R. P. WIJESIRI v. THE ATTORNEY-GENERAL

COURT OF APPEAL
RANASINGHE, J.
ABDUL CADER, J.
L. H. DE ALWIS, J.
APPLICATION NO. CA 822/80
HC KANDY 72/80
8, 9, 10, 11, 14 AND 15 JULY 1980.

Criminal Law – Acceptance of indictment by High Court – Section 480 of the Penal Code – Competency of the High Court – Absence of "complaint" by aggrieved person – Absence of investigation and sanction of the Attorney-General – Failure to hold non-summary inquiry – Sections 135 (i) (f) and 135 (a), (c) and (d) of Code of Criminal Procedure Act – Sections 109 and 118 of the Code of Criminal Procedure Act – Jurisdiction.

On 20.02.1980 the respondent (Attorney-General) filed an indictment in the High Court against the petitioner charging him for committing an offence under section 480 of the Penal Code. Summons was served on the petitioner (R. P. Wijesiri) and on the day fixed for trial before the indictment was read and explained to the petitioner, a preliminary objection to the competency of the Court was raised on the following grounds:

1. There was no complaint by the aggrieved person.
2. No sanction had been granted by the Attorney-General as required by section 135 (i) (f) of the Code of Criminal Procedure Act No. 15 of 1979.
3. There was no preliminary non-summary inquiry by Magistrate preceded by an investigation in terms of Chapter XI of the Code of Criminal Procedure Act No. 15 of 1979.

The High Court overruled the preliminary objections.

Held:

(1). The Attorney-General is a creature of the law and he is possessed of, and is entitled to exercise only such powers as have been vested in him by express provisions of law. There do not seem to be any inherent powers vested in him to which recourse could be had to justify any step taken by him which is not specially authorised by an express provision of law.

(2). The position in regard to the disposal of 'summary offences' under the Code of Criminal Procedure Act is similar to that which prevailed under the old Criminal Procedure Code. The institution of proceedings both in the Magistrate's Court and in the High Court in respect of the same offence at one and the same time would not be possible. The possibility of all summary offences being tried in the High Court upon indictments presented directly to it by the Attorney-General is also negatived.

(3). The conditions precedent to the taking of cognizance of an offence under section 480 of the Penal Code by the Court concerned are:

(a) there should be the 'previous sanction' of the Attorney-General

(b) the complaint should be made to the Court either by the 'person aggrieved' by the act of the accused person or by 'some other person' such as a Police

Officer. A complaint could be made by the 'aggrieved person' or 'by some other person' only to the Magistrate's Court. Neither of such persons can, under the Code of Criminal Procedure Act make an allegation either orally or in writing, to the High Court about the commission of an office.. Under the Code of Criminal Procedure Act the High Court can take cognizance of an offence only upon an indictment presented to it by or at the instance of the Attorney-General.

(4). According to section 392 of the Code of Criminal Procedure Act the High Court can take cognizance of such offences where they are brought up before the High Court by the Attorney-General in the circumstances set out therein, whether with or without an indictment. Furthermore cognizance can be so taken by the Court "anything to the contrary in this Code notwithstanding'. Thus if the said offences which are offences included within clauses (a) (c) and (d) of Section 135 (1) of the Code of Criminal Procedure Act, have been committed in the circumstances set out in Section 392, then the requirements of Section 135 (1) (a), (c) and (d) are brushed aside. They do not constitute a bar to the High Court taking cognizance of them once they are brought before it by the Attorney-General.

(5). Under the provisions of the Code of Criminal Procedure Act, criminal proceedings in respect of all 'summary offences' must in the first instance, originate in the Magistrate's Court: if the Attorney-General desires to have a 'summary offence' tried before the High Court he could do so only by following the procedure set out by the further proviso to sub-section 2 of Section 142 of the Code of Criminal Procedure Act No. 15 of 1979. Proceedings in respect of an offence under section 480 of the Penal Code must, under the Code of Criminal Procedure Act No. 15 of 1979, be initiated in the Magistrate's Court, irrespective of how it may be concluded – whether by the Magistrate himself summarily, or by the High Court upon an indictment presented to it by the Attorney-General. The Magistrate's Court can and must take cognizance of proceedings instituted in respect of an offence under section 480 of the Penal Code only if the requirements of section 135 (1) (f) of the Code have been complied with.

(6) As this is a case which had to be commenced in the Magistrate's Court, the sanction tendered with the indictment in the High Court said to be done out of an abundance of caution, cannot be considered to amount to a previous sanction granted in respect of an initiation of such proceedings.

Per Ranasinghe J :

"Chapter XI of the new Code is, in any opinion, one of the most, if not the most important safeguards against arbitrary deprivation of the liberty of the subject. It is the foremost bastion of the all important citadel of individual freedom. It is the bounden duty of the Courts to be extremely vigilant and ensure that those, who are charged with the duty of exercising the powers vested in them by the provisions of the said Chapter, not only exercise such powers within the limits imposed by law and do not overstep them, but also that they do not sidestep and circumvent the said provisions unless such deviation is clearly and categorically provided for by some provisions of law. Chapter XI is what gives teeth to the guarantee of individual freedom enshrined in the Constitution of Sri Lanka."

(7). There was no "first information" as required by Section 109 (1) of the Code of Criminal Procedure Act. The investigation of offences is now regulated by the provisions of Chapter XI of the said Code. In the course of an investigation under Chapter XI into a cognizable offence reports have to be sent to the Magistrate from time to time - Section 115 (1), Section 116 (1), Section 129 (1) (2) of the said Code. These reports, if not all, at least the final report under Section 129 (1) - should be forwarded to the Magistrate, whether or not a suspect has been taken into custody. The forwarding of these reports is imperative. The Magistrate should be kept informed of the progress of the investigations; for, the Magistrate has been conferred the power by section 119 of the Code of withdrawing a case, which is being investigated by the Police, from such investigating officer and proceeding himself to inquire into it, and either try it himself or commit it to a higher Court for trial.

(8). In Regard to the investigation of a non-cognizable offence such as one under section 480 of the Penal Code, section 181 (1) of the Code of Criminal Procedure Act provides that every inquirer and police officer shall have the power, upon receiving an order from a Magistrate to investigate a non-cognizable offence and to exercise all the powers conferred upon them by Chapter XI in respect of such investigations. The provisions of section 118 (1) have a compulsory force. If and when an investigation into an offence under the Penal Code becomes necessary, then such investigation must be done under the provisions of the Code of Criminal Procedure Act and no other (Section 5 of the Code). These provisions do not conflict with the any of the provisions of the Police Ordinance but are in fact complementary. The conducting of investigations under the provisions of Chapter XI attracts to itself the extremely satisfying and wholesome feature of reports having to be submitted to the Magistrate from time to time within the periods specifically set out therein, commencing from the report under section 109 (5) and culminating in the Final Report required by the provisions of Section 129 (2).

(9). Clearly an offence under Section 480 of the Penal Code is a non-cognizable offence. Admittedly no authority, in terms of Section 118 (1), had been obtained before the investigation which is said to have been carried out in this case, was begun. Even where a person utters words in the presence of a Police Officer which the Police Officer thinks is an offence under Section 120 of the Penal Code and conducts an investigation on that basis and the Attorney-General takes the view that the offence committed is one under Section 480 of the Penal Code, still even though the conducting of an investigation in the absence of a "first information" is not unlawful, the forwarding of reports to the Magistrate is inescapable. Here the correct procedure for the Attorney-General to follow would be to direct that the Police should, before any criminal proceedings are initiated, obtain authority from the Magistrate to investigate the non-cognizable offence under Section 480 of the Penal Code and conduct investigations afresh. The investigation said to have been carried out in this case is not one carried out under the provisions of Chapter XI. As the presentation of the indictment has not been preceded by an investigation under Chapter XI the indictment is invalid.

(10). The Attorney-General had no powers under the provisions of the Code of Criminal Procedure Act No. 15 of 1979 to present directly to the High Court without a preliminary inquiry under the provisions of Chapter XV of the said Act, an indictment in respect of an offence under section 480 of the Penal Code. The High Court had no jurisdiction to entertain the said indictment.

Per Abdul Cader J :

"I am in respectful agreement that investigation would include "powers of recording the first information, of requiring the attendence of persons able to give information with regard to an offence and to examine witnesses. "Therefore when the police officers in this case examined witnesses and recorded their statements without obtaining the authority of the Magistrate under section 118, they were not conducting a lawful investigation. Therefore, the indictment is not founded on evidence lawfully obtained."

(11). The burden is on the Attorney-General to satisfy Court that there "is any law specially provided for" to avoid a summary trial in a Magistrate's Court.

(12). It is not open to the Attorney-General to file a direct indictment in the High Court in respect of offences which are summarily triable by a Magistrate . It is only by directing a preliminary inquiry to be held by the Magistrate that he can divest the Magistrate of his jurisdiction to hear that offence summarily.

(13). There has been no investigation in terms of section 5 of the Code. Proceedings should have been initiated in terms of section 135 (1) (f) in the Magistrate's Court in respect of the offence under section 480 of the Penal Code.

(14). The statements recorded by the CID officer came into existence only because of his illegal act in marking an unlawful investigation. These statements cannot therefore be utilized either to found an indictment or as annexes to the indictment under section 162 (2) (b) of the Code which makes it mandatory for statements of witnesses listed in the indictment to be appended to the indictment. The indictment is invalid.

(15). The Attorney-General's powers are derived from the statute and are circumscribed by it. He has no powers other than those given by the statute - where a power is given to a public servant to do a certain thing in a certain way, the thing must be done in that way or not at all.

Cases referred to :

(1) *Moragodaliyanage Peris Perera* 3 SCC 161.
(2) *Piyadasa v. The Queen* 66 NLR 342.
(3) *Queen v. Thiagaraja* 57 NLR 58.
(4) *Vaithilingam v. The Queen* 54 NLR 345.
(5) *King v. Michael Fernando* 52 NLR 571.
(6) *R v. Thomis* (1900) 1 Br. 19.
(7) *R v. Mathes* (1899) 8 SCC 199.
(8) *R v. Meera Saibo* 3 CWR 149.
(9) *Kanagarajah v. The Queen* 74 NLR 378.
(10) *Attorney-General v. Sivapragasam* 60 NLR 468.
(11) *Arumugam v. Officer-in-Charge, Police Station, Mirihana* 72 NLR 301.
(12) *Panaditaratne v. A S P, Kegalle* 72 NLR 273, 276.
(13) Attorney-General v. Seedin 53 NLR 276.
(14) *The Queen v. Gnanasieha Thero and Others* 73 NLR 154, 189, 191, 203.
(15) *Bandarawella v. Carolis Appu* 27 NLR 401.
(16) *Brereton v. Retranahamy* 42 NLR 149.
(17) *Maraikar v. The King* AIR 1948 PC 82.
(18) *Purshottam v. Emperor* AIR 1946 Bom 492.
(19) *Thambiah v. The Queen* 68 NLR 25 (PC).

(20) *Rajapakse v. Fernando* 52 NLR 361.
(21) *Queen v. Abeysinghe* 68 NLR 386.
(22) *King v. Sepala* 38 NLR 285.

[**Note by Editor :** By Amendment No. 52 of 1980 section 393 was amended by the addition of a new sub-section 7 which made it lawful for the Attorney-General, having regard to the nature of the offence or any other circumstances, in respect of any summary offence –

(a) to forward an indictment directly to the High Court, or
(b) to direct the Magistrate to hold a preliminary inquiry in accordance with the procedure set out in Chapter XV in respect of any offence specified by him where he is of opinion, that the evidence recorded at a preliminary inquiry will be necessary for preparing an indictment; and thereupon such offence shall not be triable by a Magistrate's Court.]

Application for revision of order on preliminary objection given by the High Court Judge of Kandy

Dr. Colvin R. de Silva with *D. S. Wijesinghe, V. W. Kularatne* and *Gomin Dayasiri* for Petitioner.

Sunil de Silva, DSG with *D. P. Kumarasinghe, SC* and *Sarath de Abrew, SC* for Respondent.

Cur adv vult.

14th August, 1980
Ranasinghe. J.

This is an application made by the Petitioner to have the Order, dated 24.6.80, made by the learned Judge of the High Court exercising jurisdiction in the zone of Kandy, overruling a preliminary objection raised on behalf of the Petitioner against the acceptance by the High Court of an indictment filed by the Respondent charging the Petitioner with an offence under Section 480 Penal Code, revised.

On 20.2.1980 the Respondent filed an indictment, dated 13.2.1980, in the High Court against the Petitioner in which an offence under Section 480 Penal Code was alleged against the Petitioner. Summons were, on the same day, directed to be issued on the Petitioner returnable on 24.3.80. On 24.3.80 the Petitioner appeared before the High Court. A copy of the indictment had then been served on the Petitioner and the petitioner has been ordered bail in a sum of Rs. 500/-. The Petitioner furnished the said bail on the same day. The case had also been directed to be called on 7.4.80 for the purpose of fixing the date of trial. On 7.4.80 the case was called and fixed for trial on 23.6.80. In the meantime an inquiry was held on 3.6.80 into an application made by the defence; and that having been disposed of, the case was taken up for trial on 23.6.80. On that date, before the indictment was read and explained to the Petitioner, learned Counsel appearing for the Petitioner raised

a preliminary objection to the "competency of the Court to take cognizance of the offence set out in the indictment. The court thereupon heard submissions, made both on behalf of the Petitioner and on behalf of the Respondent, and made the said Order now sought to be revised in these proceedings.

The position taken up by learned Counsel appearing for the Petitioner was that the provisions of Section 135(1) (f) of the Code of Criminal Procedure Act No. 15 of 1979 (hereinafter referred to as the "New Code) required that, in order to initiate criminal proceedings in respect of an offence under Section 480 Penal Code, there should be a "complaint" to Court by the person aggrieved by the said offence or by some other person, with the "previous sanction" of the Attorney-General, that in this case there is neither a "complaint" nor such previous sanction of the Attorney-General: that, therefore the High Court was not "competent" to take cognizance of the said offence: that the correct procedure had also not been followed in the institution of the proceedings: that any prosecution in respect of an offence under Section 480 of the Penal Code should originate in the Magistrate's Court, with the "complaint" and the "sanction" required by the provisions of the said Section 135(1) (f) of the New Code: that, if the Attorney-General wishes to present an indictment to the High Court in respect of such an offence, the Attorney-General should require the Magistrate to hold a preliminary inquiry: that it is only after such a preliminary inquiry by a Magistrate that the Attorney-General could present an indictment in respect of such an offence to the High Court.

In defence of the procedure adopted by the Respondent, the Learned Deputy Solicitor-General, who also appeared before this Court on behalf of the Respondent, had contended that: there is no requirement that a "complaint" from the aggrieved person himself, who would be the person defamed is not a *since qua non* to the commencement of prosecution for an offence under Section 480: that, as the High Court too has jurisdiction to try offences under Section 480 of the Penal Code, a prosecution could be initiated in the first instance before the High Court itself: that in this case an indictment and the sanction having been both filed and tendered to the said High Court, the conditions required to be fulfilled for the initiation of proceedings in the High Court against the Petitioner in respect of an offence under Section 480 of the Penal Code have been well satisfied.

The learned Judge of the High Court, in his order delivered on 24.6.1980, held: that the requirements set out in the said Section 135(1) (f) of the New Code are conditions precedent only to the initiation of proceeding in the Magistrate's Court: that there is no

provision in the said Code for the making of a "complaint" to the High Court: that the indictment filed in this case is a valid initiation of proceedings in the High Court: that the filing of the sanction of the Attorney-General with the indictment in the High Court was superfluous.

Learned Counsel appearing for the Petitioner before us in this Court contended that the said High Court is not entitled to entertain the said indictment presented by the Respondent for the reason that the said indictment is not one presented according to law: that the Respondent cannot in law present an indictment to the High Court in respect of an offence under Section 480 Penal Code without a preliminary Magisterial inquiry preceded by a lawful investigation by the Police: that, if the Respondent desires to have an offence under Section 480 of the Penal Code tried by the High Court, proceedings should have been commenced before the Magistrate's Court along with the previous sanction required by section 135(1) (f) of the New Code, and the Attorney-General should have thereafter issued a directive to the Magistrate to hold a preliminary inquiry after which only the Respondent could have presented the indictment to the High Court, that in any event, an investigation, in terms of the provisions of Chapter XI of the New Code is a condition precedent to the commencement of proceedings before the Magistrate's Court, after which only an indictment could be presented to the High Court: that an indictment could be presented to the High Court only in respect of an indictable offence" which would only mean an offence in respect of which a preliminary inquiry, as set out in Section 145(a) and (b) of the New Code is held that the indictment presented in this case is bad in law as it has not been preceded by a preliminary Magisterial inquiry and/or a lawful investigation in terms of Chapter XI of the New Code, and as no previous sanction, as required by Section 135(1) (f) of the New Code, has been given: that, as the conditions necessary for initiating proceedings in respect of an offence under Section 480 of the Penal Code have not been satisfied, the said indictment presented by the Respondent is not one presented according to law: that, therefore, the learned Judge of the High Court has no jurisdiction to entertain the said indictment and to proceed to try the Petitioner upon the said indictment.

Although learned Counsel appearing for the Petitioner did, at the commencement of his argument, contend that no indictment can be presented at all to the High Court in respect of any offence without a preliminary Magisterial inquiry, he did, however, later "withdraw" from that position and did accept the position that, under the New Code, there is provision for the presentation of an indictment directly to the High Court in certain cases without the holding of a preliminary Magisterial inquiry. He, however, strenuously maintained that whatever such instances be, "direct indictment" was not possible in respect of an offence under Section 480 of the Penal Code.

The position taken up on behalf of the Respondent is: that the Respondent has the power, under the provisions of the New Code to present an indictment in respect of an offence under Section 480 of the Penal Code, directly to the High Court, without a preliminary Magisterial inquiry: that, an investigation in terms of the provisions of Chapter XI of the said Code, which is set in motion by a "first information" given under Section 109, and in the case of a non-cognizable offence, with authority obtained under Section 118 of the New Code, is not a *sine qua non* for the presentation of an indictment directly to the High Court by the Respondent: that there has been, in this case a lawful investigation by the Police upon which the Respondent was entitled to present the said indictment: that the provisions of Section 135(1) (f) of the New Code apply only to proceedings initiated in the Magistrate's Court and do not apply to proceedings initiated by the Respondent before the High Court: that the said indictment presented by the Respondent is *ex facie* valid: that it has been presented to a court which has jurisdiction to entertain it: that it is, therefore, for the Petitioner to show that the investigation held by the Police is illegal: that it is not sufficient for the Petitioner to show merely that it would have been better if the Respondent followed another procedure rather than that which the Respondent has in fact chosen to follow, but that the Petitioner must show clearly that the procedure followed by the Respondent is not warranted by law, and is illegal: that, even if no express provision has been made in the New Code in regard to the procedure adopted by the Respondent in this case, the provisions of Sections 6 and 7 of the New Code sanctioned such a course.

In order to consider the questions, which arise for determination in this application, it appears to me be helpful to consider briefly the historical background of the office of, the powers and functions of the Attorney-General, and also of the preliminary inquiries, more popularly known an "non-summary inquiries" held by Magistrates into offences with a view to committing persons accused of such offences for trial by a High Court.

A century ago, in the year 1880, in the case of *Moragodaliyanage Peris Perera* [1], the Supreme Court considered the question whether the Queen's Advocate had the power to prefer an indictment at the Criminal Sessions of the Supreme Court against a person who had not been duly committed to trial according to the procedure prescribed by Ordinance No. 11 of 1868. The question which came up for decision in that case was whether the Queen's Advocate had the power, *virtue officii,* to bring up persons to trial before the Supreme Court without any preliminary investigation or commitment, and it was held that the Queen's Advocate had failed to establish the

existence of such a power as claimed by him. In the course of the judgment Their Lordships considered both the origin of the office of Attorney-General and also the legal position to the holding of preliminary inquiries prior to the presentation of indictments to the Supreme Court. Cayley C.J. observed that: the importance of the question could hardly be overruled: the power claimed was very large and materially abridges many of what had hitherto been considered the rights and privileges of accused persons, and some of the safeguards of criminal prosecutions: that such power had not, so far as it could be gathered, over been exercised up to that time in this island: that nevertheless, if such power has been clearly conferred upon the Queen's Advocate by statutory enactment it must be upheld: that when such a large power which had not up to that time been exercised, is claimed and which seemed opposed both to the Common Law of England and of Ceylon it would be natural to expect to find the Legislature employing very clear language for its creation, that the power of the Attorney-General in England to file, criminal informations is a power conferred by the Common Law, but that the Common Law of England, except where it has been specially introduced by Ordinance, does not obtain in Ceylon: that the Proclamations of 23.9.1799, 13.2.1800, 13.2.1802, and Ordinances Nos. 5 of 1835, 6 of 1867, 2 of 1872 made provision for the administration of the criminal law of this island: that the criminal law, which was observed in Ceylon under the Dutch Government, must be taken generally to be the criminal law of the island at that time except so far as it had been altered by competent authority: that the office of Queen's Advocate seemed to correspond with that of Advocate Fiscal under the Dutch regime and the early years of British rule in Ceylon: that no precedent had been advanced or any authority cited to show that the Advocate Fiscal had power to bring persons to trial without any commitment or previous investigation, but that on the contrary such a power would seem to be opposed to the common law: that Vander Linden lays it down (Henry's translation p. 512) that, according to the general rule, all criminal prosecutions must be commenced by instituting and collecting evidence, and all criminal proceedings, after duly collecting and obtaining the necessary previous informations are instituted either by personal apprehension or by citation: that such a power has not been exercised at any time during the course of 84 years during which the maritime provinces had, up to that time, been under British rule or to have been expressly recognised in any of the enactments which had up to that time been passed to regulate the administration of justice: that section 37 of Ordinance No. 11 of 1868 enabled the Queen's Advocate to prosecute any crime or offence he chooses before the Supreme Court but that it says nothing about the mode in which he is to prosecute, and that the mode of such procedure is set out in detail by the said Ordinance, and that large powers of control are given to

the Queen's Advocate over the justices of the peace with reference to commitments for trial which would seem to be quite unnecessary if the Queen's Advocate could bring an accused person to trial without any commitment at all.

Clarence, J. in dealing with the question which arose for determination stated that: the power claimed for the Queen's Advocate is no less a power to require the Court to arraign and try any person whatever for any crime or offence cognizable by the Court upon the Queen's Advocate's information not preceded by any committal for trial or any previous charge whatever, which is a power wider than that extended by the Common Law to the Attorney-General: that if the Legislature intended to confer such a power such an intention should be declared in unmistakable terms: that unless there is some power resident in the Queen's Advocate independently of Ordinance No. 11 of 1868 to prosecute in some special manner, the charges which the Queen's Advocate may prosecute before the Supreme Court must be charges which have been previously prosecuted and prepared for trial according to the procedure which is described in the said Ordinance: that the Court has not been referred to any authority that the Queen's Advocate, as the successor of the Advocate Fiscal possesses the power now claimed for him independently of the said Ordinance: that, whatever the procedure under the Dutch had been, very quickly after the cession of the Dutch Settlements in Ceylon to the British Crown, the English procedure of a preliminary investigation by a justice of the peace of charges too grave to be summarily disposed of by police jurisdiction seems to have been adopted, and that the English method of committal for trial after a Magisterial investigation had been prescribed as the procedure to be then followed: that there was nothing to indicate that cases which the Queen's Advocate may elect to prosecute before the Supreme Court are to be considered as exceptions to the ordinary procedure for the initiation of criminal prosecutions: that no instance has been cited in which the extraordinary power now claimed for the Queen's Advocate has ever been exercised or recognized since the capitulation. Clarence J. also observed that the Proclamation of 25.6.1802 set apart Courts of Justices of the Peace and sitting Magistrates to discharge the Magisterial jurisdiction which had at first been exercised by the Fiscal's Courts very soon after the commencement of British rule, and that the Proclamation of 23.9.1799, the first Proclamation, which purported to deal with the administration of justice under British rule, expressly enacted that "no sentence shall in future be passed on the private examination of the party accused or on the written deposition of witnesses taken by or before any fiscal or any commissary out of Court or on the conclusions delivered in by the fiscal to the Court".

This judgment sheds considerable light on the legal position in respect of the powers and functions of the Chief Law Officer of the Crown. The designation "Attorney-General", it has to be noted, was substituted in place of the designation "Queen's Advocate" by the provisions of Section 1 of Ordinance No. 1 of 1883. The importance of this judgment, in regard to the necessity of a valid investigation under the relevant provision of law before the presentation of an indictment to a higher Court will be adverted to at a later stage of this judgment. Sansoni, J. in the case of *Piyadasa v. The Queen* [(2)], stated: that the Attorney-General's power with regard to the presentation of indictments is a purely statutory power derived from Section 165F of the Criminal Procedure Code, Chapter 16 (which said Code would hereinafter be referred to as the "Old Code"): that, where, in the presentation of an indictment, the Attorney-General takes any step which is not authorised by any provision of the Old Code, the Attorney-General would be acting *ultra vires*: that it is not open to the Attorney-General to invent a new procedure or to give himself new powers: that a valid indictment is a condition precedent to a valid trial.

It is, therefore, clear that the Attorney-General is a creature of law and that he is possessed of, and is entitled to exercise only such powers as have been vested in him by express provisions of law. There do not seem to be any inherent powers vested in him to which recourse could be had to justify any step taken by him which is not specially authorised by an express provision of law.

Section 10 of the Old Code laid down that any offence under the Penal Code may be tried by the Supreme Court or by any other court by which such offence is shown in the eighth column of the First Schedule to be triable. Section 12 of the Old Code provided that no District Court shall take cognizance of any offence unless the accused person has been committed for trial by a Magistrate's Court duly empowered in that behalf or unless the case has been transferred to it from some other court for trial by an order of the Supreme Court. Chapter XVI of the Old Code made provision for "the inquiry into cases which appear not to be triable summarily by a Magistrate's Court, but triable by a higher Court". Under the Old Code, whilst the Supreme Court had jurisdiction to try all offences under the Penal Code, the 1st Schedule to the Old Code set out certain offences which could also be tried by either the District Court or by both the District Court and the Magistrate's Court. The scheme of the Old Code undoubtedly was that all offences which were triable by only the higher courts, Supreme Court or District Court – could only be tried – save where express provision is made to the contrary

such as under Section 383 – upon an indictment presented by the Attorney-General. Thus a person accused of an offence, which the Magistrate's Court had no jurisdiction to hear and determine but which was exclusively triable by either the Supreme Court or the District Court, could be arraigned before either the Supremé Court, or the District Court only after a preliminary inquiry by the Magistrate terms of the provisions of Chapter XVI of the Old Code. The cases of *Piyadasa v. The Queen* [2], *The Queen v. Thiagaraja* [3], *Vaithilingam v. The Queen* [4], and the *King v. Michael Fernando* [5] constitute clear and sufficient authority for the propositions: that, under the Old Code, no indictment presented to the Supreme Court or to the District Court by the Attorney-General would be valid unless it was preceded by a valid committal by the Magistrate after a preliminary inquiry held by the Magistrate in terms of the provisions of the aforesaid Chapter XVI of the Old Code: that a valid indictment is a condition precedent to a valid trial before such a higher Court.

The Administration of Justice Law No. 44 of 1973, which came into operation from 1.1.1974, repealed the Old Code; and, under the said Law, criminal procedure in this Island was regulated by the provisions of Chapter II thereof. The effect of the said Law was that "non-summary inquiries", which were an important and wholesome feature under the Old Code, were all done away with, and offences, in respect of which preliminary inquiries by Magistrates were required under the Old Code, were henceforth to be tried by the High Courts, which came into existence under the said law and which were vested with the original criminal jurisdiction which had been vested in the Supreme Court, and the District Court upon indictments presented by the Attorney-General directly to the said Courts. Thus under the said Law the old familiar "non-summary inquiries" disappeared and "direct indictments" before the higher Courts came into being. The said Law, however, has in turn been repealed by the New Code, the provisions of which came into operation on 2.7.79.

The New Code, in effect constitutes a revival of the Old Code subject, however, to several variations and modifications. Chapter XV of the New Code is entitled: "Of the inquiry into cases which appear not to be triable summarily by Magistrate's Court but triable by the High Court". The Chapter in the Old Code which corresponds to Chapter XV of the New Code is Chapter XVI. Chapter XVI of the Old Code bears the title "Of the inquiry into cases which appear not to be triable summarily by a Magistrate's Court, but triable by a Higher Court". The wording of the titles of these two Chapters are almost identical and contemplate a similar class of cases. Chapter XVI of the Old Code opens with Section 155, the marginal note of which is "Preliminary Inquiry" and, contains the following provisions:

"When the accused appears or is brought before the Magistrate's Court, the Magistrate shall hold a preliminary inquiry according to the provisions hereinafter contained".

The position under the Old Code therefore was that, where criminal proceedings are instituted against an accused person in the Magistrate's Court in respect of an offence which was, according to the provisions of the Old Code, not triable summarily by the Magistrate's Court but was triable only by a higher court – the Supreme Court and the District Court – then it was the duty of the Magistrate to hold a preliminary inquiry in accordance with the provisions of the said Chapter XVI with a view to committing the accused to his trial before the Supreme Court or the District Court. The Section in Chapter XV of the New Code which corresponds to Section 155 of the Old Code is Section 145. This section provides:

"145. When the accused appears or is brought before the Magistrate's Court, the Magistrate shall in a case –

(a) where the offence or any one of them when there is more than one, falls within the list of offences set out in the Second Schedule to the Judicature Act No. 2 of 1978; or

(b) where the Attorney-General being of opinion that evidence recorded at a preliminary inquiry will be necessary for preparing an indictment, within three months of the date of the commission of the offence so directs, hold a preliminary inquiry according to the provisions hereinafter mentioned".

A comparison of the provisions of these two sections show at once that a preliminary inquiry does not have to be held, in terms of Chapter XV of the New Code, in regard to every offence in respect of which such a preliminary inquiry was necessary under Chapter XVI of the Old Code. Under Chapter XVI of the Old Code, as already stated, all offences not summarily triable by the Magistrate's Court had to be the subject of a preliminary inquiry, which was more popularly known as a "non-summary inquiry". An examination of the provisions of the New Code also reveals that, apart from the two categories of offences specified in Section 145, viz.

(i) those in respect of which a preliminary inquiry is compulsory – Section 145(a);

(ii) those in respect of which a preliminary inquiry will be held only upon a direction given by the Attorney-General – Section 145(b).

such preliminary inquiries may also be held on the initiative of the Magistrate himself – e.g. Sections 187(1) and (2); Section 387(2). The resulting position then is that, of those offences which, according to the First Schedule, are exclusively triable by the High Court, those that do not fall within the list of offences set out in Section 145(a) of the New Code need not be subjected to a preliminary inquiry in terms of the provisions of Chapter XV of the New Code before an indictment is presented in respect of any of them to the High Court. Those offences would, therefore, constitute a group of offences in respect of which "direct indictment before the High Court by the Attorney-General is possible under the New Code. This is a new concept brought in by the New Code which was not known to the Old Code under the provisions of which, as already stated, an indictment presented by the Attorney-General to either the Supreme Court or the District Court was, and had to be "rooted" in a preliminary "non-summary inquiry".

Learned Counsel for the Petitioner, as already stated, contends that the Attorney-General has no power to indict the Petitioner "directly" before the High Court in this case, and that proceedings against the Petitioner in respect of the offence alleged under Section 480 of the Penal Code should have been commenced with the sanction of the Attorney-General, in the Magistrate's Court, and that thereafter, if the Attorney-General so desired, the proceedings could have been brought up before the High Court by way of an indictment after complying with the procedure contemplated by the further proviso to Section 142, and the provisions of Section 145(b) of the New Code. The argument advanced in support of this contention is: that an offence under Section 480 of the Penal Code could be taken cognizance of only upon a "complaint" made with the previous sanction of the Attorney-General by some person aggrieved by such offence or by some other person with the like sanction", as required by Section 135(1) (f) of the New Code: that an offence under Section 480 being compoundable an accused person would be denied the opportunity of having the offence compounded if the proceedings in respect of such an offence are begun in the High Court without any preceding proceedings before the Magistrate's Court: that the "sanction" contemplated is a sanction given by the Attorney-General to something being done by another – either the aggrieved person himself or some other: that the definition of the word "complaint", as set out in the interpretation Section 2 of the New Code, also shows that proceedings in respect of an offence under Section 480 of the Penal Code must have its beginning in the Magistrate's Court: that

indictments could be presented only in respect of "indictable offences" as defined in Section 2 of the New Code.

Section 393 of the New Code sets out the powers of the Attorney-General. Subsection (1) provides that "it shall be lawful for the Attorney-General to exhibit information, present indictments and to institute, undertake or carry on criminal proceedings" in the cases set out therein. Among such cases are: where the offence is one in respect of which a preliminary inquiry under Chapter XV by a Magistrate is imperative or may be directed by the Attorney-General: where in a case referred to by a State Department, he considers that criminal proceedings should be instituted: where the case, being one not filed under Section 136(1)(a) of the New Code, appears to him to be of importance or difficulty or which for any other reason requires his intervention: where an indictment is presented or information exhibited in the High Court. Subsection (7) of Section 393 empowers the Minister to make regulations containing such incidental or supplementary provisions as may be necessary to enable the Attorney-General to "exercise his powers and duties under this section". Our attention has not been drawn to any regulations which are said to have been so made by the Minister. This section does not spell out the various instances in which the Attorney-General could directly indict an accused person before the High Court. Such powers, if any, would have to be looked for in the other provisions of the New Code.

It is contended on behalf of the Respondent that the said Section 135(1)(f) does not apply to prosecutions launched by the Attorney-General by way of indictment before the High Court: that "X 10" was in fact superfluous and had been tendered out of an abundance of caution in order to meet any possible objections raised on behalf of the Petitioner to thwart the issue of process.

The learned Judge of the High Court has held that the said Section 135(1)(f) has no application to a prosecution launched before the High Court by the Attorney-General by way of an indictment as he took the view that the words "any Court" appearing in Section 135(1) New Code means "any Magistrate's Court".

The questions, which have arisen for consideration, are: whether under the provisions of the New Code the Attorney-General has the power to present an indictment to the High Court in respect of an offence under Section 480 of the Penal Code, which said offence a Magistrate's Court too has power to dispose of summarily without a preliminary inquiry held by and before a Magistrate: and whether, even if the Attorney-General could do so, an investigation under

Chapter XI of the New Code is or is not a condition precedent to the presentation of such a "direct indictment".

An examination of the First Schedule to the New Code reveals the existence of offences, which are triable by the High Court and the magistrate's Court. Such offences would not, in view of the provisions of Section 2 of the New Code fall within the category of "indictable offebces", but would be "summary offences"; for, according to the definition set out in the said Section 2, an "indictable offence" is one which is triable only by the High Court, and a "summary offence" is one triable by a Magistrate's Court. Such an offence would not be in respect of which a preliminary inquiry under Chapter XV of the Code would be ordinarily compulsory. Section 142(1) of the New Code provides that, if the offence is one in respect of which, under Section 142(2) a preliminary inquiry is compulsory, the Magistrate "shall follow the procedure laid in Chapter XV" of the New Code and hold such a preliminary inquiry. If, on the other hand, the offence is a "summary offence", then Section 142(2) of the New Code provides that the Magistrate "shall follow the procedure laid down in Chapter XVII". Chapter XVII of the New Code is the Chapter which provides for the trial of offences which a Magistrate Court has the power to try summarily. The further proviso to subsection (2) of Section 142 of the New Code provides that, in any case where the offence does not fall within the Second Schedule of the Judicature Act the Attorney-General may in accordance with Section 145(1) of the New Code direct the Magistrate to hold a preliminary inquiry. Under the Old Code there was nothing to prevent a summary offence being disposed of – non-summarily" – **Dias: Commentary on the Ceylon Criminal Procedure Code, Vol I p. 488:** and *R v Thomis,* [6] *R v. Mathes* .[7] Just as much as Section 145 appearing in chapter XV of the New Code has no corresponding provision in the corresponding Chapter of the Old Code, so too the further proviso to subsection (2) of Section 142 of the New Code has no corresponding provision in the corresponding Chapter of the Old Code. Section 152(3) of the Old Code under which a Magistrate's Court could dispose of, in certain circumstances, an offence which is not ordinarily triable summarily by the Magistrate's Court finds no place in the New Code.

A consideration of these provisions leads me to the view that the position in regard to the disposal of "summary offence" under the New Code is similar to that which prevailed under the Old Code. The adoption of this construction would also, in my opinion, not only prevent the institution of proceedings both in the Magistrate's Court and in the High Court in respect of the same offence at one and the same time, but would also negative any possibility of all summary

offences being tried in the High Court upon indictments presented directly to it by the Attorney-General.

I shall now proceed to consider certain special features pertaining to those summary offences set out in Section 135 of the New Code. The said Section 135 appears under the heading "conditions necessary for initiating proceeding" and is part of Chapter XIII which deals with the "Jurisdiction of the Criminal Courts in Inquiries and Trials". According to Section 135(1)(f) an offence under Section 480, which is a section falling under Chapter XIX of the Penal Code, shall not be taken cognizance of by "any Court",

> "unless upon complaint made with the previous sanction of the Attorney-General by some person aggrieved by such offence or by some other person with the like sanction."

The word "complaint" is defined in Section 2 of the New Code as "an allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person . . . has committed an offence". According to Section 135(1)(f) the "complaint should be made by the aggrieved person or "some other person". That "some other person" could be a police officer. The part that the Attorney-General has to play, as far as Section 135(1)(f) is concerned, is only the granting of his "previous sanction". According to this section the conditions precedent to the taking of cognizance of an offence under Section 480 of the Penal Code by the Court concerned are: that there should be the "previous sanction" of the Attorney-General: that the "complaint" should be made to the Court either by the person aggrieved by the act of the accused person, or by some other person such as a police officer. Both requirements have to be satisfied before the Court could take cognizance of and proceed further. A "complaint" could therefore be made by either the "aggrieved person" or by "some other person" only to the Magistrate's Court. Neither of such persons can, under the New Code, make an allegation, either orally or in writing, to the High Court about the commission of an offence. Under the New Code the High Court can, as stated earlier, take cognizance of an offence only upon an indictment presented to it by or at the instance of the Attorney-General.

In regard to the contention of learned Counsel appearing for the Petitioner based upon the circumstances that an offence under Section 480 of the Penal Code is compoundable, it must be noted that, even though an accused has no right to move that an offence be compounded by the virtual complaint himself before the commencement of proceedings in the Magistrate's Court, yet if proceedings are not held in the Magistrate's Court, there would be no

occasion for the offence to be compounded. This is not in my opinion, a weighty consideration in the determination of the question now before this Court.

The objects and reasons for the requirement of the Attorney-General's "sanction" set out in Section 147 of the Old Code (which is the counterpart of Section 135 of the New Code) are set out in **Dias Commentary on the Ceylon Criminal Procedure Code at. p. 381, where the** learned author states:

> "the object of such legislation is two-fold, viz (1) to prevent the process of the Criminal Courts from being prostituted for the purpose of harassing an enemy by way of revenge or out of spite, and (ii) to enable the authorities to discourage false and vexatious cases, and to keep under control the number of prosecutions by requiring some public officer or Court to examine the facts of the case before a prosecution is sanctioned. Such legislation is a 'precautionary measure, in order to prevent frivolous or otherwise undesirable proceedings by private persons' – *R v. Meera Saibo* [8]"

The words "any court" would in their ordinary meaning apply to all courts established under the New Code. The criminal courts of original jurisdiction established under the New Code are only the High Court and the Magistrate's Court. In fact clause (c) of paragraph (1) of the said section 135 contains two offences – sections 191 and 192 – which are triable only by a High Court.

The case of *Kanagarajah v. The Queen,* [9] shows that a non-compliance with requirements such as are contained in Section 135(1) of the New Code would taint not only a preliminary inquiry in the Magistrate's Court where such an inquiry is held with a view to a committal for trial before a higher Court, but it would also render the High Court not competent to have proceedings in respect of such an offence.

That the Attorney-General could, under the provisions of the Old Code, take over and conduct the prosecutions in any criminal case, including a prosecution instituted under Section 148(1)(a) of the Old Code, and could also thereafter decide not to place any evidence before Court was decided by Sansoni, J., in the case of *Attorney-General v. Sivapragasam.* [10] The provisions of the Old Code which were considered by Sansoni, J. in that case were Sections 48(1)(a), 189(1), 194, 195, 199, 201, 202, 216(1) and 290 of the Old Code. Provisions corresponding to those sections in the Old Code are also to be found in the New Code but with one important difference

which limits the power of the Attorney-General as set out in the above mentioned judgment. Section 191 in the New Code is the counterpart of Section 199 of the Old Code. Subsection (2) of Section 191 of the New Code provides that such right of the Attorney-General could be exercised in certain circumstances only with the consent of the complainant.

Several sections appearing in Chapter XXXII of the New Code are, in my opinion, helpful in the consideration of this question. One is Section 387 the marginal note of which is: "Procedure in cases mentioned in Section 135(1) paragraphs ((b) and (c)". This section provides for the procedure to be followed when "any civil or criminal court other than a Magistrate's Court is of opinion that there is good ground for inquiring into any offence referred to in Section 135(1) paragraphs (b) and (c) committed before it or brought under its notice in the course of a judicial proceeding". The procedure that has to be followed in terms of subsections (2) and (3) of the said section is either trial before the Magistrate's Court or the holding of an inquiry by the Magistrate's Court under Chapter XV of the New Code. No provision is made to enable the Attorney-General to indict directly for trial before the High court.

Section 388 deals with offences under sections 173, 176, 177, 178 or 223 of the Penal Code, which are offences referred to in Section 135(1) (a) and (c) of the New Code. According to the provisions of sections 389 the Attorney-General could, in respect of the aforesaid offences specified in Section 388 and committed in the manner set out therein, *inter alia,* directly indict the offender before the High Court. Here, it must be noted, the power to directly indict is expressly given to the Attorney-General. According to the said paragraphs (a) cognizance could be taken of the offences set out therein without the previous sanction of the Attorney-General if the "complaint" is made by either the public servant concerned or a superior officer of such public servant. In the case of paragraph (c) the "complaint" could be entertained without the previous sanction of the Attorney-General, only if it is made by the Court concerned. Here then is an instance where there is an express power conferred upon the Attorney-General to indict directly in respect of offences specified in two of the clauses of the said Section 135(1) and all of which said offences are also summarily triable.

Section 392 of the New Code makes provision for the High Court to take cognizance of and try several offences, set out in paragraphs (a), (c) and (d) of subsection (1) of Section 135 of the New Code, in the circumstances set out therein. All these offences except two, viz. those under Sections 191 and 192 Penal Code referred to in clause (c), all offences triable by the Magistrate's Court as well. According

to Section 392 the High Court can take cognizance of such offences where they are brought up before the High Court by the Attorney-General in the circumstances set out therein, whether with or without an indictment. Furthermore cognizance can be so taken by the High Court "anything to the contrary in this Code not withstanding". Thus if the said offences, which, as already stated, are offences included within clauses (a), (c) and (d) of Section 135(1) of the New Code, have been committed in the circumstances set out in the said Section 392, then the requirements of Section 135(1)(a), (c) and (d) are brushed aside. They do not constitute a bar to the High Court taking cognizance of them once they are brought before it by the Attorney-General.

Section 391 provides that, except as provided in Chapter XXXII in which said Chapter the said Section 191 appears, no District Judge nor a Magistrate shall try a person for any offence referred to in Section 135(1)(b) and (c) of the New Code when such offence is committed before himself or in contempt of his authority or is brought to his notice during the course of a judicial proceeding.

A consideration of the provisions of the said Sections 388, 389 and 392 in particular seems to me to indicate that where the legislature intended that, in regard to the initiation of criminal proceedings in respect of any of the offences set out in the said Section 135(1), the requirements of the conditions precedent set out in any of the clauses forming part of the said section should be dispensed with, or that a specific procedure should be followed in bringing the offences to trial, the legislature did express itself clearly and specifically.

A glimpse into the history of "non-summary" inquiries in the criminal procedure of this Island shows, as indicated earlier, that a preliminary inquiry in the nature of the now well-known "non-summary inquiries" of a later period, being held prior to an offender being brought to trial before a high court is a feature that has been prevalent from the very early stages of the British occupation of this Island. It is in my opinion, a feature that has been so ingrained into our system of criminal procedure that it should not be lightly ruled out, unless such a course is made imperative by a clear and unambiguous provisions of law, and that in case of doubt it is the duty of the courts to adopt such a construction as would preserve to the subject the benefit and the protection of such a preliminary inquiry by and before a Magistrate.

It has also to be noted that, of the offences set out in clauses (a) to (g) of subsection (1) Section 135 of the New Code, whilst the

offences set out in clause (c) could also be taken cognizance of also upon complaint by the Attorney-General all the other offences set out could be taken cognizance of only with the previous sanction of the Attorney-General upon complaints made by the various persons or the courts referred to in the respective clauses contained in the said section.

The learned Deputy Solicitor-General, in the course of his argument stated that there is no specific provision in the New Code which expressly enabled the Respondent to directly indict the Petitioner before the High Court in respect of an offence such as is set out in the indictment presented by the Respondent in this case, and he referred this court to the provisions of Sections 1 and 7 of the New Code to support the procedure followed by the Respondent in this case. These two sections correspond to Sections 5 and 6 respectively of the Old Code. The learned author of the **Commentary on the Ceylon Criminal Procedure Code** (*supra*) states, *inter alia* at p. 22 that: "The Attorney-General is head of the Bar. In England he has no greater rights than other members of the Bar, and his opinion is, in the eyes of the court, entitled to no more authority than that of any other member of the Bar": that section 6 should be construed in the light of Section 4 of the Old Code (which corresponds to Section 5 of the New Code): that Section 6 should be called in aid only in the case of a "casus omissus". I do not think that there is, in the circumstances of this case, any need to have recourse to the provisions of Sections 5 and 6 of the New Code.

It must be noted that the sentence prescribed in respect of the offence under Section 480 of the Penal Code for an offender, who has not been previously convicted and sentenced to a term of 12 months or more, is only a term of 2 years simple imprisonment or fine or both. In the case of a previous conviction and sentence the only difference in the sentence is in regard to the description of the imprisonment; for it could then be rigorous. The maximum term of imprisonment, which could be imposed, is , therefore, one which a Magistrate's Court too can impose. A Magistrate's Court can also impose a fine up to Rs. 1,500/-

On a consideration of the foregoing which have been referred to by me, I am of opinion: that under the provisions of the New Code, criminal proceedings in respect of all "summary offences" must in the first instance, originate in the Magistrate's Court: that, if the Attorney-General desires to have a "summary offence" tried before the High Court, he could do so only by following the procedure set out by the further proviso to sub-section (2) of Section 242 of the Code of Criminal Procedure Act No. 15 of 1979: that proceedings in respect

of an offence under Section 480 of the Penal Code must, under the Code of Criminal Procedure Act No. 15 of 1979, be initiated in the Magistrate's Court, irrespective of how it may be concluded – whether by the Magistrate himself summarily, or by the High Court upon an indictment presented to it by the Attorney-General: that the Magistrate's Court can and must take cognizance of proceedings instituted in respect of an offence under Section 480 of the Penal Code only if the requirements of Section 135 (1)(f) of the said Code have been complied with.

As earlier stated, the Respondent had, at the time the indictment was presented to the HIgh Court, also tendered the document "X 10" which, on the face of it, is stated to be a "sanction" issued by the Attorney-General in terms of the provisions of Section 135 of the Code of Criminal Procedure Act No. 15 of 1979. Learned Deputy Solicitor-General stated before this Court that this "sanction" was tendered only out of an abundance of caution and for the reason which I have already referred to in the early part of this judgment.

If this is a case – as, in view of the opinion I have already formed, it is – which had to be commenced in the Magistrate's Court in compliance with the requirements set out in Section 135 (1)(f) of the New Code, then the said document "X 10" cannot be considered to amount to a "previous sanction" granted in respect of an initiation of such proceedings.

Although the view I have taken, as set out above, in respect of the right of the Respondent to have directly indicted the petitioner in this case before the High Court, is sufficient to dispose of this application, yet, I shall proceed to consider the submissions made with regard to the requirements of a lawful investigation under the provisions of the New Code, and also in regard to the legality of the investigation which is said to have been made in this case before the aforesaid indictment was presented by the Respondent.

The argument with regard to the necessity of lawful investigation was really put forward on behalf of the Petitioner on the basis that, even if the Attorney-General had the power to directly indict the Petitioner, such an indictment must be preceded by a lawful investigation. The learned Deputy Solicitor-General, whose position was that proceedings in a case such as this could commence before the High Court without either the inquisitorial or the adjudicátory powers of the Magistrate's Court being earlier invoked, did however, concede, and also base his submissions on the footing that the presentation of an indictment must be founded on material made available to the Attorney-General consequent upon an investigation

conducted by the Police. He maintained that in this case there had been lawful investigation by the Police: that the said investigation has been conducted by the Police under provisions of law which gave them the power to do so: that there is a presumption in favour of the legality and the regularity of such investigation: that the Petitioner has not specifically referred to any particular act of illegality: that, even if the investigation is not lawful, yet the material elicited in the course of such an unlawful investigation could be made use of by the Attorney-General on the principle that, even in a court of law evidence is not shut out merely because such evidence has been discovered in the course of an illegal search.

It is useful at this stage to refer to the position taken up by the learned Deputy Solicitor-General in answer to certain questions addressed to him by this court with reference to the arguments relating to the question of investigation. On being asked what provisions of law justified the investigations conducted by the Police upon the results of which the Attorney-General acted, he submitted that the investigations conducted could be justified either under Sections 56 and 71(2) of the Police Ordinance (Chapter 53) or under Chapter XI of the New Code; and in regard to the question whether it is the position of the Respondent that the investigation said to have been conducted in this case was in fact done under the provisions of Chapter XI of the New Code, he, however, remained non-committal.

The necessity for and the importance of a valid investigation by the Police into an offence before the commencement of proceeding before the Courts cannot be overstated. The judgments of Cayley C.J. and Clarence, J. delivered 100 years ago in the year 1880 in *M. Peris Perera's case* (*supra*) not only give expression, with respect, most eloquently and forcefully to the importance of this question, but also set out quite clearly how the court should approach a question such as this.

Any consideration of this question must commence with Section 5 of the New Code. This Section has introduced a very important change in the relevant provisions of law which had been in force up to the coming into operation of the New Code on 2.7.79. The offence, which is the subject-matter of the indictment under consideration in this case, is said to have been committed on 31.12.79, after the provisions of the New Code had come into operation. Section 5 of the New Code provides that:

"All offences –

(a) under the Penal Code.

(b) under any other law unless otherwise specially provided for in that law or any other law, shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of this Code."

The Section in the Old Code which corresponded to Section 5 of the New Code, was Section 4, the relevant provisions of which were as follows:–

"All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained . . . ."

Section 55 of the Administration of Justice Law No. 44 of 1973, referred to earlier, which was the relevant section under the said Law, provided that:

"All offences punishable under the written law of Sri Lanka shall be inquired into and tried according to the provisions hereinafter contained, subject, however . . . ."

An examination of the relevant provisions of the Old Code and of the said Administration of Justice Law shows that what was being regulated and was being provided for were only the **inquiry into** and **the trial** of offences. No provision was made therein for the **investigation** as well of such offences. "Investigation of offences" and "inquiry into offences" are two well known concepts in the field of criminal procedure of this Island which have existed, each with its distinct and separate features, at least from the time of the Old Code, for well nigh a hundred years. The distinction between these two concepts were retained in the Administration of Justice Law, referred to earlier, and have also been carefully preserved under the New Code which is now in operation. The inclusion is Section 5 of the New Code of the word "investigation" as well is all important and significant. The change so brought about must be taken note of, and the object and the purpose of such an all important change must be given effect to fully. I am, therefore, of opinion that, with the coming into operation of the New Code, not only must offences under the Penal Code be inquired into and tried according to the provisions of the New Code, but that the investigations into any offences under the Penal Code must also be done under the provisions of this New Code. It must be noted that, even in respect of offences coming under clause (b) of the said Section 5, such investigation, inquiry and trial could be held under provisions of law other than the provisions of the New Code only if it is "otherwise specially provided for in that law or any other law"

The provisions of the New Code which provide for the investigation of offences are to be found in Chapter XI of Part V, which is entitled "Investigation of offences", of the New Code. Part VI of the New Code deals with "Proceedings in Prosecutions" and Chapter XIII, the first chapter in the said Part VI, deals with "The Jurisdiction of the Criminal Courts in Inquiries and Trials".

Chapter XI of the New Code is, in my opinion, one of the most, if not the most, important safeguards against arbitrary deprivation of the liberty of the subject. It is the foremost bastion of the all important citadel of individual freedom. It is the bounden duty of the Courts to be extremely vigilant and ensure that those, who are charged with the duty of exercising the powers vested in them by the provisions of the said Chapter, not only exercise such powers within the limits imposed by law and do not overstep them, but also that they do not side-step and circumvent the said provisions unless such deviation is clearly and categorically provided for by some provision of law. Chapter XI is what gives teeth to the guarantee of individual freedom enshrined in the Constitution of Sri Lanka.

Although the learned Deputy Solicitor-General conceded that it is open to the learned Judge of the High Court, and also to this Court, to go "behind" the indictment presented in this case and examine whether the said indictment is one presented according to law, yet, he argued, that, in view of the presumption of regularity attaching to official acts and the provisions of Section 160(2) and of Section 394 of the New Code, it is for the Petitioner to satisfy this Court that the said indictment is not one presented according to law. I do not think that this contention put forward on behalf of the Respondent is entitled to prevail. Even if there is such a burden cast on the Petitioner, it appears to me that the Petitioner has upon the material placed before the High Court by the Respondent himself satisfied me, as would be shown later, that the investigations have not been conducted in this case, in accordance with requirements of law that have to be followed in this case.

All that Section 160(2) of the New Code states is that the filing of an indictment "shall be equivalent to a statement that all conditions required by law to constitute the offence charged and to give such Court jurisdiction have been fulfilled in the particular case." I do not think that this provision could be construed to create a presumption of validity in favour of the Respondent. It amounts only to a "statement", nothing more, nothing less. The provisions of Section 394 cannot also in any event be called in aid in this case by the Respondent for the reason that the Petitioner did not appear before the High Court either "under commitment for trial" or "in pursuance of

bail so to appear". The Petitioner appeared before the High Court only upon summons issued on him by the High Court after the said indictment was filed in the High Court. The Petitioner furnished bail only in the High Court after he had so appeared before the High Court on receipt of summons. The presumption raised by Section 114 (d) of the Evidence Ordinance in favour of official acts cannot and must not be extended to acts done by Police Officers in the course of an investigation into criminal offences.

Piyadasa's case (*supra*), and the case of *Kanagaraja v. The Queen* [9] also support the contention that this Court can go into the question of the validity of the indictment.

The Respondent has, tendered to the High Court a copy of the "I.B. Extracts" relevant for the purposes of the case, and has also annexed to the said indictment copies of the statements made to the Police by the witnesses listed in the said indictment. All these documents are filed in the record of this case maintained by the High Court; and the said record has been called for by this Court and is now before this Court.

An examination of the said extracts shows that: there has been no "first information" as required by Section 109(1) of the New Code: that the Police Sergeant, who is stated to have been present at the meeting at which the offence in question is alleged to have been committed and tape-recorded the speech, has himself made a statement on 19.12.79 to Inspector E. L. M. Perera, who is the only other Police witness whose name appears in the list of witnesses set out in the indictment and whose only function in this case seems to have been the recording of several of the statements set out in the said extracts: that the first statement which has been recorded is a statement recorded on 12.12.79 by the said inspector Perera at Matale of a person named Hussain who is not a witness in the indictment: that statements from several other persons, including the other four "lay" witnesses whose names are set out in the indictment, have been recorded by the Police between the 12th and 19th of December 1979: that at the end of the statements so recorded – except in the case of the statement of the Police Sergeant referred to above – there appears a certificate in conformity with, or substantially in conformity with the certificate set out in Section 110 (1) of the New Code: that in the recording of questions asked and the answers given in the course of the questioning, the provisions of the said Section 110 appear to have been followed.

That the absence of a "first complaint" as was popularly understood under the Old Code, is not a condition precedent to the

institution of proceedings was laid down in the case of *Arumugam v. Officer-in-Charge, Police Station, Mirihana,* [11] even though Alles, J., who was one of the Judges in the said case, had earlier, in the case of *Panditaratne v. A.S.P. Kegalle,* [12] expressed the view that such a first complaint was necessary. The provisions of Section 121 (2) of the Old Code are almost identical with the provisions of the corresponding Section 109 (5) of the New Code.

The investigation of offences is, as earlier stated, now regulated by the provisions of Chapter XI of the New Code. The provisions of this Chapter are more or less the same as the provisions of Chapter 12 of the Old Code. The various steps to be taken by the Police in investigating an offence from the moment the "first information" is given to the Police (or as in the case of the illustration given by learned Deputy Solicitor-General, and also given in *Arumugam's case* (*supra*), of the commission of an offence in the presence of a Police Officer himself) in terms of Section 109 (1) of the New Code are all set out in the other sub-sections of the said Section and in the succeeding provisions of the said Chapter.

In the course of an investigation under Chapter XI into a cognizable offence reports have to be sent to the Magistrate from time to time – Section 115(1), Section 116(1), Section 120(1), (2) of the New Code. These reports – if not all, at least the final report under Section 120(1) – should be forwarded to the Magistrate, whether or not a suspect has been taken into custody. The forwarding of these reports is imperative. The Magistrate should be kept informed of the progress of the investigations; for, the Magistrate has been conferred the power by Section 119 of the New Code of withdrawing a case, which is being investigated by the Police, from such investigating officer and proceeding himself to inquire into it, and either try it himself or commit it to a higher Court for trial.

In regard to the investigation of a non-cognizable offence, such as one under Section 480 of the Penal Code, Section 118(1) provides:

> "Every inquirer and police officer shall have the power upon receiving an order from a Magistrate to investigate a non-cognizable offence and to exercise all the powers conferred upon them by this Chapter in respect of such investigations".

It was argued on behalf of the Respondent that it was not obligatory on a Police Officer to obtain the authority contemplated in this sub-section to enable him to commence investigations into a non-cognizable offence, and that all that the said sub-section provides is that, if such authority is obtained, then all the powers

conferred upon an officer investigating a cognizable offence could also be exercised. **Maxwell: The Interpretation of Statutes (12th Edition)** at page 234 states that in some cases the expression "shall have power" has been construed to have a compulsory force. The case of *The Attorney-General v. Seedin* [13], in which it was held that a Police Officer may institute proceedings under Section 148(1) (b) of the Old Code in respect of a non-cognizable offence without obtaining a prior order from a Magistrate under Section 129 (the counterpart of Section 118 of the New Code) of the Old Code, is a decision made at a time when the provisions of the Old Code were in operation. In view, however, of the change that has been brought about as a result of the provisions of Section 5 of the New Code including therein investigations as well, this judgment cannot, with respect, be considered to hold good under the provisions of the New Code. In view of the importance that the investigation itself has now assumed under the provisions of the New Code, in that it has to be conducted under the provisions of the New Code, it appears to me that the provisions of Section 118(1) of the New Code must be construed to have a "compulsory force", and that the choice of whether or not to obtain authority from the Magistrate is no longer open to a Police Officer investigating a non-cognizable offence under the Penal Code.

It was contended on behalf of the Respondent that Section 5 of the New Code must be read with Section 121 of the New Code. The reading of these two sections together will not, in my opinion, enable a Police Officer to conduct an investigation into an offence under the Penal Code under the provisions of any law other than those contained in the New Code. The provisions of the said Section 5 will not and does not curtail or restrict in any way whatever the powers and duties Police Officers may have under any other provisions of law. All what it does is to direct that, if and when an investigation into an offence under the Penal Code becomes necessary, than such an investigation must be done under the provisions of the New Code and no other. The powers, outside the provisions of the new code, which it was contended the Police Officers were vested with and under which the investigation said to have been made into the offence set out in the indictment served on the Petitioner was sought to be justified, were pointed out to be contained in two Sections – Sections 56 and 79(2) of the Police Ordinance (Cap. 53). The Police Ordinance is, it must be noted, an Ordinance enacted long prior to the New Code, which, as earlier stated, came into operation only on 2.7.1979. Although certain observations, made in the course of the judgment in the case of *The Queen v. Gnanasieha Thero and Others,* [14] were referred to as indicating that Police Officers could be possessed of powers or duties of investigation under other statutes,

yet our attention was not drawn to, apart from the two above-mentioned Sections contained in the Police Ordinance, any other Section which makes any provision for the investigation of an offence – be it under the Police Ordinance or under the Penal Code or under any other provision of law. Section 56 of the Police Ordinance sets out the duties of Police Officers. Among the duties so set out is the duty "to detect and bring offenders to justice". Section 79 describes two offences and prescribes the punishment in respect of such offences. In fact sub-section (3) provides that every offence under the said section "shall be a cognizable offence within the meaning and for the purposes of the Criminal Procedure Code". These sections – or for that matter any other section in the Police Ordinance – do not in any way come into conflict with any provision of the New Code. Section 5 of the New Code does not in any way limit, control or detract from the powers conferred upon Police Officers under the provisions of the Police Ordinance. The provisions of the New Code and the Police Ordinance are in fact complementary.

Apart from the general considerations referred to above which make a strict compliance with the provisions of Chapter XI both salutory and absolutely essential, certain specific safeguards and restrictions imposed in regard to the reception in evidence of statements recorded in terms of the provisions of Chapter XI may not be available if such statements are recorded otherwise. For instance, the limitations placed by the provisions of Section 110(3) of the New Code may not be available in respect of statements recorded otherwise even if such recording is authorized by any other provision of law – than in the course of an investigation conducted under the provisions of the said Chapter II.

The conducting of investigations under the provisions of the said Chapter XI attracts to itself the extremely satisfying and wholesome feature of reports having to be submitted, as set out earlier, to the Magistrate from time to time within the periods specifically set out therein, commencing from the report under Section 109(5) and culminating in the final report required by the provisions of Section 129(2) of the New Code. Once an investigation under the provisions of Chapter XI commences there is a very close liaison, as it were, between the Magistrate and the Police Officer so conducting the investigations. That a Magistrate is kept informed of the progress of such an investigation is a safeguard which cannot be lightly dispensed with. It is one which must be jealously protected.

In my opinion, an investigation of an offence under the Penal Code can, after the coming into operation of the New Code, now be

carried out by a Police Officer only under the provisions of the New Code. An investigation into an offence under the Penal Code can and must be now carried out only under the provisions of the New Code.

Clearly an offence under Section 480 of the Penal Code is a non-cognizable offence. Admittedly no authority, in terms of Section 118(1) of the New Code, has been obtained before the investigation, which is said, to have been carried out in this case, was begun.

The learned Deputy Solicitor-General submitted that, where a person utters words in the presence of a Police Officer which the Police Officer thinks amounts to an offence under Section 120 of the Penal Code, and conducts an investigation on that basis, but where, once the material is placed before the Attorney-General, the Attorney-General takes the view that the offence constituted is one under Section 480 of the Penal Code, then, in such circumstances the absence of a "first information" and the failure to obtain authority from the Magistrate do not vitiate the investigation. Even though under the New Code the absence of a "first information" given to the Police by or on behalf of the victim of the offence under the Penal Code would not render an investigation conducted by the Police into such an offence unlawful, yet, what has to be noted is that even in a case such as is set out in the said illustration, the forwarding of reports to the Magistrate as referred to earlier, is inescapable.

Furthermore, the correct procedure for the Attorney-General to follow in such a situation would be to direct that the Police should, before any criminal proceedings are initiated, obtain authority from the Magistrate to investigate the non-cognizable offence under Section 480 of the Penal Code and conduct investigations afresh.

Upon the material disclosed by the I.B. Extracts, which have been tendered with the indictment to the High Court, I am of opinion that the investigation, which is said to have been carried out in this case, is not one carried out under the provisions of Chapter XI of the New Code. Thus, even if the finding of this Court had been that the Attorney-General had the power to indict the Petitioner before the High Court as has been done in this case, yet, as the presentation of the said indictment has not been preceded by an investigation under Chapter XI of the New Code, the said indictment would even then have been held to be invalid. It must, in this connection, be stated that any such finding, that the said indictment is bad as there had been no investigation under Chapter XI, would be on the footing that a "direct indictment", is respect of an offence under the Penal Code, must always be preceded by a lawful investigation, under the provisions of Chapter XI of the New Code. Such a view, however,

would not and must not be considered as being applicable also to the institution of all proceedings before the Magistrate's Court, in terms of Section 136 (1) of the New Code, as well; for, that question was not argued before us, and has not been considered by me.

For the reasons set out above, I hold that the Respondent has no power, under the provisions of the Code of Criminal Procedure Act No. 15 of 1979 (the New Code), to present directly to the High Court, without a preliminary inquiry under the provisions of Chapter XV of the said Act, an indictment in respect of an offence under Section 480 of the Penal Code: that the High Court has, therefore, no jurisdiction to entertain the aforesaid indictment, which has been presented by the respondent against the Petitioner, and to proceed to try the Petitioner upon the said indictment.

The application of the Petitioner is, therefore, allowed. The aforementioned order, dated 24.6.1980, made by the learned Judge of the High Court is set aside; and the Petitioner is accordingly discharged from the proceedings which have been instituted before the High Court on the basis of the said indictment.

Abdul Cader, J.

The petitioner appeared before the High Court Judge of Kandy on notice issued by that Court and indictment was served on him, charging him with criminal defamation under section 480 of the Penal Code. Before he pleaded to the indictment, his Counsel took a preliminary objection that the High Court had no jurisdiction to try the charge. He submitted that section 135(1)(f) had not been complied with. It reads as follows:-

> 135 (1): "Any court shall not take cognizance of (f) any offence falling under chapter 19 of the Penal Code unless upon complaint made with the previous sanction of the Attorney-General by some person aggrieved by such offence or by some other person with like sanction."

It was submitted before him that the indictment should have been accompanied by a complaint made by some person aggrieved by such offence or by some other person with the sanction of the Attorney-General, but what was filed in Court was a sanction of the Attorney-General along with the indictment, but not the complaint. It was also submitted that the person aggrieved must first obtain sanction of the Attorney-General and then tender the complaint before the Magistrate along with the sanction and, if the Attorney-

General wished to indict the accused before the High Court, he could direct the Magistrate to hold a non-summary inquiry under section 145(b) and thereafter indict the accused. The learned High Court Judge held that section 135(1)(f) would operate only when proceedings are initiated in the Magistrate's Court, but would not apply to the High Court and that the sanction which the Attorney-General filed along with the indictment is superfluous and, therefore, overruled the objection. It is against this order that the petitioner moved this Court by way of revision.

There is another matter referred to in para 6 of the petition which Counsel did not take up before us and, therefore, no order need be made in respect of that allegation.

Before us, on the question of jurisdiction, Counsel who appeared for the petitioner covered a wide area of the Criminal Procedure Code and made several submissions which were not urged before the High Court Judge which I shall tabulate in due course.

I shall now deal with the matter on which the High Court Judge has based his order. Dr. Colvin R. de Silva urged that the words "any court shall not take cognizance" appearing at the top of section 135(1) in its simple meaning would apply not only to the Magistrate's Court, but would apply to all courts wherever proceedings are initiated. Therefore, if proceedings were initiated in the High Court, it was obligatory that the indictment should accompany a complaint of some person aggrieved or of some other person with the previous sanction of the Attorney-General. He also urged that since the word "complaint" is defined as an allegation made orally or in writing to the Magistrate, proceedings should have been initiated in the Magistrate's Court and not in the High Court. To me the question whether "any court" would mean the Magistrate's Court only or would include the High Court also appears to be academic in this case in view of the latter submission of Dr. de Silva, viz:– that in the instant case, it is before the Magistrate that proceedings should have been initiated and not before the High Court.

Counsel for the respondent urged that (a) the word "complaint" in para (f) should be read to mean initiation of proceedings: and (b) in any event, there is no greater sanctity to a sanction by the Attorney-General when, in fact, the Attorney-General himself has filed the indictment. Dealing with the first submission, I find it difficult to agree that the word "complaint" can be given any meaning other than in definition contained in section (2) of the Code. It is stated there that "complaint" means "an allegation made orally or in writing to the Magistrate with a view to taking action under this Code that some person, whether known or unknown, has committed an offence." It

would be doing violence to this definition to give the word "complaint" the meaning "initiation of proceedings." It is to be noted that there should be not only an allegation made to a Magistrate, but that the allegation should be with a view to the **Magistrate** taking action under this Code, that some person had committed an offence. All these cannot be achieved by interpreting the word "complaint" to mean initiation of proceedings in the High Court.

As regards the second submission of the Deputy Solicitor, it is true that when the Attorney-General files an indictment, he impliedly gives his sanction to the "complaint" on which he had filed the indictment, but can the Attorney-General's implied sanction take the place of the written sanction that the law requires to be filed with the complaint? The question arises whether the Attorney-General can disregard the provisions of the law merely because, from the point of view of sanction, the same purpose is achieved. After all, the Legislature has required a particular procedure to be adopted if a charge under section 480 is to be tried in any Court and the procedure laid down is that the proceedings are to be initiated in the Magistrate's Court by filing a complaint with the previous sanction of the Attorney-General. An analysis of section 135(1) would establish the fact that that sub-section (c) contemplates a complaint by the Attorney-General. But (f) requires a complaint by some person aggrieved or any other person. Obviously, any other person cannot include the Attorney-General, as the Attorney-General is the sanctioning authority. This subsection, therefore, does not permit the Attorney-General to initiate proceedings. Therefore, while I agree that in an appropriate case the consent of the Attorney-General may not be necessary where he himself initiates proceedings, in the instant case proceedings have to be initiated by some party other than the Attorney-General with the written sanction of the Attorney-General.

Counsel for the respondent urged that it would be a sham to initiate proceedings in the Magistrate's Court and then to direct the Magistrate to hold a preliminary inquiry under Section 145(b) of the Code when the Attorney-General had decided already, before the initiation of proceedings in the Magistrate's Court, that the accused is to be tried in the High Court. I do not think for that reason that the Attorney-General should be permitted to override the express provisions of the law especially because the accused will have certain privileges he would not be able to avail of if an indictment is presented in the High Court in the first instance. For instance, in the Magistrate's Court, an accused may succeed in persuading the person aggrieved to compound the case. If the case, however, proceeds to the preliminary inquiry, he will have the opportunity of cross-examining the witnesses before he is committed to the High

Court. He may even succeed in breaking down the prosecution. These are substantial privileges which should not be denied to an accused.

Counsel for the respondent submitted that section 145(b) places a time limit of 3 months and if it is found that the 3 months had expired, the Attorney-General would be powerless to direct the Magistrate to hold a preliminary inquiry. The only answer is that if the Legislature has chosen in its wisdom to place a time limit of 3 months, the Attorney-General should abide by that time limit and if the time limit has expired, let the case take its own course in the Magistrate's Court. It is not as if such time limits are not unknown to criminal law. Incidentally, Dr. Silva pointed out that the maximum punishment imposable under this section is within the jurisdiction of the Magistrate.

In terms of section 393(1)(d) the Attorney-General can intervene in a case which appears to him to be of importance or difficulty or which for any other reason requires his intervention and it may well be that the Attorney-General has decided that in this instant case his intervention is necessary. But that intervention has to be within the framework of the law. It was open to him to have had proceedings initiated in the Magistrate's Court before the expiry of 3 months and directed the Magistrate to hold a preliminary inquiry and to commit the accused. Therefore, it is not as if the procedure is deficient. It is all there to be availed of by the Attorney-General without depriving the accused of the privileges and rights that he enjoys under the Code.

In *Kanagarajah v. Queen,*[9] an indictment had been filed in the District Court on a commitment from the Magistrate's Court where the plaint had been filed without complying with the requirement "unless upon complaint made by order of or under authority from, the Postmaster-General."

Samarawickrame, J. stated:–

> "The effect of the words "no court shall take cognisance of an offence ... except upon a complaint . . . . ." is to provide that a complaint by order of, or under authority from, the Postmaster-General, is a condition precedent to the assumption of jurisdiction to take proceedings in respect of any of the offences set out ... Without such a complaint therefore, a Court is not competent to have proceedings, and if it did, its proceedings, unless the defect can be cured by section 425 of the Criminal Procedure Code, would be invalid."

The latter portion of this last sentence will not apply to this case. He went on to say:–

> "In a long line of cases, in India it has been held that the absence of a complaint or sanction as required by provisions like s. 82(2) is a defect which vitiates the proceedings ..."
>
> And cited Aiyar J. who stated ... "want of sanction prescribed as a condition precedent for a prosecution, in short, defects which strike at the very root of jurisdiction stand on a separate footing, and the proceedings taken in disregard or disobedience would be illegal."

I, therefore, hold that the High Court has no jurisdiction to take cognisance of the charge laid before it and, therefore, the High Court has no jurisdiction to try the accused on the indictment presented before it.

Defence Counsel then urged that section 5 of the Code expressly requires investigation of all offences under the Penal Code "according to the provisions of this Code." It reads as follows:–

> "All offences (a) under the Penal Code (b) under any other law unless otherwise specially provided for in that law or any other law, shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of this Code."

He submitted that there has been no investigation under this Code as required by this section and, therefore, this offence cannot be "tried or otherwise dealt with" for that reason.

Certain statements made by certain witnesses have been annexed to the indictment as statements on which the Attorney-General relies for the indictment. The statements that were served with the indictment on the petitioner do not contain the certificates required by section 110 of the Code. On a perusal of the record, I find that, according to the Information Book extracts furnished to the Court, all the statements bear the certificates of the officers who recorded the statements.

Counsel for the respondent would not categorically state that there was or was not an investigation under chapter XI of the Code. But he put forward the proposition that these statements could well have been recorded under the Police Ordinance in terms of section 79(2) of that Ordinance. In the first place, we have no material before us that, in fact, the Police officers had acted under that Ordinance.

When this was pointed out to the Deputy Solicitor General, he moved to file an affidavit from a police officer almost at the conclusion of the reply of Dr. Colvin R. de Silva on the 5th day of the hearing, to which the latter objected, whereupon the document was withdrawn. In the result, we have no material before us under what provisions of the law these statements were recorded. Secondly, there is no provision in the Police Ordinance as regards the manner of investigation of the offences that come to the knowledge of the police officers. It is the Code of Criminal Procedure on which the police officers have to rely to record statements and to conduct further investigations. In any event, section 5(b) of the Code requires an investigation of an offence even under the Police Ordinance to be done in terms of the Code. Even under the old Law when section 4 did not include investigations, Nagalingam, J. had said in the case of *the Attorney-General v. Seedin.*[13]

> "I think, in so far as Section 71 comes into conflict with the provisions of the Criminal Procedure Code, the provisions of the Code must prevail over that of the Police Ordinance."
>
> "If a Police officer is, therefore, required by Section 57 of the Police Ordinance to detect offences and bring the offenders to justice, I take it, it will be his proper duty to make first of all a complaint to the Magistrate, in order to bring the offender to justice."

The fact that the police officers who recorded the statements in the instant case have appended certificates may indicate that they thought they were functioning under chapter XI of this Code.

Section 480 with which this accused is charged is a non-cognizable offence. Section 118(1) requires every police officer to obtain the authority of the Magistrate to investigate a non-cognizable offence. Such authority was not obtained in this case. Counsel for the respondent stated that the authority under this section would be necessary only if the Police officer wishes to avail himself of the succeeding sections of that chapter. But Counsel for the petitioner pointed out that any form of investigation, even the recording of statements, fall within the meaning of investigation and, therefore, there is no material before Court that there has been an investigation "according to the provisions of this Code" as required by section 5. In addition, he submitted there are many other steps which that chapter requires the police officer to do and which have not been done, leading to the conclusion that there had been no investigation in terms of section 5. He referred to section 120(3) and submitted that the police are required to forward their report in the prescribed

form to the Magistrate immediately the investigation is completed, and submitted that there is a liaison between the police and the Magistrate by which the rights of the subject are protected against the arbitrary conduct of the police. He submitted further that section 120(1) and (2) refer to reports every 15 days and detention for periods of 15 days. He submitted that, though there is a co-relationship of a report with the order of detention, it does not, therefore, necessarily mean that it is only in cases where an accused is in custody that such reports are necessary. He pointed out that section 120(1) refers to "every investigation under this chapter" and the chapter refers not only to investigation of cognizable offences, but also non-cognizable offences.

He drew our attention to the case reported in 73 N.L.R. 154 at 189.

> "It would appear from the evidence that the Criminal Investigation Department fell into the error of thinking ... that while the Detention Order was in force the Criminal Investigation Department could exercise all the rights and powers of an investigator under the Criminal Procedure Code without regard to any of the restrictions, limitations and obligations placed upon investigators by that same law."

Again at page 191:–

> "The absence of a power in the police ... to investigate non-cognizable offences under chapter 12 without an order from a Magistrate is noteworthy. It seems that the Legislature was not prepared to countenance the indiscriminate use of the Police agency for the investigation of every minor crime and give rise to a police ridden-state; again, when crimes of a serious nature such as offences against the State were made non-cognizable, the Legislature has obviously proceeded on the premise that the power of arrest without warrant and **of compulsive investigation** (emphasis is mine) under chapter 12 should be withheld from the minions of the State such as inquirers and police officers in relation to such offences unless they first had authorisation from an independent judicial officer."

As Dr. Colvin R. de Silva pointed out, the statements that have been recorded in this case have been recorded admittedly without the authority of the Magistrate under section 118. These persons could well have made statements because they did not know that they could not be compelled unless authority had been obtained under chapter XI. He submitted that there has been a compulsive investigation without the authority of the Magistrate. Thus, in terms of

section 109(6) a police officer is empowered "to require the attendance before himself of any persons ... who, ... appears to be acquainted with the case and such person shall attend as so required." Such person shall be bound to answer truly all questions ... put to him by such officer – section 110(2).

Yet another privilege that an accused enjoys is that if the statements are recorded under this Code, the statements will attract to them the provisions that such statements cannot be used to corroborate, but only to contradict.

Counsel for the respondent referred us to section 121. But that section will be applicable only to such powers or duties that are lawfully vested in or imposed on the police. That section cannot be construed to give them a licence to act outside the Code, unless they are expressly empowered by some statute, notwithstanding the provisions of section 5 of the Code.

Counsel for the respondent pointed out that in the 53 N.L.R. case[13] referred to, Nagalingam, J. held that a police officer may institute proceedings in respect of non-cognisable offences without obtaining a prior order of the Magistrate under (the then) section 129 to investigate the offence. When this judgment was delivered, section 4 of the old Criminal Procedure Code was in operation. Section 4 reads as follows:–

> "All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained."

Section 4 makes no reference to investigation, whereas there is a substantial difference in the present Code where investigation under the Code has been included as a peremptory requirement in section 5. That judgment is, therefore, to be distinguished.

Besides, it is important to note that Nagalingam, J. stated in that case, "there is no evidence whatsoever to show that the police officer did proceed to make an investigation of the complaint that was made to him. The record only describes that the police officer made a complaint to the Magistrate of the commission of the offence coupled with an application to the Magistrate that summons should issue on the accused." That judgment does not support the contention of the State.

Counsel for the respondent also referred us to the Judgment in *Bandarawella v. Carolis Appu.*[15] That was a case where evidence obtained without compliance with the requirements of section 36 of

the Excise Ordinance was declared admissible. I do not think that case has any relevance to the facts of this case. In any event, once again, the very important difference in section 5 will make that case, too, inapplicable to these proceedings. In the 53 N.L.R. case referred to, Nagalingam, J. stated as follows:–

> "What Section 129 does say is that where a police officer does receive an order from a Magistrate authorising him to investigate a non-cognisable offence, then by virtue of that authority he would become entitled to exercise the powers conferred upon a police officer by Chapter 16 of the Criminal Procedure Code, namely, powers of recording the first information, of requiring the attendance of persons able to give information with regard to an offence, to examine witnesses, to carry out searches, & c."

I am in respectful agreement that investigation would include "powers of recording the first information, of requiring the attendance of persons able to give information with regard to an offence and to examine witnesses." Therefore, when the police officers in this case examined witnesses and recorded their statements without obtaining the authority of the Magistrate under section 118, they were not conducting a lawful investigation. Therefore, the indictment is not founded on evidence lawfully obtained.

Section 5 of the Code is to the effect that all offences under the Penal Code shall be investigated ... tried ... according to the provisions of the Code. Therefore, the High Court Judge is not empowered to try this case as there has been no investigation according to the provisions of this Code.

The next submission made by Defence Counsel was based on the First Schedule to the present Code and the definition of "indictable offence" Column 8 of the first schedule reads as follows:–

> "By what Court other than the High Court triable."

There are some offences in this column which are stated to be triable by the Magistrate's Court and the column is blank in respect of other offences, meaning thereby that the latter offences are triable only by the High Court. One such instance is in respect of offences under Chapter 6. There are yet others which it is not necessary to detail. In respect of these offences, Defence Counsel conceded that the Attorney-General can file a direct indictment in the High Court as these offences are exclusively triable by the High Court. Indictable offence is defined in section 2 to mean "an offence triable only by the

High Court." Counsel submitted that the word "only" in this definition would indicate that it is only in respect of those latter offences in Column 8 that the Attorney-General can file a direct indictment and, therefore, the Attorney-General was not empowered to file a direct indictment in respect of all other offences which are declared by the first schedule to be triable not only by the High Court, but also by the Magistrate.

Counsel for the State pointed out that there is no single instance so far as he could find where the phrase indictable offence is used in the body of the Code and, therefore, what appears within inverted commas should not be interpreted in the manner submitted by the Defence.Counsel. It appears to me that there can be another meaning to this definition, simply that only the High Court can try offences on indictment.

However, I have come to the same conclusion for a different reason. Under the old Criminal Procedure Code, non-summary proceedings in the Magistrate's Court was the gateway to every indictment in the District Court or in the Supreme Court. The Administration of Justice Law abandoned non-summary proceedings altogether. The present Code re-introduced non-summary proceedings, but named it preliminary inquiry. In respect of the offences in the Second Schedule to the Judicature Act No. 2 of 1978, a preliminary inquiry by the Magistrate was made compulsory in terms of section 145(a) of the present Code. Then, there is a class of cases in Schedule 1 of the Code whereby direct indictment by the Attorney-General is permitted. We have then a third class of cases which are offences triable both by the High Court and the Magistrate's Court. On a superficial examination of the Code, it would appear that the Attorney-General is empowered to file a direct indictment in respect of the last category of offences, too, since inquiry is mandatory only when the Attorney-General requires it. But a closer analysis of Code would establish that it is not so.

Section 142(2) reads as follows:-

> "Where the offence appears to be one triable summarily in a Magistrate's Court the Magistrate **shall** follow the procedure laid down in Chapter XVII."

Chapter XVII deals with the trial of cases where the Magistrate's Court has power to try summarily, so that in respect of every offence in this last category of offences, the Magistrate is required (shall) to hear that offence summarily. It would be a queer situation indeed if the Attorney-General files a direct indictment in respect of that same

offence in the High Court, the Magistrate proceeding with his summary trial as he is obliged to do by section 142(2) and the High Court Judge proceeding to trial in respect of the same offence.

Secondly, section 10 of the Code expressly enacts that "any offence under the Penal Code ... may be tried save as otherwise specially provided for in any law –

(a) ...

(b) by Magistrate's Court where that offence is shown in the eighth column of the First Schedule to be triable by a Magistrate's Court."

Therefore, the burden is on the Attorney-General to satisfy us that there "is any law specially provided for" to avoid a summary trial in a Magistrate's Court. This, Counsel for the State has not been able to do; nor have I found any **express** provisions to that effect in respect of these offences. (Vide sec. 389(2) which makes such provision).

Thirdly, I cannot see any purpose in the enactment of the second proviso to section 142(2) and section 145(b), unless it be to compel the Attorney-General to go to the Magistrate's Court in the first instance. The second proviso to section 142(2) reads as follows:–

135 (2) "Where the offence appears to be one triable summarily in a Magistrate's Court the Magistrate shall follow the procedure laid down in Chapter XVII:

Provided ...

Provided further that in any case where any of the offences do not fall within those set out in the Second Schedule to the Judicature Act No. 2 of 1978, the Attorney-General may in accordance with section 145(b) direct the Magistrate to follow the procedure laid down in Chapter XV and the Magistrate shall then follow such procedure."

Section 145(b) reads as follows:–

145 ... the Magistrate shall in a case –

(b) "Where the Attorney-General being of opinion that evidence recorded at a preliminary inquiry will be necessary for preparing an indictment, within three months of the date of the commission of the offence so directs, hold a preliminary inquiry according to the provisions hereinafter mentioned."

If the Attorney-General needs evidence, the entire resources of the Police force are available to him to find that evidence. I cannot imagine any reason why a preliminary inquiry under section 145(b) would be necessary for the Attorney-General to collect such evidence. Therefore, my view of section 145(b) is that when the Attorney-General wishes to file an indictment in the High Court in this class of cases, he is obliged to obtain the evidence that "will be necessary for preparing an indictment" by a preliminary inquiry and that is the reason for the enactment of section 145(b).

To my mind, the Code appears to contemplate 3 types of crime varying in degrees of gravity. There is first the class of cases given in the Second Schedule to the Judicature Act. There is then that class of cases in respect of which the Attorney-General can file a direct indictment in the High Court. There is then the third category which are summarily triable by a Magistrate notwithstanding the heavier sentences prescribed which consists of less serious offences. The Magistrate is not empowered to impose the maximum sentence provided for these offences and if the Attorney-General is of the opinion that a heavier penalty should be imposed, then he is empowered to place that charge on an indictment in the High Court, but only through the provisions of section 145(b). There are other grounds found in section 393(1)(d). (There are some exceptions e.g. 389(2).

When the Attorney-General decides to take that offence to the High Court, the subject is placed in peril of a much heavier sentence than what the Magistrate would have imposed. In such a case, the Legislature has provided that a preliminary inquiry shall be had where the subject would have the opportunity to cross-examine the witnesses, place evidence himself and obtain for himself all the other benefits of a preliminary inquiry. I am of the view that where such privileges are available in terms of the law to an accused, they should not be denied to him by empowering the Attorney-General to file a direct indictment in the High Court. In this view of mine, the words "opinion that evidence recorded at a preliminary inquiry will be necessary for preparing an indictment" would mean that when the Attorney-General decides to file an indictment, he forms the opinion that "evidence recorded at a preliminary inquiry in terms of the law will be necessary for preparing an indictment."

For all these reasons, I have come to the conclusion that it is not open to the Attorney-General to file a direct indictment in the High Court in respect of offences which are summarily triable by a Magistrate. In my view of the law, it is necessary that he should direct a preliminary inquiry to be held by the Magistrate before he can file

an indictment in the High Court and it is only by that process that the Attorney-General can divest the Magistrate of his jurisdiction to hear that offence summarily.

I have, therefore, come to the conclusion that the indictment filed in the High Court in this case is bad in law.

Counsel for the State drew our attention to section 394 of the Code and submitted that the indictment in the instant case shall be deemed to have been brought before the Court in the due course of law and the burden is on the petitioner to show that the Attorney-General had acted in violation of the law. The petitioner was not brought before the High Court under a commitment for trial or in pursuance of bail. (There was some dispute whether this petitioner was in Court in pursuance of bail, but an examination of the journal entries of 22.2.80 and 24.3.80 makes it quite clear that this petitioner was not before Court on bail at the time the indictment was served on him). Therefore, this section will not apply. However, Counsel for the State conceded that the petitioner will be entitled to look behind the indictment and section 394 itself makes provisions for the petitioner to show the contrary.

In the case of *Kanagarajah* referred to earlier, Samarawickrame, J. stated:-

> "Learned Crown Counsel submitted that the presentation of the indictment to the District Court cured any defect and he sought support for his submission from decision,[2] which held that where there was a commitment regular on its face and an indictment was presented by the Attorney-General, it was the duty of the District Court to proceed to try the case."

He quoted section 12 and went on to say:-

> "In the absence of a complaint required by law, the Magistrate's Court was not competent to have proceedings in this case. It could not therefore, in my view, be considered to have been duly empowered to commit the accused for trial for the offence punishable under s. 76C(1) in this case. It is true that the District Court had no power of review as such to inquire into the regularity of the initiation of the proceedings in the Magistrate's Court or the regularity of the proceedings themselves. Nor had it power to quash the committal. It had the duty however of conforming to Section 12 of the Criminal Procedure Code and for the purpose of performing that duty it could go into the question whether the Magistrate's Court was duly empowered

to commit the accused for trial for the offence punishable under s. 76C(1) in this case. As I have indicated above the Magistrate's Court was not duly empowered to do so. The District Court therefore in terms of s. 12 was prohibited from having proceedings in respect of this offence.

"I am moreover of the view that the prohibition in s. 82(2) applied not only to the Magistrate's Court but also to the District Court. For the reasons I have set out in considering the position of the Magistrate's Court, the District Court too was not competent to have proceedings in respect of this offence.

"Learned Crown Counsel submitted that it was section 64 of the Courts Ordinance that conferred jurisdiction on the District Court and that Court had jurisdiction in respect of the offence. This contention is no doubt correct. But the exercise of jurisdiction and the having of proceedings by the District Court in disregard of statutory prohibitions against taking cognisance of this offence had the effect that such proceedings were vitiated by a defect which is not curable and is therefore fatal. Such proceedings and the conviction entered in the course of such proceedings are bad and must be set aside."

I have, therefore, come to the conclusion that for all 3 reasons (1) proceedings should have been initiated in terms of section 135(1)(f) in the Magistrate's Court in respect of the offence under section 480 of the Penal Code; (2) there has been no investigation in terms of section 5 of the Code: and (3) the Attorney-General is not empowered to file a direct indictment in respect of a matter which is summarily triable by a Magistrate; the indictment in the High Court of Kandy is bad in law.

In the result, I agree with the order made by Ranasinghe, J. the Chairman of this Bench.

L. H. De Alwis, J.

This is an application to revise the Order of the learned High Court Judge, Kandy, overruling a preliminary objection taken by the Petitioner before him. An indictment was filed by the Attorney-General against the Petitioner on a charge of criminal defamation, an offence punishable under Section 480 of the Penal Code. Before the Petitioner was called upon to plead he took a preliminary objection in regard to the competency of the Court to try the case on the ground that proceedings had not been initiated upon a complaint made with the previous sanction of the Attorney-General by the person

aggrieved or by some other person with a like sanction as required by Section 135(1)(f) of the Code of the Criminal Procedure Act No. 15 of 1979. The learned High Court Judge after hearing submissions on behalf of both parties took the view that section 135(1)(f) applied only to the initiation of proceedings in a Magistrate's Court and not to the High Court.

In his application to this Court the Petitioner raised certain other matters but at the hearing, argument was confined only to the question of the jurisdiction of the High Court to try the case on the following grounds:

(1) Proceedings had not been initiated upon a complaint made with the previous sanction of the Attorney-General by the person aggrieved or some other person with like sanction in terms of Section 135(1)(f) of the Code.

(2) A due investigation of the offence had not been carried out by the Police in accordance with the provisions of Chapter XI of the Code of Criminal Procedure Act before the indictment was filed.

(3) A direct indictment cannot be filed for an offence under Section 480 of the Penal Code without a preliminary inquiry being held in the Magistrate's Court.

The first question is whether sanction under Section 135(1)(f) is a pre-requisite for the institution of proceedings in the High Court.

Section 135(1)(f) states:

Any Court shall not take cognizance of –

"any offence falling under Chapter XIX of the Penal Code unless upon complaint made with the previous sanction of the Attorney-General by some person aggrieved by such offence or by some other person with the like sanction;"

An offence under Section 480 of the Penal Code for which the Petitioner is indicted is an offence that falls within Chapter XIX of the Penal Code. Dr. De Silva contends that the words "any Court" mean "No Court" and catches up both the Magistrate's Court and the High Court. He submits that proceedings cannot be initiated in the High Court without a complaint being made by the aggrieved person or some other person with the previous sanction of the Attorney-General. In this instance no complaint has been made by the

aggrieved person or any other person to the Police or the Magistrate. Learned Counsel also attacked the sanction of the Attorney-General marked X10, and filed along with the indictment as not a sanction contemplated by Section 135(1)(f).

Learned Deputy Solicitor-General submits that the words "any court" appearing in Section 135(1) refer only to the Magistrate's Court and not to the High Court, where a complaint and sanction are unnecessary for initiating proceedings. In any event, he submits, as the Attorney-General is the sanctioning authority under the section, his formal sanction is unnecessary when he himself files an indictment in the Court.

We are concerned in this case with section 135(1)(f) only and it is unnecessary to go into the question whether the words 'any court' refer generally to the Magistrate's Court or includes the High Court. It is sufficient to interpret the words only in the context of this particular sub-section.

Learned Deputy Solicitor-General submitted that the "complaint" contemplated in section 135(1)(f) is a complaint made to a Magistrate under section 136(1)(a) for it is the complaint that initiates proceedings in a Magistrate's Court.

The word 'complaint' is defined in section 2 to mean "the allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person, whether known or unknown has committed an offence." This definition fits in with the word "complaint" in section 136(1)(a). It is significant that section 135 comes under the heading "B – Conditions necessary for initiating proceedings" which immediately precedes section 136. Section 136 sets out the ways in which proceedings shall be instituted in a Magistrate's Court. Taking into consideration the meaning given to the word "complaint" in section 2 it seems reasonable to equate "complaint" referred to in section 135(1)(f) with a "complaint" made under section 136(1)(a). A complaint made by the aggrieved person to the Magistrate under section 136(1)(a) would be a private plaint. If the words "or by some other person" are interpreted to mean a Police Officer, then a complaint "to the like effect" can be made by the Police Officer to the Magistrate on a written report in terms of section 136(1)(b). In either event the complaint must be made to the Magistrate. As far as section 135(1)(f) is concerned, therefore, the words "any court" can only mean any Magistrate's Court.

Section 135(1)(f) requires a complaint to be made with the previous sanction of the Attorney-General in the Magistrate's Court

before initiation of proceedings. An offence under section 480 of the Penal Code, therefore, cannot reach the High Court without first being initiated in the Magistrate's Court. If the 'complaint' in the Magistrate's Court is made by the aggrieved person and is a private plaint, under section 393(1)(d) the Attorney-General has no right to present an indictment in the High Court in respect of it. On the other hand, if a written report is made by a Police Officer then too, as will be seen later, the Attorney-General cannot file an indictment in the High Court unless a preliminary inquiry is held in the Magistrate's Court under section 142(2). No preliminary inquiry has been held in this case.

It is pointed out further by Dr. De Silva, that the sanction X10 filed with the indictment is not such a sanction as is required by section 135(1)(f). Under that section, the previous sanction of the Attorney-General has to be given to an aggrieved person or some other person by name, to make a complaint to the Magistrate's Court. The sanction X10 filed in this case is the sanction of the Attorney-General to prosecute in the High Court and is not the sanction contemplated in section 135(1)(f).

The object of the requirement of sanction is to protect private persons from frivolous prosecutions. *Brereton v. Retranahamy,*[16] *Queen v. Rev. Gnanasieha Thero.*[14]

A complaint with the previous sanction of the Attorney-General is a condition precedent to the assumption of jurisdiction to take proceedings in respect of an offence and the absence of such a complaint or sanction vitiates the proceedings. *Kanagarajah v. The Queen.*[9] In that case the 'complaint' referred to was that of the Postmaster-General but the principle laid down would apply to this case too. See also *Maraikar v. The King*[17] *Purshottam v. Emperor.*[18]

In the present case proceedings have not been initiated in the Magistrate's Court on a complaint with the previous sanction of the Attorney-General in terms of section 135(1)(f). I accordingly hold that the High Court has no jurisdiction to try the case.

It is next contended by Dr. De Silva for the Petitioner that an investigation by the Police on an information received under Chapter XI of the Code is a condition precedent to the filing of an indictment.

Section 5 of the Code of Criminal Procedure Act enacts that:

"All offences –

(a) under the Penal Code;

(b) under any other law unless otherwise specially provided for in that law or any other law,

shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of this Code.

In the present case no information had been received of the commission of an offence so as to set in motion an investigation. It is submitted by learned Deputy Solicitor-General that there are occasions when an information and even an investigation are unnecessary for the initiation of proceedings in Court. He referred to the instances where an offence is committed in the presence of a Police Officer when there would be no need for an information, and to contempts committed in view of the Court where no investigation is held. Section 109(5) provides for the commencement of an investigation "if from information received or otherwise." It has been held that these words which appear in the corresponding section 121(2) of the Old Criminal Procedure Code contemplate the institution of proceedings, without a first information being received under section 121(1) as where an offence is committed in the presence of a Police Officer. *Arumugam v. O.I.C. Police Station, Mirihana*[11]. In any event section 109(5) is not applicable in the instant case. The section applies to cognizable offences whereas section 480 under which the Petitioner is charged is a non-cognizable offence. As regards contempts of court, they are exceptions for which special provision is made in sections 389(2) and 392 for the prosecution of the offender without an investigation. It is however noteworthy that before the Court concerned forwards the record to the Attorney-General for action under section 389, it is required to record the facts constituting the offence and the statement of the accused and this, no doubt, serves as a substitute for an investigation.

Learned Deputy Solicitor-General referred to a hypothetical case where a C.I.D. officer is detailed to cover a political meeting and hears a speaker make defamatory statements from a public platform. He takes the view that an offence under section 79(2) of the Police Ordinance is made out. Thereafter the advice of the Attorney-General is sought on the matter and the material collected is found to disclose either an offence under section 118 or section 480 of the Penal Code. The Attorney-General however might decide to indict the offender for an offence under section 480 of the Penal Code.

Section 79(2) of the Police Ordinance states that:

> "Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour which is intended to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned shall be guilty of an offence under this section."

Learned Deputy Solicitor-General sought to make out that the investigations in the present case could have commenced either under the Police Ordinance or under Chapter XI of the Code, but he did not commit himself to a definite position. He stated categorically to Court, that he was not conceding that investigations were conducted under Chapter XI of the Code since it was not necessary for his argument. He contended that section 5 of the Code must be read with Section 121 which states that:

> "Anything in this Chapter contained shall not be construed to restrict the powers or duties vested in or imposed on Police Officers by this Code or any other enactment."

He submitted that there could be an investigation conducted outside Chapter XI of the Code as under the Police Ordinance. He relied on a passage in the Order of Court in *Queen v. Gnanasieha Thero*[14] where it is stated "It is important to note that whatever other powers and duties of investigation, the Police may have derived from other statutes, any investigation carried out in the exercise of these powers and duties, are not carried out under magisterial supervision contemplated in an investigation under Chapter XII." As the words "may have derived" indicate, this dictum is no authority for the proposition that Police have powers of investigation under the Police Ordinance.

Learned Deputy Solicitor-General was unable to point out any provision in the Police Ordinance which empowered a Police Officer to investigate an offence under that Ordinance.

Section 56 of the Police Ordinance states that it is the duty of every Police Officer.

(b) to preserve the peace, and

(d) to detect and bring offenders to justice.

But in performing these duties a Police Officer must turn to the Code of Criminal Procedure for powers of investigation. As Nagalingam, J. said in *A.G. v. Seedin*,[13] "If a Police Officer is,

therefore, required by section 57 of the Police Ordinance to detect offences and bring the offenders to justice, I take it, it will be his proper duty to make first of all a complaint to the Magistrate in order to bring the offender to justice."

Section 5(b) of the Code provides that all offences under any other law shall be investigated according to the provisions of the Code, unless otherwise specially provided for in that law or any other law. As pointed out earlier there is nothing in the Police Ordinance which specially provides for the investigation of an offence committed under that Ordinance, so that now even an offence under the Police Ordinance has to be investigated according to the provisions of Chapter XI of the Code.

The Petitioner, however, is not charged under the Police Ordinance, but under section 480 of the Penal Code.

Learned Deputy Solicitor-General sought to show that the investigation carried out by the C.I.D. officer in the present case could fall within the provisions of Chapter XI of the Code. He pointed out that under section 2 of the Code a C.I.D. officer is a Police Officer and the C.I.D. is a Police Station. The C.I.D. Crime Pad or File is an Information Book required to be kept under section 109(3) of the Code. The statements of witnesses recorded by the C.I.D. officer carried the certificate that was required by section 110(1) of the Code as to their accuracy.

But the offence with which the Petitioner is charged is a non-cognizable offence, and before a non-cognizable offence can be investigated under Chapter XI an Order from a Magistrate has to be obtained under section 118(1) of the Code. It is submitted by learned Deputy Solicitor-General that compliance with section 118(1) becomes necessary only if the powers of investigation under Chapter XI are to be exercised. In *A.G. v. Seedin,*[13] it was held that a Police Officer may institute proceedings under section 148(1)(b) of the Criminal Procedure Code without obtaining a prior order from a Magistrate under section 129 to investigate the offence. Section 129 is in identical terms with section 118(1) of the Code of Criminal Procedure Act. In that case Nagalingam, J. said: "What section 129 does say is that where a Police Officer does receive an order from a Magistrate authorising him to investigate a non-cognizable offence, then by virtue of that authority he would be entitled to exercise the powers conferred upon a Police Officer by Chapter XVI of the Criminal Procedure Code, namely, powers of recording the first information, of requiring the attendance of persons able to give information with regard to an offence, to examine witnesses, to carry

out searches etc." In the present case if the C.I.D. officer was exercising the powers under Chapter XI of th Code when he examined witnesses and recorded their statements, it was obligatory on his part to have obtained an order from a Magistrate before he availed himself of those powers. In any event the 53 NLR case is distinguishable since section 4 of the Old Code does not require an investigation of a penal offence to be conducted under the provisions of the Code, whereas the corresponding section 5 of the present Code makes it imperative.

Under Chapter XI of the Code where an investigation cannot be completed within 24 hours a Police Officer must forward a report forthwith to the Magistrate. Thereafter he must transmit a report to the Magistrate at the end of every period of 15 days until the investigations are completed and a final report in the prescribed form on completion under section 120(3).

It is submitted by learned Deputy Solicitor-General that except for the final report, the other reports have to be forwarded to the Magistrate only in cases where a suspect is in custody. Be that as it may, it is sufficient to state that learned Deputy Solicitor-General conceded in this instance, that a final report had not been forwarded to the Magistrate in accordance with section 120(3) and admitted that it was a lapse on the part of the C.I.D. officer investigating into this offence. In my view, the failure of the C.I.D. Officer to transmit the final report to the Magistrate is clear evidence that he was not conducting the investigation under Chapter XI of the Code.

An investigation under the Code is designed for the protection of the subject. It has to be conducted by the Police in liason with the Magistrate and under his supervision. *Queen v. Rev. Gnanasieha Thero.*[14] One of the essential safeguards is contained in section 110(3) which prohibits the use of statements made in the course of an investigation to a Police Officer for the purpose of corroborating the testimony of a witness in Court. Such a bar would not operate if investigations are permitted outside the provisions of Chapter XI of the Code. If that protection is removed then the purpose of Chapter XI will be defeated and the mischief aimed at will be encouraged. See *Thambiah v. The Queen.*[19]

The investigation therefore carried out into the offence under section 480 of the Penal Code, outside Chapter XX of the Code is in violation of section 5 of the Code and is illegal.

It is submitted by learned Deputy Solicitor-General that even if the investigation is illegal the statements recorded in the course of it can

be used by the Attorney-General for the purpose of filing an indictment. He gave the analogy of the discovery of evidence in the course of an illegal search conducted under the Excise Ordinance. *Bandarawella v. Carolis Appu.*[15] See also *Rajapakse v. Fernando.*[20] But the question involved in the present case is not the admissibility of evidence. In any event the principle laid down in those two cases does not apply here. In *The Queen v. Rev. Gnanasieha Thero,*[14] the Court said: "We accept as settled law that relevant evidence ... is admissible despite the illegality of the activity of the person discovering it. But where, as here, the fact which is sought to be admitted in evidence is one which was non-existent prior to or independently of the Magistrate's unauthorised act, and came into existence only because of it, and would not have come into existence at the time and in the circumstances it did, but for the *ultra vires* act of the Magistrate, the principle that relevant evidence discovered in the course of an illegal or irregular activity is admissible can have, in our view, no application." In the present case the statements of witnesses recorded by the C.I.D. officer were non-existent prior to the unlawful investigation and came into existence only because of the illegal act of the officer making the investigation. The statements therefore cannot be utilized either to found an indictment or as annexures to the indictment under section 162(2)(b) of the Code. Section 162(2)(b) makes it a mandatory requirement for the statements of witnesses listed in the indictment to be appended to the indictment.

The next question is whether the Attorney-General is empowered to indict the Petitioner directly in the High Court for an offence under section 480 which is triable by a Magistrate's Court.

Dr. De Silva submitted that an indictment could be filed only in respect of the class of offences described as "indictable offences" by section 2. Section 2 defines 'an indictable offence' as "an offence triable only by the High Court." Offences triable only by the High Court are shown in column 8 of Schedule I of the Code. Except for the offences falling within the 2nd Schedule to the Judicature Act where a preliminary inquiry is compulsory under section 145(1), the rest, it is conceded, can be tried on direct indictment. Apart from these there are "summary" offences where the Attorney-General can direct the Magistrate to hold a preliminary inquiry under the provisos to section 142(2) and where such procedure is adopted then, it is submitted, these offences too become indictable, as they are then triable only by the High Court.

In this case it is submitted, no preliminary inquiry was held under the provisos to section 142(2) in respect of the "summary" offence

under section 480 and the offence is therefore not 'indictable', that is, triable only by the High Court on indictment.

Section 2 does not create a category of offences called "indictable offences". All that it says is that wherever the expression "indictable offence" appears in the Code it shall be given the meaning accorded it therein. But this term does not appear to occur anywhere else in the Code, nor was learned Counsel able to point out any such instance.

Dr. De Silva further submitted that non-summary inquiries, which had been done away with by the Administration of Justice Law No. 44 of 1973, were re-introduced by the present Code and a preliminary inquiry is now a *sine qua non*, as under the Old Code, for an indictment in the High Court, except in the case of offences triable only by the High Court where he conceded, exclusive of the offences in Schedule 2 of the Judicature Act, direct indictments were permitted. Under the repealed Criminal Procedure Code an accused person could not be brought to trial before the District Court or Supreme Court unless a non-summary inquiry was held in the Magistrate's Court. See *Piyadasa v. The Queen.*[2] Non-summary proceedings, it is submitted, are provided for the protection of an accused person and the Court should favour a procedure that preserves rather than deprives a person of those rights and safeguards. *King v. Michael Fernando.*[5]

Learned Deputy Solicitor-General submits that the new Code does not restore non-summary inquiries to their earlier position but only re-introduced them in a modified form and in certain situations. It is not a rule that a preliminary inquiry should precede an indictment. They are not necessary except where specially provided for.

The Attorney-General, it is submitted, is empowered to file direct indictments for all offences, except those in the 2nd Schedule to the Judicature Act. But notwithstanding that, in certain circumstances under section 145(b) and the two provisos to section 142(2), the Attorney-General has the right to direct the Magistrate to hold a preliminary inquiry. In the instant case the Attorney-General has chosen not to direct a preliminary inquiry into the offence under section 480, so that it is open to him to file a direct indictment in respect of it.

The new Code certainly does make a significant departure from the Old Code in respect of direct indictments. We have in the new Code sections like 161 and 162(2)(b) that were not found in the Old Code. The relevant portion of section 161 reads as follows:

"In every other case, whether there was a preliminary inquiry under this Chapter or not, trial shall be on indictment in the High Court without a jury."

Section 162(2)(b) requires copies of the Statements to the Police of the accused and all the witnesses listed in the indictment, to be attached to the indictment, whether there was a preliminary inquiry under this Chapter or not.

Section 389 empowers the Attorney-General to directly indict for certain offences of contempt committed in view of the Court. Direct indictment now finds a definite place in the present Code and there is no need for a preliminary inquiry unless specially provided for.

The question now is in that situation is a preliminary inquiry required by the Code. The Code draws a distinction between offences triable only by the High Court and "summary" offences which are triable by the Magistrate's Court. Section 10 sets out the jurisdiction of the two Courts as follows –

"Subject to the other provisions of this Code any offence under the Penal Code whether committed before or after the appointed date may be tried save as otherwise specially provided for in any law –

(a) by the High Court; or

(b) by a Magistrate's Court where that offence is shown in the eighth column of the First Schedule to be triable by a Magistrate's Court."

The jurisdiction of the High Court however can only be invoked on indictment by Section 12.

Offences triable only by the High Court are tried on direct indictment except in regard to offences falling within the 2nd Schedule to the Judicature Act where a preliminary inquiry is compulsory. But preliminary inquiries are provided for in special circumstances for these offences under section 145. Section 145 comes within the Chapter entitled "Of the inquiry into cases which appear not to be triable summarily by the Magistrate's Court but triable by the High Court." It enacts that:

"When the accused appears or is brought before the Magistrate's Court, the Magistrate shall in a case –

(a) where the offence or any one of them where there is more than one, falls within the list of offences set out in the Second Schedule to the Judicature Act, No. 2 of 1978; or

(b) where the Attorney-General being of opinion that evidence recorded at a preliminary inquiry will be necessary for preparing an indictment, within three months of the date of the commission of the offence so directs,

hold a preliminary inquiry according to the provisions hereinafter mentioned."

Sub-section (a) makes a preliminary inquiry compulsory where the offence is one that falls within the Second Schedule to the Judicature Act.

Sub-section (b) gives the Attorney-General the right to direct the Magistrate to hold a preliminary inquiry where he is of opinion that such an inquiry will be necessary for preparing an indictment. But that right must be exercised within three months of the date of the commission of the offence. A preliminary inquiry is not made compulsory but left to the discretion of the Attorney-General.

Section 142(2) on the other hand, provides for preliminary inquiries in respect of "summary" offences, that is, offences triable by a Magistrate's Court.

Section 142(2) reads as follows:

"Where the offence appears to be one triable summarily in a Magistrate's Court the Magistrate shall follow the procedure laid down in Chapter XVII:

Provided that if the Magistrate is of opinion that the offence cannot be adequately punished by a Magistrate's Court he shall forthwith stop further proceedings and forward the record of the case to the Attorney-General, and thereafter abide the instructions of the Attorney-General:

Provided further that in any case where any of the offences do not fall within those set out in the 2nd Schedule to the Judicature Act No. 2 of 1978, the Attorney-General may in accordance with section 145(b) direct the Magistrate to follow the procedure laid down in Chapter XV and the Magistrate shall then follow such procedure."

Under section 142(2) it is obligatory on the Magistrate to try 'summary' offences 'summarily' that is, in terms of Chapter XVII.

Section 9 also requires a Magistrate's Court, subject to and in accordance with the provisions of the Code, "to hear, try, determine, and dispose of in a summary way all suits or prosecutions for offences" committed within its jurisdiction. But the High Court also has concurrent jurisdiction to try 'summary' offences and provision is therefore made in the two provisos for the High Court to try these offences in certain situations. The first proviso empowers the Magistrate to stop further proceedings in a case and to forward the record to the Attorney-General for instructions where he is of opinion that the offence cannot be adequately punished by a Magistrate's Court.

The 2nd proviso gives the Attorney-General the right to direct the Magistrate to hold a preliminary inquiry in accordance with section 145(b) in respect of any offence which does not fall within the 2nd schedule to the Judicature Act.

These are the only instances where a "summary" offence can be removed from the Magistrate's Court to the High Court for trial, and the manner in which it is done is through the procedure of preliminary inquiry.

In the instant case section 480 under which the Petitioner is charged is a "summary" offence that is triable by the Magistrate's Court. The sentence provided for the offence is simple imprisonment for 2 years or fine or both, and that is a sentence which is within the power of a Magistrate to impose. The first proviso to Section 142(2) therefore will not apply. The 2nd proviso is also not applicable because indictment has now been filed without a preliminary inquiry.

Learned Deputy Solicitor-General submitted that the filing of the indictment in this case raises a presumption as to its validity. Section 12 and Section 160(2) raise no such presumption. Section 394 reads as follows:

> "All persons appearing before the High Court under a committment for trial or in pursuance of bail so to appear against whom an indictment is preferred shall unless the contrary is shown be deemed to have been brought before the court in due course of law and (subject to the provisions herein contained) shall be tried upon the indictment so preferred."

This section too is not applicable since the Petitioner did not appear before the High Court under committment for trial or in pursuance of bail. Indictment was received in the High Court on 20.2.80 and notice despatched on the Petitioner on 26.2.80. The Petitioner appeared in

the High Court on 24.3.80 and it was then that the indictment was served on him and bail ordered.

Be that as it may, learned Deputy Solicitor-General conceded that it is possible to look behind the indictment and examine its validity. In the instant case for the reasons given earlier, the indictment has been shown to be invalid.

Learned Deputy Solicitor-General submitted that under section 6 of the Code the Attorney-General has certain residuary powers which are not reduced or limited by the powers expressly granted to him under the Code or other Statutes. Under section 7 it is submitted, that the Attorney-General can adopt a procedure for which special provision has not been made which is not inconsistent with the Code. But under section 6 the Attorney-General does not have any inherent powers as do Judges of the Supreme Court and the Court of Appeal. The Attorney-General's powers are derived from Statute and are circumscribed by it. He has no more powers than are given him by the Statute. *Queen v. Abeysinghe.*[21] See also *King v. Sepala.*[22] "Where a power is given to a public servant to do a certain thing in a certain way, the thing must be done in that way or not at all." **A.I.R. 1936 PC 253(2).**

The presumption under Section 114 illustration (d) of the Evidence Ordinance is that of the regularity of official acts and not that of the acts themselves being done. If, for instance, a notification is issued under the powers given by law, there is a presumption that it was regularly published and promulgated in the manner in which it was required to be done. But there is no presumption that it was issued according to the terms of the section which empowers it. *Purshottam v. Emperor.*[18] In that case a notification was issued by the Government of India empowering the Controller-General and the Deputy Controller-General of Civil Supplies to grant sanction for a prosecution under Section 14 of the Hoarding and Profiteering Prosecution Ordinance. Under section 14 no prosecution under the Ordinance could be instituted except with the previous sanction of the Central or Provincial Government or an officer not below the rank of a District Magistrate empowered by the Central or Provincial Government to grant such sanctions. The question was whether the Deputy Controller General was an officer not below the rank of a District Magistrate. There was no proof that he held a rank not below the rank of a District Magistrate. It was held that there was no presumption that the sanction was issued according to the terms of the section which empowers it. In the present case there is no presumption that the presentment of a direct indictment by the Attorney-General for this offence is within the powers given him by the Code.

I am accordingly of the view that the Attorney-General had no power to file a direct indictment in the High Court of Kandy for an offence under section 480 of the Penal Code.

I would conclude this Order with the words of Sansoni, J. in *Piyadasa v. The Queen.*[2] with which I respectfully agree.

> "Is the indictment upon which the trial proceeded one which the Attorney-General had the power to present to the District Court? If he had no such power, the indictment was bad and the District Judge had no jurisdiction to try the accused on such an indictment. The Attorney-General's power with regard to the presentation of indictments is a purely statutory power derived from section 165(f). ... It follows that the Attorney-General in this case acted *ultra vires* and the District Court was not a Court of competent jurisdiction to try the accused on this particular indictment. It was not open to the Attorney-General to invent a new procedure or to give himself new powers, as he sought to do in this case. A valid indictment is a condition precedent to a valid trial."

I hold that the indictment presented in this case is not valid and the High Court Judge, Kandy had no jurisdiction to try the Petitioner on it.

I agree with the Order made by the Chairman of the Bench, Ranasinghe, J.

Application allowed.
Order of High Court Judge set aside.