1972 *Present :* **Rajaratnam, J.**

G. D. GUNASEKERA, Appellant, *and* KOSGAMA POLICE, Respondent

S. C. 394/70—M. C. Avissawella, 87796

Conciliation Boards Act No. 10 of 1958—Section 14 (1) (b)—Plaint entertained in Magistrate's Court without Chairman's certificate—Offences alleged punishable under ss. 410 and 486 of Penal Code—Defect in Schedule to Conciliation Boards Act—Objection relating to jurisdiction—Whether it can be raised for first time at stage of appeal—Difference between latent and patent want of jurisdiction—Absence of Chairman's certificate—Whether it is an irregularity curable under s. 425 of Criminal Procedure Code—Proceedings instituted by Police on behalf of State—Whether Chairman's certificate is necessary then—Interpretation Ordinance, s. 3—Criminal Procedure Code, ss. 290, 425.

The accused-appellant was convicted by a Magistrate's Court of the offences of mischief and intimidation (punishable under sections 410 and 486 of the Penal Code respectively) for causing damage to a C.T.B. bus and threatening to stab the driver of the said bus. The proceedings were instituted by the Police on behalf of the State.

Objection was taken for the first time in appeal that the Magistrate had no jurisdiction to entertain the plaint in the absence of a certificate issued in accordance with the provisions of section 14 (1) (*b*) of the Conciliation Boards Act. Admittedly a Conciliation Board had already been appointed for the area where the alleged offences were committed.

Held, (i) that the Schedule to the Conciliation Boards Act, although it takes in wholesale the Schedule of compoundable offences specified by section 290 of the Criminal Procedure Code, has omitted to make a distinction between the lessor type of intimidation and the more serious type of intimidation punishable under the Penal Code with inprisonment for seven years. Nor does it make a distinction between mischief in relation to private property and mischief in relation to public property. These two omissions in the Schedule to the Conciliation Boards Act require the immediate attention of the Legislature.

(ii) that, inasmuch as no objection relating to jurisdiction was taken in the original Court upon proof that a Panel of Conciliators had been constituted for the area in which the alleged offences were committed and that this Panel was appointed on a date prior to the alleged offences, the absence of a certificate from the Conciliation Board when the plaint was instituted could not invalidate the proceedings of the trial Court. In such a case, when want of jurisdiction is latent and depends upon proof of facts and is not patent on the face of the plaint, the objection to jurisdiction cannot be raised for the first time at the stage of appeal, nor even at a late stage of the trial.

Peiris v. Inspector of Police (Crimes), Kalutara (74 N. L. R. 479) not followed.

(iii) that, even assuming that the failure to produce the Chairman's certificate before the case was instituted constituted an irregularity, it was only a procedural irregularity that was curable under section 425 of the Criminal Procedure Code if there was no miscarriage of justice and no objection was taken at the trial.

Obiter : In view of the provisions of section 3 of the Interpretation Ordinance, a police officer, when he is the complainant in a case on behalf of the State, is presumably not bound by the requirements of section 14 (1) (*b*) of the Conciliation Boards Act.

APPEAL from a judgment of the Magistrate's Court, Avissawella.

S. B. Lekamge, for the accused-appellant.

S. Aziz, State Counsel, for the Attorney-General.

Cur. adv. vult.

November 3, 1972. RAJARATNAM, J.—

The accused-appellant was charged in the Magistrate's Court of Avissawella with the offences of mischief and intimidation punishable under s. 410 and s. 486 of the Penal Code respectively. It was alleged that he caused damage to a C.T.B. bus and he threatened to stab the driver of the said bus.

After trial he was convicted on both counts and sentenced to 6 months' rigorous imprisonmnt on each count (concurrent).

I see no reason to interfere with the finding of the learned Magistrate on the facts of the case.

The main point urged by learned Counsel for the appellant was that the alleged offences were committed within an area where there was a Conciliation Board constituted and as such the Magistrate's Court of Avissawella had no jurisdiction to entertain the said complaint nor could any action have been instituted in the said Court in view of s. 14 (1) (*b*) of the Conciliation Boards Act No. 10 of 1958.

The objection to jurisdiction was not taken in the lower Court and learned Counsel for the State concedes that there was a Conciliation Board appointed covering the area where the alleged offences were committed at the relevant period.

The question before me is whether the whole proceedings in the Magistrate's Court are null and void.

The Conciliation Boards Act was enacted to save the public from coming to Court by giving them a chance to settle their differences in cases where the offences alleged can be compounded. It provided for an attempt (to be made compulsory) to compound certain offences of a less serious nature before the Conciliation Board. The Schedule to the Conciliation Boards Act specified what offences could be taken for Conciliation and one finds that the Schedule of compoundable offences under s. 290 of the Criminal Procedure Code has been taken wholesale into the Schedule to the Conciliation Boards Act.

But it is a matter of regret that it has not struck the draughtsman to take into the Schedule of the Conciliation Boards Act only the lesser type of intimidation. Instead all types of intimidation of a serious and trivial nature have found a place in the Schedule to the Act. Moreover the Act has taken into its Schedule all types of mischief whether to public or private property.

This is a matter which must be immediately remedied by the Legislature. Otherwise as the law stands, a person threatened with death by another at the point of a gun where the offence is punishable under the Code with imprisonment of 7 years has first to go before the Board, and is forced by law to attempt a settlement with the offender. This is not a situation ever intended by the Legislature.

Similarly with regard to the offence of mischief the Schedule to the Criminal Procedure Code makes a distinction between the offence of mischief in relation to private property which is compoundable and public property which is not compoundable. The Schedule to the Act does not make such a distinction thus presenting a problem.

I refer to these situations as learned Counsel for the State invited me to interpret and modify the Schedule to the Act with reference to the Schedule to the Code in respect of these two offences, as in the present case, he says, the offence of intimidation was of a serious nature with a threat to stab with a knife which was pulled out and the offence of mischief was to public property both offences not being compoundable under the Schedule to the Code. After reading the Schedule to the Act along with the Schedule to the Code he submitted, I could hold that these were two offences which were not required by law to engage the attention of the Board and therefore a certificate was not necessary.

I am afraid that much as I would desire to do so, I must be slow to strain my imagination to modify the Schedule where the draughtsman either failed to or did not modify. It is more in the interests of justice to reveal the problems that arise from an Act as drafted than to make an attempt to judicially repair and adjust the Act to meet a problematic situation. Therefore the question before me now is—are the proceedings of the Court null and void because the plaint was instituted without the certificate from the Board ?

In the case of *Wickremaratchi v. Inspector of Police, Nittambuwa*[1], 71 N. L. R. 121, Alles J. was of the view that the proposition that offences under s. 6 must in the first instance be referred to a Conciliation Board and a certificate obtained from the Chairman, before proceedings can be instituted or entertained in an established Court of Law, is not warranted under the provision of the law. He held further " that, even assuming that the failure to produce the Chairman's certificate before the case was instituted constituted an irregularity, it was only a procedural defect that was curable under s. 425 of the Criminal Procedure Code".

In the case of *Nonahamy v. Halgrat Silva*[2], (1971) 73 N. L. R. 217, a Bench of three Judges with Alles J. dissenting held that the District Court had no jurisdiction to grant an injunction under ss. 86 and 87 of the Courts Ordinance in the absence of a certificate issued by the Chairman

[1] *(1968) 71 N.L.R. 121.* [2] *(1971) 73 N. L. R. 217.*

of the Conciliation Board in terms of s. 14 of the Conciliation Boards Act, and his Lordship the Chief Justice was of the view that the case of *Wickremaratchi v. Inspector of Police, Nittambuwa*, was wrongly decided in so far as it held that s. 14 of the Conciliation Boards Act does not apply in a case where parties do not desire to refer a dispute to a Conciliation Board, and the correctness of the further finding by Alles J. in this case that the defect in the prosecution due to the absence of the certificate was curable under s. 425 of the Criminal Procedure Code was left in doubt. Thus the question has been left open by My Lord the Chief Justice. In the case referred to above in 73 N. L. R. 217, the objection to this jurisdiction was taken in the original Court and upheld by the District Judge. It was this order of the District Judge that was reviewed in appeal.

In the case of *Samarasinghe v. Samarasinghe*[1] (1967) 70 N. L. R. 276, the objection on this point again was taken in the original Court and over-ruled. The appellate Court held that the ruling of the District Judge was erroneous.

In the case of *Fernando v. Fernando*[2] (1971) 74 N. L. R. 57, Samerawickrame J. (with Pandita-Gunawardene J. agreeing) the objection to jurisdiction was taken at a late stage after the plaintiff's case was closed and after the defendant and two witnesses had given evidence. It was held that the defendant was precluded by delay and acquiescence from raising an objection to jurisdiction. Objection relating to jurisdiction may be waived if the want of jurisdiction is not apparent and depends on the proof of facts—for example, where one party does not know that there is a Conciliation Board constituted in the area, but after a few trial dates or after a trial has started comes to know about the existence of a Conciliation Board and thereafter objects to the jurisdiction. I am fortified by the above decision in *Fernando v. Fernando* to hold that this objection cannot succeed. To allow it to succeed will defeat the whole purpose and intention of the Act to expedite litigation and make it less expensive. In the case of *Fernando v. Rosalin*[3] (1971) 74 N. L. R. 563, it was held that even assuming that a certificate from the Conciliation Board is necessary in a partition action, it would be too late to raise an objection as to the absence of such certificate if interlocutory decree has already been entered.

I have been referred to the case of *Peeris v. Inspector of Police (Crimes), Kalutara*[4], 74 N. L. R. 479, where Wijayatilake J. held that an objection to jurisdiction on this point can be taken even at the stage of the appeal. With great respect, I am not able to agree. Wijayatilake J. had quoted the observations of Samerawickrame J., " where the want of jurisdiction is patent, objection to jurisdiction may be taken at any time. In such a case it is in fact the duty of Court itself *ex mero motu* to raise the point even if the parties fail to do so ", and held that from the perusal of the

[1] *(1967) 70 N. L. R. 276.*
[2] *(1971) 74 N. L. R. 57.*
[3] *(1971) 74 N. L. R. 563.*
[4] *(1971) 74 N. L. R. 479.*

plaint s. 314 and s. 410 of the Penal Code under which the accused was charged should have made it patently clear that these offences are clearly set out in the Schedule to the Conciliation Boards Act and therefore outside the jurisdiction of the Magistrate's Court. With great respect the fact that ss. 314 and 410 are included in the Schedule to the Act does not make it patently clear whether there is a Conciliation Board exercising jurisdiction in the area. This depends upon the proof of facts.

In the case of *Fernando v. Fernando* referred to above, Samerawickrame J. went on to observe "the position however appears to be different where the want of jurisdiction is not apparent on the face of the record but depends on the proof of facts. In such a case, it is for the party who asserts that the Court has no jurisdiction to raise the matter and to prove the necessary facts". In the same judgment Samerawickrame J. exhaustively dealt with this question of patent and latent want of jurisdiction and enumerated what facts had to be proved to throw a case out of the jurisdiction of a competent Court.

In the present case there had to be proof of the following facts at least *inter alia* :—

(1) That the alleged offences were committed at Salawa within a certain area,

(2) That a Panel of Conciliators have been constituted for this area, and

(3) That this Panel was appointed on a date prior to the alleged offence,

so that this was a case of a latent want of jurisdiction without the proof of the above three facts. Moreover, how can a Court without the proof of the above facts *mero motu* rule that it lacks jurisdiction when its want of jurisdiction is latent and not patent on the face of the plaint ?

On a consideration of the decisions in the above cases apart from the decision in *Peeris v. Inspector of Police (Crimes), Kalutara*, I hold that it is too late to raise this objection in appeal or for a matter of fact even if it is raised at a later stage of the trial.

The other question which merits consideration is whether s. 425 of the Criminal Procedure Code can be applied in such a situation. My brother Alles has held it can be and My Lord the Chief Justice has allowed it open to consider the correctness of this view. With great respect I have no reason to disagree with Alles J. In my view the Magistrate's Court remains a Court of competent jurisdiction even after the Conciliation Boards Act. The production of the certificate is an essential obligatory procedural requirement. To rule that it is not essential or

obligatory will be clearly wrong and illegal. But if this requirement has been overlooked, it will nevertheless and never the more, if I may say so, remain a procedural irregularity.

Section 147(1) of the Criminal Procedure Code prohibits the Court from taking cognizance of certain offences without the previous sanction of the Attorney-General and s. 425 specifically cures an irregularity which is due to the want of such sanctions as required by s. 147, on the basis that judgment has been passed by a Court of competent jurisdiction. In the words of T. S. Fernando J. in the case of *Samarasinghe v. Samarasinghe*[1] 70 N. L. R. at p. 278, " we do not think that the Conciliation Boards Act makes any pretensions of depriving the citizen of his right of access to the established Courts. What it seeks to do is to place a bar against the entertainment by Court in certain stated circumstances of civil or criminal actions unless there is evidence of an attempt first made to reach a settlement of the dispute over which the parties appear set on embarking on litigation which is often expensive to the parties as well as to the State and which almost always finishes up in bitterness ".

It was held in *Attapattu v. Punchi Banda*[2], 40 N. L. R. 169, by a Divisional Court where a plaint was not sanctioned by the Attorney-General nor instituted in compliance with s. 147 (1) and an objection was taken at the close of the prosecution case and overruled by the Magistrate, that the Supreme Court had power in such a case to act under s. 425 of the Criminal Procedure Code where it is satisfied that the irregularity has not occasioned a failure of justice.

In the present case I do not see any miscarriage of justice. On this point I have also considered—

(1) the case of *Thomas v. Bawa*[3], 46 N. L. R. 215, where it was held that a defect arising from the non-compliance with the procedure prescribed as essential for the exercise of jurisdiction can be waived by consent of parties.

(2) *Price v. Humphries*[4], (1958) 3 W. L. R. 304, where it was held that proof of consent of the Minister which was an essential requirement for the institution of an action under the National Insurance Act was a matter of procedure.

In the light of these authorities, I am with great respect further fortified not only not to disagree but to agree with Alles J. that s. 425 can be applied by this Court in the circumstances of this case.

I will be failing in my duty not to consider another point that was elicited in the course of the argument and that was s. 3 of the Interpretation Ordinance which reads " no enactment shall in any

[1] *(1967) 70 N. L. R. at p. 278.*
[2] *(1938) 40 N. L. R. 169.*
[3] *(1945) 46 N. L. R. 215.*
[4] *(1958) 3 W. L. R. 304.*

manner affect the right of the Crown unless it is therein expressly stated or unless it appears by necessary implication that the Crown is bound thereby."

Every crime is an offence against the State and where the Police on behalf of the State considers the offence though within the Schedule to the Conciliation Boards Act serious enough to prosecute, should the matter first or each time go before the Conciliation Board for the futile purpose of going through an unreal motion for a never intended attempt at a settlement ? For instance where an offender habitually abuses or voluntarily causes hurt or mischief to a neighbour or a neighbour's property, is a certificate necessary each time for instance the offender damages the window pane of his neighbour ? Is a certificate necessary where a high officer of State while passing through an area within the operation of a Conciliation Board is criminally intimidated or even assaulted ? Is it the Police or the unfortunate officer of State so threatened or assaulted who has to come to the Conciliation Board constituted in the area to go through the unreal motion for a never intended attempt at a reconciliation ? Does the Conciliation Boards Act include such cases or is the State where it chooses to prosecute free to go straight into Court. I am inclined to consider that the rights of State cannot be affected by the Conciliation Boards Act. If it does it is a matter for the legislature to appropriately amend the provisions of the said Act.

In the case of *Saravanamuttu v. de Mel* [1], 49 N.L.R. 529 at p. 566, Dias J. referred to the Privy Council case of *The Province of Bombay v. The Municipal Corporation of Bombay* [2], 1947 A.C. 58, which laid down the principle we find in s. 3 of our Interpretation Ordinance. "Their Lordships", he said, "pointed out that the argument that when a statute is enacted for the public good, the Crown though not expressly named, must be held to be bound by its provisions cannot now be regarded as sound except in a strictly limited sense. If it can be affirmed that at the time the statute was passed and received the Royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown was bound, then it may be inferred that the Crown has agreed to be bound". Therefore if it is the case that the Crown has agreed to be bound by this Act lest its beneficent purpose be wholly frustrated, then it is a matter for the State now to take up this position and not for this Court to decide and unless a definite position is taken by learned Counsel for the State that it is not so bound, I cannot express any further views on this matter.

I dismiss the appeal and refuse the application.

Appeal dismissed.

[1] *(1948) 49 N. L. R. 529 at 566.*

[2] *(1947) A. C. 58.*