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

In the matter of an Application for mandates in the nature of Writs of Certiorari and Prohibition under and terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA WRIT Application No: 425/2023

Senarathge Lakshman Cooray
154, Thissa Mawatha
Bangalawatta
Kottawa

Petitioner

V.

Hon. Attorney General
Attorney general's Department
Colombo 12

Respondent

Before : **N. Bandula Karunarathna P/CA, J.**
B. Sasi Mahendran, J.

Counsel: Amila Palliyage wih Sandeepani Wijesooriya, Savani Udugampola, Subaj De Silva and Lakshtiha Wakishta Arachchi for the petitioner
Dilan Ratnayake, ASG with Jayalakshi De Silva, SSC for the Respondents.

Written Submissions: 27.03.2024 (by the Petitioner)
On: 19.03.2024 (by the Respondent)

Argued On: 27.02.2024

Decided On: 08.05.2024

B. Sasi Mahendran, J.

Petitioner has instituted this action to obtain the following reliefs prayed for in the prayer of the Petition dated 26th July 2023,

(a) Issue notice on the Respondent above named;

(b) Grant an Interim Order staying the proceedings of Badulla High Court Case bearing No. HC 3650/22,

(c) Call for and Inspect the records of Badulla High Court Case bearing no.44/2022 and Colombo High Court case bearing no. HC 3650/22,

(d) Issue mandates in the nature of a Writ of Certiorari to quash the Indictmnt dated 03-03-2022 of the Badulla High Court Case bearing no.44/2022 marked 'P1',

(e) Issue mandates in the nature of a Writ of Prohibition, prohibiting the Respondent and his servants and agents not instituting any action based on the purported confession marked 'P6' made by the Petitioner,

(f) Grant costs;

(g) Grant such other reliefs as to Your Lordships' Court shall seem fit.

According to the Petition, Number of indictments were filed by the Hon. Attorney General against the Petitioner in different High Courts namely Colombo, Gampaha and Badulla. In the High Court of Gampaha, in case No HC 63/2014 the Court has rejected the confession made by the Petitioner on the basis that, it was not voluntarily made by the Petitioner. Subsequently he was acquitted from all charges. According to the Petition, the

Respondent has filed another indictment under case bearing No. 44/2022 in the High Court of Badulla based on the same confession which was marked as P6. The Petitioner alleged that when the indictment was served to him by the High Court of Badulla, Counsel for the Petitioner raised a preliminary objection stating that the said confession was rejected by the High Court of Gampaha. Therefore, the prosecution could not proceed the case against the Petitioner, as there was no other material evidence available against the petitioner. The Learned High Court Judge overruled the objection and proceeded with the trial. The Petitioner challenging the discretion of the Attorney General on the basis that, without considering, the said confession which was rejected. Hon. Attorney General proceeded to file the indictment on the same confession. According to the Petitioner, decision to file the indictment at the High Court of Badulla is unreasonable. Section 393 of the Criminal procedure Code empowers the Attorney General to present the indictments.

Referring to the above provisions Fernando J, in Victor Ivon v. Sarath N. Silva Attorney General and Another 1998 (1)SLR 340 at page 342 held that;

It is clear that the Attorney-General has a statutory discretion, which involves several aspects. He has to decide whether to give or refuse sanction; and whether to exclude a summary trial, and, in that event, whether to order non-summary proceedings or to file an indictment. The exercise of that discretion is neither legislative nor judicial action, but constitutes "executive or administrative action".

The important question in this case is whether the Attorney-General's discretion in regard to the institution of criminal proceedings is absolute, unfettered and unreviewable, in which event leave to proceed must be refused without further ado.

Further held that,
In order to determine the nature of the discretion to file an indictment, and whether it is reviewable, and if so, in what circumstances and to what extent, it is useful first to examine the discretion to grant sanction: because it is difficult to see on what principle the Attorney-General could conclude that a prosecution was not warranted and therefore refuse to grant sanction, but nevertheless file an indictment. Let me begin with an extreme hypothetical case. If a person complains that he was criminally defamed at a public meeting, at which he was not present, and the only witness he has, as to the actual

words spoken, is a person who is quite hard of hearing, could sanction be granted, without any further investigation, and without the statement of the accused having been recorded? A decision to prosecute in such circumstances would be, prima facie, arbitrary and capricious, and so would the grant of sanction.

In Kaluhath Ananda Sarath de Abrew v. Chanaka Iddamalgoda an Others , S.C. F/R No. 424/2015, Decided On 11.01.2016, Priyantha Jayawardena, PC, J. held that;

The question therefore is whether the Attorney-General when exercising his statutory powers abused the discretion conferred on him by acting in bad faith or with an ulterior motive or whether he has reached a decision based on objective facts.

Further held that;
The aforesaid observation applies with equal force to this application as well. It clearly explains that in order to secure proper administration of justice, the Attorney-General must be left to exercise his discretion according to his own judgment, neither acting on any rule of thumb nor taking into account any other consideration other than what is provided by law and the public interest. Certainly, the Petitioner's remedy is not to ask this Court to question or review the exercise of the powers of the Attorney-General unless the Attorney-General has exercised his powers in bad faith or with an ulterior motive or in excess of his powers."

In Ganeshan Samson Roy v. M.M. Janaka Marasinghe and others, Case No. S.C (F/R) 405/ 2018 Decided On 20.09.2023, Aluwihare, PC, J held that;

Before indictments are filed, the Attorney General should consider if there are reasonable grounds to suspect that the person to be indicted has committed the offence, or if further evidence can be obtained to provide a realistic prospect of conviction, or if the seriousness or the circumstances of the case justifies the making of an immediate decision to file indictments or if it is in the public interest to file indictments against the suspect.

……..

Although the discretion of the Attorney General regarding forwarding of indictments is reviewable, the circumstances in which the Court will intervene are rare. Prosecutorial powers are entrusted to identified officers and no other authority can exercise them or make judgments;. "

Before we consider the contention of the Petitioner that the Hon. Attorney General has abused the discretion to file the indictment, it is prudent to consider the indictment which was filed in the High Court of Badulla. As in the said indictment of Case No 44/2022 the Petitioner is the 3rd accused. The said indictment contains 7 charges. Out of that, 1 and 3 are against the Petitioner. The 1st charge is allegation of conspiring to assassinate the President by causing a bomb explosion, punishable under section 3 of the PTA.

වර්ෂ 2009 ක් වූ පෙබරවාරි මස 01 වන දින සිට වර්ෂ 2009 ක් වූ අගෝස්තු මස 05 වන දින අතර කාලසීමාව තුළ දී හෝ ඊට ආසන්න දිනයකදී මෙම අධිකරණයේ අධිකරණ බලසීමාව තුළ පිහිටි බදුල්ල හි දී යුශ්මතුන් මි පැහිල්ල නොදත් අරුල් යන අය සමග 1979 අංක 48 දරණ ත්‍රස්තවාදය වැළක්වීමේ (තාවකාලික විධිවිධාන) පනතෙහි 2 (1) (අ) වගන්තියෙහි ප්‍රකාශ කර ඇති පරිදි යම් නිශ්චිත පුද්ගලයෙකුගේ මරණය සිදුකිරීමට සුදානම් වීමෙන් එනම්, බදුල්ල නගරයේ වින්සන් ඩයස් ක්‍රීඩාංගනයෙ දී 2009.05.08 වන දින එවකට ජනාධිපති මහින්ද රාජපක්ෂ මැතිතුමාගේ ප්‍රධානත්වයෙන් පැවැත්වීමට නියමිතව තිබුණු ජන රැලියකට බෝම්බ ප්‍රහාරයක් එල්ල කර එවකට ජනාධිපති මහින්ද රාජපක්ෂ මැතිතුමාගේ ඝාතනය කිරීමට සූදානම් වීමෙන් 1979 අංක 48 දරණ ත්‍රස්තවාදය වැලැක්වීමේ (තාවකාලික විධිවිධාන) පනතෙහි 3 (අ) වගන්තිය යටතේ දඩුවම් ලැබිය යුතු වරදක් සිදු කළ බවයි

When we peruse the production list, 2nd, 3rd,4th and 5th items contains confession made by all 4 accused.

පැමිණිලි පක්ෂයෙන් ඉදිරිපත් කිරීමට අපේක්ෂා කරන දේ

1. රජයේ රස පරීක්ෂක වෙත යවන ලද ප්‍රශ්නාවලි දෙකක්,
2. සෙල්වරාසා කිරුබාකරන්ගේ පාපොච්චාරණය,
3. නඩේශන් කුගදාසන්ගේ පාපොච්චාරණය
4. ලක්ෂ්මන් කුරේ යන අයගේ පාපොච්චාරණය
5. තංගුවීලු නිමලන්ගේ පාපොච්චාරණය
6 රජයේ රස පරීක්ෂක සංදේශ දෙකක්
7. රජයේ රස පරීක්ෂක වාර්තා දෙකක්
8. චූදිතයින් විසින් පොලිසියට කරන ලද ප්‍රකාශයන්හි උධෘතයන්
9. අධිකරණ වෛද්‍ය වාර්තාව තුනක්
10. අධිකරණ වෛද්‍ය පරීක්ෂණ පත්‍රයක්
11. අධි බලැති පිපුරුම් උපක්‍රම දෙකක් නිශ්ක්‍රීය කිරීම පිලිබඳ වාර්තාවක්
12. නිශ්ක්‍රීය කරන ලද අධිබල පිපුරුම් උපක්‍රම දෙකක්
13. ඩෙටනේටර් තුනක්
14. රිසිවර් දෙකක්
15. ඩුරස්ට් පාලකයක්

We are mindful that the 1st Count comes under the Prevention of Terrorism Act (Temporary Provisions) Act No 48 of 1979 as amended (the PTA). According to section 16 (1) (a) any person charged with the said act, make any statement to a police officer above the rank of Assistant Superintend may be proved as against that Person. Further under section 16 (3) of the said act, that statement may be proved against any other person jointly with the person making the statement.

16(1) Notwithstanding the provisions of any other law, where any person is charged with any officer under this Act, any statement made by such person at any time, whether

(a) It amounts to a confession or not;
(b) Made orally or reduced to writing
(c) Such person was or not in custody or presence of a policer officer;
(d) Made in the course of an investigation or not;
(e) It was or not whilly or partly in answer to any question,

may be proved as against such person if such statement is not irrelevant under section 24 of the Evidence Ordinance:

"Provided, however, that no such statement shall be proved as against such person if such statement was made to a police officer below the rank of an Assistant Superintendent.

(2) The burden of proving that any statement referred to in subsection (1) is irrelevant under section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant.

(3) Any statement admissible under subsection (1) may be proved as against any other person charged jointly with the person making the statement, if, and only if, such statement is corroborated in material particulars by evidence other than the statements referred to in subsection (1).

In this context, apart from the Petitioner, other 3 Accused also made confessions. The Petitioner has failed to prove that other 3 confessions were also rejected by any other Court. There is no evidence to show that, the 1st count was born out from whose confession whether the Petitioner or other Accused said to have made.

With regard to the 3rd count on the indictment is that the Petitioner transported explosives in his official vehicle from Bellanvila to Badulla.

වර්ෂ 2009 ක් වූ ජූලි මස 01 වන දින සිට වර්ෂ 2009 ක් වූ ජූලි මස 31 වන දින අතර කාලසීමාව තුලදී ඉහත පලමුවන චෝදනාවේ සඳහන් ක්‍රියාකලාපයේ දීම 03 වන යුයුෂ්මතා වරදක් එනම් එවකට ජනාධිපති මහින්ද රාජපක්ෂ යන අයගේ මරණය සිදු කිරීමේ සූදානමක් වශයෙන් බෙල්ලන්විල සිට බදුල්ලට අධිබල පිපුරුම් උපක්‍රම දෙකක් ප්‍රවාහනය කිරීමෙන් 1998 අංක 22 සහ 1982 අංක 10 දරණ පනත්වලින් සංශෝධිත 1979 අංක 48 දරණ ත්‍රස්තවාදය වැළක්වීමේ (තාවකාලික විධි විධාන) පනතේ 2 (1) (ඉ) වගන්තිය සමඟ කියවිය යුතු 2 (2) (II) වගන්තිය යටතෙ දඩුවම් ලැබිය යුතු වරදක් සිදු කළ බවයි.

The indictment revealed that the Government Analyst by his report clearly confirms the presence of RDX explosives found in the said official vehicle. It is Crystal clear that the Respondent, formed an opinion to indict the Petitioner, not only the Petitioner's confession also the other evidence discovered in the cause of the investigation. We are mindful the explosives was found on the official vehicle of the Petitioner. Our Courts are held that; unless otherwise the Petitioner is able to prove that there is a mala fide on part of the Attorney General to indict the Petitioner Courts are reluctant to intervene with the decision of the Attorney General.

In the Case of Fakhir v. Attorney General 2021 (1) SLR 230 at Page 235, Obeyesekere,J.P/CA held that;

"It is significant to note that the learned Counsel for the Petitioner is not alleging dishonesty or ma/a fides on the part of the Attorney General in indicting the Petitioner, but, as I have already stated, is only complaining that there is no factual basis to sustain the charge against the Petitioner."

For the above said reasons, We dismiss the application with Costs.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna,J (P/CA)

I AGREE

JUDGE OF THE COURT OF APPEAL