1971 *Present :* Samerawickrame, J., and Wijayatilake, J.

A. KANAGARAJAH, Appellant, *and* THE QUEEN, Respondent

S. C. 55/70—D. C. (Criminal) Trincomalee, 413/934

Post Office Ordinance (Cap. 190), as amended by Act No. 24 of 1957—Sections 76 C (1) and 82 (2)—Prosecution for offence of possessing without lawful excuse mail bags bearing the official inscription—Absence of Postmaster-General's complaint—Incurable defect—Criminal Procedure Code, ss. 12, 147, 425—Courts Ordinance, ss. 64, 71.

Section 82 (2) of the Post Office Ordinance, as amended by Act No. 24 of 1957, reads :—

" No court shall take cognizance of an offence punishable under any of the provisions of sections . . . 76A, 76B, 76C . . . of this Ordinance, unless upon complaint made by order of, or under authority from, the Postmaster-General."

Held, that a conviction on indictment in a District Court of an offence punishable under section 76 C (1) of the Post Office Ordinance, of possessing without lawful excuse five empty mail bags bearing the official inscription, was invalid in the absence of a complaint made by order of or under authority from the Postmaster-General. In such a case the absence of the required complaint was a defect which could not be cured by the application of the provisions of section 425 of the Criminal Procedure Code either to the proceedings in the Magistrate's Court or to the proceedings in the District Court.

APPEAL from a judgment of the District Court, Trincomalee.

Nimal Senanayake, with (*Miss*) *S. M. Senaratne* and *M. Mousoof Deen*, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 29, 1971. SAMERAWICKRAME, J.—

In this case, acts which constitute the simple offence of theft of property worth a few rupees have been made the basis for a conviction of an indictable offence punishable with imprisonment or with fine or both under the Post Office Ordinance (Cap. 190) because the property stolen consisted of five empty mail bags bearing the words "Post Office Ceylon".

The appellant was tried and convicted on indictment in the District Court of Trincomalee of an offence punishable under Section 76C (1) of the Post Office Ordinance, of possessing without lawful excuse, five empty mail bags bearing the official inscription. Learned counsel for the appellant submitted that it had not been proved that the mail bags bore the official inscription within the meaning of the Ordinance. He also submitted that all proceedings had and the conviction of the appellant were bad by reason of the fact that there was no complaint made by order of, or under authority from, the Postmaster-General, as required by s. 82 (2) of the Post Office Ordinance. It was conceded by learned Crown counsel that neither at the enquiry by the learned magistrate nor in the trial proceedings in the District Court was there any proof tendered that the complaint was made by order of, or under authority from, the Postmaster-General.

Section 82 (2) of the Post Office Ordinance (Cap. 190) as amended by Act No. 24 of 1957, reads—

> "No court shall take cognizance of an offence punishable under any of the provisions of sections .... 76A, 76B, 76C and .... of this Ordinance, unless upon complaint made by order of, or under authority from, the Postmaster-General."

In terms of this section, a complaint made by order of, or under authority from, the Postmaster-General is necessary for the cognizance of any of the offences mentioned. The effect of the words "no court shall take cognizance 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. This would appear to be the ordinary result of the words used and there is nothing in the context that suggests or requires that such an effect should not ensue. 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 s. 425 of the Criminal Procedure Code, would be invalid.

The express provision in s. 425 (*b*) prevents a judgment being set aside on account of the want of any sanction required by s. 147 of the Criminal Procedure Code. The want of sanction required by s. 147 is therefore no more than an irregularity which is curable. The effect of the absence of sanction or authority required by other provisions of

the Code or other laws has to be considered. In *Brereton v. Ratranhamy*,[1] Moseley, S.P.J., held that the failure to obtain the sanction of the Attorney-General as required by Ordinance No. 11 of 1933 was not curable under s. 425 of the Criminal Procedure Code and rendered the proceedings a nullity. He said "The section of the Criminal Procedure Code however by virtue of which it is now sought to cure the omission to obtain the sanction necessary to institute proceedings for an offence against Ordinance No. 11 of 1933 is section 425 which provides that no judgment of a Court of competent jurisdiction shall be reversed on appeal on account, *inter alia*, of want of any sanction required by section 147, unless such want has occasioned a failure of justice. I am satisfied that no failure of justice has been occasioned in this case by the omission to obtain the proper sanction but the case is not one of those embraced by section 147. No other provision of law has been brought to my notice under which this particular omission might be cured. It seems to me that in the absence of the required sanction the trial is a nullity." In *M. G. Perera v. Inspector of Labour, Matugama*[2], where there was nothing to show that the sanction which was in general terms referred to the particular charges made in the report, Wijeyewardene C.J. said, "The defect I have referred to cannot be cured by the application of the provisions of section 425 (*b*), as that section refers to a sanction required by section 147 of the Code. Nor do I think it possible to have recourse to section 36 of the Courts Ordinance. To do so would be to extend the operation of section 425 (*b*) of the Criminal Procedure Code, when the legislature itself had restricted its scope by reference to sanctions under section 147 of the Code (vide Bertram C.J.'s observations in *Cornelis Hamy v. Thoronis et al.*—(1924) 2 Times of Ceylon Law Reports 192."

In a long line of cases[3], 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 is not an irregularity curable under s. 537 of the Indian Criminal Procedure Code which was almost identical with s. 425 of our Code. This view is supported by decisions of the Privy Council and of the Supreme Court of India.

In *Gokulchand Divarkadas v. The King*[4], Sir John Beaumont, delivering the judgment of the Privy Council said, "It was not disputed that if the sanction was invalid the trial Court is not a court of competent jurisdiction .... For the reasons above explained the sanction given was not such a sanction as was required by cl. 23 of Cotton Cloth and Yarn (Control) Order 1943 and was, therefore, not a valid sanction. A defect in the jurisdiction of the Court can never be cured under s. 537."

In *Willie (William) Slamey v. State of Madhya Pradesh*[5], Aiyar J., considering irregularities which may be cured under s. 537 said, 'Of course, lack of competency of jurisdiction, absence of a complaint by

[1] *(1910) 42 N. L. R. 149.*
[2] *(1919) 50 N. L. R. 421 at 423.*
[3] *A. I. R. (1934) All. 863 Full Bench, A. I. R. (1925) Oudh 158, 31 Cr. L. J. 1092, A. I. R. 1927 Nagpur 202, A. I. R. 1939 F. C. 43, A. I. R. 1951 S. C. 637.*
[4] *A. I. R. (1948) P.C. 82 at 85.*
[5] *A. I. R. (1956) S.C. 116 at 135.*

the proper person or authority specified, 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."

Ramaswami, J., in the case of *In re Subramaniam*[1], said, "The 'want' of a complaint as required by law will affect the 'competency' of a magistrate to deal with a case and is not a curable error. The 'want' of a sanction required under any provision of law will similarly affect the competency of the Court and is not curable under this Section. But quite different would be irregularities in sanctions granted and in such cases irregularities in sanctions will be curable to the extent permissible under s. 537 Cr. P. C.

Thus a sharp distinction is drawn between initiation of proceedings without sanction as required by the sections and irregularities in sanctions granted, the former being a defect which vitiates the proceedings *ab initio* and not an irregularity curable under s. 537 Cr. P. C. and the latter sharing that of other irregularities of a like nature being curable to the extent laid down in s. 537 Cr. P. C. To sum up, want of sanction cannot be cured but irregularities in sanctions can be cured."

The statements in some of the cases appear to be wide. It is abundantly clear however that where, upon proper construction, the effect of a provision is that a complaint by order of, or under authority from, a person or sanction is a condition precedent to the assumption of jurisdiction, then the want of such complaint or sanction is a defect which is not curable. In this case there was the want of a complaint as required by s. 82 (2) of the Post Office Ordinance, and I am of the view that the absence of such complaint is a defect not curable under s. 425 of the Criminal Procedure Code.

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 decisions[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.

In *King v. Harip Boosa*[3], Wendt, J., stated, "A District Court, before which an accused person is brought for trial upon a warrant of commitment regular on its face, and to which an indictment is presented by the Attorney-General, is not competent to inquire whether the proceedings which culminated in the committal were regularly instituted or regularly conducted. It is its duty to try the accused." In *King v. Dayaratne*[4], the District Judge to whom an indictment setting out a charge of grievous hurt was presented had held that the medical evidence led at the non-summary inquiry did not disclose an offence under s. 317 but only the offence of simple hurt. He had gone on to find that the

[1] *A. I. R. (1957) Madras 442 at 446.*

[2] *1 S. C. R. 198, 1 Browne 400, 5 N. L. R. 236, 10 N. L. R. 199, 11 N. L. R 355, 46 N. L. R. 513.*

[3] *11 N. L. R. 355 at 356*

[4] *46 N. L. R. 513.*

committal was a nullity and had therefore discharged the accused. In appeal it was held that the District Judge had no power to inquire into the question as to whether the proceedings in the Magistrate's Court were irregular. It was his duty to try the case. Keuneman, J., in the course of his judgment said that no question of jurisdiction arose. He also stated, "It is possible that relief may be obtained in the case of a serious irregularity on application to the Supreme Court, but in my opinion the District Judge had no authority to inquire into such a matter."

In *Queen v. Kolendavail*[1], where too it was held that the District Judge had no power to inquire into the validity of the commitment, Burnside, C.J., said that the remedy for an irregular commitment would be by application to this Court.

It appears to me that the true position is not that an indictment cures an irregularity but that the District Court has no jurisdiction to inquire into the regularity of the proceedings in the non-summary inquiry before the magistrate for the purpose of considering the validity of the commitment.

Section 12 of the Criminal Procedure Code states—

> "No District Court shall take cognizance of any offence unless the accused has been committed for trial by a Magistrate's Court duly empowered in that behalf . . . ."

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 that Court had jurisdiction in respect of the offence. This contention is no doubt correct. But the exercise of jurisdiction and the having

[1] *1 S. C. R. 198.*

of proceedings by the District Court in disregard of statutory prohibitions against taking cognizance 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.

Learned Crown Counsel drew my attention to s. 71 of the Courts Ordinance and submitted that as the accused had pleaded without taking a plea to jurisdiction any objection had been waived and that the District Court must be taken and held to have had jurisdiction over the prosecution. The matter is not free of difficulty but it is not necessary to consider it. At the commencement of the proceedings in the District Court the indictment was amended and thereupon Counsel for the accused indicated that he had a preliminary objection and asked that the plea of the accused be taken on the following day. The learned District Judge stated that he had no power to put off taking the plea and he proceeded to take it. He then put off the trial as the prosecution was not ready. In the circumstances, it would not, in any event, be fair to deprive the appellant of the benefit of the objection.

I allow the appeal and I quash and set aside the proceedings of the Magistrate's Court as well as the trial proceedings in the District Court and the conviction of and the sentence imposed on the appellant.

WIJAYATILAKE, J.—I agree.

Appeal allowed.