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

In the matter of an Application for Revision under and in terms of the imperative provisions of the Constitution.

Director General
Commission to Investigate
Allegations of Bribery and
Corruption,
No.36,
Malalasekera Mawatha,
Colombo 07.

Complainant

C.A.(Revision)APN No. 29/2018

Colombo High Court Revision No. 02/2018

Magistrate's Court of Colombo No. 59287/01/16

Vs.

01. Nandasena Gotabhaya Rajapakse
No. 26,
Pangiriwatta Road,
Mirihana
Nugegoda.

02. Dissanayake Mudiyansalage Sujatha
Damayanthi Jayarathne
No.122/6, Narammina Road,
Kelaniya.

03. Waduge Palitha Piyasiri Fernando,
No.6/6, Suramya Mawatha,
Maharagama.

04. Karunarathna Banda Adhikari
Egodawela,
No.53/10/01, Perera Mawatha,
Mirihana
Nugegoda.

05. Dissanayake Wijesinghe
Arachchilage Somathilake
Diassanayake,
567/8, Ekamuthu Mawatha,
Thalawathugoda.

06. Yapa Hetti Pathiranahalaage
Nissanka Yapa Senadhipathy,
160/60, Rajamaha Vihara Para,
Mirihana, Kotte.

07. Jayantha Kumarasiri Kolambage
No. 606/1, Gamamada Road,
Katunayaka.

08. Samarasinghe Arachchige Maximus
Jayantha Perera,
No. 7A, Bhathiya Mawatha,
Kalubowila.

Accused

And

01. Nandasena Gotabhaya Rajapakse,
No. 26,
Pangiriwatta Road,
Mirihana
Nugegoda.

1st Accused-Petitioner

Vs.

Director General
Commission to Investigate
Allegations of Bribery and
Corruption,
No.36,
Malalasekera Mawatha,
Colombo 07.

Complainant-Respondent

AND

02 Dissanayake Mudiyansalage Sujatha
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No.122/6, Narammina Road,
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Jayantha Perera,
No. 7A, Bhathiya Mawatha,
Kalubowila.

2nd to 8th Accused-Respondents

AND NOW

01. Nandasena Gotabhaya Rajapakse,
No. 26,
Pangiriwatta Road,
Mirihana
Nugegoda.

1st Accused-Petitioner-Petitioner

Vs.

Director General
Commission to Investigate
Allegations of Bribery and
Corruption,
No.36,
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Jayantha Perera,
No. 7A, Bhathiya Mawatha,
Kalubowila.

2nd to 8th Accused- Respondent-Respondents

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BEFORE	:	**ACHALA WENGAPPULI, J. &** **ARJUNA OBEYESEKERE, J.**
COUNSEL	:	Romesh de Silva P.C. with M.U.M. Ali Sabry P.C., Sugath Caldera and Ruwantha Cooray for the 1st Accused -Petitioner-Petitioner. Janaka Bandara SSC with, Disna Gunasinghe (Assistant Director Legal) and Thushari Dayaratne of the Bribery Commission for the Complainant-Respondent-Respondent..
ARGUED ON	:	25th February, 2019, 27th February,2019 and 28th February,2019.
WRITTEN SUBMISSIONS TENDERED ON	:	05th April, 2019 (by the 1st Accused-Petitioner-Petitioner) 09th April, 2019 (by the Complainant-Respondent-Respondent)
FURTHER WRITTEN SUBMISSIONS TENDERED ON	:	14th June, 2019 (by the 1st Accused-Petitioner-Petitioner and the Complainant-Respondent-Respondent)
DECIDED ON	:	12th September, 2019

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ACHALA WENGAPPULI, J.

The 1st Accused-Petitioner (hereinafter referred to as the "Petitioner") has invoked the revisionary jurisdiction of this Court under

"imperative provisions of the Constitution", seeking to set aside an order of dismissal of his revision application, made by the Provincial High Court of the Western Province Holden in Colombo on 02.02.2018 under HCRA/02/2018 which had been filed by him challenging the validity of an order of the Magistrate's Court of Colombo, in case No. 59287/01/06.

The Complainant Respondent, the Director General of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as the "Respondent"), had instituted proceedings before the Magistrate's Court of Colombo in the said case bearing No. 59287/01/06, alleging commission of several offences by the Petitioner and the 2nd to 8th Accused-Respondents, under the Bribery Act (as amended).

Upon service of notice by the Magistrate's Court, the Petitioner appeared before the learned Magistrate on 30.09.2016 and was enlarged on bail. On 13.02.2017, the Petitioner had raised a preliminary objection to the jurisdiction of the Court and had tendered the same in writing on 15.03.2017. The said preliminary objection was that no written sanction of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as the "Commission") was obtained by the Respondent prior to institution of proceedings before the Magistrate's Court as per the provisions of Section 78 of the Bribery Act, which imposes a written sanction of the Commission as a "mandatory requirement".

Having heard the submissions made by the learned Counsel for the contesting parties, the Magistrate's Court made order on 17.11.2017 overruling the said preliminary objection. The Court then proceeded to read out the charge it had framed to the Petitioner and other Accused-

Respondents. After the charges were readout to the Petitioner, the matter was fixed for trial by the learned Magistrate, who had inferred from his silence, that he pleaded not guilty.

In the meantime, the Petitioner sought to revise the order of the Magistrate's Court by which it overruled his preliminary objection. In the revision application No. HCRA 02/2018 that was filed before the Provincial High Court, the Petitioner primarily moved the appellate Court to revise the said order of the original Court whilst praying for many other reliefs in the interim. The said revision application was supported on 26.01.2018 by the Petitioner. The Provincial High Court had thereafter postponed its order to 02.02.2018 after informing the Petitioner to provide any clarification it might need on a day decided by the Court.

However, on 02.02.2018, the Provincial High Court pronounced its order refusing issuance of notice on the Respondents.

Being aggrieved by the said order of the Provincial High Court, the Petitioner filed the instant revision application in this Court challenging the validity of the order dated 02.02.2018 of the Provincial High Court and also seeking relief in allowing his "... application to revise the order of the Learned Magistrate dated 17th November 2017".

The Petitioner sought to challenge the order of the Provincial High Court on the following exceptional grounds :

a. The said order is contrary to the provisions of law, imperative principles of statutory interpretation, to the evidence on the grant of "sanction and/or directive",

b. The Court misdirected itself in its failure to take cognizance of the fact that the Commission and Director General are two distinct bodies in terms of the Bribery Act (as amended),
c. The action instituted before the Magistrate's Court failed to meet the mandatory pre requisite outlined in section 78 of the Bribery Act (as amended),
d. There was no opportunity afforded to the Petitioner to consider the charges that had been readout by Court as directed by section 182 of the Code of Criminal Procedure Act No. `15 of 1979.

This Court, having heard the submissions of the Petitioner and the Respondent, who had already been served with notice by the Petitioner, granted formal notice and interim relief on 04.07.2018, thereby stated the proceedings before the Magistrate's Court.

In the objections filed by the Respondent, it is stated that "... the issues raised by the Counsel for the Petitioner when supporting this application ... are new issues for which the 1st Respondent has the right to reply in the oral submissions". The Respondent seeks dismissal of the petition of the Petitioner.

At the inquiry before this Court, both parties made submissions in support of their respective positions. They were afforded an opportunity to tender a précis of their submissions with the authorities they have made reference to, during oral submissions.

Having considered the submissions of the parties, this Court sought certain clarifications from the learned Counsel on two issues, on 17.05.2019 which it thought would assist the determination of this application.

With this short introduction on the nature and the history of litigation between the parties, it is helpful at this juncture, if this Court reproduced the submissions of the respective parties *albeit* in summary form.

Learned President's Counsel mounted his challenge on the legal validity of the orders of the Provincial High Court as well as the Magistrate's Court, on the applicability of the mandatory statutory provisions contained in Section 78(1) of the Bribery Act (as amended). He had set down that the dispute of the parties presented to this Court's determination as to "... whether the Magistrate's Court could have entertained the prosecution for an offence under the Bribery Act without the Written Sanction as required by Section 78" of the said Act.

His primary contention before this Court is that there is no dispute by the Respondent on the factual position that "no written sanction in terms of Section 78 has been obtained and/or filed of record in the Magistrate's Court" where the prosecution against the Petitioner is conducted. Based on this undisputed fact, learned President's Counsel for the Petitioner submits that this Court should therefore rule that the pending prosecution before the Magistrate's Court, that had been instituted without written sanction of the Commission, is illegal and accordingly, such proceedings should be quashed for want of jurisdiction.

In his reply on behalf of the Respondent, learned Senior State Counsel referred to the wording of the Section 78(1) where it is stated that "... except by or with" in support of his submission that the Respondent had stated in the plaint tendered to the Magistrate's Court that such

proceedings are instituted with the "directions of the Commission" and therefore the said reference should satisfy the requirement since it had been instituted by the Commission itself. Hence, he argued that no written sanction is necessary when the Commission itself institutes any prosecution as per the reasoning of the unreported Court of Appeal judgment in ***Rodrigo v The Commission to Investigate Allegations of Bribery or Corruption*** - CA/PHC/ 57/99 (decided on 10.11.2010) where this Court held that the *"written sanction would be superfluous as the Commission has given directions to institute proceedings in the relevant Court."* Learned Senior State Counsel further submits that the Supreme Court had refused Leave to Appeal when an attempt was made to challenge this determination by the Court of Appeal.

In defending the order of the Magistrate's Court in overruling the Petitioner's preliminary objection on written sanction under Section 78(1), learned Senior State Counsel contended that the original Court was bound to follow the said judgment of the Court of Appeal on *stare decisis* principle and therefore the impugned order is a legally valid order.

The submissions of the parties revolve around the Sinhala text of Section 78(1) of the Bribery Act (as amended). In view of the submissions, it has become imperative for this Court to decide the meaning of the wording of the said section in the Sinhala text, in relation to the submissions. This endeavour was necessitated due to a defect in the drafting of the amending portion, introduced to Section 78(1) of the principle enactment (Bribery Act) by the amending Act No. 20 of 1994.

Learned President's Counsel for the Petitioner. to his credit, highlighted this serious anomaly in the Sinhala text of the said amending Act which was brought in to substitute certain words in the principle enactment.

Section 78 of the Bribery Act had undergone many a change since its enactment in 1954, owing to the fact that different institutions were empowered from time to time by the Legislature, to institute prosecution in order to effectively eradicate the menace of bribery from our public life. For convenience, it is proposed to consider the English text of Section 78(1) as it existed before the amendment which was brought in by Act No. 20 of 1994.

Section 24 of the Bribery (Amendment) Act No. 9 of 1980, had repealed Section 78(1) of the Bribery Act, in its entirety as it stood after the amendment by Act No. 2 of 1965.

The substituted Section 78(1) reads thus:

> *"No Magistrate's Court shall entertain any prosecution for an offence under this Act except by or with the written sanction of the Bribery Commissioner or an officer authorised by him in that behalf."*

Section 12 of the Bribery (Amendment) Act No. 20 of 1994 amended Section 78 *"by the substitution for the words 'the Bribery Commissioner or an officer authorised by him in that behalf'* of the words 'the Commission'.

In order to maintain visual clarity of the amendment, it is thought that the consolidated Section 78(1), incorporating the said amendment should be reproduced below in the following form.

> *"No Magistrate's Court shall entertain any prosecution for an offence under this Act except by or with the written sanction of ~~the Bribery Commissioner or an officer authorised by him in that behalf~~ the Commission."*

This shows that there is no defect in the drafting of the English text of the said Act, since the intention of the Parliament, with the legislative changes it made to facilitate the responsibility of the State in prevention, investigation and prosecution of activities involving bribery and corruption. With the enactment of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994, that will of the Parliament is clearly reflected in the relevant Sections of the Bribery Act as well.

Learned President's Counsel, however pointed out an anomaly in the relevant provisions of the Act in Sinhala text.

Before the amendment, in the text of section 78(1) states as follows;

> "අල්ලස් කොමසාරිස් වරයා විසින් හෝ තත්කාර්ය සඳහා ඔහු විසින් බලය දෙනු ලැබූ නිලධාරියකු විසින් හෝ අල්ලස් කොමසාරිස් වරයාගේ හෝ එසේ බලය දෙනු ලැබූ නිලධරයකුගේ ලිඛිත අනුමතය ඇතිව හෝ හැර මේ පනත යටතේ වූ වරදක් සම්බන්ධයෙන් යම් නඩු පැවරීමක් කිසිදු මහේස්ත්‍රාත් අධිකරණයක් විසින් භාරගනු නොලැබිය යුතුය"

Section 12 of the Sinhala text identified the words that are to be substituted as follows :

> "ප්‍රධාන ප්‍රඥප්තියේ 78 වන වගන්තියේ " අල්ලස් කොමසාරිස් වරයාගේ හෝ ඒ සඳහා ඔහු විසින් බලය දෙන ලද නිලධරයකුගේ" යන වචන වෙනුවට "කොමිෂන් සභාවේ" යන වචන ආදේශ කිරීමෙන් ඒ වගන්තිය මෙයින් සංශෝධනය කරනු ලැබේ".

At first glance, one finds that Section 78(1) of the Bribery Act as amended by Act No. 09 of 1990 does not contain the words, that are sought to be substituted by Bribery (Amendment) Act No. 20 of 1994 and highlighted by placing them within inverted commas, in that very form. Instead it reads thus :

> "අල්ලස් කොමසාරිස් වරයා විසින් හෝ තත්කාර්ය සඳහා ඔහු විසින් බලය දෙනු ලැබූ නිලධාරියකු විසින්"

In the form introduced to Section 78(1) after Act No. 9 of 1980, it is seen that there are two instances where the reference to "Bribery Commissioner" and also to "an officer authorised by him in that behalf" were made but are presented in slightly different wording to each other.

Thus, it is clear that the substitution of the words "ප්‍රධාන ප්‍රඥප්තියේ 78 වන වගන්තියේ " අල්ලස් කොමසාරිස් වරයාගේ හෝ ඒ සඳහා ඔහු විසින් බලය දෙන ලද නිලධරයකුගේ" " to the words "අල්ලස් කොමසාරිස් වරයා විසින් හෝ තත්කාර්ය සඳහා ඔහු විසින් බලය දෙනු ලැබූ නිලධාරියකු විසින්" could not be carried out to a perfect accuracy as if a clocksmith replaces a worn out part and replaces with a new spare part, which fits perfectly into the void left by the worn out part.

In challenging the order of the Provincial High Court, learned President's Counsel firstly contended that the order of the Provincial High Court is based in the wording of the English text of the Bribery

(Amendment) Act and, whereas the same provisions in the amending Act in Sinhala language, contained the already referred to serious anomaly in the wording used by the Parliament, thereby giving the intended amendment a totally different connotation. He also contended that the Sinhala text takes precedence over its English version and therefore the impugned order of the Provincial High Court is *ex facie* illegal.

Secondly he contended that with this legislative anomaly, the amendment sought to be made by Act No. 20 of 1994 had become meaningless and the Court should therefore revert back to the position that prevailed before the Act No. 20 of 1994 was enacted, i.e. the provision which reads:

> *"No Magistrate's Court shall entertain any prosecution for an offence under this Act except by or with the written sanction of the Bribery Commissioner or an officer authorised by him in that behalf."*

In support of his argument, the learned President's Counsel submitted that Courts, when interpreting statutes will not step into the Legislature's role and fill 'gaps' in Statutes. He cited the judgment of ***Magor and St Mellons Rural District Council v Newport Corporation*** [1951] 2 AER 839, ***Jinadasa v Hemamali*** (2006) 2 Sri L.R. 300, ***Suffragam Rubber and Tea Co. Ltd v Mushin*** 55 N.L.R. 44, ***Liquidator, RVDB v Hendrick*** (1997) 3 Sri L.R. 236 and ***Attorney General v Sumathipala*** (2006) 2 Sri L.R. 126 in support of his contention.

Contrary submissions were made by the learned Senior State Counsel who contended that the "only purposive interpretation that can

be given effect the true intention of the Legislature is that S.12 of Act No. 20 of 1994 refers to whole Section .78 but not only Section 78(1) and thus, it has substituted both segments in sub section referring to the "Bribery Commissioner" with the "Commission" that falls in line with the English and Tamil versions of the Act.".

He relied on the judgments of ***Seaford Court Estates Ltd v Asher*** [1949] 2 AllER 155, ***Mercantile Credit Ltd v Jayathilake and Others***(1993) 2 Sri L.R. 418 and **Bindra**, *Interpretation of Statutes* (8th Ed) in support of his argument of adopting a purposive interpretation of Section 78(1) which is in line with the spirit of the Bribery Act as well as Act No. 19 of 1994.

In the preceding paragraphs of this order, the obvious anomaly in the Sinhala text as it appear in the wording of Section 24 of Act No. 9 of 1980, was considered and identified. It is clear that Section 78(1) after the substitution of the words "කොමිෂන් සභාවේ" leaves another reference to the Bribery Commissioner in that Section and thereby rendering the meaning of the amended Section hard to decipher as it fails to offer a meaningful and grammatically correct full sentence as the resultant amended law as seen from the following :

> "අල්ලස් කොමසාරිස් වරයා විසින් හෝ තත්කාර්ය සඳහා ඔහු විසින් බලය දෙනු ලැබූ නිලධාරියකු විසින් හෝ අල්ලස් ~~කොමසාරිස් වරයාගේ හෝ එසේ බලය දෙනු ලැබූ නිලධරයකුගේ~~
>
> කොමිෂන් සභාවේ
>
> ලිඛිත අනුමතය ඇතිව හෝ හැර මේ පනත යටතේ වූ වරදක් සම්බන්ධයෙන් යම් නඩු පැවරීමක් කිසිදු මහේස්ත්‍රාත් අධිකරණයක් විසින් භාර ගනු නොලැබිය යුතුය".

It is in this context that the learned President's Counsel referred to the judgments where the English Courts, when presented with such an issue on interpreting statutes, decided that it should not step into the Legislature's role to fill in the 'gaps' in Statutes and therefore, urges that this Court adopts his contention that the statutory provisions contained in Section 78(1), as it stood before the Act No. 20 of 1994 was enacted, should be given effect to in spite of the said amendment. Thus, it is the Bribery Commissioner, who should be taken as the authority who is vested with the authority who was empowered to sanction a prosecution under Section 78(1).

In the judgment of ***Magor and St Mellons Rural District Council v Newport Corporation*** (supra), cited by the Petitioner contains the view expressed by Lord *Simonds* having taken a different approach to the one taken by Lord *Denning* in ***Seaford Court Estates Ltd v Asher*** (supra), an authority relied upon by the Respondent.

Lord *Simonds*, referring to the approach of Lord *Denning*, in the said judgment states that it could not be supported since:

> *"It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled in. If a gap is disclosed, the remedy lies in an amending Act."*

In ***Suffragam Rubber and Tea Co. Ltd v Mushin*** (supra), another authority cited by the Petitioner, the Court followed ***Magor and St Mellons***

Rural District Council v Newport Corporation (supra) and stated its view that :

> *"In the construction of a statute, 'the duty of Court' – and a fortiori the duty of the tribunal created by the statute' is limited to interpreting the words used by the Legislature, and it has no power to fill in any gaps disclosed.*

However, Lord *Morton,* in ***Magor and St Mellons Rural District Council v Newport Corporation***(supra), expressed his view (at p. 846 C) more in line with the one held by Lord *Denning :*

> *"We sit here to find out the intention of the Parliament and the Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than opening it up to destructive analysis."*

What has been discouraged by their Lordships is adopting an approach that would (at p.847 B) " *... defeat the Minister's intention by giving an ultra-legalistic interpretation ... or to pull the language of the Act ... to pieces, or to make nonsense of them."*

The view expressed by Lord Denning in ***Seaford Court Estates Ltd v Asher*** (supra) is as follows :

> *"Whenever a statute comes up for consideration it must be remembered that it is not within human*

powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the judges in Heydon's case, and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his second volume Eyston v

Studd. Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."

Lord *Denning* cited ***Heydon's Case*** **[1584] EWHC Exch J36,** where Lord *Coke* laid down the mischief rule in interpretation of statutes as follows:

"For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1st). What was the common law before the making of the Act? (2nd). What was the mischief and defect for which the common law did not provide. (3rd). What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, (4th). The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force

and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.'

In ***AG v Hale*** 53 NLR 289, ***Mowjood v Pussedeniya*** (1987) 1 Sri L.R. 63, ***Science House (Ceylon) Ltd v IPCA Laboratories (Pvt.) Ltd*** (1987) 1 Sri L.R. 185, the view expressed by Lord *Denning* in ***Seaford Court Estates Ltd v Asher*** (supra), was adopted and followed.

Maxwell, on The Interpretation of Statues (12th Ed, at p.228), under the heading "Exceptional Construction" identifies the exceptions to the rule highlighted by Lord Morton, in ***Magor and St Mellons Rural District Council v Newport Corporation*** (supra) as he states :

> *"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence" (emphasis added).*

He further states :

> *"What is, then being discussed here are the instances in which the Court will depart from the literal rule. Such instances are, however, exceptional and it is impossible to lay down any categories of cases in which ordinary grammatical interpretation will inevitably be abandoned: the Courts are very reluctant to substitute*

words in a statute or to add words to it" (emphasis added).

At p. 230, *Maxwell* adds that "Just as the Court will occasionally fill omission, so it will sometimes-contrary to the general principle that effect must be given to every word in the statute-read a section, and while doing so ignore certain words (emphasis added). He cites ***Clapham v National Assistance Board*** [1961] 2 Q.B.77 where Lord *Parker* CJ has said the words of Section 44(3) of the National Assistance Act 1948, "in any proceedings on an application under the last foregoing subsection" should be read as meaning "in any proceeding arising out of an application" etc by insertion of the words 'arising out of' into the text and also by deletion of the word 'on', from the text of the said section.

Bindra on Interpretation of Statutes (9th Ed) at p. 279, under the title of "Anomaly", states thus :

"Although, it is one of the recognised cannons of interpretation of statutes that the words used in a statute should normally be given their plain ordinary meaning, if such a method of interpretation leads to manifest anomaly and is calculated to defeat the professed and declared intention of the Legislature, it is proper for the Courts to give a go-by to the rule mentioned above and to interpret the words used as to give effect to the intention of the Legislature. That could be done of necessary even by modification of the language used. The Legislators do not always deal with specific controversies which the Courts decide. They

incorporate general purpose behind the statutory words and it is for the Court to decide a specific issue. If a given case is well within the general purpose of the legislation but not within the literal meaning of the statute, then the Court must strike the balance."

Learned author, then reemphasises the said principle (at p.342) in following terms :

"It is equally the duty of the Court to accept a contention which promotes the object and for that purpose the Court can go beyond the language in order to give effect to the intention of the Legislature. The Court has to discharge the onerous duty of ascertaining the intention of the lawmaker which may be obscure due to errors in draftsmanship. Statutes must not be construed in a manner leading to absurd results defeating the legislative intent."

Thus, it is clear that there are exceptions even to the rule of interpretation that Courts should attribute literal meaning to a statute and not legislate by filling the gaps in Statutes, since the authorities and the learned text writers permit even to modify the meaning of the words and the structure of the sentence, to substitute words in a statute or to add words or to ignore certain words, in giving effect to the intended meaning of the lawmaker, if and when the reading of distorted text in a statute leading to absurdity.

When one peruses the Bribery (Amendment) Act No. 20 of 1994, it is clear that the purpose of the amended Act is to enact certain legislative provisions in relation to procedural aspects of bribery investigations and prosecutions as well as, more importantly, to remove the many references that are contained in the principle enactment to the office of Bribery Commissioner and to substitute them with the references to the Commission to Investigate Allegations of Bribery and Corruption.

Section 3 of Act No. 20 of 1994 substituted references to the Bribery Commissioner in Section 23A(4) of the principle enactment with the Commission. Similarly, such substitutions to the references of the Bribery Commissioner found in sections 71(4), 73(1)(a) and 81(1) of the principle enactment were substituted with term "the Commission" by the said Act, a clear indication of the Legislative intent of replacing the now defunct office of the Bribery Commissioner with the newly created entity, so that the Bribery Act reflects the comprehensive changes the Parliament had made the prevention, investigation and prosecution of bribery and corruption by the enactment of Commission to Investigate Allegations of Bribery and Corruption Act No. 19 of 1994. It is relevant to note that this Act No. 19 of 1994 which created the Commission, was certified by the Hon. Speaker on the same day with Bribery (Amendment) Act No. 20 of 1994, on 27th October 1994.

In view of such clear legislative intent, the obvious anomaly that had resulted in the Sinhala text of the Act No. 20 of 1994, qualifies to be termed as an instance where, if constructed on the lines the Petitioner strongly suggests, would lead to "*absurd results defeating the legislative intent*" and thereby warranting intervention of this Court by adopting an "exceptional

construction" in interpreting Sinhala text of the amendment brought about by section 12 of Act No. 20 of 1994 to section 78(1) of the Bribery Act.

The situation that is perfectly in line with the learned President's Counsel's submission that Courts will not fill gaps in legislation, arose for consideration before *Gratiaen* J, in ***Tennekoon v Dissanayake*** 50 NLR 403. At this point of time in history there was no Bribery Act in operation and as such the prosecutions were instituted under the provision of the Penal Code, the only piece of legislation by which acts of bribery were criminalised. Noting the legislative inadequacy in dealing with the situation that arose for determination before the then Supreme Court, it was held as follows :

> *"This case illustrates the unsatisfactory state of the law in Ceylon: relating to bribery. The provisions of the Penal Code are not always wide enough to deal with the iniquity of persons attempting by improper means to influence the actions and decisions of public servants. It is not surprising that this is so. Chapter 9 of the Code was adopted in this country from the corresponding provisions of the Indian Penal Code of 1860, the final draft of which had been completed by its distinguished author in 1837. At that time the law aimed principally at the taker and not at the giver of bribes, because " the giver was so often found to be a person struggling against oppression by the taker. " (Law Quarterly Review, Volume 60, at page 46). For this reason, it was not thought necessary to introduce*

a substantive section directly prohibiting persons from giving or offering bribes to public officials, such conduct being caught up, if possible, by the somewhat circuitous application of the law dealing with abetment. In spite of the mischievous changes which have since taken place, the law which was conceived over a century ago still stands unamended. That is of course a matter for the consideration of the Legislature. In the meantime, the plain meaning of the language of an antiquated enactment cannot be given an extended judicial interpretation so as to cope with modern methods of corruption."

This judgment was pronounced on 8th December 1948, and the Bribery Act was passed by Parliament in 1954 with the certification by the Hon. Speaker on 1st March 1954. The situation that has now arisen before this Court cannot be equated to the one before Gratiaen J and could clearly be termed as one which justifies requiring "Exceptional Construction" as *Maxwell* recognises.

Having carefully considered the submissions of the Counsel and the applicable rules of interpretation, this Court therefore decides to interpret the Sinhala text of the amendment brought by Act No. 20 of 1994 to Section 78(1) of the Bribery Act, to read as follows :

"කොමිෂන් සභාව විසින් හෝ කොමිෂන් සභාවේ ලිඛිත
අනුමතය ඇතිව හෝ මේ පනත යටතේ වූ වරදක්

සම්බන්ධයෙන් යම් නඩු පැවරීමක් කිසිදු මහේස්ත්‍රාත් අධිකරණයක් විසින් හර ගනු නොලැබිය යුතුය."

In doing so, this Court had omitted the repetitive reference to the words 'Bribery Commissioner' and 'an officer authorised by him on that behalf' with its slightly different wording to the wording that appears in the principle enactment, to bring about a harmonized text that reflects the obvious legislative intent in bringing the amendment. The amendment does not speak of the number of references to the Bribery Commissioner in its text. The reasonable intent that could be attributable to the Legislature in bringing the amendment is then to substitute all references in Section 78(1) to Bribery Commissioner with the word 'Commission'.

Having decided the wording of the Sinhala text of Section 78(1) of the Bribery Act (as amended) this Court would now consider the primary dispute of the parties, namely the question of sanction.

To impress upon the requirement of a sanction, learned President's Counsel relied on a hypothetical but a realistic situation that could arise in the powers exercised by several entities that are established under the provisions of the Commission to Investigate Allegations of Bribery and Corruption Act No. 19 of 1994. He is apprehensive that there might arise a situation where "an errant Director General acting contrary to the Commissions directions" institutes proceedings before the Magistrate's Court.

Learned Senior State Counsel, in his submissions stated that the prosecution against the Petitioner was not instituted upon a "private plaint" by the Director General but in the capacity of a public officer. He further contended that the "*necessity of a written sanction, on a cursory glance*

is to discourage persons other than the respective authorities empowered to institute such proceedings with a view to exclude vexatious complaints".

Having stated the reasons for the requirement for sanction, he further adds, in relation to the instant matter :

> *"The case has been investigated by the official authorized to conduct investigations on behalf of the Commission. The investigation, as in other cases as well, subjected to direct supervision of the Commission. Having considered the material placed before it* ***the Commission has taken the decision to institute proceedings*** *in the Magistrates Court" (emphasis original).*

Making a reference to these submissions made by the parties had presented an opportunity for this Court to ponder over the question as to why a sanction is imposed by the Legislature, as a necessary precondition, to institute criminal proceedings in respect of certain type of offences.

Learned Senior State Counsel had identified several such instances that are found in the statutes, other than the Bribery Act, and drew attention to Section 147(2) of the Customs Ordinance, Section 23 of the Public Security Ordinance, Section 52 of the Excise Ordinance and Section 47 of the Tea Control Act.

He also cited the following quotation from Vol. 1, page 281 from the authoritative text of *R.F. Dias,* ***A Commentary on the Ceylon Criminal Procedure Code.***

"Any private person is at liberty to initiate criminal proceedings ... Legislature intervenes and imposes a fetter upon this unrestricted right of the subject, by requiring him, in certain cases, to obtain the sanction of some public officer or Court before commencing a prosecution. The object of such legislation is twofold, viz, (i) to prevent the process of the Criminal Courts from being prostituted for the purpose of harassing an enemy by way of revenge, 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."

No doubt, the commentary of the learned author provides an invaluable insight in relation to the rationale behind the imposition of a sanction in instituting certain prosecutions. The Code of Criminal Procedure which had governed the procedural aspect of investigations and trials nevertheless had placed necessary safeguards to protect the interests of the persons who are suspected and accused of committing offences.

R.K.W. Goonesekere in his book titled ***Bribery, A study in law making and of criminal process,*** makes an interesting observation in this regard in the following manner (at p.77) :

"Complaints of bribery have to be treated cautiously. On the one hand the Bribery Department would like to receive as many complaints as possible from persons who have given bribes in the past, from others from whom bribes have been solicited, and even from persons claiming to have 'good' second-hand information. On the other hand, it cannot be overlooked that to make an allegation of bribery can be an easy way of taking revenge on one's personal and political enemies. The problem is how the law is to deal with the false complaint firmly and at the same time to bring the genuine information into the open. To begin with it was natural that the complaints should be encouraged and therefore the Bribery Act gave protection to informants. The bribe-giver, also an offender under the Act, was safeguarded from prosecution by s.78(4) which made the Attorney-General's written sanction necessary for any criminal prosecution against him. Complainants also had to fear that if the accused was acquitted they ran the risk of a civil action being brought against them. This too was countered by requiring the Attorney General's written sanction for the institution of any civil proceedings against a complainant (s.78(4)). But in order that a wronged person might have redress against a false and mischievous allegation of bribery it was provided that the Attorney-General's sanction was not necessary for

a civil action if the District Judge who heard the case certified that in his opinion the complainant had wilfully and with intent to harm made a false or frivolous allegation of bribery (s.27). In this way the Act tried to strike a balance between competing interests, perhaps, not too successfully because s.78(4) was repealed by the Bribery (Amendment) Law No. 38 of 1974."

Observations made by the learned author of the above quoted text further strengthens the requirement to have the prerequisite of a sanction in initiating a prosecution since it had also been observed "that the general procedural law does not apply to bribery investigations" (at p.80). The amendments brought about by the Commissions of Inquiry (Amendment) No. 3 of 2019, where the Commission was empowered to institute criminal proceedings "on a consideration of material collected in the course of an investigation of inquiry as the case may be by a Commission of Inquiry appointed under Section 2" of the Commissions of Inquiry Act (Chapter 393) adds another dimension. It is clear that the amendment was brought in with the high ideal of strengthening the fight against bribery and corruption. But the Courts will have to maintain a balance between the purpose oriented legislation and the legal safeguards that had been afforded to an individual.

In ***Bereton v Ratranhamy*** 19 C.L.W. 11, the Court attributed the necessity of the sanction to prevent frivolous and vexatious prosecutions. ***Atapattu v Punchi Banda*** 40 N.L.R. 169 also expressed a similar view. The

Court of Appeal divisional bench in ***Wijesiri v The Attorney General*** (1980) 2 Sri L.R. 317, has stated that :

> *"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".*

The judgment of ***The Attorney General v William*** 57 N.L.R. 9, is in relation to a prosecution for an offence under the Bribery Act. When the question arose as to the jurisdiction of Court which had accepted an indictment without the signature of the Attorney General himself, under

Section 78(1), their Lordships have added another important consideration in their judgment as to the reasons for the imposition of such a precondition by way of a sanction. The Court declared that :

> *"Some of the powers conferred on the Attorney General are of such magnitude that it was probably considered necessary that they should be exercised by him and him alone to ensure that his judgment and decision will serve as a guarantee that those powers would be properly exercised."*

This rationale was echoed by the apex Court recently in ***Polwatte v Jayawickrama and Others*** - S.C. Writ application No. 1/2011 - decided on 26.07.2018. Their Lordships, having considered the issue raised by the Petitioner that the Commission had ceased to function due to expired of its term of appointment, decided that "*... as for the exercise of functions such as direction to be given to the Director General, it is crystal clear that the Act has not provided for one member alone to give such direction*" and as such it was held that " *... there is no valid directive made under section 11 of the Act to institute criminal proceedings before the Magistrates Court ...*". This determination by the Supreme Court, therefore lays down a view, contrary to that taken by the Court of Appeal on the point in ***Gunawardene v Nelum Gamage,*** C.A. (PHC) APN. 385/2004 - decided on 12. 06. 2006.

Dias, in his commentary refers to the criterion under which a sanctioning authority should consider grant of sanction (at p. 283 - also cited by the Respondent) :

> *"Sanction to prosecute should only be given with the object that the ends of justice may be served, and not in order to assist private persons to harass their opponents. No sanction ought to be given unless a prima facie case is made out, or unless there exists a reasonable a chance of a conviction following the prosecution. Great care and circumspection should be observed in granting sanctions so that it might not be used by the person to whom it had granted as a weapon of oppression, or for purpose of blackmail. Section 147(4) declares that a sanction, once given, lapses after six months from the date it is given."*

Section 78(1) required the sanction to be in written form. The provisions speaks of a "written sanction". However, no particular reference was made in the statutory provisions contained in the said section of the format to be followed by the sanctioning authority in issuing such a sanction.

However, there is guidance, in relation to the format in which a sanction should be granted, that has been offered in ***Shoni's Code of Criminal Procedure, 1973*** (18th Ed) Vol. 3, p.2059, in line with the provisions of the Indian Code.

" It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential since the section does not require the sanction to be in particular form, nor even to be in writing ... The desirability of such a course is obvious, because when the facts are not set out in the sanction, proof has to be given 'aliunde' that sanction was given in respect of the facts constituting the offence charged, though an omission to do so is not fatal so long as the facts can be, and are, proved in some other way."

With the consideration of the reasons as to the imposition of a sanction as a prerequisite to institute prosecution under Section 78(1) of the Bribery Act, it is appropriate to consider the core issue that had been presented before this Court at this stage.

Having considered the importance of the sanction as a pre requisite for a prosecution, this Court must now endeavour to deal with the following issues,

a. what is the entity, which had been invested with the authority with the sanctioning a prosecution under section 78(1) of the Bribery Act ?
b. whether that entity had in fact granted its sanction to launch the prosecution against the Petitioner and other Accused Respondents ?

The issue regarding the entity, which had been invested with the authority with the sanctioning a prosecution under section 78(1) of the Bribery Act needs no detailed discussion as Section 78(1) itself is clear that it is the Commission itself and no other. There is no dispute about this legal position between the Petitioner (subject to his submission of the legislative anomaly) and Respondent.

The most contentious issue between the parties was therefore whether the Commission had sanctioned the prosecution that had been initiated by the Respondent citing the Petitioner and several others as accused which is now pending before the Magistrate's Court of Colombo.

In his submissions, the Respondent concedes that there is no written sanction by the Commission in this instance. His position is that since this prosecution was initiated by the Respondent on behalf of the Commission as per its direction, the prosecution ought to be considered as a prosecution instituted "by" the Commission and therefore issuance of a written sanction would be quite superfluous. He hinges his argument on the factual position that, in the plaint addressed to the Magistrate's Court which had been tendered under Respondent's signature, it is clearly stated that the facts are reported under 136(1)(b) of the Code of Criminal Procedure Act No. 15 of 1979, upon a direction by the Commission to the Respondent under Section 11 of the Commission to Investigate Allegations of Bribery and Corruption Act No. 19 of 1994. Based on this fact, learned Senior State Counsel further submits that accordingly it ought to be treated

as a prosecution that had been initiated "by" the Commission, which need not sanction a prosecution which itself had initiated.

Learned President's Counsel for the Petitioner sought to counter this contention by placing total reliance on the judgment of the Supreme Court in ***Senanayake v The Attorney General*** (2010) 1 Sri L.R. 149. It is a case where the apex Court had decided the issue, whether the failure to name the Respondent, who was the Complainant in the Court below, as a necessary party in the matter before it, violating Supreme Court Rules 4, 28(1) and 28(5), against the appellant. The appeal was dismissed by the Supreme Court *in limine* on the said preliminary objection.

Learned Counsel highlighted the relevant portions of the said judgment, where their Lordships have determined that :

> *"Considering the provisions contained is Sections 11 and 12 of the Act, No. 19 of 1994 it is quite obvious that where the material received by the Commission to investigate Allegations of Bribery or Corruption, in the course of an investigation conducted under and in terms of the Act, No. 19 of 1994 discloses the commission of an offence, the said Commission shall direct the Director - General to institute criminal proceedings against such person in the appropriate Court. The said provisions also indicate, quite clearly that when such a direction is given by the Commission that it is mandatory for the Director-General to*

institute proceedings. Furthermore, in terms of Section 12 of the Act, No. 19 of 1994, the indictment under the hand of the Director-General is receivable in the High Court.

It is therefore evident that the Director-General has to be regarded as the complainant, as the authority to institute criminal proceedings on the offences under Act No. 19 of 1994, is exclusively vested with the Director-General of the Commission."

In view of this determination, learned President's Counsel submits that the Commission has no authority to institute a prosecution since that power is *"exclusively vested with the Director-General of the Commission"* and as such, the sanction of the Commission is a mandatory requirement and its absence makes the pending prosecution against the Petitioner *null and void* since he had objected to the assumption of jurisdiction of Court on the said prosecution at the very outset.

It is advisable to remind the statutory provisions contained in Section 78(1) once more at this juncture. The section reads thus :

"No Magistrate's Court shall entertain any prosecution for an offence under this Act except by or with the written sanction of the Commission."

There is no dispute that the prosecution against the Petitioner is under the Bribery Act. The words "entertain any prosecution" in the said Section requires a little more consideration. The word "entertain" was deliberately used by the Parliament for a reason. *Dias*, in his commentary explains (Vol. 1, p. 284) the reason :

> *"When a charge needing sanction of a particular kind of complaint is presented the Court may not "take cognizance" of such charge and exercise jurisdiction ... unless such charge is supported by the necessary sanction, or is preferred by a person lawfully entitled to make the complaint."*

Therefore, it appears that when facts are reported by the Respondent, alleging commission of offences under the Bribery Act, Section 78(1) requires the relevant Magistrate's Court, before it assumes jurisdiction over such plaint, to satisfy itself as to whether it should take cognizance of the matter by undertaking a verification that the statutory prerequisites of a written sanction by the Commissioner is satisfied.

Then, the reference made by the learned Senior State Counsel to the words "by or with the written sanction of the Commission" in Section 78(1) also needed consideration.

Plain reading of the words in section 78(1) indicate that "... any prosecution for an offence under this Act except by or with the written

sanction of the Commission" envisages two scenarios. Firstly, there could be a situation where the prosecution is instituted "by" the Commission itself. Secondly there could also be a situation where a prosecution was initiated "with the written sanction of the Commission" by another entity. It is common sense that if the prosecution is initiated by the Commission itself then an imposition of an additional requirement, that there should also be a written sanction, would be a superfluous exercise.

In fact, this is the reasoning in the judgment relied upon by the Respondent. In ***Rodrigo v The Commission to Investigate Allegations of Bribery or Corruption*** - CA/PHC 57/2009 - decided on 10.11.2010, it was held by the Court of Appeal that :

> *"We are of the view that written sanction in this instance would unnecessarily obstruct and delay the smooth and harmonious working of the Bribery Act. We are satisfied that the Commission has given direction to institute proceedings in the relevant Court. As such written sanction contemplated by the Appellant would be superfluous."*

Learned President's Counsel submits that this judgment is against the weight of the judicial precedents and the relevant statutory provisions and therefore had been decided *per incuriam.*

This judgment was pronounced on 10.11.2010. The Supreme Court pronounced its judgment in ***Senanayake v The Attorney General*** (supra), 26 days later on 06.12.2010. Therefore, their Lordships did not have the benefit of the determination of the Supreme Court on the powers and

functions of the Commission in comparison to the functions and powers of the Director General at the time of their determination in ***Rodrigo v The Commission to Investigate Allegations of Bribery or Corruption*** (supra).

Their Lordships determination that *"written sanction in this instance would unnecessarily obstruct and delay the smooth and harmonious working of the Bribery Act"* is apparently based on the acceptance of the proposition that the prosecution is instituted "by" the Commission itself as per Section 78(1) in that particular instance.

But this determination, when viewed in the light of the subsequent pronouncement of the Supreme Court, is in direct conflict with the view held by the apex Court that *"... the authority to institute criminal proceedings on the offences under Act No. 19 of 1994, is exclusively vested with the Director-General of the Commission".*

The Supreme Court further added that :

> *"An examination of the aforementioned provisions of the Act, No. 19 of 1994, reveals that, the functions of the Commission are restricted to investigating allegations and directing the institution of proceedings. It is also evident that on the material received by the Commission in the course of an investigation conducted by the Commission there is disclosure of the commission of an offence, thereafter the role of the Commission is only to direct the Director-General to institute criminal proceedings and the indictment would be signed by the Director-*

General. The said procedure is clearly laid down in Section 12(1) of Act, No. 19 of 1994, ..."

The provisions contained in Section 3 of the Act, No. 19 of 1994, further clarified this position. The said Section 3 of the Act referred to earlier, deals with the functions of the Commission and clearly states that the functions of the Commission are limited to investigate allegations and to direct the institution of proceeding against such person.

A careful examination of the provisions in Section 3 and 11, thus clearly indicates that, whilst the Commission has the authority to investigate, and on the basis of the findings of such investigation, the Commission has the authority to direct the institution of proceedings, such institution of proceedings shall be carried out in effect by the Director- General of the Commission."

The determination of the Supreme Court on the powers and functions of the Commission and Director General in ***Senanayake v The Attorney General*** (supra) is a binding authority on all other Courts on application of the principle of *Stare decisis*, until and unless changed by the Supreme Court itself or the Parliament.

Therefore, this Court is of the considered view that, with the pronouncements made by the Supreme Court in ***Senanayake v The Attorney General*** (supra), the proposition that a prosecution under Bribery

Act could be instituted "by" the Commission itself as per Section 78(1) could no longer be considered as a legally valid statement. In the circumstances, with due respect to the submissions of the learned Senior State Counsel, this Court rejects his submission on this point as it runs contrary to the above referred determination of the apex Court.

The resultant position then is that there should be a written sanction issued by the Commission for a Magistrate's Court to entertain a prosecution instituted under the Bribery Act.

It is an admitted fact that there is no written sanction by the Commission. The Petitioner has highlighted the fact that the Respondent, in her Statement of Objections, has "not even stated that sanction in terms of section 78 has been obtained."

Since there is no provision contained in Section 3 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994, permitting the Commission to institute proceedings on its own, there is no possibility that there could be a situation where the prosecution is instituted "by" the Commission as contended by the learned Senior State Counsel. Then the question whether the Commission had directed the Respondent to institute criminal proceedings against a particular accused or not, has no direct bearing in a situation where the Magistrate's Court considers the issue whether to entertain a prosecution under Section 78(1). Hence, the reliance placed by the Respondent, in her statement in the plaint that the plaint is filed on the direction of the Commission against the Petitioner becomes an irrelevant consideration under Section 78(1).

In view of the above, the position taken up by the Respondent, that she was directed by the Commission to file plaint against the Petitioner is purely an internal administrative arrangement between the Commission and its Director General, which has no bearing to the question whether there is written sanction by the Commission to institute prosecution against the Petitioner, under section 78(1) of the Bribery Act.

The only conclusion that could be reached in view of the above considerations is that the prosecution pending before the Magistrate had been instituted without the written sanction of the Commission and thereby, without complying with the mandatory provisions contained in section 78(1) of the Bribery Act.

Then, what would be the effect of this failure on the pending prosecution against the Petitioner before the Magistrate's Court that had been instituted without written sanction of the Commission ?

The requirement of sanction was first introduced by Section 147 of the Criminal Procedure Code (Ordinance No.15 of 1898) which made it a condition precedent for the initiation of prosecutions for certain type of offences. The Administration of Justice Law No. 44 of 1973, Section 116 imposed a similar precondition. Section 135 of the Code of Criminal Procedure Act No. 15 of 1979 continued with this statutory limitation by making the sanction by the Attorney General as a pre-condition to the institution of proceedings in respect of the instances that are specified therein as no Court could take cognisance of certain offences without it.

This Court already considered why this precondition was imposed by the Parliament. The significance the Legislature has attached to this

provision and its obvious determination to continue with it, in spite of creating a dedicated institution to deal with prevention, investigation and prosecution of bribery and corruption, is evident with the passing of Act No.20 of 1994, by which the requirement of a sanction is retained as a statutory pre-condition. Given the importance attached to the sanction by the Legislature, this Court must then consider the approach the Courts have adopted when dealing with situations where prosecutions were instituted without sanction when the law imposes such a requirement.

There had been instances where the Courts have treated absence of a sanction as fatal to the proceedings before the original Court while there are other instances where the Courts have treated such instances as curable defects under Sections 425 of the old Code and 436 of Act No. 15 of 1979 respectively.

Section 436 specifically states that *"... any judgment passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account ... of the want of any sanction required by section 135."*

In ***King v Harmanis*** 8 N.LR. 140, the Court held that a sanction is necessary to prosecute the accused. The judgment of ***Atapattu v Punchi Banda*** 40 N.L.R. 169, refers to an instance where the objection of no sanction was taken belatedly. Whilst approving the Magistrate's decision to proceed with the case, the Court held it had the power to act under Section 425 of the Criminal Procedure Code, if it is satisfied that the irregularity had occasioned a failure of justice following the principle laid down in ***Halliday v Kandasamy*** 14 N.L.R. 492 that Section 423 should only apply when there was no objection raised to the jurisdiction of the Court.

In ***Silva v Razak*** 1 C.L.W. 213, it was decided that a Magistrate cannot take cognizance of an offence except with the previous sanction of the Attorney General.

However, a distinction is made to this particular approach in ***Wickremaaratchi v Inspector of Police, Nittambuwa*** 71 NLR 121. It is a matter where the prosecution was initiated under Section 14 of the Conciliation Boards Act and an objection was taken only at the appeal that a certificate of the board has been filed as required by law. *Alles* J stated as follows :

> *"Section 425, inter alia, provided for the dismissal of an appeal if any error, omission, irregularity or want of sanction has not occasioned a failure of justice. The absence of the certificate in this case, if it can be called an irregularity, would be similar to the want of sanction under section 147 of the Criminal Procedure Code. It only relates to the exercise of jurisdiction by a Magistrate's Court as distinct from the conferment of jurisdiction and therefore would be curable under section 425."*

Moseley J, in ***Brereton v Ratranhamy*** 19 CLW 11, made the distinction of cases where the want of sanction at the time of institution of proceedings cannot be treated as a curable defects under Section 425. However, it made the cases where the sanction was available, but defective owing to some reason are curable with said section and restricted its applicability only to prosecutions that qualify under Section 147."

His Lordship states thus :

> *"In regard to the omission to obtain the sanction of the Attorney General, it is contended, I think properly, that the object of this requirement is to protect private persons from frivolous and vexatious prosecutions. In* ***Atapattu v Punchi Banda alias Nilame*** *(13 CLW 73) the absence of sanction was held to be cured inasmuch as no objection to want of sanction was taken to the trial, and it must therefore be assumed that the prosecution was neither frivolous or vexatious. In the present case the sanction of the Tea Controller, as provided by section 35(2) of Chapter 299 was obtained. It may therefore be taken that the prosecution was not frivolous or vexatious. 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 the 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 ***Perera v Inspector of Labour Matugama*** 50 N.L.R. 421, *Wijewardene* J adopted the view:

"A defect in the sanction cannot be cured by the application of the provisions of section 425 of the Criminal Procedure Code"

Maymoon v Erasaratnam 68 NLR 331, is a judgment where *Tambiah* J had adopted a stricter approach as it was held that the initial defect of not having the sanction could not be cured subsequently by the issuance of a sanction. His Lordship states that:

"The provisions of Section 45 of the principal Act, as amended by Act No. 68 of 1961, states categorically that no prosecution for an offence under the Immigrants and Emigrants Act could be instituted except by the Controller or by a Police Officer of a rank not below that of an Assistant Superintendent of Police, or with the written sanction of the Controller or such Police Officer. The words used are that without the necessary sanction, no action can be instituted and not that the prosecution cannot be proceeded with. This prosecution was instituted without the necessary sanction. Therefore, the learned Magistrate had no jurisdiction to hear this case. A fatal defect of this kind cannot be cured by the production of a certificate of a

later date. The attention of the learned Magistrate was not brought to this fatal defect."

The judgment of ***Caldera v Wijewardene*** **65 NLR 211,** delivered by *Sansoni* J states thus :

"There is also a recent decision of the Supreme Court of India in which the operation of section 537 was considered, see Slaney v. State of Madhya Pradesk [A. I. R. (1956) S. C. 116.]. Bose, J. expressed the view that the trend of the more recent decisions of the Privy Council, and indeed all later-day criminal jurisprudence in England as well as in India, has been away from technicality, to regard the substance rather than the shadow, and to see whether even where there has been a non-compliance with the provisions of the Code there has actually been a failure of justice. Chandrasekhera Aiyar, J. pointed out in that case that the gravity of the defect will have to be considered-whether it is a mere unimportant mistake in procedure or whether it is substantial and vital. He said : " If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree it will be an irregularity, and prejudice by way of failure of justice will have to be established." As instances of illegality he mentioned " lack of competency of

jurisdiction, absence of a complaint by the proper person or authority specified, want of sanction prescribed as a condition precedent for a prosecution, in short, defects that strike at the very root of jurisdiction."

The judicial attitude on the question whether the defect in the sanction is a curable one or not had been considered and decided clearly by *Samerawickrame* and *Wijayatilake* JJ in the then Supreme Court whilst delivering its judgment in ***Kanagarajah v the Queen*** 74 NLR 378. The reasoning is quite important as that provides great insight in to the core issue before this Court and therefore, it is appropriate that the judgment is reproduced at length to retain its clarity in presentation :

"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 , 42 N. L. R. 149 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 50 N.L.R. 421 , 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 (6), 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 (6) 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 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 A. I. R. (1948) P. C. 82 at 85., 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 (Willaim) Slamey v. State of Madhya Pradesh A.I.R. (1956) S.C. 116 AT 135. Aiyar J., considering irregularities which may be cured under

s. 537 said, 'Of course, lack of competency of jurisdiction, absence of a complaint by 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 SubramaniamA. I. R. 1954 S. C. 637. 149., 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."

Having considered and compared the judicial precedents, *Samerawickrame* J, in determining this vital issue, had laid down the following important principle of law:

"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."

A similar view was echoed in a relatively recent judgment of this Court in ***Appuhamy v Kesbewa Presdeshiya Sabhawa and Others*** (2007) 1 Sri L.R. 1, where acquittal in a Contempt of Court matter was challenged without obtaining the sanction of the Attorney General, a statutory pre requisite imposed by the Code of Criminal Procedure Act No. 15 of 1979. It is held by Court that :

"Section 336 of Ordinance No. 15 of 1898, section 316(c) of 33 of 1973 and Section 318 of Act No. 15 of 1979, which deal with the qualification to lodge an appeal against an acquittal by a Magistrate, except with the written sanction of the Attorney-General, is undoubtedly a restriction affecting the procedural law. In my opinion, under no circumstances it can constitute an integral part of the substantive law.

In the circumstances, it would be seen that the judicial precedents, relied upon by the appellant are unrelated to the question that arises for determination in this case. Based on the underlying principles, I am inclined to endorse the view that the requirement laid down in

section 318 of the Court of Criminal Procedure Act, No. 15 of 1979, is a procedural step. Hence, it is my view that section 318 of the Code, is incapable of being isolated from section 798 of the CPC and should strictly be followed mutatis mutandis, in respect of appeals against acquittals recorded by a District Judge.

As the appellant has admittedly failed to conform to the 160 requirement of section 318 of the Code, the preliminary objection, raised by the accused is upheld."

In ***Kanagarajah v the Queen*** (supra), the Court had referred to the view of the neighbouring jurisdiction, India, and therefore for the sake of completeness the views expressed in ***Shoni's Code of Criminal Procedure, 1973*** *(18th Ed) Vol. 3, p. 2057,* on this very issue are reproduced below :

"Sanction to prosecute constitutes a condition confers jurisdiction on the Court to try the case; and where there is no valid sanction, there is a defect in the jurisdiction of the Court which can never be cured under section 465. It is not permissible to look at the ultimate result of the trial in order to examine whether the Magistrate has taken legal cognizance of the case. If a general power to take cognizance of an offence is vested in a Court, any prohibition to the exercise of that power, by any provision of law, must be confined to the terms of the prohibition. In enacting a law

prohibiting the taking of cognizance of an offence by a Court, unless certain conditions are complied with, the Legislature does not purport to condone the offence. It is primarily concerned to see that prosecution for offences in case covered by the prohibition shall not commence without complying with the condition contained therein."

In a recent judgment, ***Nitinbhai Shah v State of Gujarat*** AIR 2002 SC III 2784, the Supreme Court of India stated that;

"Section 196(1) of the Code of Criminal Procedure enjoins that 'no Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code, except with the previous sanction of the Central Government or of the State Government'. The sanction of the Government is thus a pre-condition for the cognizance of the offences specified in various clauses of S.196."

However, in this particular instance, the apex Court of India refused to intervene as their Lordships observed :

"Such a situation should not be permitted to happen while exercising the jurisdiction under Art 136, more so, when the petitioner inexplicably failed to raise the objection at the earliest. Evidently he chose to raise objections in piecemeal without apparent justification."

The judicial attitude of the English Courts is no different to the ones expressed in the judicial precedents already referred to above.

The Court of Appeal, in ***Regina v Welsh (Snr) & 17 Others*** [2015] EWCA Crim 1516, considered the question "should the Attorney General's consent to institute proceedings have been obtained before the preliminary hearing in the Crown Court?". The Respondent (Crown) conceded that consent was not obtained prior to the institution of proceedings.

Their Lordships have held that "*... the proceedings instituted before the Attorney gave consent would (at least should) have been treated as a nullity by the Crown Court, had the matter been raised prior to conviction. They would then have been instituted properly and the convictions recorded and sentences imposed exactly as they were.*"

This point is best illustrated in the judgment of ***Regina v CW & MM*** [2015] EWCA Crim 906. Relevant portion of Section 4(2)(a) of the Criminal Law Act 1977 reads "*in relation to the institution of proceedings ... otherwise than by, or on behalf or with the consent of , the Attorney General, ...*". The question raised before the original Court was "*should the Attorney General's consent to institute proceedings have been obtained before the preliminary hearing in the Crown Court ?*".

Rejecting the submissions of the Respondent (Crown) that section 25 of the Prosecution of Offences Act 1985, in order to justify its failure, the Court of Appeal had held :

> *"Certain steps during the conduct of a criminal case must be taken. It would risk an injustice were their place in the chronology to found, without more, a*

successful submission that proceedings were null and void. That potential injustice is all section 25 seeks to address, and by its language it does no more that protect against the law of unintended consequences. It does not provide an escape route which cures deficiencies in the Crown's adherence to the terms of section 4."

The appellate Court had endorsed the view taken by the Crown Court on the objection taken on the issue of sanction as it is stated that *"The Judge was astute to the problems the Crown had created for itself and unmoved by a last-ditch attempt to bend the language of section 25 to accommodate that failure."*

All these precedents are on the question of sanction by the Attorney General under section 135 of the Act No. 15 of 1979 or section 147 of the Code of Criminal Procedure or such similar provisions.

In the judgment of ***Attorney General v William*** (supra), *de Silva* and *Sansoni* JJ have considered whether an indictment signed by a Crown Counsel contravenes the requirements of sections 5, 6 and 78(1) of the Bribery Act. Their Lordships have decided that :

"A preliminary objection was taken by their Counsel based on S. 78 (1) of the Bribery Act, No. 11 of 1954, which reads : " No prosecution for any offence under this Act shall be instituted in any Court except by, or with the written sanction of, the Attorney-General ". It was contended that this prosecution had not been

instituted by the Attorney-General or with his written sanction. The Act makes provision for the prosecution of two classes of offences, namely, offences of bribery and offences other than bribery, and these two classes are dealt with in Part II and Part V respectively. The offences with which the accused were charged fall within Part II, and all prosecutions for such offences have to be instituted by the Attorney-General.

"... the pointed references in the Act to certain duties being performed by the Attorney-General alone, and others being performed by him or officers authorised by him, necessarily flow from the far-reaching nature of certain of the powers conferred upon the Attorney-General by the Act. It is only reasonable to presume that the legislature designedly abstained from conferring upon any officer but the Attorney-General the right to exercise the more responsible powers conferred upon the latter. It was not prepared to permit the Attorney-General to delegate the power to sanction civil or criminal proceedings. This is a power which has to be exercised in connection with the prosecution of offences other than bribery. It would not be unreasonable to expect that the corresponding power of indicting or arraigning, in the case of offences of bribery, should be exercised by the Attorney-General and nobody else, and it is not easy to see why the legislature appears to have empowered the Attorney-

General by writing under his hand to delegate to the Solicitor-General the power to indict, but not the power to sanction civil or criminal proceedings."

Thus, it is clear from the above analysis, that the local as well as foreign jurisdictions have treated all instances where criminal proceedings have been instituted without sanction of the authority that is empowered to grant such sanctions, and if an objection is taken at the first available opportunity, as an error that had adversely affected the assumption of jurisdiction by the original Court and cannot be considered as a curable defect by mitigating its effect on the operation of any other section which was meant to cure other procedural irregularities which causes no prejudice to the accused.

In this backdrop, this Court must now turn its attention to decide the validity of the impugned orders pronounced by the Provincial High Court and Magistrate's Court, in the light of above stated considerations.

It is evident from the order of the Magistrate's Court, that the Original Court had treated the prosecution instituted by the Respondent before it, actually as a prosecution instituted "by" the Commission itself and therefore concluded that if a sanction is needed to approve the prosecution that had already been instituted by the Commission on its own, such a proposition would seem an absurd one. Then the Court had accepted the reference made in the plaint, that Respondent had been directed by the Commission to institute proceedings as a fact, that confirms issuance of a direction to the Director General by the Commission under Section 3 of the Act No. 19 of 1994.

In determining the validity of the preliminary objection raised by the Petitioner, the Magistrate's Court had expressly relied on the reasoning of the judgment of the Court of Appeal in ***Rodrigo v The Commission to Investigate Allegations of Bribery or Corruption*** (supra). When the order of the Magistrate's Court was pronounced on 17.11.2017, the Supreme Court had already decided the powers and functions of the Commission and the Director General conferred by the provisions of the Act No. 19 of 1994, in ***Senanayake v The Attorney General*** (supra). However, the original Court had failed to take into consideration that the Commission on its own cannot institute proceedings and only had the power to direct the Director General to do so. The Magistrate's Court also failed to note as per the operative part of the Section 78(1), that it was to the Magistrate's Court that the discretion under said Section was conferred on by the Legislature to entertain prosecutions with the written sanction of the Commission. Thus, the rejection of the preliminary objection to its jurisdiction is clearly made upon arriving at erroneous conclusions as to the functions and powers of the Commission.

In the order of the Provincial High Court, it had been observed by the appellate Court that the Commission had no power to institute prosecutions on its own but only had power to direct the Respondent to do so. Nevertheless, the Provincial High Court endorses the view taken by the Magistrate's Court that the prosecution pending before the lower Court is a prosecution instituted "by" the Commission and therefore no sanction is needed under Section 78(1) of the Bribery Act.

This Court, in view of the determination of the Supreme Court in ***Senanayake v The Attorney General*** (supra) and the provisions contained in Section 3 of the Act No. 19 of 1994, is of the view that prosecution "by" the Commission, as per Section 78(1) of the Bribery Act, has now become an obsolete or redundant function with no corresponding power being conferred upon the Commission in this regard under the provisions of Commission to Investigate Allegations of Bribery and Corruption Act No. 19 of 1994. The prosecution "by" the Commission is therefore clearly legislative residue from Section 78(1) from the statutory provisions that existed before the amendments brought in by Act Nos. 19 and 20 of 1994, with no corresponding power conferred on the Commission to institute proceedings. In the circumstances, the orders of the Magistrate's Court and the Provincial High Court are tainted with illegality and thereby subjected to be interfered with by this Court in exercising its powers of revision.

Clearly this is not a situation where the provisions of Section 436 is applicable since the assumption of jurisdiction is a fundamental legal issue which could not be cured as a mere irregularity or illegality in view of ***Kanagarajah v the Queen*** (supra) and not qualified to be treated as an instance where the prosecution has been instituted under Section 135 of the Code of Criminal Procedure Act No. 15 of 1979.

Therefore, this Court sets aside both the impugned orders and quashes the pending criminal proceedings before the Magistrate's Court for want of jurisdiction. The relevant Magistrate's Court is directed to discharge the Petitioner and 2nd to 8th Accused-Respondents from the proceedings of case No. 59287/01/16, forthwith.

This determination will not act as bar to initiate a criminal prosecution afresh, if the Commission is of the view that the investigation discloses the commission of an offence under the Bribery Act and directs the Respondent to institute proceedings before the appropriate Court. If that Court is the Magistrate's Court, then the Commission must sanction the institution of such proceedings by a written communication to that effect, addressed to that Court.

Application of the Petitioner is allowed. No costs ordered.

JUDGE OF THE COURT OF APPEAL

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE COURT OF APPEAL