugam and another (1980) 2 S. L. R. 01**, in which it was held that,

“In any event, an objection to jurisdiction such as that in the present case must be taken as early as possible, and the failure to take such objection when the matter was being inquired into must be treated as a waiver on the part of the petitioner...”

3. The case of **Senarath Pathiranalage Gunathilake V. S.P. Sunil Ekanayake [SC Appeal No 26/2009 – Decided on 15.12.2010]**, in which it was held that,

“There are certain objections which must be raised at the earliest opportunity available. The objection to the jurisdiction of a Court is one...”

“In my view this is because of the effect of the failure giving rise to the objection, that such promptness is required...”

In light of above, it is understood that certain objections must be raised at the earliest opportunity. However, I think that the term ‘earliest opportunity’ cannot be

interpreted to be the very first date after filing of the complaint and such 'earliest opportunity' could vary according the proceedings of each Court. I observe that the complaint in the instant appeal was filed on 07.01.2005 and the summons was issued on the same date. Accordingly the case was called on 25.02.2005 and one P.D. Sugathapala appeared on behalf of the appellant. On that day, the Court directed him to bring a letter of authorization on next date i.e. 04.03.2005. Accordingly, the said Sugathapala appeared on 04.03.2005 and on the same day the charge was read to him, upon which he pleaded not guilty. On the same day, the Learned Magistrate fixed the case for trial on 20.05.2005. However, the proceeding of the said date is not available in the brief. I observe that date of 16.09.2005 is mentioned as 'Trial (1)'. On the said date, the trial was postponed to 11.11.2005, since the PW 01 was not available. On 11.11.2005, the trial was postponed due to absence of officers for the prosecution (Page 135 of the brief). Thereafter, on 27.01.2006, the appellant was not present and the trial was fixed for 21.04.2006. On 21.04.2006, again the PW 01 was not available and therefore the trial was fixed for 16.06.2006. On the said date i.e. 16.06.2006, the appellant raised the aforesaid preliminary objection on the basis of prescription.

I observe that even though the trial was fixed by the Learned Magistrate, the trial did not commence and the evidence of the witnesses was not led. Therefore, it is manifested that the appellant raised his objection before the trial commenced. I observe that in the case law submitted by the Learned SSC for the respondent, mostly the appellants raised their jurisdictional objections at the appeal stage and not in the first Court/original Court. Therefore the appellate Court refused to uphold such objection since it should be treated as a waiver on the part of the appellant. However, since the appellant in the instant case raised his objection at the original Court, especially prior to the commencement of the leading of

witnesses, I think this situation should fall, within an 'earliest opportunity' as described in our law. However, I must mention that this 'earliest opportunity' could depend on the circumstances of each case.

In the case of **Tunnaya alias Gunapala V. Officer in Charge, Police Station, Galewela (1993) 1 Sri L.R. 61**, it was held that,

"Equating a report under Section 116 (1) to an institution of proceedings is wrong."

In the said case, the Court took up the view that the statements on the law (obiter) in the case of **Attorney General V. Punchi Banda (1986) 1 Sri L.R 40 (C. A.)**, should not be followed. Accordingly in the case of **Tunnaya (supra)**, it was held that,

"...and at page 45 of the report... "once a suspect is taken before the Magistrate...on the basis that information is well founded then by virtue of s. 136 (1) (d) proceedings are instituted and the Magistrate is directed to start an inquiry under s. 145", are wrong in law and should not be followed..."

In light of above and upon perusal of the proceedings, it is understood that the instant case was instituted after filing of the complaint on 07.01.2005. It is clear that the period of three months was lapsed as mentioned in section 20 of the Food Act. Therefore the contention of the Learned President's Counsel for the appellant should be answered in affirmative. Accordingly I am of the view that both the Learned High Court Judge and the Learned Magistrate erred in overruling the preliminary objection.

In the case of **Bank of Ceylon V. Kaleel and Others (2004) 1 Sri LR 284**, it was held that:

" ...to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which is beyond an error or defect or irregularity that an ordinary person would instantly react to it ... the order complained of is of such a nature which would have shocked the conscience of the court."

Since the error on the part of the Court clearly caused a miscarriage of justice, I am of the view that this Court needs to invoke the revisionary powers to rectify such error. Therefore I set aside the order of the Learned High Court Judge dated 12.09.2006 in case No. HCR 35/2006 and the order of the Learned Magistrate dated 28.07.2006 in case No. 26570.

Accordingly the appeal is hereby allowed.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL