

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

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

C.A. (Writ) 216/2020

Adikari Mudiyanseilage Chaminda Bandara
Adikari

No.357, Desi Mount Estate,
Pilessa.

PETITIONER

-Vs-

1. A.M. Kapila Adikari
Chief Inspector of Police,
Head Quarters Inspector,
Police Station,
Kurunegala.
2. Pingamage Don Ranjith Kulatunga
Officer-in-Charge,
Special Investigations Unit,
Police Station,
Kurunegala.
3. C.D. Wickramaratne
Acting Inspector General of Police,
Police Headquarters,
Colombo 01.

4. Pro. Senarath Dissanayake
Director General of Archaeology,
Department of Archaeology,
Sir Marcus Fernando Mawatha,
Colombo 07.

5. Hon. Sampath Hewawasam
Magistrate,
Magistrate's Court,
Kurunegala.

6. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

In the matter of an application for an order in the nature of a *Writs of Certiorari* and *Prohibition* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) 217/2020

Thushara Sanjeewa Witharana,
No.334, Wehera Urban Housing Scheme,
Wehera,
Kurunegala.

PETITIONER

-Vs-

1. A.M. Kapila Adikari
Chief Inspector of Police,
Head Quarters Inspector,

Police Station,

Kurunegala.

2. Pingamage Don Ranjith Kulatunga

Officer-in-Charge,

Special Investigations Unit,

Police Station,

Kurunegala.

3. C.D. Wickramaratne

Acting Inspector General of Police,

Police Headquarters,

Colombo 01.

4. Pro. Senarath Dissanayake

Director General of Archaeology,

Department of Archaeology,

Sir Marcus Fernando Mawatha,

Colombo 07.

5. Hon. Sampath Hewawasam

Hon. Magistrate,

Magistrate's Court,

Kurunegala.

6. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENTS

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

Nilaludeen Zulfikar,

Nissanka Mawatha,

Wehera,

Kurunegala.

PETITIONER

-Vs-

1. A.M. Kapila Adikari

Chief Inspector of Police,

Head Quarters Inspector,

Police Station,

Kurunegala.

2. Pingamage Don Ranjith Kulatunga

Officer-in-Charge,

Special Investigations Unit,

Police Station,

Kurunegala.

3. C.D. Wickramaratne

Acting Inspector General of Police,

Police Headquarters,

Colombo 01.

4. E.M. Chithra Kanthi Ekanayaka

Regional Officer,

Regional Office-Kurunegala,

Department of Archeology,

No.425/31, Dharmapala Udyanaya,

Thiththawella,

Kurunegala.

5. Hon. Sampath Hewawasam
Magistrate,
Magistrate's Court,
Kurunegala.

6. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

In the matter of an application for the grant of a *Writs of Certiorari* and *Prohibition* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) 221/2020

Nawarapakshage Pradeep Nishantha
Tilakaratna
No.9, Wathhimi Road,
Kurunegala.

PETITIONER

-Vs-

1. A.M. Kapila Adikari
Chief Inspector of Police,
Head Quarters Inspector,
Police Station,
Kurunegala.
2. Pingamate Don Ranjith Kulatunga
Officer-in-Charge,
Special Investigations Unit,

Police Station,

Kurunegala.

3. C.D. Wickramaratne,

Acting Inspector General of Police,

Police Headquarters,

Colombo 01.

4. Pro. Senarath Dissanayake,

Director General of Archaeology,

Department of Archaeology,

Sir Marcus Fernando Mawatha,

Colombo 07.

5. The Minister of Lands and Land Development,

Ministry of Lands and Land Development,

Mihikatha Medura,

Land Secretariat,

No.1200/6, Rajamalwatta Road,

Battaramulla.

6. Jayasindara Mudiyanselage Wasantha Kumara Hunukumbura,

Executive Engineer,

Executive Engineers Office,

Road development Authority,

Kurunegala.

7. Adhikari Mudiyanselage Chaminda Bandara Adhikari

Municipal Engineer,

Municipal Council,

Kurunegala.

8. Thushara Sanjeeva Vitharana

Mayor,

Municipal Council,

Kurunegala.

9. Hon. Sampath Hewawasam

Magistrate,

Magistrate's Court,

Kurunegala.

10. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENTS

In the matter of an application for the grant of a *Writs of Certiorari* and *Prohibition* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) 222/2020

Warnasuriya Patabedige Lakshman Priyantha,
Backhoe Operator,
Wewagedara,
Kurunegala.

PETITIONER

-Vs-

1. A.M. Kapila Adikari,

Chief Inspector of Police,

Head Quarters Inspector,

Police Station,

Kurunegala.

2. Pingamage Don Ranjith Kulatunga
Officer-in-Charge,
Special Investigations Unit,
Police Station,
Kurunegala.
3. C.D. Wickramaratne
Acting Inspector General of Police,
Police Headquarters,
Colombo 01.
4. Pro. Senarath Dissanayake
Director General of Archaeology,
Department of Archaeology,
Sir Marcus Fernando Mawatha,
Colombo 07.
5. The Minister of Lands and Land Development,
Ministry of Lands and Land Development,
Mihikatha Medura,
Land Secretariat,
No.1200/6, Rajamalwatta Road,
Battaramulla.
6. Jayasundara Mudiyanselage Wasantha Kumara
Hunukumbura,
Executive Engineer,
Executive Engineers Office,
Road development Authority,
Kurunegala.
7. Adhikari Mudiyanselage Chaminda Bandara
Adhikari

Municipal Engineer,
Municipal Council,
Kurunegala.

8. Nilaludeen Zulfikar

Nissanka Mawatha,
Wehera,
Kurunegala.

9. Thushara Sanjeeva Vitharana

Mayor,
Municipal Council,
Kurunegala.

10. Hon. Sampath Hewawasam

Magistrate,
Magistrate's Court,
Kurunegala.

11. Hon. Attorney General,

Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J (P/CA) and
Sobhitha Rajakaruna, J.

COUNSEL : C.A. (Writ) 216/2020 - Shavindra Fernando, PC with Bernard Peterson instructed by Lanka Dharmasiri for the Petitioner.
Sarah Jayamanne, PC, SASG with Vickum de Abrew, SDSG, Madhawa Tennakoon, DSG, Manohara Jayasinghe, SSC and K. Gunathilake, SC for the Attorney General.

C.A. (Writ) 217/2020 - Kalinga Indatissa, PC with Neranjan Iriyagolla, Chalaka Vidanage, Rashmini Indatissa, Roshan Dinesh, Razana Salih, Thilak Silva, Geethanjali Tennakoon and Sayuru Withanage instructed by Lanka Dharmasiri for the Petitioner.

Sarath Jayamanne, PC, SASG with Vickum de Abrew, SDSG, Madhawa Tennakoon, DSG, Manohara Jayasinghe, SSC and K. Gunathilake, SC for the Attorney General.

C.A. (Writ) 218/2020 - Riad Ameen, with Udara Muhandiramge, Namal Karunaratne, Chamindri Arsecularatne, Sasheen Arsecularatne and Varana Wijenayake for the Petitioner.

Sarath Jayamanne, PC, SASG with Vickum de Abrew, SDSG, Madhawa Tennakoon, DSG, Manohara Jayasinghe, SSC and K. Gunathilake, SC for the Attorney General.

C.A. (Writ) 221/2020 - Rienzie Arsecularatne, PC, with Chamindri Arsecularatne, Thejitha Koralage, Namal Karunaratne, Sasheen Arsecularatne and Udara Muhandiramge for the Petitioner.

Sarath Jayamanne, PC, SASG with Vickum de Abrew, SDSG, Madhawa Tennakoon, DSG, Manohara Jayasinghe, SSC and K. Gunathilake, SC for the Attorney General.

C.A. (Writ) 222/2020 - Rienzie Arsecularatne, PC, with T.S. Jayanaga, PC, Chamindri Arsecularatne, Thejitha Koralage, Namal Karunaratne, Sasheen Arsecularatne and Udara Muhandiramge for the Petitioner.

Sarath Jayamanne, PC, SASG with Vickum de Abrew, SDSG, Madhawa Tennakoon, DSG, Manohara Jayasinghe, SSC and K. Gunathilake, SC for the Attorney General.

Decided on : 25.08.2020

A.H.M.D. Nawaz, J. (P/CA)

In a conspectus, the issue that arises in this application for judicial review is whether a Magistrate has the power to issue a warrant of arrest even in cases where the Police can make an arrest without a warrant.

All the Petitioners in the Writ Applications (CA/Writ/216/2020, CA/Writ/217/2020, CA/Writ/218/2020, CA/Writ/221/2020 and CA/Writ/222/2020) seek in the main a writ of *certiorari* that would quash the orders made by the Learned Magistrate, Kurunegala in the Case bearing No. B/2427/2020 issuing and reissuing a warrant of arrest against them on 07.08.2020 and 10.08.2020. An interim order until the final determination of the application staying the action of the aforesaid order is also sought in the applications.

When these applications came up for support on 12.08.2020, consensually only the application CA/Writ/218/2020 was taken up as this was one of the cases that had the complete set of papers relating to the proceedings in the Magistrates Court of Kurunegala in the aforesaid Case B/2427/2020. Mr. Riad Ameen, the learned Counsel who appeared for the Petitioner in CA/Writ/218/2020, tendered to both this Court and Mr. Sarath Jayamanne, PC, Senior Additional Solicitor General (SASG) certified copies of proceedings obtained from the Magistrate's Court and thereafter proceeded to support this application, in the course of which both Mr. Riad Ameen and Mr. Sarath Jayamanne made extensive submissions for and against the grant of Notice and Interim Orders. The respective counsel in the other applications, Mr. Rienzi Arsecularatne, PC in CA Writ 221/2020, Mr. Kalinga Indatissa, PC in CA Writ 217/2020 and Mr. Shavindra Fernando, PC in CA Writ 216/2020 all in unison associated themselves with the submissions made by Mr. Riad Ameen.

As gleaned from the B-reports filed upon a complaint made by the Department of Archeology on 06.07.2020 and 15.07.2020, it is common ground that consequent to allegations that a structure of Buwaneka Hotel described as an antiquity or protected

monument has been demolished, investigations commenced during which statements of several persons have been recorded.

As has been briefed to this Court, B-reports dated 20.07.2020, 23.07.2020 and 28.07.2020 indicate the progress of the case and it is the proceedings dated 07.08.2020 that constitute the subject-matter of these applications.

As the Journal Entry dated 07.08.2020 makes it clear, the learned SASG Mr. Sarath Jayamanne PC and the learned President's Counsel Mr. Kalinga Indatissa made submissions on the question whether an arrest warrant should be issued against the following persons who have been made suspects;

1. Thushara Sanjeewa Witharana (the Petitioner in CA Writ 217/2020)
2. Nuwarapakshage Pradeep Nishantha Tilakaratna (the Petitioner in CA Writ 221/2020)
3. Adikari Mudiyanselage Chaminda Bandara Adhikari (the Petitioner in CA Writ 216/2020)
4. Nilaludeen Zulfikar (the Petitioner in CA Writ 218/2020).
5. Warnasuriya Patabedige Lakshman Priyantha (the Petitioner in CA Writ 222/2020).

The order of the learned Magistrate of Kurunegala dated 07.08.2020 issuing a warrant of arrest has been made subsequent to the adduction of evidence of a Police Officer called Kulathunga. It is this order on 07.08.2020 and the subsequent order On 10.08.2020 to reissue the warrant that are being impugned in these proceedings as *ultra vires* and as having been made without jurisdiction.

Before I proceed to decide on the question of arguability that attend the issue before this Court, I must first dispose of a preliminary objection that the learned SASG raised, namely the Petitioners must have sought revision instead of an order in the nature of a writ of *certiorari* from this Court. That raises the question whether revision, as provided for in Article 138 and 154P (3) (b) of the Constitution, is the only exclusive remedy that

should be sought by the Petitioners. There is a slew of cases that have laid down threshold requirements around this constitutional remedy of revision such as exceptional circumstances. See *Caderamanpulle v. Ceylon Papersacks* (2001) (1) 3 Sri L.R. 172; *Rustom v. Hapangama* (1978-79) 2 Sri L.R. 225; *Atukorale v. Samynathan* 41 N.L.R 165; *Dharmarathna v. Palm Paradise Cabanas* (2003) (3) Sri L.R. 24; *Vanik Incorporation v. Jayasekara* (1997) (2) Sri L.R. 365; *AG v. Gunawardena* (1996) (2) Sri L.R. 149.

Moreover, the constitutional language of Article 138 and Article 154P (3) (b) does not make the remedy of revision exclusive if one were to begin with the language of the empowering enactment to ascertain the exclusivity or otherwise of the remedy of revision.

Both Article 138 along with Article 154P (3) (b) and Article 140 that provide for revision and writs respectively allude to Courts of First Instance specifically and the remedies thus are not mutually exclusive.

Article 140 is quite explicit on the persons and institutions against whom judicial review lies - “subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of *certiorari*, *prohibition*, *procedendo*, *mandamus* and *quo warranto* against the judge of any court of first instance or tribunal or other institution or any other person.”

As such the Petitioners are not confined to seek only revision and provided that the Petitioners make out grounds on which *certiorari* issues, an order of a court of first instance becomes susceptible to review by a discretionary remedy such as a writ. I need not labor this point beyond what I would state thus: “once the statutory language makes it clear that there exist overlapping remedies, the question is whether a statutory remedy such as revision in the provincial high court, which is also provided for in Article 154P (3) (b) is exclusive or is concurrent. If concurrent the question arises whether the statutory remedy provides a sufficient satisfactory alternative to the discretionary

remedy such as a writ. There are instances where an alternative remedy may be available only upon the existence of other factors which are hard to find and difficult to establish which then does not render that remedy satisfactory. Except for the bare assertion that revision lies against an order of a Magistrate's Court it was not argued that revision is more efficacious than this application for judicial review and I therefore would hold that the Petitioners have properly sought judicial review by virtue of Article 140 of the Constitution.

Issuance of Notice-Arguability Principles

It has to be borne in mind that in an application for judicial review the stage of notice demands that a court seized of an application for notice should consider whether the case is suitable for full investigation at a hearing at which all parties have been given notice- see *R v. Secretary of State for Home Department exp Begum* (1990) COD 107. As a consequence then, one fact that it will take into account is whether the application for permission or notice relates to a matter that ought to be resolved after full argument.

In other words, at the notice stage, the court considers whether the matter brought before it is arguable. That entails the conclusion that notice should not be granted if the application for judicial review is unarguable- see *R v. Legal Aid Board ex p Hughes* (1993) 3 Admin LR 623 at 628D in which Lord Donaldson MR held that Notice/ Permission should be granted if an application is *prima facie* arguable. The permission judge needs to be satisfied that there is a proper basis for claiming judicial review, and it is wrong to grant notice without identifying an appropriate issue on which the case can properly proceed-see *R v Social Security Commissioner ex p. Pattni* (1993) 5 Admin LR 219 at 223G. However voluminous the papers, or complex the putative issues, the task remains the same-*R v Local Government Commission ex p. North Yorks County Council* (unreported) 11 March 1994, per Laws J. For a compendious account of principles that should guide an administrative law court in issuing notice see the illuminating article entitled “Arguability Principles” by Michael Fordham QC in (2007) Judicial Review 12:4, 219-220.

Procedure and No evidence rule-the two prongs of impugnation of the warrant

Then, what are the quintessential issues that were contended to be arguable and unarguable by both counsel who addressed this Court? Mr. Riad Ameen learned Counsel for the Petitioner in CA Writ Application 218/2020 assailed the order of the learned Magistrate on two grounds - namely; the procedure adopted by the Magistrate that finally culminated in the issuance of notice and what I would call the no evidence rule by which the learned Counsel sought to attack the warrant of arrest issued by the learned judge. Mr. Sarath Jayamanne PC demurred with an argument that took us through a raft of documents in order to show that offences have indeed been committed by the Petitioners. These documents were led before the learned Magistrate of Kurunegala at the inquiry he conducted on 07.08.2020 and it is afterwards that the learned Magistrate concluded that cognizable offences had been committed by the Petitioners. Let me make first focus on the first argument of Mr.Riad Ameen that the learned Magistrate did not have any power to issue the warrant at a B-report stage as such a power is not expressly conferred on him in the Code of Criminal Procedure Act No 15 of 1979 (the Code). Does this raise an arguable issue? Methinks it is an issue that has been gone into.

Though the frontiers of the province of judicial review have since been expanded, the traditional boundaries of judicial review as re-echoed and articulated by Lord Fraser in the following tenor remain seminally established.

*“Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made...Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the administrative tribunal substitutes its own decision on the merits for that of the administrative officer.”-see **Re Amin** (1983) 2 AC 818, 829.*

I would thus characterize the first argument of Mr.Riad Ameen as impacting upon the manner in which the decision to issue the impugned warrant of arrest came to be made.

The learned Counsel contended that since what is set out in the B-reports filed by the Police are made out to be cognizable offences, the recourse to the Magistrate, Kurunegala to seek authorization for the arrest of the Petitioners is unwarranted and unauthorized. When the learned Magistrate embarked upon an inquiry and proceeded to issue a warrant of arrest at the end of it on 07.08.2020, the learned Magistrate usurped a jurisdiction which he did not have. This constituted the nub of the submissions of the learned Counsel. The learned SASG countered this argument by traversing that 124 of the Code empowers a Magistrate to issue processes and therefore the learned Magistrate did not act ultra vires his powers. In other words, this argument raises the issue of legality or jurisdictional propriety of the issuance of process and we take the view that the relative merits of these rival arguments have to be tested at a full hearing. Implicit in the argument of the learned SASG is that a Magistrate can utilize section 124 of the Code to issue processes even in cases where the police can arrest without a warrant. After all, what is the prejudice caused to these Petitioners? Whether they are arrested by police without a warrant or upon a warrant, for a cognizable offence, would entail the same consequences -so argued the learned SASG. But therein lies the rub. In a case involving a magistrate's warrant, the legality of the decision making process by the Magistrate would be influenced by the consideration whether the Magistrate is empowered by law to decide the matter. But the officers trying to enforce the warrants would be performing an *executive or ministerial* function.

Is it an executive or ministerial function of just executing a warrant that is imposed on police officers in terms of the Code when it comes to cognizable offences? Is not it a case where they are enjoined by the Code to assess the evidence collected and make the decision for themselves that the material in their possession discloses a cognizable offence? Should they seek the interposition of a judge to make that decision? Should discretionary powers vested in the police be abandoned and abdicated to a judicial body who causes them to arrest? These are questions that these applications raise before us in the context of administrative justice and it is these issues that engage a court in writ applications.

It is trite that illegality was articulated by Lord Diplock in the case of *Council of Civil Service Unions v. Minister of the Civil Service* (1985) AC 374 at 410; (1984) 2 WLR 174a; (1984) All ER 935 (the GCHQ case) and reasserted in *HM Treasury v Ahmed* (2010) UKSC 2, where it was emphasized that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

Therefore the question arises - Did the learned Magistrate correctly understand the scope of his power when he assumed a power to adopt a procedure as he did before he arrived at the decision to issue the impugned warrant of arrest? Does Section 124 of the Code permit him to hear the testimony of a police officer and form an opinion as to a cognizable offence at a B-report stage? This question becomes markedly pronounced in the face of Section 32 (1) (b) of the Code which manifests that a reasonable suspicion of any such cognizable offence has to be formed by a police officer. These are questions that loom large in these applications. Though the learned SASG cited to *Mahanama Tilakaratne v Bandula Wickremasinghe* (1999) 1 Sri.LR 372, the authority is of little assistance to resolve the issue that this Court is confronted with.

Undoubtedly after institution of proceedings in the Magistrates Court by virtue of s.136 of the Code, a Magistrate enjoys the express power of issuing process on evidence by virtue of s.139 (1) of the Code of Criminal Procedure Act. It would appear that adduction of such evidence is not specified in the provisions dealing with investigation of offences from Section 109 onwards and at the B-report stage. Whether in the absence of specific provisions in the Code section 124 of the Code could be invoked in order to confer jurisdiction on a Magistrate to have evidence led and empower him to form an opinion as to the existence of a cognizable offence raises arguable issues that demand consideration at a full hearing.

The learned SASG also sought to justify the adduction of evidence of the police officer at the B-report stage on a *casus omissus* provision namely section 7 of the Code which states the following; "As regards matters of criminal procedure for which special provisions may not have

been made by this code or by any other law for the time being in force such procedure as the justice of the case may require and as is not inconsistent with this code may be followed."

Definitely this is a provision that confers inherent powers on a criminal court and it affords a criminal court sufficient authority to adopt a procedure which is not in conflict or inconsistent with the provisions of the Code. However, whether Section 7 of the Code could afford such protection to the procedure adopted by the learned Magistrate has not been judicially commented upon; nor has that procedure been advanced before this court as has been a permissible practice in criminal courts for a considerable period of time. I hold the view that whether Section 7 of the Code would validate the procedure adopted has to be gone into at a full hearing.

It has to be borne in mind that it is through this process adopted by the learned Magistrate of Kurunegala that he arrived at the conclusion that he was satisfied that a reasonable suspicion arose as to the commission of offences under the Antiquities Ordinance No. 09 of 1940 as amended, Public Property Act No.12 of 1982 and s.408 of the Penal Code. – see page 09 of the order made by the learned Magistrate, Kurunegala on 07.08.2020. It would appear that he indulged in his own analysis of the material put forward by the witness and arrived at the conclusion that cognizable offences have been committed.

This observation made by the learned Magistrate leads one irresistibly to the inference that it is the learned Magistrate who formed the reasonable suspicion of a cognizable offence at the B-report stage. The offences that the learned Magistrate refers to in his order appear to be cognizable – see column 3 of the 1st schedule to the Code of Criminal Procedure Act.

It would appear such a finding for cognizable offences has to be reached by the police officer in terms of section 32 (1) (b) of the Code of Criminal procedure Act No. 15 of 1979. In fact section 32 (1) of the Code of Criminal Procedure Act No. 15 of 1979 is quite explicit on the formation of this reasonable suspicion to be formed by the police officer for s. 32 reads as follows:

(1) Any peace officer may without an order from a Magistrate and without a warrant arrest any person-

- (a)
- (b) Who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;
- (c)
- (d)

It is crystal clear that there is no corresponding provision for such a formation of a reasonable suspicion in the mind of the learned Magistrate at the stage when the police moved him, with the assistance of the officials of the Attorney General's Department, for the formation of such an opinion at the stage of the B-reports. In terms of section 32 (1) (b) a police officer can arrest anyone who has committed a cognizable offence. He need not get a warrant from a Magistrate. Section 118 (1) of the Code makes it clear that it is only for non-cognizable offences that police need the prior authorization of a Magistrate. – see *Wijesiri v AG* (1980) 2 SRI LR 317 at 340-341. Kulatunga J in *T.N.Fernando v Nelum Gamage* (1994) 3 Sri.LR 192 stated that a mere suspicion is not enough. A reasonable suspicion or credible information is required. If at all the Magistrate were to rely on section 7 of the Code, the procedure he adopts cannot be inconsistent with the Code but in this instance, it is legitimate to pose the question that when the formation of a reasonable suspicion as to a cognizable offence by the Police and the consequent arrest without an order from a magistrate and without a warrant are specifically provided for in section 32 1 (a) of the Code, has the police abandoned their discretionary power and simply delegated it to the learned Magistrate to form that opinion? Now that the Magistrate has formed a firm opinion at an anterior stage, the further question arises- Could he make further orders if any other section in the subsequent stages of the investigation calls for an independent mind to be brought to bear on these subsequent orders more particularly if the subsequent orders are going to impinge upon the liberty of the individual?

These are questions that loom as large as life and I take the view that all these issues raise a *prima facie* case for issuance of notice.

Thus, the assumption of jurisdiction by the learned Magistrate to form the opinion as he did raises the question whether he assumed a jurisdiction which he did not have. In our view, this matter has to be fully gone into as questions of law and we are satisfied that the Petitioners passes the test of arguability criteria.

On the question of sufficiency of evidence which Mr. Riad Ameen raised and the SASG's answer to this question, I would state that no doubt they too raise arguable issues and no evidence rule has taken a firm root in administrative law as De Smith's Principles of Judicial Review (2nd Edition, 2020 edited by Harry Woolf, Jeffrey Jowell, Catherine Donnelly and Ivan Hare) runs this illustrative passage of Carnwath LJ in *E v Secretary of State for the Home Department* (2004) EWCA Civ 49:

Mistake of fact “giving rise to unfairness” is indeed a ground on which to quash a decision on judicial review, provided that , first, there was a mistake as to an existing fact (including as to the availability of evidence on the matter).....the mistake must have played a material (although not necessarily a decisive) part in the decision-maker’s reasoning.

Rival arguments were made as to whether the building in question came within the four corners of the Antiquities Ordinance and if there is a material error in the decision making process it is competent to this Court to assay such reasoning on no evidence rule-see the discussion of *E v Secretary of State for the Home Department (supra)* by Paul Craig in (2004) Public Law 788 under the title “Judicial Review, Appeal and Factual Error”.

In the final analysis we are of the opinion that the Petitioners have met the threshold for issuance of notice and that there are several matters that require serious consideration by this Court at a final hearing after notice. In the circumstances, we direct the issuance of notice on the Respondents.

We are also mindful of the submissions of the learned SASG that any order made by this Court at this stage should not impede or obstruct any investigation conducted by the

Police. We also take the view that any arrest of the Petitioners pending the determination of these applications would render these applications nugatory since the very foundation of the warrant of arrest is under challenge before this Court. We therefore make the following interim Orders;

- a) Staying the execution of the warrant of arrest ordered by the learned Magistrate on 7th August 2020 and the subsequent order until final determination of these applications *and;*
- b) This order will not impede or obstruct any investigations to be conducted by the Police nor shall this order impede or obstruct the learned Magistrate to make any such order to assist investigation in terms of the law upon a request being made by the Police for such assistance, save and except that the Police shall not arrest the Petitioners during such investigations and the 5th Respondent shall not make any order remanding the Petitioners until the final determination of these applications.

This Court orders that the Petitioners should appear in Court through their Attorneys-at-Law, within the course of the day or tomorrow and the learned Magistrate shall acknowledge their presence until the propriety of the issuance of the warrant of arrest is finally gone into at a hearing.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree

JUDGE OF THE COURT OF APPEAL