

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

In the matter of an application under and in terms of Article 140 of the Constitution of the Socialist Democratic Republic of Sri Lanka for a Mandate in the nature of writs of Mandamus and/or prohibition and/or procedendo and/or certiorari

Weerawarna Kurukulusuriya Busabadhuge  
Antony Paul Fernando  
No. 6 Post,  
Idigolla, Bowatta,  
Balangoda.

**Petitioner**

CA (WRIT) Application: CA/WRIT/565/23

Vs

1. Officer in Charge  
Crimes Investigation Unit  
Police Station  
Balangoda.
2. The Officer in Charge  
Special Investigation Unit  
Colombo - 01.
3. Hon. High Court Judge of Rathnapura  
High Court Complex of Rathnapura,  
Rathnapura.
4. The Hon. Attorney General  
Attorney General's Department  
Colombo 12
5. Peli Muhandiram Appuhamilage Chandana  
Nishantha alias Peli Muhandiram  
Appuhamilage Chamil Nishantha  
No. 212/4 Salalihina Mawatha, Mulleriyawa  
North,  
Angoda.
6. Hondurugoda Gamaga Ravindra Leelasena  
No. 48,  
Ganga Asabada Para, Kalanimulla,  
Angoda.

7. Senarath Mohottilage Nishantha Perera alias Senarath Mohottilage Krishantha Perera No. 70/18, Bodhiya Patumaga, Mulleriyawa North, Angoda.
8. Sitharam Antony Digananda, Palawela, Rathnapura.
9. Ranasinghe Arachchilage Sajith Kumara No. 77/O Seneviratne Mawatha, Magammana, Minuwangoda.
10. Athukoralalage Karunanayake alias Kumara Bowatta, Rajawaka, Balangoda.

**Respondents**

Before: **Dhammadika Ganepola, J.**

**Damith Thotawatte, J.**

Counsel Hafeel Farisz with Shannon Thilakaratne instructed by Sanjeewa Kodithuwakku for the Petitioner.  
Dushantha Epitawela instructed by Iroshini Pathirana for the 10<sup>th</sup> Respondent.  
Shanit Kularatna , PC ASG for the Respondents.

Supported 25-02-2025 and 17-03-2025

Order Delivered on: 20-05-2025

**D. Thotawatte, J.**

On the 24th of April 2014, a gang of robbers claiming to be Police Officers entered the Petitioner's residence and robbed him of money and jewellery. Acting on the complaint made on the same day by the Petitioner, the Officer in Charge of the Crimes Investigation Unit of the Balangoda Police Station, had begun investigations and reported the matter to the Learned Magistrate of Balangoda under case No. B 281/2014

The Petitioner being dissatisfied with the manner in which the investigations were being conducted, had complained to the Inspector General of Police requesting him to assign competent investigators to investigate the said crime.

The Petitioner states in his petition that thereafter the Special Investigations Unit of the Sri Lanka Police was assigned to take over the investigation and/or assist the 1<sup>st</sup> Respondent in his investigations. As a result of these investigations, persons named in this application as 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents had been taken into custody and produced as suspects. In the indictment that was subsequently filed in the High Court of Ratnapura (as HCR 53/2021), by the Hon. Attorney General (4<sup>th</sup> Respondent), with regards to the robbery at the Petitioner's residence, the above persons had been named as 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Accused.

However, two other persons namely Ranasinghe Arachchilage Sajith Kumara and Athukoralalage Karunanayake Alias Kumara (respectively the 9<sup>th</sup> and the 10<sup>th</sup> Respondents of the instant application) produced before the Learned Magistrate as suspects in the robbery case, had not been named as accused in the Indictment.

The Petitioner states that by the report dated 9<sup>th</sup> of October 2014, filed by the 1<sup>st</sup> Respondent in the Magistrate Court 1<sup>st</sup> Respondent had informed the court of the recovery of a gold chain and a gold bangle under the provisions of Section 27 of the Evidence ordinance and also the recovery of Gem stones stolen from the Petitioner from the 9<sup>th</sup> Respondent.

The 9<sup>th</sup> Respondent on advice of the 4<sup>th</sup> Respondent, had been charged separately in the Magistrates Court of Minuwangoda for retention of stolen property that was identified as belonging to the Petitioner.

The 10<sup>th</sup> Respondent has been discharged from the proceedings by the 4<sup>th</sup> Respondent on the grounds that there is insufficient evidence to charge them.

The Petitioner states that his main and only grievance is that the Hon. Attorney General had failed to indict some of the persons who committed the crime despite there being clear, unambiguous, and indisputable evidence against them.

The Petitioner further submits that the indictment is not properly formulated as it does not mention the productions contained in the report filed by the investigating officers in the Magistrate court as having been recovered in relation to the crime.

The Petitioner claims that the 4<sup>th</sup> Respondent is bound in law to name 9<sup>th</sup> and 10<sup>th</sup> Respondents as accused in the Indictment bearing No HCR 53/2021 and discharging them from the main case added insult to injury on the Petitioner and every law-abiding citizen of the country.

According to the journal entries of the High Court of Ratnapura case No. HCR 53/2021, the Indictments had been served on the accused on 26-11-2021, and eventually the trial had been fixed for 28-08-2023. Although the journal entries of 28-08-2023 had not been annexed to the petition, the Petitioner claims that his counsel unsuccessfully attempted to prevent the trial commencing on the grounds that a Writ Application had been filed in the court of appeal. However, the Judge of the High Court had commenced the trial, and the prosecution had concluded the examination in chief of the Petitioner.

The Petitioner has filed this present Application on the 2<sup>nd</sup> October 2023 seeking, *inter alia*, the following substantive reliefs:

- c) Issue a Writ of Mandamus directing the 4<sup>th</sup> Respondent to name the 9<sup>th</sup> and 10<sup>th</sup> Respondents as the 5<sup>th</sup> and 6<sup>th</sup> Accused respectively in Case No. HCR 53/2021.

**Or in the alternative**

- d) Issue a Writ of Certiorari quashing the indictment in Case No. HCR 53/2021, and issue a Writ of Mandamus directing the 4<sup>th</sup> Respondent to file a fresh indictment naming the 9<sup>th</sup> and 10<sup>th</sup> Respondents as Accused in relation to the offence committed against the Petitioner.
- e) Issue a Writ of Certiorari quashing the decision not to indict the 9<sup>th</sup> Respondent in Case No. HCR 53/2021.
- f) Issue a Writ of Certiorari quashing the decision of the 4<sup>th</sup> Respondent as contained in document marked X6B (Discharge Order).
- g) Issue an Interim Order staying the continuation of the trial in Case No. HCR 53/2021 until the final hearing and determination of this Application.

**Or in the alternative**

- h) Issue an Interim Order naming the 9<sup>th</sup> Respondent as an Accused in Case No. HCR 53/2021.

In order to establish that the 4<sup>th</sup> Respondent had not exercised his prosecutorial discretion correctly and lawfully, the Petitioner has submitted the following facts reported to the Magistrate court by the 1<sup>st</sup> Respondent;

- a) 1<sup>st</sup> Respondent by his report dated 11<sup>th</sup> of November 2014, had informed the Learned Magistrate that the said 9<sup>th</sup> Respondent was the main suspect of the crime.
- b) The said 9<sup>th</sup> Respondent had constant communication with the robbers who had committed the act.
- c) A suspect had confessed that the said 9<sup>th</sup> Respondent was in the vicinity and planned the entire crime.

- d) In the report filed on the 16<sup>th</sup> of October 2014, the 1<sup>st</sup> Respondent had reported to court that the 10<sup>th</sup> Respondent was also involved in the crime and that the gang of robbers had in fact gathered at his residence prior to the commission of the crime.

The petitioner submits the following facts as reasons that may have prevented the 4<sup>th</sup> Respondent from including the 9<sup>th</sup> and the 10<sup>th</sup> Respondents as Accused in the Indictment.

The Information Book, the extracts sent by the 1<sup>st</sup> Respondent to the Hon. Attorney General, for consideration were incomplete as:

- a) No statements and/or notes of the officers of the 2<sup>nd</sup> Respondent Special Investigation Unit pursuant to the 15<sup>th</sup> of September 2014 have been included.
- b) No sketches and/or other crime scene investigation notes have been included.
- c) A proper list of productions (which are material and a part of the High Court Indictment), recovered during the investigation, has not been included.
- d) The phone record details which were obtained as a part of the investigations and were *prima facie* evidence of the involvement of the 9<sup>th</sup> and 10<sup>th</sup> Respondents of the crime have not been included.

The Attorney General's prosecutorial discretion is very wide, it can extend up to not presenting evidence with a resultant acquittal of the accused.<sup>1</sup> However, this power is not absolute or unfettered<sup>2</sup>. It is a discretion held in trust for the public and must be exercised according to law, fairly and in the public interest, not arbitrarily and is subject to judicial review for illegality, irrationality and procedural impropriety<sup>3</sup>. Our courts have consistently held judicial review would occur only if the Attorney-General's discretion was exercised in bad faith, with an ulterior motive, or based on subjective, arbitrary satisfaction rather than objective facts<sup>4</sup>. It is clear that the Attorney-General's decision to file or not to file an indictment must be exercised based on objective facts and available evidence. Judicial review of prosecutorial discretion can be invoked if:

- Malafides (bad faith) is alleged and properly pleaded
- Irrationality, unreasonableness, or arbitrariness in decision-making is demonstrated.

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<sup>1</sup> The Attorney-General v. K. Sivapragasam et al. (60 NLR 468)

<sup>2</sup> Victor Ivon v. Sarath N. Silva, Attorney-General and Another (1998) 1 Sri L.R. 340

<sup>3</sup> Thennakoon Mudiyanselage Janaka Bandara Thennakoon Vs. Hon. Attorney General and others CA WRIT 335-2016

<sup>4</sup> Kaluhath Ananda Sarath de Abrew v. Chanaka Iddamalgoda et al. SC FR NO. 424-2015

- Violation of fundamental rights is alleged (e.g., unequal treatment, discrimination, violation of fair trial rights)
- Failure to take into account relevant considerations, or taking into account irrelevant considerations.
- Prosecution initiated for an improper purpose or abuse of process.
- When it is clear that the decision to file or not to file the indictment had not been exercised based on objective facts and evidence available.

The Learned Additional Solicitor General who appeared for the 1<sup>st</sup> to 4<sup>th</sup> Respondents informed the court that the 4<sup>th</sup> Respondent in exercising his prosecutorial discretion, considers only the admissible evidence available in the form of testimony of the witnesses, notes of the police officers, material collected connected to the offence, and reports of experts. Investigation officer's reports to the Learned Magistrate during investigation are not evidence and only serve to keep the Learned Magistrate informed of the progress of the investigation. I agree with this submission

It was submitted on behalf of the Petitioner that there are two statements that implicate the 9<sup>th</sup> Respondent in the robbery. The Learned Additional Solicitor General responded to this by stating that the statement of G. P. Amarathunge appearing at page 1203 of the annexes to the petition was recorded when G. P. Amarathunge was considered a suspect. Considering the fact that G. P. Amarathunge was remanded regarding this matter, there are no reasonable grounds to expect that he will be disposed to aiding the prosecution. Further, even if G. P. Amarathunge's statement is considered at its highest, it is unclear regarding the participation of the 9<sup>th</sup> Respondent in the robbery. The second statement, which the petitioner states, that implicates the 9<sup>th</sup> Respondent is the statement of another accused, and as such cannot be legally used against the 9<sup>th</sup> Respondent.

The Learned Additional Solicitor General further explained that although the stolen items that were recovered could be connected to the 9<sup>th</sup> Respondent, there was no admissible evidence to connect him to the robbery, and as such, he was charged separately for retention of stolen property.

The Learned Additional Solicitor General categorically denied that any telephone conversation details were submitted to the 4<sup>th</sup> Respondent and also stated that the entire investigation file has been submitted to the 4<sup>th</sup> Respondent.

The Learned Additional Solicitor General admitted, by an oversight, some productions had not been included in the production list of the Indictment, but that issue has been rectified at present.

In Nadun Chinthaka Wickramaratne v. Hon. Attorney General<sup>5</sup> his Lordship Sobitha Rajakaruna has held that the Attorney General's prosecutorial discretion to indict, based on available evidence, must not be interfered with unless exercised in bad faith, mala fide, or ultra vires.

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<sup>5</sup> CA WRIT 523-2024

The Petitioner in his petition had stated nothing that would amount to allegations of bad faith, mala fide, or that the 4<sup>th</sup> Respondent had acted ultra vires. The Petitioner himself had surmised that the reason for the 4<sup>th</sup> Respondent not including the 9<sup>th</sup> and the 10<sup>th</sup> Respondents in the indictment is a result of the 4<sup>th</sup> Respondent not being provided with complete facts.

The Petitioner has failed to satisfy the court as to the existence of any material relevant to the offense that had been withheld from the 4<sup>th</sup> Respondent or that the 4<sup>th</sup> Respondent has neglected to consider any material submitted to him.

The Petitioner has not demonstrated that the Attorney General's decision to exclude the 9<sup>th</sup> and 10<sup>th</sup> Respondents was made arbitrarily, capriciously, or in bad faith. The material before the Court do not reveal any breach of legal duty by the Attorney General in evaluating the sufficiency of evidence.

After considering the contents of the petition and the submissions of all parties, I am of the view that the Petitioner has failed to establish a *prima facie* case which warrants this Court to issue formal notice of the instant Application on the Respondents. Therefore, I proceed to refuse the instant Application

**Judge of the Court of Appeal**

**Dhammika Ganepola, J.**

I agree

**Judge of the Court of Appeal**