

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

*In the matter of an appeal against the  
judgment of the Provincial High Court  
exercising its revisionary jurisdiction.*

Officer In Charge  
Police Station  
Padukka.

**Complainant**

**Vs.**

Court of Appeal Application  
**No: CA/ PHC/231/15**

High Court of Avissawella  
**No: HCR/05/2015**

Magistrate's Court of  
Avissawella  
**No :68984**

Hanwella Rubber Products  
(corrected) Hunwella Rubber  
Products Ltd  
Tunnana

**Respondent**

**And now**

1. Manager (Mohan Perera).  
Hanwella Rubber Products Ltd,  
Tunnana
2. Hanwella rubber Products Ltd.  
Tunnana

**Petitioner**

**Vs.**

Officer In Charge  
Police Station  
Padukka

**Complainant-Respondent**

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

**Respondent**

2. W.P.Jayantha Nandana  
371/02/01 Kudaluwila  
Tunnana

3. R.L.A.Sepala Dasanayake  
379/C, Kudaluwila  
Tunnana

4. S.D.Padmini Chandralatha,  
393/1, Kudaluwila  
Tunnana

5. Padmasiri Weerasinghe,  
437/D/01 Kudaluwila  
Tunnana

6. G.A.Setunga.  
408/B/12/2, Kudaluwila  
Tunnana

7. R.S. Ariyaratna  
372/C Kudaluwila  
Tunnana.

8. N.A.Ajantha Hemajitha  
372/E, Kudaluwila  
Tunnana.

9. I.P.Gunatathna  
418/01/A, Kudaluwila  
Tunnana.

10. E.P.D. Sumethra Damayanthi  
419, Kudaluwila  
Tunnana.

11.D.P. Somaratna  
446/02/A, Kudaluwila  
Tunnana

**Aggrieved Party-Respondents**

**And now between**

S.D.Padmini Chandralatha,  
393/1, Kudaluwila  
Tunnana

**Aggrieved Party-Respondent**  
**Appellant**

**Vs.**

1. Manager (Akaravitage Chamara Wimalawardana).  
Hanwella Rubber Products Ltd,  
Tunnana
2. Hanwella Rubber Products Ltd.  
Tunnana

**Respondent-Petitioner-Respondent**

1. Officer In Charge  
Police Station  
Padukka

**Complainant-Respondent-**  
**Respondent**

2. Hon. Attorney General  
Attorney General's Department,  
Colombo 12

**Respondent-Respondent**

3. Padmasiri Weerasinghe  
437/D/01  
Kudaluwila,  
Tunnana.

**Aggrieved Party Respondent**  
**Respondent**

**BEFORE** : Menaka Wijesundera J  
Neil Iddawala J

**COUNSEL** : Harishka Samaranayake for the  
Appellant

Gamini Marapana PC with Navin  
Marapana PC and Jeevantha  
Jayathilake for Respondent-  
Petitioner-Respondents

Priyani Abeygunerwardena SC for the  
State.

**Argued on** : 22.03.2022

**Written Submissions on** : 30.06.2020 (Appellant)  
31.07.2020 (Respondents)

**Decided on** : 24.05.2022

## **Iddawala – J**

This is an appeal filed on 30.11.2015 against the order of the High Court dated 11.11.2015 which set aside an order of the Magistrate Court dated 30.04.2015 in Case No 68984. Case No 68984 was filed in terms of Section 98 of the Code of Criminal Procedure Act, No. 15 of 1979 (*hereinafter the CPC*) whereby the respondent was named as an accused for causing public nuisance. The respondent is a subsidiary of Hayley's Group and manufactures and exports rubber gloves. During the course of the instant application, all but one petitioner withdrew their petitions.

On 28.02.2015 the Magistrate issued a conditional order (under Section 98 of the CPC) detailing certain conditions to halt the operation of the factory and ordered the factory to be closed within 14 days. During the inquiry, the Magistrate called reports from the Central Environmental Authority and the office of the Medical Officer of Health Hanwella. Subsequently, on 30.04.2015, the Magistrate directed the respondent to close the factory, making the conditional order dated 28.02.2015 absolute. Aggrieved by the said determination, the respondent preferred a revision application to the High Court. On 11.11.2015, the learned High Court Judge set aside the Magistrate Court order and directed fresh conditions to the respondent, allowing the factory to continue its operations in compliance with the said conditions. Dissatisfied with such a pronouncement, the petitioner has preferred the instant appeal to the Court of Appeal.

During the argument stage, the counsel for the petitioner submitted that he will be canvassing a single issue of substantive law. The counsel for the petitioner impugned the learned High Court Judge's decision that the Magistrate's failure to consider the documents (which were not led as evidence during the inquiry) amounted to an irregularity warranting the interference of the High Court acting in revision. As such, the issue to be dealt with by this Court was framed as follows: had the High Court erred in law in holding that the Magistrate Court had failed to consider in his judgment a document that was not led in evidence? (Vide

Page 178, Vol 1 and Page 188, Vol 1 of Appeal Brief). The counsel's contention was that the Magistrate was correct in disregarding the documents as they were not authenticated or otherwise validated by way of evidentiary principles. In support of this contention the counsel submitted that ours was an adversarial system and not inquisitorial one where the Magistrate is expected to embark on a voyage of fact finding on his own. It was contended that the Magistrate is required to make an inquiry till the point of delivering a conditional order under Section 98 of the CPC. It was his submission that after such a conditional order, the burden shifts to the respondent, whereby the respondent must lead evidence to show cause as to why the conditional order should not be made absolute. Counsel for the petitioner further submitted that while Section 98 of the CPC envisions a procedural mechanism by which the environmental rights of citizens are safeguarded, it does not exclude the substantive laws of evidence and other laws. In support of this contention, counsel for the petitioner referred to instances where the contents of governmental reports such as Surveyor's Report, Government Analyst Report are required to be testified to carry any evidentiary value. The counsel further contended that a mere submission of a report by a government authority doesn't qualify such report as evidence, its authenticity and veracity must be tested before it is accepted as evidence. Referring to excerpts of the impugned High Court order (Vide Page 189, vol 1), the counsel for the petitioner argued that no greater status or credibility ought to be afforded to government authorities by virtue of its legitimacy as a state structure and that before the eyes of justice, all entities whether private or public are equally treated. Counsel argued that the High Court has erroneously concluded that reports, by virtue of it being produced by a state entity, ought to be considered. He contended that if such a construction is accepted by this Court it would open a floodgate, necessarily endowing the Magistrate Court with the power to consider any material presented before it by the government irrespective of its authenticity. (Vide Page 191, vol 1). In concluding, the counsel for the petitioner contended that the respondents cannot later come and agitate the application of the reports without leading them as evidence in the first instance.

The President's Counsel appearing on behalf of the respondent stated that as the respondent company has received an Environmental Protection License (EPL) the company cannot commit a public nuisance. The President's Counsel stressed on the adverse impact of an erroneous application of Section 98 of the CPC on the country's development projects and reiterated the role played by the respondent company within the community and the country at large. According to the written submissions of the respondent, at the time of filing the instant application, the company sourced almost 90% of all its raw material from the local market and had at the time around 3000 local latex suppliers. Additionally, at that time the respondent directly employed 500 employees in the factory which has in turn indirectly created 7000 employment opportunities across its value chain. The President's Counsel characterized the ground raised by the petitioner as a mere technicality that ought to be disregarded. The President's Counsel referred to **Dulfa Umma v Urban District Council, Matale 40 NLR 474** in support of the contention that a 'technicality' as the current issue should not vitiate the entire process before the High Court. Finally, the President's Counsel submitted that there was no need to lead the reports as evidence since they were called by the Magistrate himself and that in such a context, the contents of the report which revealed that there was no environmental impact from the factory, was erroneously disregarded by the Magistrate. Hence, the President's Counsel submitted that the High Court order dated 30.11.2015 which set aside the Magistrate Court order should be re-affirmed.

This Court will briefly set out the law governing public nuisance. Section 98 of the CPC confers vast powers on a Magistrate to act with urgency when confronted with a public nuisance. The marginal note of Section 98 of the CPC states, 'Conditional order for removal of nuisance' and begins by *stating "Whenever a Magistrate considers on receiving a report or other information and on taking such evidence (if any) as he thinks fit..."*. This section empowers the Magistrate to issue *ex parte* conditional orders in specific instances. Hence, Section 98(1) details the instances under which such a conditional order can be delivered and the actions

that the Magistrate it entitled order thereunder. As such Section 98(1) ends with the following:

*“.....such Magistrate may make a conditional order requiring that the person causing such obstruction or nuisance or carrying on such trade or occupation or keeping any such goods or merchandise or owning, possessing, or controlling such building, substance, tree, tank, well or excavation shall within a time to be fixed by such order –*

- (i) remove such obstruction or nuisance; or*
- (ii) suppress or remove such trade or occupation; or*
- (iii) remove such goods or merchandise; or*
- (iv) prevent or stop the construction of such building; or*
- (v) remove, repair, or support it; or*
- (vi) alter the disposal of such substance; or*
- (vii) remove such tree; or*
- (viii) fence such tank, well. or excavation as the case maybe.”*

A plain reading of Section 98(1) of the CPC reveals that the Magistrate has very wide powers under the section to issue a conditional order. These powers are in consideration of a sense of urgency in that the legislature has provided for the Magistrate to expediently intervene in instances where a public nuisance can cause irreparable danger. This is evident from the fact that the Magistrate is allowed to take drastic measures and make orders even in the absence of the faulty party. The threshold to issue such conditional order is *“Whenever a Magistrate considers on **receiving a report or other information and on taking such evidence (if any) as he thinks fit...**”* (Section 98(1)). The words are very wide enabling the Magistrate to act expediently to safeguard public interest. When such wide powers are vested, a Magistrate should exercise such powers sparingly, after careful consideration of all material relevant.

When considering Indian authorities (though the Sections are not identical to Sri Lankan context), the counterpart to Section 98(1) of the CPC is contained in Section 133 of the Code of Criminal Procedure India. Indian authorities commenting on the Section observes that proof of imminent danger or urgency is necessary for the Magistrate to exercise the wide-ranging powers vested on him to deal with public nuisance: *“there must be imminent danger to the health or the*



*physical comfort of the community in the locality in which the trade or occupation is conducted. The danger should be such that if the Magistrate does not take immediate action and directs the public to take ordinary course of law, irreparable damage would ensue”* (Principles of Commentary on the Code of Criminal Procedure, 1973 19<sup>th</sup> Edition, Delhi Law House, Page 968). Sohoni commenting on Section 133 of the Indian code observed the following:

*“the magistrate, while dealing with an application under Section 133 Cr. P. C would first issue a conditional order in Form No 20 of the code calling upon the respondent to remove the nuisance. If the respondent objects to do so on his appearance, he should be asked to show cause for the order being made absolute. Thereafter, the Magistrate has to take evidence in the matter as in a summons case, and only thereafter the Magistrate if he is satisfied, will make the order absolute.*

*There is no statutory provision in India justifying a private person or member of the public in demolishing a building etc., by way of abating a nuisance. The scheme of Section 133 to 141 indicates that in the case of such a public nuisance, anybody aggrieved by it should not take the law into his own hand but must resort to the particular procedure laid down therein. Section 133 of the Code provides a speedy and summary remedy in case of urgency where danger to public interest or public health is concerned. In all other cases the party should be referred to the remedy under the ordinary law or annoyance must be caused. Any person naturally can give a Magistrate information of the existence of any state of affairs, and when the Magistrate acts on that information he is acting suo motu.”*

(Sohoni’s The Code of Criminal Procedure, 1973 18<sup>th</sup> Edition Volume 2 (1985) at Page 953)

When examining Section 98(2) of the CPC, it provides for the following:

*“Any person against whom a conditional order has been made under subsection (1) may appear before the Magistrate making that order or any other Magistrate of that court before the expiration of the time fixed by that order and move to have the order set aside or modified in manner hereinafter provided”*

As such, it is clear that after an *ex parte* conditional order is issued by the Magistrate under Section 98(1) of the CPC, the person to whom the order is addressed is given an opportunity to ‘show cause’ (Section 100 of the CPC). If the person appears and moves the conditional order to be set aside or modified, the legislature provides that the Magistrate shall take evidence in the said matter and, depending on his satisfaction, either rescind or modify the impugned order or make the order absolute (Section 101 of the CPC). Under Section 101 of the CPC the Magistrate is allowed to either make the previous conditional order absolute or rescind or amend the previous conditional order. In the latter case, the amended conditional order will be made absolute. If the Magistrate, after evaluating the material presented by the person to whom the conditional order is addressed, is satisfied that the conditional order he previously made was not reasonable and proper, the Magistrate will not make the same absolute. (Section 101 of the CP). As held in **Kularatne v Dharnadasa (2001) ACJ 28 CA**, when a Magistrate makes a conditional order in terms of Section 98, it is the party who moves to have the conditional order set aside or modified that has to begin and adduce evidence to show that the order is not reasonable and proper. The overall burden of establishing a public nuisance lies on the complainant. Speaking on Section 101(1) of the CPC, **Greena Fernando v Teckla Saparamadu (1990) 1 SLR 270** held that *“Section 101(1) lays down the procedure to be followed when such party appears in Court and moves to have the order set aside or modified. This section makes it mandatory for the Magistrate to take evidence in the matter. A judicial investigation must be held and after it, if the court thinks that the conditional order is not reasonable and proper in view of the circumstances of the*

*case, it will either rescind it entirely or modify its terms so as to bring it into conformity with the requirements of the case.”*

From the above examination, it is clear that the Magistrate acting under Section 98 of the CPC has unique and wide powers. In exercising such power, the specific facts and circumstances should be considered by the Magistrate on a case-by-case basis. As the Magistrate is vested with a wide range of powers under Section 98 of the CPC with far reaching impact, the exercise of that power must be reasonable and proper. This is most important as the Magistrate will be acting in the public interest, whereby the interest of all parties must be considered and balanced accordingly. The judges of the courts of first instance may be called upon to make decisions that have implications on the social and economic policy of the country. In such a context, weighing and balancing individual rights against the requirements of the rest of the society must take center stage. Hence, it is the duty of the presiding judge to consider all available material prior to arriving at a decision that effectuate far-reaching implications. In the context of public nuisance, whereby a judge is endowed with drastic powers, court should exercise its power to issue conditional (or absolute) orders in a judicious manner at the most appropriate case of absolute necessity. Such an order must be issued under caution whereby the possible hardships and repercussions on the parties involved must be considered.

The conditional order delivered by the Magistrate on 28.02.2015 directed the closure of the respondent factory. When such a direction has been made, one must carefully evaluate all relevant and available material pertaining to the alleged public nuisance. The reports commissioned by the Magistrate would inevitably give insight into the operations of the factory and the allegations levelled against it. As displayed by the previous analysis, the role of the Magistrate is to take evidence and conduct a judicial investigation. Even at the point of making the conditional order absolute, the Magistrate failed to take cognisance of the commissioned reports, which in the considered opinion of this Court amounts to an irregularity that warrants intervention. As such, this Court agrees with the decision of the High Court dated 11.11.2015, whereby the learned

High Court Judge allowed the respondent to operate the factory while imposing fresh conditions to be followed by the respondent. The High Court has correctly held that the commissioned reports ought to have been considered by the Magistrate.

Hence, I see no reason to interfere with the learned High Court Judge's order dated 11.11.2015.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**Menaka Wijesundera J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**