1943 *Present :* **de Kretser J.**

## A. J. M. DE SILVA *v.* MAGISTRATE, GAMPOLA, AND POLICE INSPECTOR HERAT.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF *Mandamus* IN M. C. GAMPOLA, 4,421

***Writ of mandamus—Cas pending before Magistrate—Case instituted by Police—Right of complainant's proctor to appear—Criminal Procedure Code, s. 148 (1) (b).***

**Where proceedings are instituted in a Magistrate's Court on a report by a police officer under section 148 (1) (b), a police officer is not entitled to conduct the prosecution.**

**A proctor retained by the complainant has the right to appear for him and conduct the prosecution.**

THIS was an application for a writ of *mandamus* on the Magistrate of Gampola.

*H. V. Perera, K.C.* (with him *S. P. Wijeyewickreme*) in support.

*G. E. Chitty, C.C.*, as *amicus curiae.*

*Cur. adv. vult.*

July 7, 1943. DE KRETSER J.—

The point raised in this application is said to arise rather frequently in recent times, and both the Attorney-General's Department and members of the legal profession are anxious that it should be authoritatively decided. I was inclined, therefore, to have the case sent up before

a Divisional Bench, but when I saw that the trial of this summary offence had started so far back as May 25, 1942, and had been held up from July of that year by reason of this application, I decided that further delay was undesirable.

The question has been touched upon by Keuneman J. in the case of *Grenier v. Edwin Perera* [1] but his remarks were made *obiter* and the matter therefore has to be considered afresh.

In that case a police constable had been charged with causing grievous hurt with a club. Proceedings started with a written report under section 148 (1) (*b*) of the Criminal Procedure Code by Sub-Inspector Grenier. After a preliminary discussion the magistrate had allowed the Assistant Superintendent of Police to conduct the prosecution. The accused was acquitted and the injured party moved this Court in revision. Objection was taken that he had no status, and eventually the case seems to have been considered on its merits, but it is not clear whether this was done because he *had* a status. It was when considering the question of status that Keuneman J. considered the terms of section 199 of the Code. He seemed to think that the injured person may be regarded as a complainant, that Sub-Inspector Grenier also may be regarded as a complainant, and that the Assistant Superintendent of Police came within the words "any officer of any government department" in that section, and that it was a matter for the magistrate to decide, in his discretion, as to who should conduct the prosecution. In other words, he seemed to think that more than one person might claim the right under that section and the magistrate would then decide between the conflicting claimants. He did not indicate on what lines the magistrate should exercise his discretion. To my mind it seems unlikely that the Code would have left the matter in such a doubtful position, and that in most cases—if not in all cases—the decision of the magistrate would be arbitrary.

Section 2 of the Code defines the word "complaint", and the natural inference would be that the person making a complaint is the *complainant*. But I think it is necessary to distinguished between a person making a complaint and a person instituting proceedings under section 148 of the Code. If one analyses the definition of "complaint" it gives the word its ordinary meaning but restricts it to offences and to complaints made to a magistrate. It is not concerned with the method employed in bringing a complaint before a magistrate. A magistrate, in the Code, represents the first judicial officer who deals with an offence. He is not concerned with grievances which are not offences, and, however much a person may have a grievance or complaint to private parties, proceedings in a Court will not start except in one of the ways indicated in section 148, and not unless a grievance relates to an *offence*.

It is useful to examine the sections of the Code in which the words "complaint" or "complainant" occur and to understand the scheme of the Code.

Section 22 requires that every peace officer should forthwith communicate to the nearest magistrate or inquirer, or to his own immediate superior, any *information* he may obtain respecting the commission of any *offence*.

[1] *42 N. L. R. 377.*

"Peace officer" is defined as including police officers and headmen appointed by a Government Agent in writing to perform police duties. Every police officer therefore is bound to report *any* offence in terms of section 22.

Section 33 requires a peace officer making an arrest without a warrant to send the person arrested before a magistrate. Section 38 casts the duty on officers in charge of police stations to report the cases of all persons arrested without warrant. Section 70 authorises a magistrate to act upon information.

Section 81 and the following sections deal with security for keeping the peace and security for good behaviour, and in sections 81, 82, and 83 the magistrate acts on *information*. In section 84 provision is made for his acting on the report of a peace officer. Section 105 also provides for a magistrate acting upon a report or other information. In none of these sections has the word "complaint" been used, and if any. allegation made in writing constituted a *complaint* it seems to me that the Code need not have used the word *information*.

Under section 121 *information* of a cognizable offence is given to an officer in charge of a police station or to an inquirer, and the duty is cast on those two persons to forward a report to the magistrate forthwith and also to make an immediate investigation. Section 127 says that if upon investigation there are grounds for believing that the information is well founded, the officer in charge of the police station "shall forward the accused under custody", or take bail when that is permitted. Note that he forwards the accused but is not required to make a complaint. What follows on his so forwarding the accused is laid down in section 151 (2). Section 127 goes on to say that "in such case the officer or inquirer shall require the *complainant*, if any, and the witnesses to execute a bond to appear before the magistrate's court". Of course there may be no complainant, where the police officer is acting on information. But the important thing is that the existence of a *complainant* in the person of the injured man is recognized, and the person reporting is regarded as somebody different. A *complainant* is regarded as being different from the *witnesses*.

The sections hitherto examined suggest that the magistrate is mainly responsible for the supervision of crime in his division, and that it is the duty of all inquirers and peace officers to keep him informed of all offences committed or likely to be committed in his division. Section 22, unlike section 121, relates to *any* offence and not merely to a cognizable offence. An "offence" is defined in section 2 as meaning "any act or omission made punishable by any law for the time being in force in this Island.

We then pass on to section 147 (2) and (3) which speak of the "complaint" by a Court. Chapter XV. takes us a step further and indicates how proceedings commence in a Magistrate's Court. The very first method contemplated is that of a complaint made by the party affected by an offence; that is to say, he is the obvious person to complain. Reports by the police or by inquirers are confined to cognizable offences (*vide* section 121): section 148 (1) (*a*) is not so restricted. It provides that the complaint, if in writing, shall be drawn by a pleader and signed by the complainant. The last case mentioned (*f*) is that of a written

complaint by a Court. Having already defined the word "complaint" and having used the word in this very section, what is called for in the case of an inquirer or peace officer or public servant or servant of a local body is a *written report*. Where the offence alleged is an indictable one (section 150) the magistrate is authorised to examine the complainant or informant, and the two sub-sections particularly referred to are 148 (1) (*a*) where the word "complaint" is used and 148 (1) (*b*) where the word "report" is used. A clear distinction seems to be drawn between the two cases; in the former one it is the *complainant* who is examined, in the latter the *informant*. A peace officer therefore seems to be an *informant*, not a complainant.

It is useful to examine here the terms of section 388 which deals with one of the powers of the Attorney-General. The magistrate may be ordered to discharge the accused from the matter of the *complaint* (presumably under section 148 (1) (*a*) and (*f*), *information* (section 148 (1) (*b*) or *charge* 148 (1) (*d*).

Having indicated in what cases the magistrate would issue summons or warrant, the Code proceeds to deal in Chapter XVI. with inquiries into indictable offences when the stage has been reached of the accused being before the Court. No provision is made in this chapter for any person appearing and conducting the inquiry. The general tenor of the chapter is to place on the magistrate the duty of conducting the inquiry and, as we know, when a magistrate proceeds to the scene of a murder he invariably calls upon those present who know anything about the matter to come forward and give evidence. Section 392 is clear and states that "No person other than the Attorney-General, the Solicitor-General, Crown Counsel, or a pleader generally or specially authorised by the Attorney-General shall conduct the prosecution in any case into which the magistrate of a Magistrate's Court may be inquiring". "In the absence of the Attorney-General, the Solicitor-General, Crown Counsel, and a pleader generally or specially authorised by the Attorney-General the magistrate shall conduct the prosecution, but nothing in this section shall preclude the magistrate from availing himself, if he considers it so desirable, of the assistance of any pleader or public officer in the conduct of any inquiry".

Chapter XVIII. deals with trials of summary cases. The Code seems to contemplate four possible situations:

(*a*) where the trial proceeds;
(*b*) where the complainant is absent;
(c) where the complainant desires to withdraw the charge; and
(*d*) where some other situation may arise.

Where then the trial proceeds, section 189 (3) uses the word "complainant" and says that he or his pleader shall be entitled to open his case. It says nothing about officers of government departments or local bodies. Perhaps the main purpose of the section is to outline the general procedure and not to indicate who should conduct the prosecution. It is useful, however, as indicating the view that the person affected would be the proper person to conduct the case.

Section 194 deals only with complaints under section 148 (1) (*a*) ; reports by police officers are therefore excluded. The section says that if the complainant does not appear the magistrate may acquit the accused. The complainant is permitted to have the case reopened on grounds entirely personal to him, such as sickness or accident. There can be no ambiguity about the meaning of the term *complainant* in this section. Presumably the presence of his pleader and of all his witnesses will not save the situation. Section 195 provides for a complainant withdrawing a case. It seems to me that here too "complainant" must refer to the private individual affected by the offence.

The question naturally arises why a public servant should not be permitted to withdraw a case, and why *he* should not be penalised for his absence. The only reason I can think of is that public servants are responsible officers of the Crown who are not expected to launch prosecutions lightly, and that prosecutions launched by them affect the public and not merely private individuals and should not therefore be put on the same footing. In most cases the public servant would have the assistance of the Attorney-General's Department and the Attorney-General's powers are wide enough.

Section 196 seems to deal with the position of public servants. It excludes sub-heads (*a*), (*c*) and (*d*) of section 148 (1). Provision has already been made for cases falling under section 148 (1) (*a*). In cases falling under sub-heads (*c*) and (*d*) the magistrate has the control of the case from its very inception and is the person responsible for having instituted proceedings. In the remaining three cases the magistrate is empowered to stop proceedings at any stage but only with the previous sanction of the Attorney-General. This would cover cases of non-prosecution, cases where the prosecuting officer desires to withdraw the prosecution, and cases which the magistrate thinks should be stopped for some other reason. It seems to me that the sanction of the Attorney-General is required because those cases affect public departments and local bodies. What would happen should the Attorney-General, on being asked for sanction, refuse to grant his sanction ? The magistrate might be faced with an *impasse*. Accordingly provision is made for intervention by the Attorney-General. The opportunity is seized to state by whom prosecutions in summary cases should be conducted. Normally they would be conducted by the complainant or by a representative of the department or local body affected by the offence. It seems fairly clear that the word "interested" in section 199 does not refer to the kind of interest which the public may have in a case but is equivalent to saying that a person or a department is affected by the case.

Having stated quite emphatically the right of the Attorney-General to conduct the prosecution in any case, the section goes on to state that in the absence of such appearance the *complainant* or any officer of the department or local body concerned may appear to prosecute. It is over this provision that the present dispute arises.

I do not think anything turns on the fact that in the first part of the section the words used are "shall be entitled to appear" and later "may appear to prosecute". The two expressions mean the same thing. Perhaps the Attorney-General's right is the more emphatically stated.

The word "complainant" has up to this stage borne only one meaning, and I do not think any different meaning is to be attributed to it here. If the person making a report under section 148 (1) (*b*) is also included in the term, then the magistrate might be called upon to choose between two rival complainants. The difficulty is avoided if we distinguish the person forwarding the report by calling him "informant", as section 150 does. In prosecutions by government departments or local bodies no private individual is so closely affected by the offence as to be termed the *complainant*; it is the department or body which is affected. It seems to me that it is only in the case of the police that it has been claimed that a police officer is interested in every offence, even though he may not be affected by the offence. The Attorney-General's Department, the Solicitor-General's Department, the Legal Secretary's Department and others would be equally so interested.

Under the Code the police are entrusted with the same duties as inquirers and police headmen. An inquirer or a police headman is not a government department in himself nor is he an officer of any government department, as far as I am aware, and yet they also forward reports under section 148 (1) (*b*). Did the Legislature contemplate that they were qualified to conduct prosecutions and even better qualified than the person affected or his lawyer? That seems hardly likely. Is it more likely that the Legislature intended at this stage to distinguish between them and police officers and considered that the latter would be covered by the expression "officer of a government department"? The question is not "who has instituted proceedings", for both the private individual and the police may do so. It appears to me that section 199 has reference back to section 148 (1). The *complainant* comes first and then the persons mentioned in sub-head (*b*) are provided for—except inquirers and police headmen. The question is whether the police also were not excluded, and whether the police constitute a government *department*.

Chapter XLII. of the Legislative Enactments establishes the Excise Department and refers to it as such. But when we turn to the police they are never referred to as a *department* but as a *force*: *vide* also the Ceylon Naval Volunteer Force, the Ceylon Defence Force. In the Code a police officer is defined as being "a member of an established police force". What is more, the Police Ordinance contemplates a general police force and police in rural districts. It provides for the establishment by proclamation of a police force in a town. Is then each such police force a separate department? We know that there exists within the force a Criminal Investigation Department, and there may be other departments also in it.

The Ordinance establishing the police having referred to it as a *force* and the Criminal Procedure Code also referring to it as a *force*, it does not seem to me correct to interpret "government department" as referring to the police. It may be that the police are called a *department* for certain purposes but one never thinks of the Police *Department* being on parade or of the Police Department being called out for any other purpose. There is a further difficulty: if within the police force itself there are departments, a contest may arise between an officer of such a

department and an officer of the force considered as a larger department—if a purely theoretical situation be visualised.

If the police base their claim on the ground of their interest in bringing offenders to justice, then they might intervene in any case brought by any other department, such as the Customs or the Excise. It is impossible to believe that the Legislature contemplated any such situations. The Code very carefully assigns to the police the part of *informants*. of persons assisting a Court, and nowhere else does it recognise them as entitled to conduct prosecutions. Section 148 (1) (*b*) distinguishes them from "public servants" and terms them "peace officers".

The remarks of My Lord the Chief Justice in *Kulatunga v. Mudalihamy* [1] may appropriately be considered here. In that particular case the sergeant who conducted the prosecution was a material witness, and while the remarks of His Lordship apply no doubt to that particular situation they have also a wider application, namely, that it is a bad practice to allow a policeman to act as an advocate before any tribunal. The duties of the police are set out in section 57 of the Police Ordinance (Chapter XLIII.) and one of them is to detect and bring offenders to justice. It is hardly desirable that a force entrusted with detective work and likely in the course of such work (subconsciously perhaps) to develop the instincts of the sleuth-hound should do more than bring offenders to justice, in the person of the magistrate. The case of *Webb v. Catchlove* cited by the Chief Justice was decided in 1887, as also the case of *Duncan v. Toms*. The framers of the Code might well have had in mind these judgments to support their own experience.

It has to be borne in mind that the Evidence Ordinance indicates the belief that the police should not be trusted in the matter of confessions. The policy of the law in Ceylon is not in their favour. The Information Book is always available to guide a Court. Lawyers are officers of Court and are expected to perform their duties honestly and honourably. There is one advantage in police officers not conducting cases. They usually have their notes of investigations already made, often not quite accurately or intelligently, and are apt to lead a witness along the lines of their notes. A comparison of these notes during a trial with the magistrate's record often betrays a very close correspondence between them.

To sum up: In my opinion the person sending a written report to Court is not a complainant but an informant. The departments referred to are departments which are closely affected by the offence alleged, whose representatives are termed "public servants" in section 148 (1) (*b*). The police are not given the position of being other than informants and assistants to a magistrate.

In my opinion, therefore, the police inspector in the present case was not justified in opposing the appearance of the proctor for the complainant. He will no doubt assist the Court in such a way as is open to him. There used to be the closest co-operation between the police and complainants' lawyers and the police always welcomed legal assistance. The apparent rivalry is most deplorable.

*Rule made absolute.*

[1] *42 N. L. R. 33.*