1950 *Present:* **Jayetileke C.J. and Swan J.**

PERERA (S. I. Police), Applicant, *and* PAULU SUARIS *et al.*, Respondents

S. C. 538—Application in revision in M. C. Kanadulla, 2,415

Criminal procedure—Prosecution initiated by police officer—Right of private pleader to conduct prosecution—Criminal Procedure Code (Cap. 16), sections 148 (1) (b), 199.

A police officer made a report under section 148 (1) (*b*) of the Criminal Procedure Code in respect of the commission of an offence which was triable summarily. On the date of trial he stated that he appeared for the prosecution. A Proctor then appeared and stated that he had been retained by the aggrieved party to conduct the prosecution and claimed the right to do so. The police officer opposed the application on the ground that the prosecution had been initiated by him.

Held, that a police officer who institutes proceedings in the Magistrate's Court is entitled to appear and conduct the prosecution at the trial. A police officer who makes a written report to a Magistrate comes within the words "complainant" or "any officer of any Government Department" in section 199 of the Criminal Procedure Code.

De Silva v. The Magistrate of Gampola (1943) 44 N. L. R. 320 overruled.

APPLICATION to revise an order of the Magistrate's Court, Kanadulla. This application was reserved by Jayetileke C.J. for consideration by a Bench of two Judges.

R. R. Crossette-Thambiah, K.C., Solicitor-General, with *H. A. Wijemanne, Crown Counsel*, and *S. S. Wijesinha, Crown Counsel*, in support.—The question for determination in this case is whether the police officer who initiated proceedings in the Magistrate's Court under section 148 (1) (*b*) of the Criminal Procedure Code has or has not the right to conduct the prosecution. The accused was charged with the theft of coconuts from the land of one Kande Naide. The Magistrate has upheld the claim of Kande Naide to conduct the prosecution by his pleader Mr. O. M. P. Perera. The Magistrate held he was bound by the decision of the Supreme Court in *De Silva v. The Magistrate, Gampola* [1].

The right to conduct the prosecution in summary cases such as this is governed by section 199 of the Criminal Procedure Code. Under this section the right to appear in and conduct the prosecution in summary cases is given to the Attorney-General, to the Solicitor-General, or to a pleader appointed by the Attorney-General. In the absence of these officers the right to appear in and conduct the prosecution is given to the complainant or any officer of any Government Department or any officer of any Municipality, District Council or Local Board in any case in which such complainant or District Council or Local Board or Municipality or Government Department is interested.

On the question as to the meaning to be attached to the word complainant in section 199 of the Criminal Procedure Code there are conflicting decisions of this Court. In *Grenier v. Edwin Perera* [2] Keuneman J. was of opinion that a person making a written or oral

[1] *(1943) 44 N. L. R. 320.* [2] *(1941) 42 N. L. R. 377.*

1——J. N. A 98322—1,042 (6/50)

complaint under section 148 (1) (*a*) or a Police Officer making a written report under section 148 (1) (*b*) or yet again the aggrieved person giving information to a police officer when the police officer makes the written report under section 148 (1) (*b*) may be regarded as coming within the meaning of "complainant" in section 199 of the Criminal Procedure Code. Keuneman J. held further in that case that a police officer who makes the written report under section 148 (1) (*b*) is an officer of a Government Department interested in such case. But in *De Silva v. Magistrate of Gampola* (*supra*) de Kretser disagreed with the view taken by Keuneman J. and held that a police officer who makes a written report under section 148 (1) (*b*) does not come within the words "complainant" or "officer of a Government Department" as contemplated by section 199 of the Criminal Procedure Code. In *The Attorney-General v. Herath Singho* [1] Dias J. disagreeing with the view taken by de Kretser J. held that the police officer who initiates proceedings in a Magistrate's Court with a written report under section 148 (1) (*b*) is a complainant within the meaning of section 199 and that he alone is entitled to conduct the prosecution as complainant. There is also an old case *Thomas v. Cornelis* [2] where Browne J. was of opinion that the word "complainant" referred to head (*a*) of section 148 (1) and "informant" to any of the officers mentioned in head (*b*), or to persons who have given information to such officers.

No doubt there is an omission in section 199. The words "inquirer", "public servant" and "peace officer" which occur in 148 (1) (*b*) have been omitted. But the words "officer of a Government Department interested in the case" are sufficient to take in an officer in the Police Department as, undoubtedly, the Police Department is one of the departments of the Government under the Constitution of Ceylon.

In any event Kande Naide has no right at all to prosecute by himself or by his pleader Mr. O. M. P. Perera. Kande Naide is neither a complainant nor an officer. He is only a witness and has therefore no right to conduct the case. On the other hand Sub-Inspector Perera, both as officer who made the written report under 148 (1) (*b*) and also as an officer of Government Department interested in the case, is entitled to conduct the prosecution. The order of the Magistrate is clearly wrong. Counsel also cited *Mendis v. Carlinahamy* [3]; *Babi Nona v. Wijesinghe* [4]; *Sanmugam Pillai v. Ferdinands* [5].

H. V. Perera, K.C., with *E. B. Wikramanayake, K.C., N. M. de Silva, J. A. L. Cooray, H. W. Jayewardene, S. J. Kadiryamar, Asoka Obeysekera* and *C. E. Jayewardene*, for the complainant respondent.—In *The Attorney-General v. Herath Singho* (*supra*) Dias J. gives what seems to be a very simple solution of the question that arises for determination in this case. He says that the word "complaint" has been defined in the Criminal Procedure Code as an allegation, made orally or in writing, to a Magistrate with a view to his taking action, under the Criminal Procedure Code, that some person has committed an offence. He then says that this definition is wide enough to catch up not only the

[1] *(1948) 49 N. L. R. 108.*
[2] *(1901) 2 Browne 16.*
[3] *(1900) 4 N. L. R. 341.*
[4] *(1926) 29 N. L. R. 45.*
[5] *(1942) 46 N. L. R. 380.*

complaint under section 148 (1) (*a*) but also the written report under 148 (1) (*b*) and that, therefore, when proceedings are initiated on a written report by a police officer, that police officer alone is entitled to conduct the prosecution as complainant under section 199. It will be seen that Dias J. is of the view that the complainant is the person who makes the complaint as defined by the Criminal Procedure Code. It is respectfully submitted that though this solution is simple it is not quite correct.

As will be seen from the Criminal Procedure Code the word "complaint" alone is defined and not its derivatives. When one word is defined singly without reference to derivatives, there is no rule of construction by which it is permissible to give a meaning to a word similar to a word that has been defined, merely because the two words are similar. Therefore it is not permissible to hold on the strength of the definition of the word "complaint" that "complainant" is the person who makes the complaint. Section 148 (1) (*a*) does not define "complainant". A person who makes a complaint under section 148 (1) (*a*) is undoubtedly a complainant but it does not follow that "complainant" means only such person. Indeed there are many sections in the Criminal Procedure Code where the word "complainant" occurs and it is obvious that "complainant" in those sections does not mean a person who makes a complaint under section 148 (1) (*a*). For instance in section 127 (1) a person who gives information to a police officer or to an inquirer relating to the commission of a cognizable offence is called complainant.

There is no doubt that the question before Court is the interpretation of section 199 of the Criminal Procedure Code.

[JAYETILEKE C.J.—Why are the words "inquirer", "peace officer" and "public servant" which occur in section 148 (1) (*b*) left out in section 199 ?]

Probably deliberately, because those persons who were omitted were not to be given the right to prosecute.

The clue to the meaning of section 199 is the last word in the section, viz., "interested". The Police have no interest in the case as such. Functions of police officers are defined in section 57 of the Police Ordinance (Cap. 43). Conducting of cases is not the function of the police. As a matter of fact it is undesirable that Police should conduct the prosecution in criminal cases. See *Police Sergeant Kulatunge v. Mudalihamy* [1] and *Webb v. Catchclove* [2]. "Interest" in section 199 does not mean the general interest which everybody has in every case. It must be such an interest as everybody else and every other Department does not have in the case. Police must have an interest in the particular case and not merely the general interest they have in every case. Only a complainant with an interest as described above has the right to prosecute under section 199. There is no doubt that Kande Naide has such an interest. Counsel also cited 77th Edition of Stone's Justices Manual p. 2100 ; *Heyzer v. Piloris Hamy* [3] ; *Senaratne v. Lenohamy* [4].

[1] *(1940) 42 N. L. R. 33 at 35.*
[2] *(1886) 3 Times Law Reports 159.*
[3] *(1883-5) 5 S. C. C. 202.*
[4] *(1917) 20 N. L. R. 44.*

R. R. Crossette-Thambiah, K.C., Solicitor-General.—The duties of police officers are set out not only in section 57 but also in section 72 of the Police Ordinance.

[JAYETILEKE C.J.—Is not section 72 of the Police Ordinance repealed by sections 148 and 199 of the Criminal Procedure Code ?]

No, the provisions are not in conflict. Section 72 of the Police Ordinance gives the police officers the right to prosecute. Same word is used as in section 199. It is well settled both in England and here that the police have a right to prosecute in summary cases. See *22 Cox's Criminal Law Cases 306 ; Duncan v. Toms* [1] *; 7th Edition of Chitty's Statutes p. 792.*

Cur. adv. vult.

July 14, 1950. JAYETILEKE C.J.—

This application was reserved for consideration by a bench of two Judges as there are conflicting decisions of this Court on the question that has arisen.

On July 19, 1949, Sub-Inspector Perera made a report to the Magistrate under s. 148 (1) (*b*) of the Criminal Procedure Code that the accused had committed theft of 325 coconuts valued at Rs. 17 belonging to one Kande Naide. The accused appeared on summons and pleaded not guilty to the charge, and the case was fixed for trial. On the date of trial S. I. Perera stated that he appeared for the prosecution. Mr. O. M. P. Perera, Proctor, appeared and stated that he had been retained by Kande Naide to conduct the prosecution and claimed the right to do so. Sub-Inspector Perera opposed the application on the ground that the prosecution had been initiated by him. The learned Magistrate held that he was bound by the decision of this Court in *De Silva v. The Magistrate of Gampola* [2] and allowed Mr. Perera's application. The present application is made by the Attorney-General to have the said order revised.

The question that arises for decision is whether a Police Officer who institutes proceedings in the Magistrate's Court under s. 148 (1) (*b*) of the Criminal Procedure Code is entitled to appear and conduct the prosecution at the trial. The answer to this question turns on the meaning of the word "complainant" in s. 199 of the Code. S. 199 is in these terms—

> "The Attorney-General, the Solicitor-General, a Crown Counsel or a pleader generally or specially authorised by the Attorney-General shall be entitled to appear and conduct the prosecution in any case tried under this Chapter, but in the absence of the Attorney-General, the Solicitor-General, a Crown Counsel, and any such pleader as aforesaid, the complainant, or any officer of any Government Department, or any officer of any Municipality, District Council, or Local Board may appear in person, or by pleader, to prosecute in any case in which such complainant or Government Department or Municipality or District Council or Local Board is interested."

In *Grenier v. Perera* [3] Keuneman J. took the view that the person making a complaint under s. 148 (1) (*a*), that the person making a written report under s. 148 (1) (*b*), and that the aggrieved party where a report is made

[1] *(1887) 56 Law Times 719.*
[2] *(1943) 44 N. L. R. 320.*
[3] *(1941) 42 N. L. R. 377.*

under s. 148 (1) (*b*) may be regarded as a complainant. Further that a Police Officer who makes a written report to the Magistrate comes within the words " any officer of any Government Department . . . . in any case in which . . . . the Government Department . . . . is interested ".

In *De Silva v. The Magistrate of Gampola* (*supra*) de Kretser J. disagreed with the view taken by Keuneman J. and held that a Police Officer who makes a written report to a Magistrate does not come within the words " complainant " or " any officer of any Government Department " in s. 199.

In *The Attorney-General v. Herath Singho* [1] Dias J. disagreed with de Kretser J. and held that a Police Officer who initiates a prosecution in a summary case is a complainant and is entitled to conduct the prosecution. The word " complainant " has not been defined in the Code but the word " complaint " has been defined thus :—

> " Complaint means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed an offence."

The dictionary meaning of the word " complaint " is an " utterance of grievance ". But according to the definition quoted above an utterance of grievance is not a complaint unless it relates to an offence and is made to a Magistrate. In Chapter XII which deals with prejudicial proceedings an utterance of grievance is referred to as information relating to the commission of an offence. That would be correct because the utterance of grievance is not made to a Magistrate. But in Chapters XV and XVIII which deal with judicial proceedings the word " complaint " is used in the sense indicated in the interpretation clause. In Chapter XII the word " complainant " is used in s. 127 (1) and in Chapters XV and XVIII in Sections 148 (1) (*a*), 189 (3), 195 and 199.

Chapter XII deals with investigation of offences by Police Officers and Inquirers. Section 121 indicates what steps an officer in charge of a Police Station or an inquirer should take before he commences an inquiry under Chapter XII. Sub-section (1) provides that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a Police Station or to an inquirer, shall be reduced to writing by him or under his direction and be read over to the informant. Sub-section 2 provides that if from information received or *otherwise* an officer in charge of a Police Station or inquirer has reason to suspect the commission of a cognizable offence, he shall forthwith send a report of the same to the Magistrate's Court having jurisdiction in respect of such offence, and shall proceed in person to the spot to investigate the facts and circumstances of the case. S. 127 (1) provides that if upon an investigation under the Chapter it appears to the officer in charge of the Police Station or the inquirer that there is sufficient evidence or reasonable ground as aforesaid, such officer or inquirer shall forward the accused under custody before a Magistrate's Court having jurisdiction in the case, or, if the offence is bailable and the accused is able to give security, shall take such security from him for

[1] *(1948) 49 N. L. R. 108.*

his appearance before such Court. When an officer in charge of a Police Station or an inquirer forwards an accused person before a Magistrate's Court or takes security for his appearance, he shall send to such Court any weapon or other article which it may be necessary to produce before such Court and shall require the *complainant* (if any) and so many of the persons who appear to such officer or inquirer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before such Magistrate's Court therein named and give evidence in the matter of the charge against the accused. When s. 127 is read with s. 121 it seems to be fairly clear that the word " complainant " in Section 127 refers to the informant in Section 121. The words " if any " have been used with reference to the words " or otherwise " in Section 121 (2).

Chapter XV deals with the commencement of proceedings before a Magistrate's Court. S. 148 (1) provides that proceedings in a Magistrate's Court shall be instituted in one of the following ways :—

(*a*) on a complaint being made orally or in writing to a Magistrate of such court that an offence has been committed which such Court has jurisdiction either to inquire into or try : Provided that such a complaint if in writing shall be drawn and counter-signed by a pleader and signed by the complainant.

(*b*) on a written report to the like effect being made to a Magistrate of such court by an inquirer under Chapter XII or by a peace officer or a public servant or a Municipal servant or a servant of a District Council or a servant of a Local Board.

(*c*) upon the knowledge or suspicion of a Magistrate of such court to the like effect : Provided that when proceedings are instituted under this paragraph the accused or when there are several persons accused any one of them, shall be entitled to require that the case shall not be tried by the Magistrate upon whose knowledge or suspicion the proceedings were instituted, but shall either be tried by another Magistrate or committed for trial.

(*d*) on any person being brought before a Magistrate of such court in custody without process, accused of having committed an offence which such court has jurisdiction either to inquire into or try.

(*e*) upon a warrant under the hand of the Attorney-General requiring a Magistrate of such Court to hold an inquiry in respect of an offence which such court has jurisdiction to inquire into.

(*f*) on a written complaint made by a court under s. 147.

The complaint under s. 148 (1) (*a*) can be made by the aggrieved person or any one else. Suppose A sees B assaulting C when he is going along the road it is open to A to make a complaint to a Magistrate against B under s. 148 (1) (*a*). The person who makes the complaint is called the complainant in the sub-section. S. 196 refers to a case instituted under sub-sections (*c*) and (*d*) as one instituted on a " complaint ". The words in s. 148 (1) (*b*) are on a written report " to the like effect ", that is to say, on a written report to such Magistrate alleging that an offence has been committed which such Court has jurisdiction either

to inquire into or try. To my mind there is no difference between a complaint made under sub-sections (*a*), (*c*) and (*d*) and a written report to a Magistrate by any of the persons referred to in s. 148 (1) (*b*). I am of opinion that a written report made to a Magistrate under s. 148 (1) (*b*) is a complaint. If a person who makes a complaint under s. 148 (1) (*a*) can be regarded as a complainant I see no reason why a person who makes a complaint under s. 148 (1) (*b*) should not also be regarded as a complainant.

S. 150 (1) says that where the offence alleged in any proceedings instituted under s. 148 (1) (*a*) or s. 148 (1) (*b*) is an indictable one the Magistrate may examine on oath the complainant or informant and any other person who may appear to the Magistrate to be able to speak to the facts of the case.

In *Thomas v. Cornelis* [1] Browne J. said—

> " For my own part I would consider that in s. 149 (1) ' complainant ' relates to head (*a*) of s. 148 (1) and ' informant ' to any of the officers mentioned in head (*b*) or to the person whom they report to have given them the information."

With great respect I am unable to place upon the words " complainant " and " informant " the restricted meaning the learned Judge has placed upon them. The language of s. 148 (1) (*a*) is wide enough to enable a person who knows nothing about the facts of a case to make a complaint to a Magistrate. For instance the proprietor of an estate will be entitled to make a complaint against a person for theft on information given to him by the superintendent. According to s. 148 (1) (*a*) the proprietor will be the complainant. I can think of no other word by which the superintendent can be more accurately described than the word " informant ". Under s. 150 (1) it will be open to the Magistrate to examine on oath the proprietor or the superintendent or any other person who can speak to the facts of the case. I do not think there is any justification for limiting the word " complainant " in s. 150 (1) to the person who makes a complaint under s. 148 (1) (*a*) and the word " informant " to the person who makes a written report under s. 148 (1) (*b*). I am of opinion that the said words are applicable to both sub-sections. The word " complainant " next occurs in Chapter XVIII which lays down the procedure for the trial of cases triable summarily by a Magistrate. S. 189 (1) (3) says that the complainant and accused or their respective pleaders shall be entitled to open their respective cases but the complainant or his pleader shall not be entitled to make any observations in reply upon the evidence given by or on behalf of the accused. According to Mr. Perera's argument the complainant referred to in this section and in s. 199 is the aggrieved party. If Mr. Perera's argument is correct there will be five complainants if a person causes hurt to five persons in the course of the same transaction and a Police Officer institutes proceedings under s. 148 (1) (*b*). It seems to me that the word " complainant " in those two sections must be taken to be the person who made the complaint under s. 148 (1) and initiated the proceedings which necessitated the trial. The words " inquirer " and " peace officer "

[1] *(1901) 2 Browne 16.*

which appear in s. 148 (1) (*b*) have been omitted in s. 199 because they come within the word "complainant". The words "any officer of any Government Department, or any officer of any Municipality, District Council or Local Board" in s. 199 have, I think, been inserted in order to give an officer other than the officer who made the written report under s. 148 (1) (*b*) the right to appear and conduct the prosecution. For instance if the written report under s. 148 (1) (*b*) was made by the Deputy Collector of Customs it will be open to the Collector of Customs to appear and conduct the prosecution in any case in which the Customs Department is interested. Mr. Perera said that he could not argue that a police officer is not an officer of a Government Department. With great respect I am unable to agree with de Kretser J. that a Police Officer is not a member of a department. The Police Department is one of the departments of Government. The words "any officer of a Government Department" would entitle any police officer to appear and conduct the prosecution in a case instituted by a peace officer under s. 148 (1) (*b*).

I am of opinion that the order made by the learned Magistrate is wrong. I would, accordingly, set it aside.

SWAN J.—I agree.

Order set aside.

1950 [IN THE PRIVY COUNCIL]

***Present* : Lord Porter, Lord Radcliffe and Sir John Beaumont**

ALLES, Appellant, *and* ALLES *et al.*, Respondents

Privy Council Appeal No. 76 of 1947

S. C. 118-119—D. C. Colombo, 586

Evidence Ordinance (Cap. 11)—Section 112—Child born during continuance of valid marriage—Presumption of legitimacy—Proof of "no access".

In a suit for divorce the paternity of a child that was born during the continuance of the marriage was in issue, and the question for decision was whether the ostensible father (the appellant) had no access to the mother (the first respondent) at any time when the child could have been begotten.

It was established that the only date upon which the appellant had access to the first respondent during any material period was the 9th August, 1941, and that the child was born on 26th March, 1942. The interval between the two dates was 229 days, if both dates were included in the computation. According to the testimony of the doctor who had attended the first respondent on her confinement and delivered the child, the labour was normal and the child at birth was "a mature child . . . . . an average full term child".

The expert evidence left no doubt that a fully developed child normally appears after a uterine existence of 280 days, calculated from the date of the commencement of the last menstrual flow. There was, however, no reliable information as to when the mother had her last menstrual period, but there was positive evidence of experts that an insemination-delivery period of 229 days could not produce a fully developed child.

Held, that the appellant had sustained the onus, heavy as it was, of proving affirmatively that the only date when he had access to the first respondent was not a date when the child could have been begotten, and that the presumption of legitimacy contemplated in section 112 of the Evidence Ordinance was sufficiently rebutted.