

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

In the matter of an Application for 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)Application
No. WRT 311/2019

01. Ajahn Gardiye Punchihewa,
23/2A,
Nidahas Mawatha,
Colombo 07.

And Presently at

No.79, Chay Yan Street,
#03 -18,
Singapore

Petitioner

Vs.

01. The Officer-In-Charge,
Financial Investigation Unit III,
Criminal Investigation Department,
New Secretariat Building,
Colombo 01.

02. Mr. G. S. Abeysekera,

The Director,
Criminal Investigation Department,
New Secretariat Building,
Colombo 01.

03. The Deputy Inspector General of Police
Criminal Investigation Department,
New Secretariat Building,
Colombo 01.
04. The Senior Deputy Inspector General of Police,
Criminal Investigation Department,
New Secretariat Building,
Colombo 01.
05. The Inspector General of Police,
Police Head Quarters,
Colombo 01.
06. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
07. The Registrar,
The Permanent High Court -at-Bar ,
Hulfts Dorp,
Colombo 12.
08. Mr. Lakshman Arjuna Mahendran
No.52/1, Flower Road,
Colombo 07.
And

No.20,
Cuscaden Road, #18 – 01,
Singapore 249726.

09. Mr. Arjun Joseph Aloysius
No.52/1, Flower Road,
Colombo 07.
10. Perpetual Treasuries Limited,
3rd Floor, Alfred Tower,
No.10, Alfred House Gardens,
Colombo 03.
11. Mr. Appuhamilage Don Kasun
Palisena,
No. 21, Arethusa Lane,
Colombo 06.
12. Mr. Geoffrey Joseph Aloysius,
No. 7, Queens Road,
Colombo 03.
13. Mr. Pushya Mithra Gunawardena,
No.54, Anderson Road,
Kalubowila.
14. Mr. Chitha Ranjan Hulugalle,
#45D, West Tower,
No.1 Galle Face,
Colombo02.
15. Mr. Muthuraja Surendran,
No.88/3, Eli House Road,
Colombo 15.

16. Mr. Pathinige Samarasiri,
No.72B, Weera Mawatha,
Depanama, Pannipitiya.

Respondents

BEFORE : ACHALA WENGAPPULI, J.
MAHINDA SAMAYAWARDHENA, J.
ARJUNA OBEYESEKERE, J.

COUNSEL : Uditha Egalahewa P.C. with N.K.
Ashokbharan instructed by R.A. Lanka
Dharmasiri for the Petitioner.
Parinda Ranasinghe (Jnr.), P.C., A.S.G. with
Dilan Ratnayake D.S.G., Shaheeda Bary
S.S.C. and Chathuri Wijesuriya S.C. for the
1st to 7th Respondents.
Hafeel Farisz with Sahan Kulatunga
instructed by Rasika Wellappili for the 14th
Respondent

SUPPORTED ON : 17.10.2019, 25.10.2019, 05.12.2019,
14.01.2020, 27.01.2020 & 05.02.2020

WRITTEN SUBMISSIONS

TENDERED ON : 12.02.2020 (by the Petitioner)
13.02.2020 (by the 14th Respondent)
20.02.2020 (by the 1st to 7th Respondents)

DECIDED ON : 18.06.2020

ACHALA WENGAPPULI, J.

In this application, the Petitioner primarily seeks to quash an indictment pending before the Permanent High Court at Bar in case No. PTB/01/05/2019 by issuance of a Writ of Certiorari and stay the said prosecution by issuance of a Writ of Prohibition.

Upon the application of the Petitioner by motion dated 24. 07.2019, a Divisional Bench was constituted to hear and determine this application, owing to the *"crucial and critical legal questions which embraces the rare combination of the core of both Criminal law and Public law"* it involves.

The Petitioner has served notice on the Respondents as per Rule 2(1) of the Court of Appeal (Appellate Procedure) Rules 1990 and the 1st to 7th and 14th Respondents were represented at the hearing for issuance of formal notice and interim relief.

The Petitioner, after his graduation from the University of Nottingham in 2008, was involved in the field of Stock-brokering and Investment Banking and had served in several commercial establishments. He acted as an Independent Non-Executive Director of Perpetual Treasuries Ltd., of its Board of Directors, upon invitation by the 9th Respondent, over their long acquaintance.

The Petitioner categorically denies his participation of any meeting of the board of Directors of the said Company, either formally or informally, during February 2015. He attended his first meeting only in

March 2015 and therefore claims that the concerned incident in relation to the charges in the indictment occurred on or about 27.02.2015, and by that date had not even attended a single Board Meeting of the said Company.

He became aware in March 2019 that he was named a suspect in the Magistrate's Court of Colombo in case No. B 8266/2018 by the Financial Investigations Unit III of the Criminal Investigation Department and was subsequently named as the 10th accused in case No. PTB 1/5/2019, pending before the Permanent High Court at Bar.

The complaint of the Petitioner to this Court is the decision of the 6th Respondent to initiate criminal proceedings against him before the Permanent High Court at Bar, is taken arbitrarily, capriciously unreasonably, irrationally and in haste, without giving due considerations to the factors stipulated in Section 12A(4)(a)(i) to (v) of the Judicature Act (as amended by Act No. 9 of 2018) in referring the matter to His Lordship the Chief Justice for a direction, whether criminal proceedings in respect of such offence shall be instituted in the Permanent High Court at Bar, rendering the act illegal and unlawful, thus a nullity and no avail in law.

At the hearing, the parties made extensive submissions in support of their respective positions and were afforded an opportunity to tender a precis of their respective submissions and the authorities they relied on.

The Petitioner has sought the following substantive reliefs from this Court by invocation of its jurisdiction conferred under Article 140 of the

Constitution, (in addition to the multiple reliefs that associate with these substantial reliefs, in the interim);

- a. Issuance of a Writ of *Certiorari* quashing the charges against the Petitioner contained in the impugned indictment or in the alternative, quashing the impugned indictment,
- b. Issuance of a Writ of *Certiorari* quashing the decision of the 6th Respondent to initiate criminal proceedings against and/or indict the Petitioner for the charges contained in the said indictment,
- c. Issuance of a Writ of Prohibition preventing and or restraining the 6th Respondent from proceeding against the Petitioner for the charges contained in the said indictment,
- d. Issuance of a Writ of Prohibition preventing and or restraining the 7th Respondent from listing, commencing and continuing any proceedings against the Petitioner before the "Permanent High Court at Bar" pertaining to the charges stipulated in the said indictment,
- e. Issuance of a Writ of Prohibition preventing and or restraining the 5th and 6th Respondents from directly or indirectly through INTERPOL in any manner or against the Petitioner and seek extradition against him based on the said indictment,

It is clear from the nature of the reliefs sought from this Court, that the main thrust of the Petitioner's challenge is focused on the validity of the indictment pending against him before the Permanent High Court at Bar in case No. PTB/01/05/2019. He alleges that the decision to indict him is "... arbitrary, capricious, unreasonable, vexations, and irrational" and

therefore is "*clearly an abuse of process*", since it had been taken "*depriving*" him of procedural fairness and in violation of his legitimate expectations.

In mounting his challenge on the validity of the indictment, the Petitioner, in his submissions before this Court, had placed heavy reliance on the provisions of Section 12A(4)(a) of the Judicature Act No. 2 of 1978, as amended by Act No. 9 of 2018,

Learned President's Counsel contended before this Court that the decision taken by the 6th Respondent to indict the Petitioner before the Permanent High Court at Bar should be quashed since;

- a. he was deprived of an opportunity to make a statement, in view of the order of the Magistrate's Court of Colombo on 05.04.2019 in case No. B 8266/18, by which the Court ordered him to "appear at the Criminal Investigation Department on or before 26.06.2019". Instead, the Criminal Investigation Department (hereinafter referred to as "CID") had filed a report on 13.06.2019, under Section 120(3) of the Code of Criminal Procedure Act No. 15 of 1979, informing Court that the investigations were concluded, when in fact the investigations were incomplete due to their failure to record the Petitioner's statement, in violation of the mandatory provisions couched in the said Section,
- b. the 6th Respondent had sought a direction from His Lordship the Chief Justice by making a request on 07.06.2019, that criminal

proceeding be instituted before the Permanent High Court at Bar and, upon the receipt of a direction issued by His Lordship to that effect, an indictment was forwarded to the Permanent High Court at Bar on 28.06.2019, naming the Petitioner as the 10th accused. Therefore, the decisions of the 6th Respondent to indict the Petitioner, and to seek a direction from His Lordship the Chief Justice which are taken under Section 12A(4)(a) of the Judicature Act, even before the investigations are properly completed, are taken in a "dubious haste" and therefore results in a nullity, due to following factors;

firstly, the 6th Respondent's decision to indict him should be based on the fulfilment of provisions of the Judicature (Amendment) Act, and;

secondly, in the absence of a statement of the Petitioner and without having an opportunity appraising himself of its contents, the 6th Respondent could not have formed his opinion as to the existence of the "five" mandatory "fetters" that are specified in the said Section.

The 14th Respondent, also contended that the actions of the CID are violative of the mandatory provisions of Section 120(3) of the Code of Criminal Procedure Act No. 15 of 1979 and resulted in a denial of a fair investigation.

Thus, it is clear from these contentions, the Petitioner challenges the validity of the decisions taken by the 6th Respondent to institute proceedings against him and to indict him before the Permanent High Court at Bar.

In view of the submissions of the Petitioner, it is necessary to examine the scheme of statutory provisions introduced by Section 12A(4)(a) to the Judicature Act No. 2 of 1978 by way of Judicature (Amendment) Act No. 9 of 2018.

The said Section reads as follows;

"The Attorney General or, the Director General for the Prevention of Bribery and Corruption on the direction of the Commission to Investigate Allegations of Bribery or Corruption, as the case may be, shall, taking into consideration-

- (i) the nature and circumstances;*
- (ii) the gravity;*
- (iii) the complexity;*
- (iv) the impact on the victim; or*
- (v) the impact on the State,*

of the offence, referred to in subsection (1), refer the information relating to the commission of such offence to the Chief Justice for a direction whether criminal proceedings in respect of such offence shall be instituted in the Permanent High Court at Bar."

The provisions of Section 12A(4)(a) of the Judicature Act, as amended by Act No. 9 of 2018, is only a part of the new statutory scheme the Parliament had enacted when it introduced several new Sections with the passing of the Act No. 09 of 2018 and by insertion of Sections 12A, 12B and 12C immediately after the Section 12 of the principle enactment .

Amendments to the Judicature Act, that were brought in by Act No. 9 of 2018, have created a special Court and conferred it with jurisdiction to exercise original criminal jurisdiction only in respect of a set of statutorily specified offences.

Section 12A(1)(a) of the Judicature Act, after the said amendment reads;

"Notwithstanding anything in any other written law, the High Court established by Article 154P of the Constitution for a Province shall, in terms of sub-paragraph (c) of paragraph (3) of Article 154P of the Constitution hear, try and determine in the manner provided for by written law and subject to the provisions of subsection (4), prosecutions on indictment against any person, in respect of financial and economic offences specified in the Sixth Schedule to this Act, and any other offence committed in the course of the same transaction of any such offence, with three Judges sitting together nominated by the Chief Justice from among the Judges of the High Court of the Republic of Sri Lanka

(hereinafter referred to as the "Permanent High Court at Bar").

Thus, it is evident from the statutory provisions contained in Section 12A(1)(a), that it confers jurisdiction to the newly established Permanent High Court at Bar to hear, try and determine "*prosecutions on indictment against any person, in respect of financial and economic offences specified in the Sixth Schedule to this Act, and any other offence committed in the course of the same transaction of any such offence*". But Section 12A(4)(b) imposes a precondition for institution of proceedings in this manner as the said Section states that the institution of proceedings should only be done upon a direction to that effect by His Lordship the Chief Justice.

It is to be noted that these provisions are similarly applicable to the Director General for the Prevention of Bribery and Corruption, who could institute criminal proceedings before the Permanent High Court at Bar, on the direction of the Commission to Investigate Allegations of Bribery or Corruption as well. Section 24(1) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994, had invested the Supreme Court with the jurisdiction conferred upon this Court under Article 140 of the Constitution in respect of the said Commission and therefore the prosecutions instituted by the said Commission are outside the preview of this Court. Hence, this judgment will only concern the prosecutions that are instituted by the 6th Respondent, the Attorney General.

Section 12A(4)(a) specified the applicable procedure in instituting criminal proceedings before the Permanent High Court at Bar. The 6th Respondent could “*refer the information relating to the commission of such offence to the Chief Justice for a direction whether criminal proceedings in respect of such offence shall be instituted in the Permanent High Court at Bar*”. Only after taking certain factors in to consideration that are statutorily enumerated in the said Section. If there is a direction to that effect from His Lordship the Chief Justice, then a trial before the Permanent High Court at Bar, “shall be held upon indictment by the Attorney General ...”.

The Petitioner, in his submissions stressed the point that, in order to seek a direction from His Lordship the Chief Justice, the 6th Respondent should have first satisfied himself that “all” of the “five fetters”, as termed by the Petitioner, that are specified in Section 12A(4)(a), exists.

The Petitioner is wrong in identifying these are “five fetters” in the Section. Section 12A(4)(a) stipulates that the 6th Respondent to take into consideration what it had specified in the Section. The Section lists out the following, under the scheme of numbering given to them as (i) to (v);

- “(i) the nature and circumstances;
- (ii) the gravity;
- (iii) the complexity;
- (iv) the impact on the victim; or,
- (v) the impact on the State.”

It is clear from the above, what the 6th Respondent is required to consider under "impact". He must consider either the impact on the victim "or" the impact on the State and not both. The Petitioner, in the context of exercising discretion, sought to describe them as "fetters". In that limited context, it is a justifiable description. As a result there are only four "fetters" to be considered by the 6th Respondent in making a request. The Section requires the 6th Respondent to seek a direction from His Lordship the Chief Justice only after taking into consideration of these four "fetters". The 6th Respondent would therefore have to consider the available material in relation to each of these four factors, before he exercises his discretion to refer the matter for a direction.

It appears that the Petitioner is under a misapprehension that the institution of proceedings before the Permanent High Court at Bar essentially consists of a "two staged process". According to him the first of the two stages occurs when the 6th Respondent considers the "fetters" in determining the Court where he should file the indictment. The second stage, as the Petitioner described, is the stage at which the direction of His Lordship the Chief Justice is addressed to the 6th Respondent to institute proceedings before the Permanent High Court at Bar, if His Lordship is satisfied that one or more of the "fetters" did exist.

The Petitioner contends that, the discretion is vested in His Lordship the Chief Justice to grant the request of the 6th Respondent for a direction, in relation to the institution of proceedings before the Permanent High Court at Bar, should necessarily be exercised by His Lordship, upon

consideration of the material submitted to him along with the said request by the 6th Respondent. If the material considered by the 6th Respondent, when he exercised his discretion, deciding to institute criminal proceedings against the Petitioner and, in seeking a direction from His Lordship the Chief Justice, is incomplete, then that initial disqualification of the decisions of the 6th Respondent is transmitted to the exercise of the discretion by His Lordship the Chief Justice as well. Therefore, he argues that the institution of proceedings before the Permanent High Court at Bar is a nullity due to the reason that “ *...if the prosecuting authority ... doesn't fulfill the first stage of the process lawfully, properly and appropriately, then that gravely, and inevitably affects the second stage, as the second stage of the process derives from and is completely reliant and dependent on the first stage of the process.*”

This Court agrees with the Petitioner that Section 12A(4) contemplates two stages as he had described them. However, in his description of the two stage process, the Petitioner unfortunately ignores an equally important step in the process. That is the decision of the prosecuting authority to present an indictment. The decision to indict is obviously the starting point of the process, since the Court in which the proceedings should be instituted would only arise as a secondary consideration with the decision to indict. It appears that the Petitioner sought to fuse the two distinct decision making processes, in which the 6th Respondent decides to indict and then decides whether to seek a direction from His Lordship the Chief Justice, by arranging them along a straight line of decision making process. The decision of the 6th Respondent to

present an indictment is taken when the available material is sufficient to establish a *prima facie* case against the suspect. Then only, the 6th Respondent must decide the Court in which he should institute proceedings. These two distinct decision making processes, independent of each other, involve application of two different considerations.

In deciding the Court in which the institution of criminal proceedings be instituted, the 6th Respondent had several options. He could direct the police to institute criminal proceedings before the Magistrate's Court. He could also decide to forward an indictment to the High Court of the Republic. Under section 450 of the Code of Criminal Procedure Act No. 15 of 1979, the 6th Respondent could also request His Lordship the Chief Justice to direct that the trial of any person for that offence taken before the High Court at Bar. With the establishment of the Permanent High Court at Bar, the 6th Respondent is offered with another option in seeking a direction from His Lordship the Chief Justice. Thus, it is clear that the decision making process to seek a direction from His Lordship the Chief Justice under Section 12A(4)(a) of the Judicature Act is a distinct process from deciding to indict since the 6th Respondent must consider the four "fetters" in doing so, in fulfilment of his statutorily laid down obligation.

Clearly the decision to indict is obviously the starting point of the process, since the Court in which the proceedings should be instituted would arise only with the decision to indict. Contrary to the submissions of the Petitioner, the amendment brought to the Judicature Act, although

correctly termed substantive law and not procedural law by the Petitioner, does not empower the prosecuting authority with power to indict.

Learned Additional Solicitor General referred to a statutory provision which he claims that the 6th Respondent could utilise to institute criminal proceedings. He submitted that the 6th Respondent was empowered to institute proceedings under Section 24 of the Commissions of Inquiry Act No. 17 of 1948, as amended by Act No. 16 of 2008. The Said Section conferred the power to the Attorney General to institute proceedings as it states "*...it shall be lawful for the Attorney General to institute criminal proceedings in a Court of law in respect of any offence, based on material collected in the course of an investigation and or inquiry or both an investigation and inquiry, ..., by a Commission of Inquiry appointed under this Act.*"

Plain reading of this section indicates that it empowers the 6th Respondent to institute criminal proceedings based "*on material collected in the course of an investigation and or inquiry or both an investigation and inquiry, ...*" by a Commission of Inquiry appointed under the said Act, in order to override the mandatory provision contained in Section 5 of the Code of Criminal Procedure Act. The said Section of the Code of Criminal Procedure Act imposes a mandatory duty that all offences, unless otherwise specially provided for, shall be investigated, inquired into, tried and otherwise be dealt with the provisions of that Code. It also imposes the condition that the investigations should be conducted either by the police or by an "inquirer" recognised by the Code. With this amendment

to the Commissions of Inquiry Act, the 6th Respondent could consider “material collected in the course of an investigation and or inquiry or both an investigation and inquiry” by that Commission.

The intention of the Legislature in this regard is clearly reflected in the wording found in the Section 24 of the Commissions of Inquiry Act as it states that “*notwithstanding anything to the contrary in the Code of Criminal Procedure Act, No. 15 of 1979 or any other law, it shall be lawful for the Attorney-General to institute criminal proceedings in a court of law in respect of any offence, ...*”.

Section 393(1) of the Code of Criminal Procedure Act No. 15 of 1979, states “*it shall be lawful for the Attorney General to exhibit information, present indictments and to institute, undertake, or carry on criminal proceedings ...*” and section 12 of the said Act states “*High Court shall not take cognizance of any offence unless the accused person has been indicted before it for trial or at the instance of the Attorney General*”.

No such parallel provisions, similar to the provisions that are found in Section 393(1) of the Code of Criminal Procedure Act, that confer the 6th Respondent with power to institute proceedings, could be found in Section 12A of the Judicature Act or in Section 24 of the Commissions of Inquiry Act. This Court is of the view that the power conferred by Section 12A of the Judicature Act only empowers the 6th Respondent to consider the material before him in determining the Court before he wishes to institute criminal proceedings.

The resultant position therefore could be described as necessarily a three stage process, not a two stage process as the Petitioner contends. In addition to the two stage process, identified by the Petitioner there is an initial and a more fundamental step by which the 6th Respondent decides to institute proceedings, which triggers the remaining two stages.

In order to fill this gap in the contention advanced by the Petitioner, in relation to 6th Respondent's power to indict, he relies on the observations made by the Supreme Court in its determination of the Constitutionality of the draft bill of the Judicature (Amendment) Act No. 9 of 2018 (SC/SD/07/2018 – SC/SD/13/2018). The Petitioner, in order to buttress his contention that Section 12A(4)(a) confers power to 6th Respondent to indict as well as to seek a direction, whether he could forwards an indictment or exhibit information to the Permanent High Court at Bar, has highlighted the fact that the Supreme Court has foreseen a remote possibility of abuse of discretion, if the provision remained unchanged as it was proposed in the draft bill, and had therefore addressed its mind in remedying the situation by stating that;

"In the draft bill, the prosecution has a discretion to select cases and file indictment in the Permanent High Court at Bar. The danger is that there is a possibility of wrongly exercising of the discretion although it may not happen. Therefore, like in section 450 of the Criminal Procedure Code, Chief Justice should be given power to decide whether a trial at bar should be held or not. This will remove inconsistency in the Bill."

In view of the said recommendation by the Supreme Court, the Petitioner contends that;

"The Supreme Court rightfully acknowledged that vesting the discretionary power to indict before the Trial at Bar with the Attorney General who is the prosecuting authority, as "it might lead to abuse of process". Following the Supreme Court's determination, and in adopting the suggestion of the Court, the Legislature in the Judicature (Amendment) Act No. 9 of 2018, while imposing five mandatory fettering factors to be considered by the prosecuting authority, which would following such considerations of the five mandatory fettering factors forward such information to His Lordship the Chief Justice, who is empowered by the Act to decide on the said information submitted to his Lordship by the prosecuting authority, whether to indict before the Permanent High Court at Bar."

It is evident that the Petitioner, with his submissions referred to above, seeks to confer statutory power on the 6th Respondent to indict under the section 12A of the Judicature Act.

Clearly this is not an accurate statement of the law, in view of the explicit statutory provisions referred to in the preceding paragraphs. In the determination referred to above, the Supreme Court had expressed its concern on the possibility of abuse, only in respect of leaving the decision to institute proceedings before the Permanent High Court at Bar with the 6th Respondent. The recommendation was to remove the proposed power

conferred on the 6th Respondent, which enabled him to decide the Court, in which he should present an indictment. Its observation on "*wrongly exercising the discretion*" is clearly confined to that particular provision and not on the general power of the 6th Respondent to institute proceedings by presenting an indictment.

This Court is of the considered view that, without challenging the 6th Respondent's exercise of discretion to indict the Petitioner directly, and by confining his challenge only to the exercise of the discretion conferred upon the 6th Respondent to refer the matter for a direction to His Lordship the Chief Justice under Section 12A(4)(a) of the Judicature Act by erroneously attributing the power to indict also to the said section, it is not possible for the Petitioner to obtain reliefs he had prayed for in his petition.

The decision to indict had been made by the 6th Respondent, prior to making a request for direction under Section 12A(4)(a). That decision remained unchallenged. The Petitioner did not challenge the exercise of discretion of His Lordship the Chief Justice, in directing the 6th Respondent to institute proceedings before the Permanent High Court at Bar, either. It is already noted that His Lordship is expected to consider at least one of the factors, spelt out in Section 12A(4)(a) of the Judicature Act in directing the 6th Respondent to institute proceedings before the Permanent High Court at Bar.

The pending indictment against the Petitioner came into being because the 6th Respondent had decided there is a *prima facie* case established upon consideration of the relevant material. The 6th Respondent could have simply forwarded an indictment to the High Court of Colombo, as he would do in most of the cases, where that Court is bound to take cognizance of such indictments. Instead, owing to the circumstances of the material revealed and having considered the four "fetters" in section 12A(4)(a) of the Judicature Act, the 6th Respondent had sought a direction from His Lordship the Chief Justice to institute proceedings before the Permanent High Court at Bar.

The decision of the 6th Respondent to institute proceedings by way of an indictment against the ten accused, including the Petitioner, would still remain valid since the Petitioner thought it fit not to challenge the discretion of the 6th Respondent to indict him and the institution of proceedings before the Permanent High Court at Bar.

Therefore, even if this Court were to hold with the Petitioner that the discretion of the 6th Respondent, in seeking a direction from His Lordship the Chief justice, is wrongly exercised, in the absence of a valid challenge to the other two steps such a decision taken by the 6th Respondent it would not invalidate the criminal proceedings that are pending before the Permanent High Court at Bar. The nature of the error, (there is none) had crept in only at the second stage of the process, which would not transmit itself either to the first or the third stages of the three stage process.

It is relevant to mention here that the Petitioner is not challenging the indictment on the footing that given the material available before the 6th Respondent, he could not have reasonably forwarded an indictment. He sought to challenge it on the basis of discretion conferred under section 12A(4)(a) was wrongly exercised to indict him, which is clearly an instance of the Petitioner misleading himself. The wrong complained of by the Petitioner, in challenging the 6th Respondent, in his decision to make a request for a direction from His Lordship the Chief Justice did not affect the decision to indict, which was taken independently of the latter. In fact, there was no decision to indict, interwoven with the decision to make the request since the applicable considerations are quite different to each other on these two instances.

Therefore, by nullifying the request to His Lordship the Chief Justice by the 6th Respondent for a direction, the decision to indict or the pending indictment will not automatically vitiate by themselves. Even though the Petitioner seeks Writ of Certiorari against the decision to indict and on the indictment itself, he only challenged the decision to make a request for a direction, on a presumed wrong, which had no bearing on the decision to indict or on the charges.

The consideration of exercise of the discretion by the 6th Respondent to indict brings in another important area for this Court to consider since the learned Additional Solicitor General claimed in his submissions that the decision of the 6th Respondent in determining whether to present

charges against an accused or not is not amenable to the jurisdiction of this Court, conferred under Article 140 of the Constitution.

In countering this claim, the Petitioner relies on the judgment of the Supreme Court in *Victor Ivan v Sarath N. Silva, Attorney General & Another* (1998) 1 Sri L.R. 340. This was an instance where the Petitioner challenged the decision of the Attorney General to indict him in respect of several defamatory articles he had published in the *Ravaya* newspaper, claiming it violated his fundamental rights. *Fernando J*, having considered the contention advanced by the Respondent that the Attorney General's decision to grant sanction to prosecute, or to file an indictment, or the refusal to do so are absolute, unfettered and unreviewable", proceed to reject the same by stating that "...the Attorney General's power to file (or not to file) an indictment ... is a discretionary power, which is neither absolute nor unfettered. It is similar to other powers vested by law in public functionaries. They are held in trust for the public, to be exercised for the purpose for which they have been conferred, and not otherwise."

His Lordship was pleased to term the decision, taken by the Attorney General to institute criminal proceedings, simply as an "executive or administrative action". It is stated in the judgment 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"”.

In a comparatively more recent judgment of the Supreme Court (*Sarath de Abrew v Iddamalgoda and six Others* (S.C.F/R No. 424/2015 – decided on 11.01.2016), where the Petitioner claimed that the decision taken by the Attorney General to indict him under Section 365B of the Penal Code as well as to direct the Police to institute proceedings before the Magistrate's Court had thereby violated his fundamental rights.

The apex Court was of the view that;

"The Attorney General's decision to indict the Petitioner may be vitiated if a conclusion is arrived not on an assessment of objective facts or evidence but on subjective satisfaction. The reason is where the decision is based on subjective satisfaction if some of the statements turn out to be irrelevant, it would be impossible for a Superior Court to find out which of the statements are relevant, valid or invalid had brought about such satisfaction. But in a case where a conclusion is based on a collective assessment such difficulty would not arise. If it is found that there was evidence before the Attorney General and such evidence had been considered by several officers of the said Department and a final decision was reached by the Attorney General based on the views of the said officers, the Superior Court would not interfere and would hesitate to substitute its own view in place of the Attorney General."

In applying the rationale of the said judgments of the Supreme Court, this Court must be mindful that those applications were decided in relation to Article 126 of the Constitution. *Fernando J* stated that the Court had exercised "*Constitutional jurisdiction under Article 126, which takes precedence over the statutory jurisdiction of the High Court*". The jurisdiction conferred in the Supreme Court by Article 126 is an exclusive original jurisdiction in nature, which is only subject to the other Articles of the Constitution. In contrast, the Petitioner had invoked the jurisdiction on this Court by Article 140 in the instant application where the jurisdiction of this Court has been defined as *grant and issue, orders in the nature of Writs of Certiorari, Prohibition, Procedendo, Mandamus and Quo warranto* only "*according to law*", thereby subjecting its jurisdiction to both Constitutional and other general Statutory provisions.

In this context, it is relevant to note that overlapping nature of the scope of Writ jurisdiction and of the fundamental rights jurisdiction was considered by the apex Court. The judgment of *Mundy v Central Environmental Authority and Others* (S.C. Appeal 58/2003 - decided on 20.01.2004) deals extensively with this aspect and it is therefore necessary to quote the relevant paragraphs from the judgment, almost in its entirety, in order to retain its integrity. The relevant determinations are as follows;

"Before dealing with the Court of Appeal judgment, it is necessary to consider the scope of the writ jurisdiction - the basis and the grounds on which executive acts and decisions may be reviewed, as well as the Court's power and discretion

in regard to relief - in the light of several Constitutional provisions. Historically the writ jurisdiction had limitations, arising from its linkage to the English "prerogative" writs in regard to which it has been observed:

"... the development of administrative law remedies in the common law sphere proceeded piecemeal from a variety of historical antecedents and, unto well into the [twentieth] century, without any recognition of the character and needs of administrative justice as a separate legal discipline. In fact, the main traditional remedies are classed as `extraordinary remedies'..." (Friedmann, Law in a Changing Society, 1959, p 403)

The jurisdiction conferred by Article 140, however, is not confined to "prerogative" writs, or "extraordinary remedies", but extends - "subject to the provisions of the Constitution" - to "orders in the nature of" writs of Certiorari, etc. Taken in the context of our Constitutional principles and provisions, these "orders" constitute one of the principal safeguards against excess and abuse of executive power: mandating the judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents. Further, this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which

they have been conferred, and that their exercise is subject to judicial review by reference to those purposes."

Their Lordships have added that;

"The link between the writ jurisdiction and fundamental rights is also apparent from Article 126(3), which contemplates that evidence of an infringement of fundamental rights may properly arise in the course of hearing a writ application, whereupon such application must be referred to this Court which may grant such relief or make such directions as it may deem just and equitable. Thus, although this Court would still be exercising the writ jurisdiction, its powers of review and relief would not be confined to the old "prerogative" writs. These Constitutional principles and provisions have shrunk the area of administrative discretion and immunity, and have correspondingly expanded the nature and scope of the public duties amenable to Mandamus and the categories of wrongful acts and decisions subject to Certiorari and Prohibition, as well as the scope of judicial review and relief."

Thus, when this Court ventures to consider the Petitioner's alleged grievance, it must bear in mind that the exercise of the jurisdiction under Article 140 must be undertaken and considered in the light of the rights conferred on the citizenry by the Constitution. *P.P. Craig* (Administrative Law, 5th Ed, p.19), who describes this approach as the "*rights based approach*" as he notes "... that the Courts should whenever possible interpret

legislation and the exercise of administrative discretion to be in conformity with fundamental rights".

It is strange that neither party cited or relied on any local authority which has considered the extent of a challenge to the prosecutorial powers of the 6th Respondent could be brought although they quoted extensively from the judgments of the English and Indian Courts and authoritative texts on Administrative law, in support of their respective submissions.

In the absence of any citation of any judicial precedent specifically where the scope of the Writ jurisdiction was considered *vis-a-vis* the exercise of the discretion of the Attorney General in the institution of criminal proceedings, this Court must therefore look for applicable judicial precedents.

The parties have relied heavily on the English judgments where certain pronouncements were made by the House of Lords on some of the issues that had been raised and argued before this Court.

However, it is prudent and important to undertake an exercise in examining as to how our Courts have dealt with this contentious issue over the years before this Court considers these authorities.

The judgment of *The King v Fernando* 8 NLR 354, dealt with an appeal where it was contended on behalf of the accused that the Attorney

General has wrongly exercised his discretion in committing the appellant to be tried by the District Court. Layard CJ was of the view;

"If the Attorney-General had manifestly abused the discretion left him under section 387 I have no doubt this Court could interfere in appeal, as suggested by the appellants' counsel. I think, however, in this case there is no reason to think that the Attorney-General has not exercised a wise discretion."

The King v Noordeen 13 NLR 115, is an instance where the revisionary jurisdiction of the then Supreme Court was invoked to interfere with the refusal by the Attorney General to grant sanction upon an acquittal. In an appeal from a conviction where the judgment of *The King v Baba Singho* 21 NLR 142 has dealt with the discretion of the Attorney General to decide to which Court he should commit cases. A Trial at Bar had considered the power of the Attorney General to exhibit information and the circumstances under which it could be done in the judgment of *The Queen v Gunawardene* 56 NLR 193. In *Attorney General v Sivapragasam* 60 NLR 468, the then Supreme Court had dealt with the right of the Attorney General to take over a prosecution and inform the trial Court that he is not placing any evidence. In the judgment of *The Queen v Liyanage & Others* 65 NLR 337, the Trial at Bar held that;

"The second plea is that the Attorney-General should have satisfied this Court that he had good reason for proceeding by way of information instead of by indictment. The answer to this is that Section 440A (6) empowers the Attorney-General

to exhibit Information in respect of the offences now charged against these defendants, and the section contains no conditions as to how the Attorney-General should exercise his discretion. Nor do we think we have the power to question the exercise of the Attorney-General's discretion in this matter."

The Privy Council, by its judgment of *Liyanage & Others v The Queen* 68 NLR 265 has set aside the conviction entered by the Trial at Bar, in an appeal on the basis that the law under which the appellants were tried and convicted was *ultra vires*. At the hearing of that appeal what had been decided by the Trial at Bar on the powers of the Attorney General to exhibit information was not challenged. However, it could be seen from the above quoted portion of the judgment of the Trial at Bar, of the judicial attitude that prevailed at that point of time when a challenge to the power to institute criminal proceedings by the Attorney General was made.

The judgment of the Trial at Bar in *The Queen v Abeysinghe & Another* 68 NLR 386 is an instance where the power of the Attorney General to withdraw a conditional pardon granted to an accomplice was dealt with. In *Velu v Velu & Another* 76 NLR 21, Weeramantry J sitting alone had considered the powers of the Attorney General in directing the Magistrate's Court to commit an accused who had been discharged after the preliminary inquiry.

In *Wijesiri v Attorney General* (1980) 2 Sri L.R. 317, the Petitioner successfully challenged the validity of an indictment presented by the

Attorney General without following proper procedure and the jurisdiction of the High Court to take cognizance of such an indictment, which resulted in the retrospective amendment to the Code of Criminal Procedure Act, introduced by Act No. 52 of 1980, empowering the Attorney General to present indictments directly to the High Court, without a preliminary inquiry, by insertion of a newly created sub Section 7 to Section 393 of the Code of Criminal Procedure Act.

This Court had considered the right of the Attorney General to defend public officers both in civil and criminal cases by its judgment of *Seetha v Sharvananda and Others* (1989) 1 Sri L.R. 94. This was an application for a Writ of Habeas Corpus and the objection raised by the Petitioner was on the decision to undertake the defence of the Respondent officers by the Attorney General.

These representative citations clearly reveal the position that the exercise of discretion of the Attorney General in relation to institution of proceedings and other related decisions in the administration of criminal justice could successfully and effectively be challenged under the regularly and popularly exercised appellate and revisionary jurisdiction of the appellate Courts.

However, it must be noted that there is an area which had been identified by the Supreme Court, where these traditional powers of appeal and revision might not be effective to secure relief to an aggrieved person.

In *Victor Ivan v Sarath N. Silva, Attorney General & Another* (supra), the Supreme Court noted that “*upon filing of an indictment it is the High Court alone which has the jurisdiction to try the accused on that indictment; it has also the power to consider whether that indictment complies with legal requirements, as to form and etc., but it has no authority whatsoever to review the antecedent process leading up to the executive act of issuing the indictment, ...*”. (emphasis added)

The precedents thus far considered by this Court did not address directly on this particular niche of “*antecedent process leading up to the executive act of issuing indictment*” in the process of decision making in the exercise of discretion of the Attorney General to institute criminal proceedings. This is an area where the jurisdiction conferred under Article 140 of the Constitution could provide an effective remedy for an aggrieved party, whose rights were violated.

The nature and the extent of the judicial review of the discretion of the 6th Respondent over institution of criminal proceedings should be considered by this Court at this juncture.

Professor Wade in his book (Administrative Law, 10th Ed, p.29), noted that “*unfettered discretion cannot exist where the rule of law reigns. The same truth can be expressed by saying that all power is capable of abuse and that the power to prevent abuse is the acid test of effective judicial review*”. One might infer from this strong statement that the Courts, in its legitimate task of exercising of judicial review, have assumed unfettered power upon itself

without recognising any limitations in such an undertaking. However, he also notes (at p. 290 and 297) that “*... there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question to be asked is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal.*”

One such area he identifies as where minimal review of the discretionary powers are the decisions taken in national security. He quotes Lord Scarman “*there is no abdication of judicial function, but there is a common sense limitation recognised by the judges as to what is justifiable.*”

Similarly, under the title “Boundaries of Judicial Review”, Prof Wade observes (at p. 535) that;

“The Court has granted review of a decision to prosecute, or not to prosecute or to continue or discontinue a prosecution, but not of a law officer’s refusal to cite a newspaper for contempt of Court. House of Lords has however held that decisions about prosecutions are not amenable to judicial review where the complaint could equally well be made in the Courts of trial, since otherwise trial would be unacceptably delayed by collateral proceedings.”

It is therefore clear that the English Courts, although recognising its role in exercising judicial review over the prosecutorial discretion to prevent any abuse by the prosecuting authorities, are equally mindful of its impact on the criminal justice system, and clearly indicated its “extreme

reluctance" (*Sharma v Deputy Director of Public Prosecutions & Others* [2006] UKPC 57) for intervention by placing certain limitations in the scope of judicial review.

The reasons for such "extreme reluctance" to intervene in judicial review should be examined, in order to understand the larger picture.

The discretion to institute criminal proceedings is generally referred to as the "prosecutorial discretion" in the Common law jurisdiction. The Attorney General or the Director of Public Prosecution is mandated with the prosecutorial powers to institute criminal proceedings as the case may be.

The origins of the prosecutorial powers were considered in the Canadian Supreme Court judgment of *Keieger v Law Society of Alberta* [2002] 3 S.C.R. 372, when their Lordships have quoted from the text of *Controlling Prosecutorial Powers – Judicial review, Abuse of Process and Section 7 of "The Charter"* (1986-87), 29 Crim. L.Q. 15, at pp. 20-21, reproduced below;

"Most [prosecutorial powers] derive . . . from the royal prerogative, defined by Dicey as the residue of discretionary or arbitrary authority residing in the hands of the Crown at any given time. Prerogative powers are essentially those granted by the common law to the Crown that are not shared by the Crown's subjects. While executive action carried out under their aegis conforms with the rule of law, prerogative powers are subject to the supremacy of

Parliament, since they may be curtailed or abolished by statute."

The term "prosecutorial discretion" has regularly been used in the Common law jurisdictions both in its judicial pronouncements and in academic writings. In identifying the legitimate scope of the term "prosecutorial discretion", the Supreme Court states;

"... what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion."

In this same judgment, the Supreme Court added to this description of prosecutorial discretion, as the following;

"Prosecutorial discretion is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper

political and other vitiating factors by the principle of independence."

The Canadian Supreme Court then refers to some instances where the exercise of prosecutorial discretion is required. Some of the instances where such discretion is exercised are identified by the Court includes the instances where the prosecuting authority was to decide whether to bring the prosecution of a charge whether to enter a stay of proceedings in either a private or public prosecution; whether to accept a guilty plea to a lesser charge; whether to withdraw from criminal proceedings altogether; and whether to take control of a private prosecution.

The Court emphasises the underlying policy objectives in conferment of prosecutorial discretion and the manner in which it should be exercised. It states that, such discretion is conferred on prosecuting authority only "*... in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as 'ministers of justice'"*" citing one of its earlier decisions.

The approach of the English Courts also seems to be on the same line of thinking as of its Canadian counterpart. The Privy Council, in exercising its appellate powers over an appeal preferred by the former Chief Justice of Trinidad and Tobago, to avert the imminent prospect of being prosecuted on a charge of attempting to pervert the course of justice, sought judicial review from the Court of Appeal of this country. Having

denied relief by the local Court he had then appealed to the Privy Council. In delivering its judgment in *Sharma v Deputy Director of Public Prosecutions & Others*, (Supra) in dismissing the appeal Lord Bingham has stated as follows ;

"It is the duty of police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective, professional judgment on the facts of each case. It not infrequently happens that there is strong political and public feeling that a particular suspect or class of suspect should be prosecuted and convicted. Those suspected of terrorism, hijacking or child abuse are obvious examples. This is inevitable, and not in itself harmful so long as those professionally charged with the investigation of offences and the institution of prosecutions do not allow their awareness of political or public opinion to sway their professional judgment. It is a grave violation of their professional and legal duty to allow their judgment to be swayed by extraneous considerations such as political pressure."

Having traced the historical origins of prosecutorial powers in *Keieger v Law Society of Alberta* (supra) the Canadian Supreme Court also considered the impact on the criminal justice system, if the Courts were to undertake judicial review on the exercise of prosecutorial discretion, as not only would it violate the concept of separation of powers but as a result, would also lead to a paradoxical situation as referred to in the quotation below.

In *R v Power* [1994] 1 S.C.R. 601, the Court accepted that;

"It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. If the court is to review the prosecutor's exercise of his discretion the Court becomes a supervising prosecutor. It ceases to be an independent tribunal. (Emphasis in original)

In adopting a more pragmatic approach, the Canadian Supreme Court by its judgment of *R v Anderson* [2014] 2 S.C.R. 167, stated, if it were to “enormously expand the scope of judicial review of discretionary decisions made by prosecutors” as the appellant argues before their Lordships, then;

".... In doing so, it puts at risk the adversarial nature of our criminal justice system by hobbling Crown prosecutors in the performance of their work and by inviting judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis."

The Court of Appeal judgment of *A v R* [2012] EWCA Crim 434, reflects a similar approach of the English Courts on the scope of the judicial review of prosecutorial discretion. Lord Judge CJ states;

"...that the decision whether to prosecute or not must always be made by the Crown Prosecution Service and not the Court. The Court does not make prosecutorial decisions. Second, provided there is evidence from which the jury may properly convict, it can only be in the rarest circumstances that the prosecution may be required to justify the decision to

prosecute. Third, the decision whether or not to prosecute in most cases requires a judgment to be made about a multiplicity of interlocking circumstances."

Lord Salmon, in *DPP v Humphrys* [1977] AC 1, was of the view;

"... a judge has not and should not appear to have any for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. "

In *Sharma v Deputy Director of Public Prosecutions & Others* (supra), the Privy Council had identified the following reasons from the judicial precedents to explain the "extreme reluctance", (as their Lordships preferred to describe its approach), shown by Courts to disturb decisions to prosecute, by way of judicial review;

- a. *"the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the Courts to assess their merits"*
- b. *"the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account"*

- c. "*the delay inevitably caused to the criminal trial if it proceeds*"
- d. "*the desirability of all challenges taking place in the criminal trial or on appeal*"
- e. "*that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay.*"
- f. "*In addition to the safeguards afforded to the defendant in a criminal trial, the Court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself.*"
- g. "*the blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil Courts*".

Despite the proclaimed "extreme reluctance" to intervene, the Higher Judiciaries of Canada and United Kingdom, have, in an unambiguous and precise terms, expressed that the prosecutorial discretion is amenable to judicial review, subject to several self-imposed limitations, depending on the peculiarities of their respective jurisdictions.

Therefore, it is important and relevant to dedicate some space in this judgment to consider the exact scope of the judicial review, as undertaken by these two countries.

The Canadian approach is such that the prosecutorial discretion is "only reviewable for abuse of process" whilst identifying another category titled "tactics and conduct" of the prosecutors before trial Courts, which attracts a different set of considerations in judicial review as per *R v Anderson* (supra). The difference of the approach in judicial review of these two categories were explained in the said judgment as it would depend on whether the prosecuting authority has exercised its discretion over its "core functions" in the impugned instance, which is reviewable solely on the basis of "abuse of process", or whether the prosecuting authority was merely acting on a "tactical decision" outside of its core functions, where the remedy would be for the Court to exercise its "*inherent jurisdiction to control its own processes even in the absence of abuse of process*".

In the English Courts, the oft quoted and relied on authority on the scope of review seems to be the judgment of the House of Lords in *DPP v ex parte Kebeline and Others* [1999] UKHL 43, where the Respondents have successfully invited the Divisional Court to judicially review a decision of the DPP to consent to a prosecution, was considered in appeal. The appeal by the DPP was allowed.

In the judgment of the House of Lords, Lord Steyn, with whom Lord Slynn and Lord Cooke agreed, it was observed;

"My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the DPP to consent to the prosecution of the Respondents is

not amenable to judicial review. And I would further rule that the present case falls on the wrong side of that line. While the passing of the Human Rights Act marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings."

The strictness in which this principle was applied is indicative from the statement of Lord Judge CJ, in *A v R* (Supra) where it is stated that;

"...We have detected the development of what may, if not arrested at an early stage, become a new form of satellite litigation, in which the exercise of the prosecutorial discretion is made subject to a judicial review or abuse of process/stay of proceedings argument in the Crown Court. ... As to judicial review, there can, we suggest, be very few occasions indeed when an application for permission by or on behalf of a defendant should not be refused at the outset on the basis that an alternative remedy is available in the Crown Court."

Applying this principle to an instance where the prosecuting authority decided not to prosecute, then in such a situation, the Courts

have held that judicial review is the only available remedy as per *Reg. v DPP. Ex parte C* [1995] 1 Cr.App.R.136.

The admitted reluctance of the Canadian and English Courts in judicial review of prosecutorial discretion is not confined to that jurisdiction only. In Sri Lanka, although the judgments were delivered in exercising its appellate and revisionary jurisdiction, our Superior Courts too have clearly indicated their reluctance to intervene as well by restricting intervention only to the most deserving instances.

In *The King v Fernando* (supra) Layard CJ states;

"I do not think that it is desirable in every case to interfere with the discretion vested in the Attorney-General. The only cases in which this Court should interfere is when the Attorney-General has abused the discretion left to him, and these cases are very rarely likely to arise."

A similar approach was adopted in *The King v Baba Singho* (supra), as the Court held;

"... it is within the discretion of the Attorney-General to direct to what Court a case shall be committed and what offence he shall be indicted for, and it appears to me that it should only be in some extreme case that the Court of Appeal should interfere with the discretion so given to him and direct a trial in a different Court."

In delivering the judgments of *The Queen v Gunawardene* (Supra) and *The Queen v Liyanage* (Supra) the respective Trials at Bar clearly questioned its jurisdiction to challenge the prosecutorial discretion. The judgment of *The Queen v Gunawardene* states;

"If the Attorney-General in whom rests the discretion either to proceed by indictment or information takes the view that the imputations tend to disturb or endanger the Government, it seems to us that it is impossible to hold, assuming that we have the power to review that discretion, that that view is wrong",

while the judgment of *The Queen v Liyanage* held that;

"The second plea is that the Attorney-General should have satisfied this Court that he had good reason for proceeding by way of information instead of by indictment. The answer to this is that Section 440A(6) empowers the Attorney-General to exhibit Information in respect of the offences now charged against these defendants, and the section contains no conditions as to how the Attorney-General should exercise his discretion. Nor do we think we have the power to question the exercise of the Attorney-General's discretion in this matter."

Weeramantry J, while sitting alone in the judgment of *Velu v Velu and another* (supra) observed that;

"... the Attorney-General is vested with a measure of discretion which is rendered effective by his statutory power to secure that inquiries under Chapter 16 will terminate in a manner determined in the exercise of that discretion. Into the sphere where this discretion is exercised it is not the province of this Court to enter save for the gravest cause."

In view of these pronouncements, it is clear that the prosecutorial discretion is reviewed in English Courts as well as in Sri Lanka, in exercising its powers of judicial review only when there is material to satisfy that the decision to prosecute was taken in extreme situations akin to "*dishonesty or mala fides or an exceptional circumstance*" warranting effective judicial intervention.

Unlike Section 29(3) of the Supreme Court Act 1981, which governs the issuance of prerogative writs by the High Court of England, except to "*matters relating to trial on indictments*", this Court derives its jurisdiction to issue such orders under Article 140 of the Constitution. The said Article confers this Court with jurisdiction to "*... grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto*".

The term "*according to law*" was originally contained in Section 42 of the Courts Ordinance and had conferred jurisdiction on the then Supreme Court to issue prerogative writs, before it was finally included in Article 140 of the Constitution conferring such jurisdiction on this Court. . This

particular term was interpreted by the Privy Council, in its judgment of *Nakkuda Ali v Jayaratne (Controller of Testiles)* 51 NLR 457, where Lord Radcliff stated that;

"... there can be no alternative to the view that when s. 42 gives power to issue these mandates " according to law " it is the relevant rules of English common law that must be resorted to in order to ascertain in what circumstances and under what conditions the Court, may be moved for the issue of a prerogative writ. These rules then must themselves guide the practice of the Supreme Court in Ceylon."

Therefore, the English law principles on judicial review of the prosecutorial discretion is applicable to the instant application by the Petitioner by which he sought to challenge the validity of an indictment against him by seeking issuance of several prerogative writs.

As previously noted, the Respondents have appeared before this Court on notice being served on them by the Petitioner, since he sought interim relief upon notice. In these circumstances, at this stage of the proceedings, where the Petitioner only supported his application for formal notice on the Respondents and also for interim relief, the objective of this Court is to assess the submissions of the parties in the light of their respective pleadings and decide whether the Petitioner has established a *prima facie* case.

It has already been decided that the Petitioner must *prima facie* satisfy this Court, upon the material he had pleaded, that the 6th Respondent took the decision to prosecute him "*dishonesty or mala fides or an exceptional circumstance*".

The indirect submission on illegality and procedural impropriety in respect of Section 12A(4)(a) of the Judicature Act had already been dealt with by this Court in the preceding paragraphs of this judgment. The other complaint the Petitioner relied on is the denial of an opportunity for the Petitioner to make a revealing statement by which he intends to provide valuable information to incriminate his co accused and also to extricate himself of criminal liability.

The contention advanced by the Petitioner and the 14th Respondent is that he was ordered to make a statement on or before 26.06.2019 by the Magistrate's Court but even before that time period was fully exhausted, the 6th Respondent had proceeded with filing of an indictment before the Permanent High Court at Bar. It is alleged that the CID, on their part also had acted illegally when they filed a report under Section 120(3) of the Code of Criminal Procedure Act No.15 of 1979, confirming the terminal point of their investigation against the Petitioner and others before the expiration of the time period mentioned in the Court order.

It is obvious that the said contention is based upon the premise that provisions contained in Section 120(3) of the Criminal Procedure Code are mandatory in nature and therefore imposes an inviolable prerequisite in

the institution of proceedings. It was also founded upon the premise that, in order to institute criminal proceedings, a prior recording of a statement from the intended accused is a mandatory prerequisite.

This Court would first deal with the contention in relation to Section 120(3) of the Code of Criminal Procedure Act No. 15 of 1979 which states that;

"As soon as the investigation is completed the officer in charge of the police station shall forward to such Court a report in the prescribed form. If in the report there is no allegation that the suspect has committed or been concerned in the committing of any offence the Magistrate shall discharge him. If the report alleges that the suspect has committed or been concerned with commission of an offence he shall be prosecuted in accordance with the provisions of this Code."

The Section contains statutory provisions regulating three situations. Firstly, it imposes a duty on the inquirers to inform the Magistrate's Court of the fact that the investigations have been completed. Secondly, if there is no allegation of committing an offence then the suspect is entitled to be discharged. Thirdly, if the report alleges that the suspect has "*committed or been concerned with commission of an offence*", then he shall be prosecuted in accordance with the provisions of the Code.

In this instance, the CID had in fact tendered a report to Court informing of the completion of its investigation. The second part of the Section has no application to the instant matter. The third part, that if the report alleges the suspect has "*committed or been concerned with commission of an offence*", then he shall be prosecuted in accordance with the provisions of the Code, merely makes it mandatory that the suspect be prosecuted according to the statutory regime put in place by the Legislature in the form of Act No. 15 of 1979. There is no indication in the language of the said Section even to infer that the institution of criminal proceedings should take place only after the report is filed.

In practical terms, the Officer-in-Charge will know the point of time that the investigation he commenced with the reception of the 1st information has reached its logical conclusion. The Section is meant to ensure there is no undue delay in completion of investigations. The first part of the Section imposes a mandatory duty on him to inform Court, under whose supervision he acted, that the investigation has reached its completion. In reaching the second or third stages, the Officer-in-Charge of investigation must first decide the outcome of the investigations he had conducted and concluded. At that stage if he is of the view that there was no material to conclude that he could make an allegation of committing an offence, then the second part applies by discharging of the suspect by Court. If he is of the opinion that the suspect has "*committed or been concerned with commission of an offence*", then, the legal duty is imposed that such a suspect "*shall be prosecuted in accordance with the provisions of the Code*". At this stage, the necessity arises as to the determination by the

police or with the advice of the of the 6th Respondent of the Court, in which the institution of proceedings should be made. If it is the Magistrate's Court, then with the completion of investigation, and reporting to Court of the completion of investigation the institution of proceedings could follow seamlessly. Situation could be different if the proceedings are instituted in any other Court except the Magistrate's Court.

The 6th Respondent is invested with the prosecutorial discretion in determining the Court in which the proceedings should be instituted. He was tasked to advise the investigators by Section 393(2) of the Code of Criminal Procedure Act. Section 393(1) the said Act empowers him to forward indictments to the High Court of the Republic and also to exhibit information before Trial at Bar appointed by His Lordship the Chief Justice. He could also advise the investigators to institute proceedings before the Magistrate's Court either as a preliminary inquiry or as a summary prosecution. As noted earlier on, in addition to provisions of Section 450 of the Code of Criminal Procedure Act, by Section 12A(1)(a) of the Judicature Act, the 6th Respondent is invested with the discretionary power to request for a direction from His Lordship the Chief Justice to institute proceedings before the High Court at Bar and Permanent High Court at Bar, respectively.

In this instance, the 6th Respondent intended to institute criminal proceedings against the Petitioner and others before the Permanent High Court at Bar under Section 393(1) of the Act No. 15 of 1979 as Section 120(3)

provides for, by acting under the provisions of Section 12A(4)(a) of the Judicature Act and Section 24 of the Commissions of Inquiry Act No. 17 of 1948, as amended by Act No. 16 of 2008, subject to the direction of His Lordship the Chief Justice.

Section 120 of the Code of Criminal Procedure Act No. 15 of 1979 imposes several responsibilities to the "Officer-in- Charge of a police station" or to an "inquirer". There is no indication in the Section that these responsibilities are equally applicable to the 6th Respondent, whose powers are defined in Chapter XXXIII of the said Act.

In the limited objections of the 1st to 7th Respondents, it is stated that the report informing Court of the completion of the investigations was filed on 13.06.2019 ("R10"). By this report, the CID reported to Court that the investigations are completed and the 6th Respondent has informed them by a letter dated 10.06.2019, that a request was made under Section 12A(4)(a) of the Judicature Act for a direction from His Lordship the Chief Justice to institute criminal proceedings against the Petitioner and other suspects before the Permanent High Court at Bar.

By the time the 6th Respondent, sought the direction of His Lordship the Chief Justice under Section 12A(4)(a), he should have decided on the available material whether to institute criminal proceedings against the Petitioner or not, as otherwise, he cannot seek a direction as per the provisions of Section 12A(4)(a). The direction under the said Section is sought in respect of "*whether criminal proceedings in respect of such offence be*

instituted in the Permanent High Court at Bar" and not whether to institute proceedings in respect of such offence.

The complaint of the Petitioner in this regard is twofold. He contends that without the proper completion of investigations (due to failure to record his statement), the 6th Respondent cannot seek a direction from His Lordship the Chief Justice. The reason he attributes is, in such a situation, the 6th Respondent is unable to take into consideration of the four "fetters" as found in Section 12A(4)(a), in the absence of the Petitioner's statement. He then couples the decision of the 6th Respondent to seek a direction with the decision to prosecute.

The consideration of the Petitioner's complaint brings this Court to the point where it had to consider whether the Petitioner's statement is a mandatory requirement for an investigation to be considered as complete.

In *Victor Ivan v Sarath N. Silva, Attorney General & Another* (supra) it was emphasised by the Supreme Court that;

"A citizen is entitled to a proper investigation – one which is fair, competent, timely and appropriate – of a criminal complaint, whether it be by him or against him. The criminal law exists for the protection of his rights – of person, property and reputation – and lack of a due investigation will deprive him of the protection of the law".

Professor Peiris, in his book titled *Criminal Procedure in Sri Lanka under the Administration of Justice Law No. 44 of 1973*, states (at p.35) that the purpose of police conducting investigation is "threefold" and proceeds to describe them as follows;

- i. to ascertain whether a crime has been committed,
- ii. to discover the identity of the offender, if a crime is shown to have been committed; and
- iii. to collect evidence with a view to securing the conviction of the offender in subsequent proceedings.

Therefore, it is a legal requirement that the investigators should conduct a proper investigation. Such an investigation should ideally include the statement of witnesses in support of the allegation and identity of the offender. In addition it should include, a statement by the suspect and of his witnesses. The investigators should also conduct further investigations, after hearing the suspect's version and of his witnesses if they found it necessary.

In this particular instance admittedly there is no statement recorded from the Petitioner. The question therefore arises whether the fact that the statement of the Petitioner is not recorded, could be considered as a failure to fulfil a mandatory statutory requirement in the completion of investigations?

Learned Additional Solicitor General rightly points out that the Code of Criminal Procedure Act No. 15 of 1979 does not contain any statutory

provision by which the Legislature has imposed such a mandatory legislative duty on the inquirers by recording the statement of a suspect, prior to completion of an investigation.

Sections 109 and 110 of the Code of Criminal Procedure Act No. 15 of 1979 regulates the procedure of recording statements in relation to witnesses as well as suspects as it does not recognise any difference

Relevant part of Section 110 (1) reads as follows;

"Any police officer or inquirer making an investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case,"

And

"If the police officer or inquirer asks any question in clarification such question and the answer given thereto shall be recorded in form of question and answer."

Section 110(2) clearly defines the nature of protection afforded to suspects in recognition of the rule against self-incrimination. Said section reads as follows;

"Such person shall be bound to answer truly all questions relating to such case put to him by such officer or inquirer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture".

Section 110(3) clearly demarcates the legitimate use of the contents of a statement whilst protecting the interests of an accused. The Section reads;

"A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court;

Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time.

Anything in this subsection shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or to prevent any statement made by a person in the course of any investigation being used as evidence in a charge under section 180 of the Penal Code.

The scope of the provisions of Section 110 was extensively dealt with by a divisional bench of the Supreme Court in *Rupasinghe v Attorney General* (1986) 2 Sri L.R. 329. It was contended before their Lordships that during the investigations the investigators have acted in violation of the provisions of Section 110 of the Criminal Procedure Code as they fail to recognise the appellants "right to silence" and also failed to accept his "exculpatory statement".

The apex Court has held;

"In Sri Lanka, unlike in England, the right to silence is restricted only to questions which would have a tendency to expose any person to a criminal charge or to a penalty or forfeiture. This has been the law in Sri Lanka for a considerable period of time. Under section 110 (1) the police are invested with powers during the investigations of offences of examining "orally any person supposed to be acquainted with the facts and circumstances of the case." In Sri Lanka, unlike in England, a reciprocal obligation is imposed on the person interrelated, in that such person is declared to be "bound to answer truly all questions relating to such case put to him by a police officer or inquirer other than questions which have a tendency to expose him, to a criminal charge or to a penalty or forfeiture.". In Sri Lanka the right to silence has been and is governed by statute and such questions are not determined by the English Common Law and the English decisions pertaining thereto."

Had the Petitioner decided to make a statement, it would have been recorded under these provisions and the investigators were bound to acknowledge his right to silence as to the "*questions which have a tendency to expose him, to a criminal charge or to a penalty or forfeiture*". In relation to any other question put to him by the investigators, he is "*bound to answer truly all questions relating to such case*".

This judgment clearly states that;

"There is a statutory immunity in our law given to a suspect to decline to answer any incriminating questions put by the police. However, if he does make an incriminating statement in answer to questions by the police that statement shall not be proved against him at his trial as section 25 of the Evidence Ordinance expressly forbids it subject to the proviso in section 27 of the Evidence Ordinance."

Section 111 imposes a duty on investigators that they "shall not offer or make or cause to be offered or made any inducement, threat, promise to any person charged with an offence to induce such person to make any statement."

If the suspect is already in custody, a statement could easily be recorded subject to the provisions of Section 110. If the suspect is in Sri Lanka, then there are provisions under which the investigators could secure his attendance to record a statement. As in the case of the Petitioner, who had located himself in a place where such provisions are unenforceable, unless he voluntarily submits himself to its jurisdiction, there is no opportunity to record a statement in the absence of his intention and willingness to do so.

If the Courts were to accept that there must be a statement of a suspect, in order to lawfully conclude an investigation against him, then, adoption of such an argument will only result in placing a suspect, who prefers to evade justice, in a more advantageous position than the applicable law had ever envisaged or permitted and the suspect who is in Sri Lanka.

The 14th Respondent, who echoed the submissions of the Petitioner and contended that the failure to record a statement is a denial of a fair investigation, did not address this aspect in his submissions.

The Petitioner complains to this Court that he could have provided information that would have convinced the CID and the Attorney General that there exists the four "fetters" as required by Section 12A(4)(a) of the Judicature Act. If there was an opportunity to put such questions to him and his answers could be disqualified by the provisions of Section 110(2) of the Code of Criminal Procedure Act as it tends indirectly to "*expose him, to a criminal charge*".

In the eyes of the investigators, the conduct of the Petitioner had not evinced any confidence in them that he would return to Sri Lanka in the near future and make a statement as he indicated in his correspondence. This seems to be a justifiable suspicion on their part, since even in his petition to this Court, there is no indication that the Petitioner was at least making plans to return to Sri Lanka or in order to fulfil his undertaking to make known his "response", had made some preparatory arrangements in view of that undertaking.

Having considered the applicable legal provisions in relation to recording of statements and of conclusion of investigations, this Court now turns its attention to consider the contention whether that the Petitioner had entertained legitimate expectation of the procedural fairness in view

of the order issued by the Magistrate's Court to appear before CID on or before 26.06.2019.

It appears that the learned President's Counsel for Petitioner, in view of the learned Additional Solicitors General's submission that there is no statutory duty to record a statement of a suspect, has sought to fill this Legislative "gap" in the statutorily laid down criminal procedure, by bridging it with public law consideration of legitimate expectation. His attempt to merge the public law principle of legitimate expectation with the statutorily laid down criminal procedure, in the context of determining the validity of his complaint on deprivation of procedural fairness, needs judicial confirmation.

Unlike in the general decision making process of public officers, where there are no clearly laid down procedures to follow, in relation to conduct of investigations, institution of proceedings, trials in relation to the commission of offences are heavily regulated by statutorily laid down procedure. The Code of Criminal Procedure Act No. 15 of 1979, which replaced the Administration of Justice Law No. 42 of 1973, has regulated criminal proceedings in Sri Lanka for well over four decades with a substantial collection of judicial interpretations on its permissible scope. The number of local authorities cited in this judgment itself is a testimony of that feature and also is a confirmation that the statutory provisions contained therein have adequately protected the interest of the suspects as well as the accused.

The English Courts have displayed a certain degree of reluctance to apply public law principles in relation to Criminal Justice system, as they did with judicial review of prosecutorial discretion. The Court of Appeal, in its judgment of *R v AJ* [2019] EWCA Crim 647 reiterated the principle that;

*“... conduct which might prevent a public authority from conducting itself as it might otherwise do as a matter of Public Law was not necessarily of such a kind as to present a challenge to the integrity of the criminal justice system, and to underline the fact that, for the powerful reasons given in *Sharma v Browne-Antoine* [2007] 1 WLR 780, orders to quash decisions to prosecute are very rarely granted. He opined that the observations of the Court in that case were equally potent in suggesting that a stay should be even more rare.”*

When a challenge on the prosecutorial discretion is based particularly on the public law principle of legitimate expectation, the Court of Appeal had indicated there is no shift or change of its approach. In *R v Drury and Others* [2001] EWCA Crim 975, it is stated;

*“In the case of *ex parte Kobilene*, the Divisional Court certified as a point of law of general public importance whether, pending the coming into force of its substantive provisions, the enactment of the Human Rights Act 1998, gave rise to an enforceable legitimate expectation that the Director of Public Prosecutions would exercise his prosecutorial discretion in accordance with the ECHR.*

The Divisional Court and the House of Lords had no difficulty in dismissing such a suggestion in terms which give no comfort to the argument that public law principles applicable to general policy decisions are apt to be applied in relation to particular decisions on procedural and evidential matters taken by the prosecution ..."

In *R v AJ* (supra), when it was complained to the Court of Appeal by the Applicant that a decision to prosecute him had already been made by the time of his last communication with the Chief Inspector and that was deliberately withheld either from or by the Chief Inspector in persuading him to return to the United Kingdom by creating a legitimate expectation in him based on that communication, the Court held that the Applicant never received a categorical assurance that he would not be prosecuted and it seemed the Applicant did not trust the assurance he was given and also knew that he was taking a risk. In these circumstances it was held that;

"The Judge was also right not to concern himself with whether there might have been, in public law terms, a legitimate expectation. As he concluded, the introduction of that concept into an application to stay as an abuse of process in criminal proceedings (on the basis that a trial would offend the court's sense of justice and propriety, or undermine confidence in the criminal justice system and bring it into disrepute) runs the risk of watering down the test

and (we would add) of unnecessarily confusing the issue. As the Judge put it "The public law concept of legitimate expectation sits uneasily with the hopes and fears of a person suspected on reasonable grounds of having committed serious criminal offences and facing prosecutions for them. That person has the protections of the criminal law and of Article 6, and is entitled, as a matter of law to a fair trial. The role of any expectation that person might have as to how he will be treated."

Even in an instance where the institution of a prosecution was challenged on the basis of deviating from the publicly declared policy in the Leal Guidance Manual, the Court remained unmoved. This was an instance where by a general charging advice, stressing the point that money laundering is an area where careful exercise of prosecutorial discretion is required is included in the manual for prosecutors. When challenged the decision to prosecute on the basis of legitimate expectation, the Court in its judgment of *Crown Prosecution Service, Nottinghamshire v Kevin Rose* [2008] EWCA Crim 239, adopted the reasoning in the judgment of *R (Wilkinson) v Director of Public Prosecutions* [2006] EWHC 3012 (Admin) where Kay LJ observed;

"...[Having considered the Code for Crown Prosecutors and the CPS's own document on money laundering, I feel unable to say that the decision to proceed under s.329 was arguably vitiated by some public law consideration. The passages to

which we have been referred seem to me to be encouragement to crown prosecutors to resort to offences under the 2002 Act in serious cases. They are less obviously expressed as discouragement to resort to offences in less serious cases, of which this is one. The question of who should be charged and with what offence is essentially one for the Crown Prosecution Service."

The judgment of *R v Drury and Others* (Supra) is an instance where the Court had reluctantly considered the facts of the case in relation to the application of the principles of legitimate expectation by making reference to a precedent, whilst stressing its non-applicability. The Court said;

"Even if we accepted (as we do not) the relevance of the public law principle of legitimate expectation in a case of this kind, and even if (which we doubt) the appellants' expectation can be characterised as one of a substantive, rather than merely procedural, benefit, we also note the statement in Coughlan at 645E that:

'Here, too, the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.'

Pausing only to observe that the expression 'abuse of power' in that passage is not the same as 'abuse of process' in criminal proceedings, the approach referred to does not seem to us very different from that required of the court when weighing the countervailing considerations of policy and justice ...".

In *A v R* (supra) the Court sought to justify the deviation from a laid down policy in the institution of prosecution, by acknowledging the prosecution's entitlement to such a deviation. It was observed;

"... even if it can be shown that in one respect or another, part or parts of the relevant guidance or policy have not been adhered to, it does not follow that there was an abuse of process. Indeed, it remains open to the prosecution in an individual case, for good reason, to disapply its own policy or guidance."

The contention that the Magisterial order, directing him to appear before the CID on or before 26.06.2019, made him legitimately expect that the investigations would not be completed without recording his statement, should be considered in relation to the factual circumstances as averred by the Petitioner as well as the 1st to 7th Respondents. The Petitioner contends that the investigations are not complete, in spite of the filing of the report under Section 120(3) of the CPC, since no forensic audit report was finalised at that point of time and in the absence of his statement and therefore the reporting to the Court by the CID that the investigations are complete is made arbitrarily, capriciously, unreasonably,

vexatiously, irrationally and by deprivation of the Petitioner's legitimate expectation and procedural fairness.

Referring to the factual position, the Petitioner submitted that, he entertained a legitimate expectation in preparing himself to make a statement with the assistance of his legal advisor, before the date as specified in the order of the Court, but well before the expiration of the time period afforded by Court. However, the CID in informing Court that the investigations are completed before the said date, deprived him of any reasonable and fair opportunity to provide his statement before the deadline.

The Petitioner stresses to this Court that the taint that was introduced to the investigation by denying him of an opportunity to make a statement had contaminated the decision to indict him before the High Court at Bar since he should have been given a chance to make his statement before being indicted by the 6th Respondent simply because without hearing the Petitioner, the 6th Respondent is not in a position to appreciate and assess the mandatory "fetters" put in place by Section 12A(4)(a) of the Judicature Act.

Since the Petitioner claims that he entertained legitimate expectation that the investigations would not be concluded without his statement being recorded demands an inquiry into his conduct in order to satisfy this Court whether he did act on such an expectation as per *R v AJ* (Supra)

The Petitioner, is a dual citizen of Sri Lanka and the United Kingdom. During the time period applicable to the investigations referred to in this Petition, he resided in Singapore. The legal status of the Petitioner in relation to his stay in Singapore is not known. It is admitted that he had left Sri Lanka in June 2018, and it appears from the material before this Court that since then he had not returned.

The Presidential Commission, having concluded investigations as per its mandate, issued the final report on 30.12.2017. In the said report, the Commission made several recommendations, including that “*...the Hon. Attorney General or other appropriate authority should consider whether the Perpetual Treasuries Ltd. is liable for prosecutions for an offence in terms of the aforesaid Section 56A(1) of the Registered Stock and Securities Ordinance*”..

The Commission, having investigated into the Treasury Bond Auction on 27.02.2015, identified that there were market manipulations, insider dealings and other illegalities and was of the view that “*... the evidence establishes that Perpetual Treasuries Ltd., has made the major part of its profit by using 'insider information' and by means of 'market manipulations'*”. It then recommended appropriate proceedings be instituted against the said Company.

It is alleged by the 1st to 7th Respondents that the Petitioner was a director of Perpetual Treasuries Ltd, during the period 18.02.2015 to 18.07.2017. It is specifically alleged that the Petitioner was a director of the said Company prior to and on the date of the Treasury Bond Auction

conducted on 27.02.2015. According to the 1st to 7th Respondents, Perpetual Treasuries Ltd was a key perpetrator of the offences identified and "*in view of the onerous responsibility cast on the directors of a Company, with regard to the conduct of the Company, which is a legal person, and in view of the necessity to establish the mental element of an offence in respect of a charge under the Penal Code, it was the responsibility of the law enforcement authorities to include the directors of the Company in any indictment or charges to be served on the Company itself*".

It is in these circumstances that the CID took steps to name the Directors of the said Company as suspects in case No. B 8266/2018 of the Chief Magistrate's Court on the advice of the 6th Respondent.

In their limited objections, the 1st to 7th Respondents have sought to refute the allegation of procedural unfairness by claiming that the Petitioner has conducted himself in "bad faith", and "deliberately and tactfully evaded the lawful investigation process set forth in Sri Lanka".

Therefore, this Court will examine the material placed before it, with a view to assess the validity of the allegation of the Petitioner that he was informed denied of an opportunity to make a statement in violation of his legitimate expectations.

The 1st email, sent by the 2nd Respondent is dated 29.03.2019, by which it was informed that the Petitioner has been named as a suspect and the necessity to record his statement. He was directed to appear before the

2nd Respondent on or before 05.04.2019. The 2nd Respondent also sought the postal address of the Petitioner. The Petitioner was served with a document, depicting the nature of the charges as an attachment to this particular email.

In his reply, the Petitioner clarified with the 2nd Respondent whether he could make his statement via email. It was informed to the Petitioner by the 2nd Respondent's 2nd email that it was not legally permissible. The 2nd Respondent also provided an opportunity to the Petitioner to provide his "position" known via email on 04.04.2019, and the CID is prepared to conduct further investigations, if necessary. The request for the Petitioner's postal address was made once again. The Petitioner then replied by email on 5.04.2019 that the annexure is in Sinhala language and he needed two weeks to "respond".

However, the Petitioner did not respond even after two weeks with his "response" nor did he take any steps to provide his personal address. The facts were reported to Court on 05.04.2019 and an order was obtained by the CID directing the Petitioner to appear before CID on or before 26.06.2019. The said Court order was delivered to the Petitioner via a courier service on 26.04.2019 to the Postal address obtained by the CID, through the interviews it had conducted with the Petitioner's parents who resided in Sri Lanka. The Petitioner claims his parents were "harassed" by the CID.

The next email sent by the Petitioner to the 2nd Respondent was on 10.06.2019 by which the Petitioner confirmed the service of Court order on him and appraised the 2nd Respondent of the fact that he had retained the services of an Attorney-at-Law. The Petitioner clarifies that he had retained legal Counsel, in order to obtain "*legal advice on how I could best assist and cooperate with the investigations while reserving my rights and liberty, given that I had already been named as a suspect.*"

He further informs the 2nd Respondent that he is aware that the 6th Respondent had already decided to indict him and sought sanction for a Trial at Bar. He further states "*note that in the event Hon. Attorney General reverses the decision to indict as an accused I am eager to assist this investigation and provide information, investigative material and evidence that will be valuable to CID and to the Hon Attorney General*" and requests to keep his offer confidential.

It is relevant to note that the Petitioner never did offer to assist investigations by providing "*information, investigative material and evidence that will be valuable to CID and to the Hon. Attorney General*" until the fact that he was indicted had reached him through news reports. Strangely, the Petitioner even then preferred to adopt a twin track strategy in relation to the criminal investigation conducted by the CID. Through his Attorney, the Petitioner correspond with the 6th Respondent by the letters dated 10.06.2019 and 18.06.2019, in addition to interviewing several senior officers of the Attorney General's Department on 13.06.2019 and 14.06.2019, offering his assistance to conduct investigations. On 13.06.2019,

the CID filed a report under Section 120(3) of the Criminal Procedure Code, informing Court that the investigations are completed.

An officer of the said Department replied to the Petitioner's Attorney on 18.06.2019, informing him that "*there is no legal impediment for your client to appear before the Director of CID and to make a statement and any disclosure relating to the matters under investigation.*" The Attorney of the Petitioner, in his affidavit, stated that he made representations to the 6th Respondent seeking the Petitioner be "delisted as an accused and listed as a witness" in the matter pending before the Permanent High Court at Bar.

However, on the last date of the time granted by the Magistrate's Court directing the Petitioner to appear before CID, i.e. 26.06.2019, the same Attorney, made submissions to the Chief Magistrate that the said order was issued *per incuriam* since the Court had no power to order the Petitioner to appear before CID. Despite the repeated offers to the 2nd and 6th Respondents that the Petitioner would assist in investigations, and despite the report under Section 120(3) being filed, marking the terminal point of investigations, the Petitioner did not seek further time from Court to make a statement to the CID or to assist its investigations by seeking an extension.

By then the 6th Respondent had sought directions from his Lordship the Chief Justice to institute criminal proceeding before the Permanent High Court at Bar on 10.06.2019 and finally the indictment was presented before the Permanent High Court at Bar on 28.06.2019.

It is reasonable to expect from a person who had been named a "suspect" in a case, to act swiftly to secure his interests and to place any material in his possession to convince the investigators of his innocence at the first available opportunity. The Petitioner was aware from the 1st email sent by the 2nd Respondent that he was named as a suspect. That was on 29.03.2019. The Petitioner, in his reply sought time to study the annexure and to respond within two weeks. That two weeks period ended on 19.04.2019. There was no response from the Petitioner by the 2nd Respondent until it was reported in the newspapers that the 6th Respondent has sought a decision from His Lordship the Chief Justice to indict the Accused before the Permanent High Court at Bar.

The CID obtained a Court order on 05.04.2019, which ordered the Petitioner to appear before CID on or before 26.06.2019 and served it on him on 26.04.2019. The Petitioner took about 45 days to respond from the date of service of the Court order to his last email and made no declaration of his intention to return to Sri Lanka or to make a statement, which he undertook to do within two weeks. On 10.06.2019, the 6th Respondent had sought a direction from His Lordship the Chief Justice and, by then, had decided to indict the Petitioner.

In these circumstances, the 2nd and 6th Respondents are justified in their thinking that the Petitioner's conduct failed to evoke any confidence and that he is not honest in his declared intentions about making a statement.

The Petitioner described the filing of the indictment was done in "extreme" and "dubious" haste and alleged "glaring *mala fides*" on the part of the 6th Respondent, in deciding to institute criminal proceedings against him. The "extreme haste", as alleged by the Petitioner, of the 6th Respondent in indicting him, is also relevant to the area under consideration.

On 30.12.2017, the Presidential Commission issued report which contained adverse findings against Perpetual Treasuries Ltd. The 2nd Respondent has commenced CID investigations on 02.02.2018 regarding the treasury bond auction conducted on 27.02.2015. It is evident from the limited objections of the 1st to 7th Respondents that the investigations were conducted on the advice of the 6th Respondent, which was regularly sought by the CID.

The 6th Respondent made the request to His Lordship the Chief Justice on 10.06.2019, more than four years after the auction and 18 months since the release of the findings of the Presidential Commission. A considerable amount of time has already elapsed. Clearly the 6th Respondent had the material collected by the Commission and the CID when he decided to indict the Petitioner. The 6th Respondent must have been mindful of the fact that a significant delay has resulted in initiating a prosecution.

The 1st to 7th Respondents had stated in their limited objections that the Petitioner was a director of the Company prior to and on the date of the auction and the imputation of criminal liability on the Petitioner was apparently made on that basis. The Petitioner himself relies on the wide publicity given to the decision of the 6th Respondent to such a decision from His Lordship the Chief Justice .

Even if the Petitioner had made a full and truthful disclosure in his statement, that would not alter the material already before the 6th Respondent, in determining whether a direction should be sought from His Lordship the Chief Justice or not, having considered the four "fetters" referred to in Section 12A(4)(a) of the Judicature Act. On the other hand, the Petitioner cannot claim that he only had the monopoly of information as to "the nature and circumstances", "the gravity", "the complexity" and "the impact on the State", so that without him making a statement, the 6th Respondent is totally helpless to make a valid determination on that aspect.

Since "*mala fide*" decisions to prosecute are clearly amenable to judicial review, it is important that this Court considers the basis of the Petitioner's allegation that the 6th Respondent had acted *mala fide*. In support of the allegation of *mala fide* on the part of the 6th Respondent, the following factual situations are relied upon by the Petitioner;

- a. in the further report dated 25.03.2019, filed by the CID in the Magistrate's Court, it was reported to Court that the Petitioner had left Sri Lanka in June 2018 and in

confirmation statements of his parents and *Grama Niladhari* of the area were recorded, when in fact the statements of his parents were recorded only on the following day (26.03.2019) and *Grama Niladhari's* statement was recorded, several months later, on 20.07.2019, even after the indictment was filed,

- b. the same report described the visit by the Police to the Petitioner's parent's house to arrest him on 25.03.2019, and since the report too is filed on the same day, the improbability of visiting the house and filing report simultaneously,
- c. harassment of the Petitioner's parents by the CID officers by visiting their residence to serve summons on the Petitioner on 11.07.2019, when they knew that he is based in Singapore at that point of time,
- d. the 6th Respondent failed to tender a copy of the request he had addressed to His Lordship the Chief Justice in seeking a direction to institute proceedings before the Permanent High Court at Bar,
- e. the act by the 6th Respondent in reserving his right to produce the proceedings before the Chief Magistrate of Colombo from 05.04.2019 "upon the same becoming

available", when in fact the said proceedings are part and parcel of the proceedings before the Permanent High Court at Bar, thereby suppressing vital information from the purview of this Court.

In contrast, the Petitioner claims that he acted with utmost *bona fides*, when he volunteered, though in vain, to provide valuable information with his intended statement.

These factors cannot surely be used to support an allegation of *mala fide* of the 6th Respondent in indicting the Petitioner. It is apt to quote Fernando J, in *Victor Ivan v Sarath N. Silva, Attorney General & Another* (*supra*). His Lordship observed;

"Errors and omissions do occur, and by themselves are not proof that the impugned decision was arbitrary, capricious, perverse or unreasonable ...".

This Court is not convinced of the declared *bona fides* of the Petitioner, in view of the considerations in the preceding paragraphs. This Court is more inclined to accept the allegation of the 1st to 7th Respondents that the Petitioner deliberately and tactfully evaded the lawful investigation process, under the guise of offering incriminating material against his co accused from his trove of information, whilst arranging for him to be "delisted" as an accused from the indictment pending before the Permanent High Court at Bar.

It is pertinent to note that the Petitioner is not challenging the indictment on the footing that given the material available before the 6th Respondent, he could not reasonably have forwarded an indictment. Instead, the Petitioner harped on the contention that the 6th Respondent had failed in giving an opportunity for the Petitioner to disclose what he knew of and to place the Petitioner's side of the story before him. It is also contended that the impugned action of the 6th Respondent had resulted in rejecting the offer of material which incriminates other accused and also exculpates the Petitioner.

In delivering judgment of the apex Court in *Sarath de Abrew v Iddamalgoda and six Others* (supra), Priyantha Jayawardena, PC, J was of the view that;

"While I agree with the submissions made by the learned President's Counsel for the Petitioner that every power must be exercised by the authority fairly, reasonably and lawfully, the mere fact that the statement of witnesses of the defence has not been recorded as claimed by the Petitioner cannot make the decision of the Attorney General unsustainable. The Attorney General's decision to indict the Petitioner may be vitiated if a conclusion is arrived not on an assessment of objective facts or evidence but on a subjective satisfaction. The reason is where the decision is based on the subjective satisfaction if some of the statements turn out to be irrelevant, it would be impossible for a Superior Court to find out which of the statements are relevant or irrelevant,

valid or invalid had brought about such satisfaction. But in a case where a conclusion is based on a collective assessment such difficulty would not arise. If it is found that there was evidence before the Attorney General and such evidence had been considered by several officers of the said Department and a final decision was reached by the Attorney General based on the views of the said officers, the Superior Court would not interfere and would hesitate to substitute its own view in place of the Attorney General."

In the instant petition, the Petitioner had annexed correspondence and referred to the interviews his Attorney has had with several senior officers of the Attorney General's Department. The designation of these officers range from State Counsel to Additional Solicitor General. This indicates that the decision to indict the Petitioner was reached as a collective decision and therefore it is clear to this Court that the allegation of *mala fide* on the part of the 6th Respondent had no factual basis whatsoever.

In view of the conduct of the Petitioner, as the English Courts noted, even if the principle of legitimate expectation is applicable, the Petitioner himself made him disqualify from its protection. He, having opted not to comply with the order of Court and surrender to its direction but instead chose to challenge the jurisdiction of the Court in making the said order, and thereby, effectively negated any inference that could have been drawn in his favour, that he had taken the order of Court seriously and was in the process of making a statement, in compliance with the said order.

The Petitioner, through his Attorney, indicated that he intends to tender incriminating material in relation to the investigation, whilst making his statement. This offer of assisting investigations consists of three possible courses of action. The Petitioner could have made a statement, presumably an exculpating one. He also could have tendered the promised incriminating material without making a statement, which could have assisted the investigators in their investigation. He also had the option of amalgamating other two courses of action by making a statement revealing incriminatory material against the others, while exculpating himself. But he opted to do nothing. Despite his repeated undertaking to do so, as indicative from his correspondence and representations. The CID, on their part, have initially acted under Section 109(6) by directing the Petitioner to appear before it. When he failed to appear, realising it was futile to issue a warrant on him acting under the proviso of Section 109(6), the CID instead moved Court under Section 124 for an order in assisting investigations, since the Petitioner was operating from a place, which was beyond their jurisdiction.

Contrary to the Petitioner's claim that he was deprived of an opportunity to make a statement, by examination of his conduct, this Court is of the considered view that it is reasonable to think that the Petitioner had voluntarily renounced his entitlement to make a statement, by acting contrary to his declared intentions.

Returning to the question this Court posed earlier on, in this judgment, namely, whether the fact that the statement of the Petitioner is

not recorded could be elevated as a failure to fulfil a mandatory statutory requirement in the completion of investigations, therefore, should be answered in the negative. This conclusion is reached by this Court mainly due to the absence of a specific provision of law declaring that the investigations cannot be completed without recording a statement of a suspect and in view of the absurdity of imposition of such a requirement.

Adoption of an interpretation of such a requirement will obviously lead to absurdity since any absconding suspect could easily hamper an investigation which would otherwise have reached its practical conclusion. In doing so, a suspect is benefited in two ways. Without completion of investigations, there cannot be a prosecution. This will result in a situation where the suspect will enjoy immunity from criminal prosecution until and unless he decides to make a statement and complete the investigation. Clearly this is not what the Legislature intended when it enacted the provisions of Sections 109 and 110 of the Code of Criminal Procedure Act No.15 of 1979.

Before this Court parts with this judgment, it should deal with the contention that the offences against the Petitioner are not made out owing to various factors the Petitioner had relied on.

The Supreme Court, having embarked on a voyage by which it had exhaustively considered with the issue of the effect of availability of an alternate remedy in instances of application for judicial review, by its

judgment of *Vanniasingham v Forbes & Another* (1993) 2 Sri L.R. 362, declared that;

"In this area of the law, where there is no illegality, the Court should first look into the question whether a statute providing for alternative remedies expressly or by necessary implication excludes judicial review. If not, where remedies overlap, the Court should consider whether the statutory alternative remedy is satisfactory in all the circumstances. If not, the Court is entitled to review the matter in the exercise of its jurisdiction. Of course if there is an illegality there is no question but that the Court can exercise its powers of review."

This Court has already decided that there is no illegality in the decision making process. Therefore, the English as well as Sri Lankan judicial precedents already referred to have clearly stressed that these trial issues could effectively be dealt with by the trial Court itself at the appropriate stage.

In these circumstances, this Court is not inclined to issue formal notice of this application on the 1st to 7th and other Respondents, since the Petitioner has failed to satisfy that there exists a *prima facie* matter to be considered. Consideration of granting of interim relief does not arise in view of the above finding.

The petition of the Petitioner is accordingly dismissed *in limine*.

Parties will bear their costs.

JUDGE OF THE COURT OF APPEAL

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE COURT OF APPEAL