

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

*In the matter of an Appeal under and in terms of Article 154P of the Constitution read with section 11 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 read with section 12(2) of part II of Court of Appeal (Procedure for appeals from High Courts established by Article 154P of the Constitution) Rules 1988.*

K.P. Nimal,  
Public Health Officer/Authorised Officer,  
Pimburaththewa.

**Complainant**

Court of Appeal Application  
No: **CA (PHC) 129/2014**

**Vs.**

Provincial High Court  
Application  
No: **HCRA 11/2013**

Magistrate's Court  
Polonnaruwa Case  
No: **91913 (AR 135/2012)**

1. Lanka Cannaries Private Limited,  
No. 43/75,  
Narahenpita,  
Colombo 05.

2. Mohomed Furquan Dossa,  
Director,  
No. 43/75,  
Narahenpita,  
Colombo 05.

3. Lakmini Renuka Premani Dossa,  
Director,  
No. 43/75,  
Narahenpita,  
Colombo 05

4. Shirley Mark Fernando,  
Director,  
No. 43/75,  
Narahenpita,  
Colombo 05

5. Don Herschal Jayaprithi,  
Director,  
No. 43/75,  
Narahenpita,  
Colombo 05

6. Lionel Cuthbert Read De Cabraal  
Wijethunga,  
Director,  
No. 43/75,  
Narahenpita,  
Colombo 05

**Defendants**

**AND**

1. W.M. Chandradasa Perera  
Company Representative,  
Lanka Cannaries Private Limited,  
No. 43/75,  
Narahenpita,  
Colombo 05

**Petitioner**

2. Lanka Cannaries Private Limited,  
No. 43/75,  
Narahenpita,  
Colombo 05

**1<sup>st</sup> Defendant- Petitioner**

**Vs.**

1. K.P. Nimal,  
Public Health Officer/Authorised Officer,  
Pimburaththewa.

**Plaintiff- Respondent**

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

**Respondent**

**AND NOW BETWEEN**

1. W.M. Chandradasa Perera  
Company Representative,  
Lanka Cannaries Private Limited  
No. 43/75,  
Narahenpita,  
Colombo 05

**Petitioner – Appellant**

2. Lanka Cannaries Private Limited  
No. 43/75,  
Narahenpita,  
Colombo 05

**1<sup>st</sup> Defendant-Petitioner-Appellant**

**Vs.**

1. K.P. Nimal,  
Public Health Officer/Authorised Officer,  
Pimburaththewa.

**Plaintiff- Respondent-Respondent**

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

**Respondent- Respondent**

**Before** : Menaka Wijesundera J  
Neil Iddawala J

**Counsel** : Asthika Devendra with Sanjeewa  
Ruwanpathirana for the Petitioner-  
Appellant.  
Chathurangi Manawaduge, State  
Counsel for the State.

**Argued on** : 07.09.2022

**Written Submissions on** : 01.10.2018 Respondent-Respondent  
19.10.2018 Petitioner-Appellant

**Decided on** : 31.10.2022

**Iddawala – J**

This is an appeal filed against the judgment of the learned High Court Judge of the Provincial High Court of Polonnaruwa dated 28.04.2014 bearing Case No. HCRA 11/2013, which dismissed the revision application filed against the order of the learned Magistrate of the Magistrate’s Court of Polonnaruwa in Case No. 91913 (AR 135/2012). The petitioner has invoked the appellate jurisdiction of this Court to set aside both orders and thereby to dismiss the

matter *in limine* as the matter in question is a preliminary objection based on prescription.

The facts of the case are as follows. The 1<sup>st</sup> Defendant-Petitioner-Appellant Company published the impugned advertisement in question in 'Lankadeepa' newspaper on 14.11.2011 indicating that 'MD Diabetic Jam' is suitable for diabetic patients. On 09.02.2012 Plaintiff-Respondent-Respondent (hereinafter referred to as Respondent) who is a Public Health Officer informed in writing to the learned Magistrate of Polonnaruwa regarding the violation of Regulation 13(9)(ii) of Food (Labelling and Advertising) Regulations of 2005 by the said advertisement. The charge sheet for the matter was filed on 28.06.2012.

The contention under scrutiny of this Court is whether this action is prescribed under section 20(1)(b) of the Food Act, No. 26 of 1980 as amended by the Food (Amendment) Act, No. 20 of 1991 (hereinafter referred to as the Food Act).

Section 20 (1) on the Institution of Proceedings in the Food Act states that;

*(1) A prosecution for an offence under this Act or any regulations made thereunder shall not be instituted-*

*(a) except by an Authorized Officer; and*

*(b) after the expiration of three months, from the date of detection of that offence or where sampling is done, from the date of sampling.*

Hence, it must be deliberated whether the written report sent by the Respondent to the learned Magistrate amounts to an 'institution of proceedings', and if it was duly sent before the time bar imposed by the Food Act. To understand what constitutes an 'institution of

proceedings', we must draw our attention to the section 136 (1)(b) of the Code of Criminal Procedure Act, No. 15 of 1979 (hereinafter the CPC).

*(1) Proceedings in a Magistrate's Court shall be instituted in one of the following ways: –*

*(a) ...*

*(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;*

At this instance, reference should be made to ***Tunnaya alias Gunapala v. Officer-in-Charge, Police Station, Galewela*** [(1993) 1 Sri L.R. 61 where Bandaranayke J. stated,

*“When proceedings are instituted under Chapter XIV on the other hand the Magistrate takes cognizance of the accusation contained in the Police report or in a written complaint or upon the taking of evidence as the case may be in terms of s. 136(1). Section 136(1) is read with the provisions of s. 135 when appropriate. It is to be noted at this stage that the language of all the clauses in s. 136(1) contemplates a person accused of an offence and not a mere suspect.”*

Therefore, it can be distilled from the above case that, instituting proceedings under section 136(1)(b) of the CPC entails three requisites;

- (i) Proceedings being instituted by an authorized officer indicated in the section,
- (ii) Specific material or the accusation to form the charge, and

(iii) Naming the accused

When perusing the written report sent to the learned Magistrate by the respondent - who is a Public Health Officer and thereby a public servant, it is evident that it explicitly identifies the 1<sup>st</sup> Defendant-Petitioner-Appellant Company as the producers and distributors of the item advertised by the impugned advertisement and the specific material to form the charge. Further, a request made to the Company Registrar was pending in order to obtain the details of the Board of Directors of the company. Under section 27 of the Food Act, it is a requisite under the provision to name the directors, general managers, secretaries or such similar officers as parties to the action if the offense is committed by a body corporate.

*27. Where an offence under this Act or any regulations made thereunder is committed by a body of persons then-*

*(a) if that body of persons is a body corporate, every person who at the time of commission of the offence was a director, general manager, secretary or other similar officer of that body;*

It is clear that, under Section 136(1)(b) of the CPC, institution of proceedings in a Magistrate Court (in addition to certain other modes) takes place upon the presentation of a written report complaining of the commission of an offence. Once a report is filed under Section 136(1)(b) of the CPC, the next step is to ascertain under Section 182 of the CPC as to whether there is a sufficient ground for proceeding against the accused. In the event of the opinion being favorable to the prosecution, the Magistrate shall frame a charge against the accused. Magistrates usually do not frame charges themselves in each and every case but accepts the



draft charge which is tendered by the prosecuting party. Yet in law, it is the charge framed by the Magistrate from the moment it is accepted. (See **CA-PHC-108/2010**- CA minutes dated 26.08.2014). Therefore, this Court determines that the written report sent by the respondent on 09.02.2012 unequivocally falls in line with 'institution of proceedings' under the section 136(1)(b) of the Code of Criminal Procedure Act read with sections 20 and 27 of the Food Act.

Furthermore, this Court would like to distinguish the case at hand from the case **CA (PHC) 292/2006** CA minutes dated 26.07.2019 relied upon by the counsel for the Appellant. In the latter case K.K. Wickramasinghe J. states that;

*'I observe that as per section 20(I)(b) of the Food Act as amended 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(I)(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.'*

However, in the above-mentioned case, the Public Health Inspector produced the impugned product - a Ginger beer bottle found with a bent straw inside, to the Magistrate within the time bar and thereafter the Magistrate called for a Government Analyst's report. The case was such that it required the involvement of a Government

Analyst and this particular report which amounted to the institution of proceedings under section 136(1)(b) of the Code of Criminal Procedure Act, was submitted to the Magistrate after the expiration of three months. On the contrary, in the case at hand, as observed above, the written report sent to the learned Magistrate of Polonnaruwa by the respondent Public Health Officer indubitably amounts to an 'institution of proceedings' and it has been duly sent within the three months' period.

Therefore, this Court finds no reason to interfere with the decisions of the learned Magistrate and the learned High Court Judge.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**Menaka Wijesundera J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**