

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

C.A. (Writ) 335/2016

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

Thennakoon Mudiyansege Janaka
Bandara Thennakoon

Member of Parliament,
Matale Road,
Dambulla.

PETITIONER

-Vs-

1. Hon. Attorney General

Attorney General's Department,
Colombo 12.

2. Officer-in-Charge

Special Investigation Unit,
Criminal Investigation Department,
Sri Lanka Police,
Colombo 01.

3. Director

Criminal Investigation Department,
Sri Lanka Police,
Colombo 01.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J. (P/CA)
Shiran Gooneratne, J. and
Arjuna Obeyesekere, J.

COUNSEL : Gamini Marapana, PC with Navin Marapana, PC and Uchitha Wickremasinghe for the Petitioner.
Dilan Ratnayake, DSG with Janaka Bandara SSC for the Respondents.

Argued on : 18.06.2020

Decided on : 20.11.2020

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

The Petitioner has sought mandates in the nature of writs of *certiorari* to quash the decision to indict him in the High Court of Kandy in case No. HC 81/2016. Further orders in the nature of *certiorari* to quash and set aside proceedings before the Magistrate's Court of Matale dated 24.11.2015 have also been sought in this application. The main relief sought is the *quashal* of the indictment filed against the

Petitioner in respect of an incident which allegedly took place on or about the 14th of December 1999.

It is indisputable that *certiorari* lies even against decisions of the Attorney General to indict a person. Article 140 of the Constitution recognizes the class of persons against whom writs lie; namely, *a judge of any court of first instance or tribunal or other institution or any other person*. This Court enjoys the powers to issue orders in the nature of writs of *Certiorari*, *Prohibition*, *Procedendo*, *Mandamus* and *Quo-warranto* according to law. The words ‘according to law’ would connote English Law, the Constitutional provisions pertaining to judicial review and statutes that regulate the discretion of a statutory functionary but it is in English common law that we look for the legal standards to challenge the lawfulness of decisions made by public bodies and others exercising public functions.

It is quite clear that the functions of the Attorney General which are statutory partake of the characteristics of public functions and thus the decisions of the Attorney General are always amenable to judicial review.

The reviewability of the discretion vested in the Attorney-General came up for interpretation in the case of *Victor Ivan v. Sarath N. Silva, Attorney General* (1998) 1 Sri.LR 340. In a fundamental rights application, the Supreme Court declared:

“It is enough, for the purposes of this case, to say that the Attorney-General’s power to file (or not to file) an indictment for criminal defamation 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 purposes for which they have been conferred, and not otherwise. Where such a power or discretion is

exercised in violation of a fundamental right, it can be reviewed in proceedings under Article 126”

The Supreme Court once again grappled with the question of reviewability of Attorney-General's discretion in *Sarath de Abrew v. Idaamalgoda and Others* SCFR/424/2015 SC minutes of 11/01/2015, wherein His Lordship Priyantha Jayawardena, J. (with their Lordships K. Sripavan, CJ. and Upali Abeyratne, J. agreeing) emphasized the aforesaid legal position in the following tenor:

“....The Attorney General’s decision to indict the Petitioner maybe vitiated if a conclusion is arrived at not on an assessment of objective facts or evidence but on subjective satisfaction.”

The Petitioner is entitled to resist any unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion. It is a fundamental requirement of the rule of law, viewed as a safeguard against arbitrary power that decision makers act within the powers conferred on them by law and do not exceed those powers.” (at page 10)

The exercise of prosecutorial discretion is reviewable not only in applications against infringement of fundamental rights but also in applications for judicial review under Article 140 of the Constitution. No discretionary power is unfettered and whether the discretion is vested in a statutory functionary like the Attorney-General or in a court of law, the remit of that statutory power is subject to the controlling jurisdiction of judicial review under Article 140 of the Constitution.

The decisions of a Court of First Instance are also thus amenable to writ jurisdiction of this court provided an applicant for judicial review is able to establish the grounds necessary for the grant of *Certiorari, Prohibition, Procedendo*

Mandamus and *Quo-warranto-see* the recent pronouncement of this court in *Chaminda Bandara Adikari v Kapila Adikari and Others* C.A. (Writ) 216/2020 (CA minutes of 25.08.2020).

There are dicta from courts which appear to recognize *quashal* of indictments even in the trial courts. In *Mudiyanselage Hami v Appuhamy* 3 N.L.R 101, Lawrie, J. said on 2nd February, 1898:

"In a criminal case it is too late to quash the indictment after it has been once accepted by the Court, and the case for the prosecution is closed."

The percipient passage above appears to recognize implicitly the right of a trial judge to quash an indictment at the inception in the trial court.

In the case reported in 7 S.C.C 51 the District Judge quashed the indictment. This practice was not discountenanced by the Supreme Court. On the contrary it was recognized. So much for case law on quashing of indictments in the trial courts and superior courts of this country.

We have heard arguments both from the learned President's Counsel and the learned Deputy Solicitor General on the facts and circumstances immanent in the case and it is convenient to begin with the advice of the then learned Solicitor General Mr. Priyasath Dep (later His Lordship the Chief Justice of Sri Lanka) dated 04.04.2008, which was proffered from the Attorney-General's Department to the Superintendent of Police, Matale in respect of Magistrate's Court case Matale, bearing No. B 35627. This case pertained to the incident in question that allegedly took place on 14.12.1999- an event which forms the subject matter of the indictment pending against the Petitioner.

The comprehensive advice given by the then Solicitor General in AG's reference bearing No. CM 2/29/2002 speaks nary a word about the Petitioner as a suspect in the case even though the advice was, among other things, in relation to non-summary proceedings to be commenced against *Herath Mudiyanselage Rupasinghe* also known as *Thatte Rupe* (hereinafter referred to as *Thatte Rupe*). The advice was also in relation to some other suspects who were involved in the incident. The then Solicitor General had not directed a non-summary inquiry against the Petitioner because no witnesses had ever referred to him in the investigation book extracts as *particeps criminis*. It was only against *Thatte Rupe* that a non-summary inquiry for murder of *Samantha Thilak Kumara* and attempted murder of *Chaminda Sampath Kumara* was ordered.

After a lapse of 7 years and 5 months from the date of the advice of the then Solicitor General dated 04.04.2008, another advice dated 29.09.2015 under the hand of a Senior State Counsel was sent to Director CID, to initiate a non-summary inquiry against the Petitioner in relation to the same incident. This advice of the Senior State Counsel dated 29.09.2015 makes no reference to the advice of the then Solicitor General, dated 04.04.2008.

By the time the advice of the Senior State Counsel dated 29.09.2015 was dispatched, the non-summary inquiry against *Thatte Rupe* for the same offences, pursuant to the advice of the then Solicitor General, had already concluded and after committal, he now stood indicted in the High Court of Kandy Case bearing No. 164/14. The indictment dated 11.06.2013 charges the accused *Thatte Rupe* for causing the death of *Samantha Thilak Kumara* on 14.02.1999 punishable under section 296 of the Penal Code and with attempted murder of one *Chaminda Sampath Kumara* on the same day under Section 300 of the same Code. I have perused the

indictment against *Thatte Rupe* which is now pending in the High Court of Kandy and I must straightaway point out that there seems to be a mistake in the date of the offence mentioned in the indictment. Most witnesses speak to an incident that took place at *Dimbulgamuwa* on 14.12.1999. Even the B-reports filed in the case before the non-summary inquiry began refer to 14.12.1999 as the date of the incident. But the indictment refers to the date of the offence as 14.02.1999.

Be that it may, the indictment against *Thatte Rupe* arising from the non-summary proceedings as had been directed by the then Solicitor General (SG), is referred to in the advice sent to the CID by the Senior State Counsel on 29.09.2015. As I have said before, this advice dated 29.09.2015 directs the CID to commence non-summary proceedings against the Petitioner for the same offences. The advice on 29.09.2015 specifically refers to a first opinion on the same matter on 31.01.2006.

The officer who sent this first advice on 31.01.2006 had been looking at the IB extracts from the CID, whilst the learned Solicitor General examined IB extracts from the *Mahawela* police. Two agencies namely the *Mahawela* Police and CID had conducted investigations into the same incident and two separate IB extracts on the same matter arrived in the Attorney-General's Department from these two agencies. What was examined finally by the Solicitor General was the material from the *Mahawela* police whilst the officer I have referred to above handled the IBs from the CID. The first advice in the matter went to the CID on 31.01.2006 directing them to commence non-summary proceedings against both the Petitioner and *Thatte Rupe*, whilst the Solicitor General by his advice dated 04.04.2008 took the view on the material provided by the police that it was *Thatte*

Rupe who must face the non-summary proceedings. So thus there were three opinions in the matter.

- 1) Advice to CID dated 31.01.2006 –to charge both Janaka Bandara Tennakoon (the Petitioner) and *Thatte Rupe* at a non-summary inquiry.
- 2) Solicitor General's Advice to Mahawela Police dated 04.04.2008- to charge only *Thatte Rupe* at a non-summary inquiry.
- 3) Advice to CID dated 29.09.2015- to charge Janaka Bandara Tennakoon at a non-summary inquiry.

After the hearing in this matter had concluded, Mr. Dilan Ratnayake, the learned Deputy Solicitor General, made available to this court the two files with regard to advice No. 1 and 2, handled by the Attorney-General's Department on the same incident and upon a perusal of these two files, one could notice that whilst file bearing No. CM2/29/2002 (the file finally dealt with by Solicitor General) was opened on 05.03.2002 in respect of the investigations conducted by the Mahawela Police, the file bearing No. CRI/16/2003 which contains IB extracts from the CID was subsequently opened on 07.02.2003. The officer who examined the material from the CID refers to another file bearing No. CM2/134/2000 but this file does not seem to be the file handled by the Solicitor General, which is of course CM2/29/2002.

It would appear that there had been three files relating to the same matter but suffice it to note that there is no cross reference in the file examined by the Honorable Solicitor General as to the existence in the Department of a file from the CID on the same incident. The attention of the Honorable Solicitor General had not been drawn to the existence of another file from the CID on the same incident though the SG gave the 2nd advice on 04.04.2008.

It is quite apparent upon an examination of the files that there had been two instances of decision making in relation to the same matter and it was only the decision of the Solicitor General that was given effect to by Police. I could perceive the absence of a coordination that finally resulted in two opinions being given. The first opinion dated 31.01.2006 directed non-summary proceedings against the Petitioner and *Thatte Rupe*, whilst the 2nd opinion given by the Solicitor General two years later namely on 04.04.2008 directed a non-summary inquiry only against *Thatte Rupe*.

This court is not altogether unaware of the existence of the unwitting practice of two or more files being opened in the Attorney General's Department on the same matter and the perils of this, *albeit* unwitting and unknown to the perceptive sense of an officer however vigilant and sedulous he may be, are too well known resulting in two opinions or more being given depending on the available material.

One is only incredulously reminded of the haunting aphorism-“*The voice is the voice of Jacob, yet the hands are the hands of Esau.*”

A careful perusal of the documents available to this Court shows that it is the opinion of the learned Solicitor General that was given effect to while the direction to the CID had not acted upon for well over 9 years.

The advice of the Solicitor General, *albeit* second in the chronological order, resulted in non-summary proceedings against *Thatte Rupe* and he was committed to stand his trial on 19.07.2011, as the MC proceedings in *Matale* indicates-vide Journal Entry dated 19.07.2011 at page 681 in the exhibit marked as P5 and appended to the Petition.

As I said before, *Thatte Rupe* now stands indicted in the High Court of Kandy for the murder of *Samantha Thilak Kumara* and attempted murder of *Chaminda Sampath Kumara*. It is undeniable that *Thatte Rupe* was committed to stand trial on the depositions that had been recorded. The proceedings dated 19.07.2011 corresponding to the above journal entry are found at page 699 of the exhibit marked as P5, wherein the accused *Thatte Rupe* was offered the opportunity to make a statutory statement and thereafter committed.

A perusal of the proceedings shows that at the non-summary inquiry witnesses were referred to their statements made to *Mahawela* police and they affirmed to the correctness of their contents. As would be apparent, these depositions made reference to *Thatte Rupe* as the statements had implicated only him to the police. The indictment against him dated 11.06.2013 charges *Thatte Rupe* for causing the death of *Samantha Thilak Kumara* and for attempted murder of *Chaminda Sampath Kumara*- both offences punishable under Sections 296 and 300 of the Penal Code respectively. The indictment is quite explicit in that it is only him and him alone who committed these offences. There is no reference in the indictment to the Petitioner as having been associated with the accused in the commission of the offences.

So by 2013 the witnesses who had implicated only him in their statements and non-summary depositions were listed in the indictment against *Thatte Rupe*. It was intimated to this Court that this indictment is yet pending in the High Court of Kandy in case bearing No. HC 164/13. In a nutshell the witnesses had spoken to the involvement of only *Thatte Rupe* and they subsequently affirmed to their statements at the non-summary inquiry. Upon this material the Attorney-General

indicted *Thatte Rupe* for murder and attempted murder by the indictment dated 11th June 2013.

The gravamen of the complaint of the learned President's Counsel was that whilst the indictment against *Thatte Rupe* for murder of *Samantha Thilak Kumara* and attempted murder of *Chaminda Sampath Kumara* is yet pending in the High Court, the Petitioner has since been indicted in another indictment for the murder of *Samantha Thilak Kumara* and attempted murder of *Chaminda Sampath Kumara* as having committed these offences in association with *Thatte Rupe*.

Whilst *Thatte Rupe* stands indicted for murder and attempted murder in the indictment dated 11th June 2013, he has since become a co-accused of the Petitioner in the 2nd indictment dated 01.08.2016 for the self-same offences.

Thus there are two diametrically opposite indictments flowing from the same incident that allegedly took place on 14.12.1999. The first indictment dated 11.06.2013 charges *Thatte Rupe* for murder and attempted murder of the two victims, whilst the Petitioner has been brought in as a co-accused of *Thatte Rupe* in the 2nd indictment dated 01.08.2016 to face the same two charges allegedly committed against the same victims.

This shows that the witnesses who had implicated *Thatte Rupe* in their first statements made a volt-face subsequently and proceeded to inculpate the Petitioner too in their second statements to the CID. The learned Deputy Solicitor General brought to the notice of the court that it was because of this turn around that the CID was directed to commence non-summary proceedings against both the Petitioner and *Thatte Rupe* as far back as 31.01.2006 (the first advice to CID). But

the CID chose not to act on this advice and it is only the Solicitor General's advice that was acted upon by way of a non-summary inquiry against *Thatte Rupe*.

But the witnesses who had thus made contradictory statements (whatever explanations they may have offered to the CID for their volt-face) stuck to their first statements when they came forward to depose to the facts at the 1st non-summary inquiry that took place against *Thatte Rupe*. When they made their depositions at the non-summary inquiry in 2011, they only implicated *Thatte Rupe* and nary a word did they utter against the Petitioner.

By the time the non-summary inquiry against *Thatte Rupe* as ordered by Solicitor General came around, the witnesses had made their second statements to CID but they never revealed their hand about the Petitioner at the non-summary proceedings.

By 2011, the new procedure relating to non-summary inquiries introduced by the Code of Criminal Procedure (Special Provisions) Act, No. 15 of 2005 was so well entrenched that their statements were read out to them and in terms of the new procedure they had to be asked whether the statements were an accurate record of what they had stated.

Another salient aspect of the new procedure was that they were also given an opportunity to make such additions or alterations to their original statements- vide section 6 (3) (a) of the Code of Criminal Procedure (Special Provisions) Act, No. 15 of 2005. One could see the witnesses sticking to their original statements to police and no deposition was made by them that they had made a subsequent statement to the CID speaking to the participation of the Petitioner. The witnesses affirmed to the accuracy of their original statements to police and the Petitioner was nowhere brought near the scene.

The new procedure of giving an opportunity to a witness at non-summary proceedings to add to his original statement or make alterations is aimed at advancing the credibility of the witness and this opportunity went a-begging in the cases of the witnesses at the non-summary inquiry against *Thatte Rupe* as they culpably failed to state that they had implicated the Petitioner too in their 2nd statements to CID. For instance the victim of the alleged charge of attempted murder *Chaminda Sampath Kumara* specifically brought home the fact that he had nothing to add to or alter the statement which he had made to police-vide proceedings dated 05.07.2011 at page 696. This was in the teeth of his subsequent statement to CID wherein he implicated the Petitioner.

This culpable omission to make use of the first available opportunity to refer to their second assertion to the effect that the Petitioner was involved in the incident manifests the fact that it was their first statement that was being relied upon by the witnesses. Of what earthly use is the provision so elaborately laid out in the law other than for the witness to draw the attention of court to his second version and probably offer an explanation as to why the 2nd version is at complete variance with the 1st version? The legislature does not make new provisions *in vacuo*.

Even the Attorney-General indicted *Thatte Rupe* on the strength of their 1st statements and depositions and having failed to draw the attention of the Magistrate to so glaring a gaping hole in the differing statements, it follows that these witnesses could not now be put through a 2nd non-summary inquiry to affirm to the correctness of their 2nd statements to CID. In any event it goes beyond mere credibility of witnesses. The question is whether these self same witnesses could be put through a 2nd non-summary inquiry just to affirm to their statements, almost 5 years after the 1st non-summary inquiry. Their silence at the 1st non-summary as to their second statement would make their version highly

improbable when they ascended the witness box to depose to the correctness of their 2nd statements. Sans an explanation which exculpates their conduct, they cannot blow hot and cold.

*"No party can thus make contradictory claims-allegans contraria non est audiendus. It is a principle of good faith that a person should not be allowed to blow hot and cold at different times. In fact a person who denies today what he affirmed yesterday is not to be heard or believed. This elementary rule of logic expresses the trite saying of Lord Kenyon that a man shall not be permitted to blow hot and cold with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to prompting of his private interests-vide- **Wood v. Dwarris**, 1 Exch. 493; **Andrews v. Elliott**, 5 E&B 502"*

This is exactly what happened when the 3rd advice dated 29.09.2015 was dispatched to the CID. This advice dated 29.09.2015 which has been marked as R3 to the objections of the state, laments about the fact that the CID has remained inactive for nearly 9 years without having begun a non-summary inquiry against the Petitioner in relation to the incident that had taken place as far back as 14.12.1999.

The advice faulted the CID for not adhering to AG's opinion dated 31.01.2006 and specifically brought to the notice of Director, CID that *Thatte Rupe* now stood indicted for the offences of murder and attempted murder in the High Court of Kandy.

The advice dated 29.09.2015 further directed the CID to commence non-summary proceedings against the Petitioner for the murder of the same victim *Samantha Kumara*, for which *Thatte Rupe* had already been indicted in 2013. The draft charge

appended to the advice also charges the Petitioner for the attempted murder of *Sampath Kumara*. This was notwithstanding the indictment dated 11.06.2013 that arraigned *Thatte Rupe* for the same offence.

Mr. Gamini Marapana, the learned President's Counsel for the Petitioner contended strenuously that the enthusiasm to bring the Petitioner to face charges for which *Thatte Rupe* had already been indicted assumed greater proportions with the advent of the year 2015. He *though* maintained that he would remotely complain of mala fides but he called in question the procedure adopted. After all, in a writ application this Court looks at the process adopted to make a decision and if the decision suffers from what in administrative law is called *Wednesbury* unreasonableness in its umbrella sense, even a decision to indict a person is susceptible to the writ jurisdiction of this Court-see M.D.H.Fernando, J. in *Victor Ivan v. Sarath N. Silva, Attorney General* and Priyantha Jayawardena, J. in *Sarath de Abrew v. Idaamalgoda and Others* (*supra*).

The force of the argument of the learned President's counsel was perceptible. The alleged offences took place in 1999. *Thatte Rupe* was indicted for the offences in 2013, after his committal. The witnesses had spoken to his involvement alone in the offences.

By way of the aforesaid advice in 2015, the Petitioner was being ordered to be arrested in order to have him face a non-summary inquiry for the same offences for which *Thatte Rupe* had been indicted in 2013-this prosecutorial decision to put forward the same witnesses to depose against the Petitioner based on their 2nd statements, after a lapse of 15 long years from the so called commission of the alleged offences in 1999, is so unreasonable that it defies logic and common sense

in the narrow sense of *Wednesbury* unreasonableness as well, apart from the umbrella sense of unreasonableness I have already alluded to.

I now turn to the non-summary inquiry against the Petitioner that was ordered by the 3rd advice in 2015. Presently in this judgment I will deal with an important aspect of this non-summary inquiry, which I consider dispositive of the issues, but for the moment I intend focusing on the content of the depositions that was led against the Petitioner in his absence.

Though there is a failure to rationalize the consequence of offering the same witnesses a second time at a non-summary inquiry to have evidence adduced that the Petitioner was also involved in the incident, it does not stand to reason that these witnesses who had implicated *Thatte Rupe* before a judicial officer could now come through as inspiring witnesses at the 2nd non-summary inquiry, despite their contradictory statements.

Therefore, even though the Honorable Attorney-General enjoys the statutory discretion to direct a non-summary inquiry based on the material collected in the course of an investigation, this discretion has to be exercised subject to permissible standards of administrative justice and the question arises whether the initiation of a non summary inquiry against a person based on a latter or prior statement of witnesses who have taken diametrically opposite stances on the same incident is unreasonable in the umbrella sense of *Wednesbury* unreasonableness. In my view there was a failure to take into account relevant considerations and this aspect of the matter has not been considered at all before the advice was dispatched ordering a 2nd non-summary inquiry based on the 2nd statements of the witnesses. This becomes pivotal when one considers the fact that the witnesses never added to or altered their 1st version in light of their 2nd statements to CID.

The Second Non-Summary against the Petitioner

When one examines the non-summary proceedings held against the Petitioner consequent to the advice of the Senior State Counsel dated 29.09.2015, the procedure adopted in the 2nd non-summary proceedings courts some observations from this court. The CID filed a report in the Magistrate Court of *Matale* on 06.10.2015 intimating that the Petitioner had been arrested whilst being treated at Lanka Hospital. The learned Magistrate thereafter visited Lanka Hospital where the Petitioner had been receiving treatment and called for a report from the Judicial Medical Officer.

On the same day, the learned Magistrate, having considered the medical reports by the JMO and the Chief Medical Officer of Prisons, gave permission to the Petitioner to continue to be treated at Lanka Hospital and remanded the Petitioner till 20.10.2015. On 03.11.2015 the non-summary inquiry was fixed for 11.11.2015. On 11.11.2015 the inquiry was fixed for 24.11.2015 as the Petitioner was not present in court. A medical report was called for through prisons as to whether the Petitioner is in a condition to be produced in the Magistrate Court of *Matale*; vide page 632 of the proceedings attached to the petition.

An important aspect of the case is that on 24.11.2015, the inquiry began and concluded on the same day. Six prosecution witnesses were called to testify in accordance with the new procedure introduced by the law on non-summary inquiries and all these witnesses affirmed to the correctness of their statements to the CID. Even *Chaminda Sampath Kumara*, the alleged victim of attempted murder also affirmed to the correctness of his 2nd statement to the CID. However, he offered no explanation as to why he had implicated *Thatte Rupe* in his 1st statement. If the version given in the 2nd statement is true, it should have been elicited as the

truth with explanations at the Magisterial inquiry. Instead, we have witnesses confirming their diametrically opposite versions as true on two different occasions. An indicting counsel must have had regard to this aspect and considered these vital omissions and irregularities. He cannot rest content that it is a matter of credibility which must be left to the trial judge. In administrative justice, failure to take into account relevant considerations and taking into account irrelevant considerations would taint and nullify the decision as illegality which is an aspect of *Wednesbury* unreasonableness. Our attention has not been drawn to any analysis or consideration of these matters before a decision was made to indict the Petitioner.

If the 1st statement is partially untrue in regard to the total involvement of *Thatte Rupe*, the deposition at 1st non-summary inquiry would thus become untrue and an opportunity arose to explain this discrepancy at the 2nd non-summary inquiry. The witnesses culpably failed to do so. Rather both versions are offered to be true by the witnesses.

When this discrepancy was pointed out to the learned Deputy Solicitor General, he stated that the Attorney General would withdraw the 1st indictment against *Thatte Rupe* and persist with the 2nd indictment to prosecute the Petitioner and *Thatte Rupe*. This assertion is a concession before this court that the witnesses had not been reliable and creditworthy at the 1st non-summary and it is as plain as the pikestaff that it is unsafe to pin this prosecution on these witnesses. One cannot now say that the unreliable deposition is demonstrably separable from the truth.

Nowhere in the material made available to us have these aspects been considered and there are no reports or supervisory decisions that throw light on the decision making process in regard to the 2nd indictment.

It would appear that the Attorney-General had proceeded to consolidate two commitments and join together, in one indictment, counts relating to offences inquired into in separate non-summary proceedings. Sansoni, J. in *Piyadasa v. The Queen* (1962) 66 N.L.R 342 at 344 stated the following which would dispose of this issue before this court:

"There is no provision of the [Criminal Procedure] Code which authorizes the Attorney General to consolidate commitments and join together, in one indictment, counts relating to offences inquired into in separate non-summary proceedings. It follows that the Attorney-General in this case acted ultra vires....it was not open to the Attorney General to invent a new procedure to give himself new powers, as he sought to do in this case. A valid indictment is a condition precedent to a valid trial."

In the circumstances apart from the grounds of judicial review which justify the issuance of a certiorari to quash the indictment dated 01.08.2016 against the Petitioner, I am fortified by the assertion of Sansoni, J. in my conclusions that this indictment has to be quashed for its procedural irregularity and impropriety which are recognized as grounds for *certiorari*.

I have looked at the decision making process in the forwarding of indictments and set out above my reasoning against the tenability of the indictment.

I would now turn to certain pre-conditions to the assumption of jurisdiction on the part of the learned Magistrate to begin the 2nd non-summary inquiry against the Petitioner and deal with it under the rubric "*jurisdictional facts*."

Infringement of jurisdictional facts

As judicial review looks at the decision-making process, the antecedent events prior to the forwarding of indictment against the Petitioner repays some comment. The non-summary inquiry which resulted in the committal of the Petitioner and the subsequent forwarding of the indictment has to be first looked at. This non-summary inquiry began on 24.11.2015 and concluded on the same day. The proceedings dated 25.11.2015 indicate that a preliminary objection had been taken to the commencement of the non-summary inquiry as witnesses had testified only to the involvement of *Thatte Rupe* in 1st non-summary inquiry. The proceedings indicate that a Senior State Counsel appeared on behalf of the prosecution to place the deposition of witnesses on 24.11.2015. After having disposed of the preliminary objection in favour of the prosecution, the learned Magistrate, *Matale* proceeded to commence the inquiry on the mere *ipse dixit* of the Attorney-at-Law, Mr. Shaheid, who had stated to Court that without prejudice to the rights of the suspect, he was giving consent on his behalf, to have the non-summary proceedings commenced. The Attorney-at-Law had cited section 148 (4) (a) (ii) of the Code of Criminal Procedure Act, No. 15 of 1979 (The Code).

Upon the citation of this provision of the Code, the learned Magistrate states in his order that he would be commencing the non-summary inquiry on the consent apparently given on behalf of the suspect (sic). One of the reasons for the learned Magistrate to commence the non-summary inquiry on 24.11.2015 is the *ipsissima verba* of the learned Counsel for the Petitioner that he had the consent of the suspect-petitioner. The dominant reason that the learned Magistrate cites for the commencement of the inquiry is the legal assistance available to the accused and the provision of his consent through the Attorney-at-Law. In other words, though there was a medical report certifying to the ability of the Accused-Petitioner to

travel to court, the Magistrate treated the legal assistance and the consent given on behalf of the accused as the compelling reasons to commence the non-summary inquiry. At two places of the order the learned Magistrate speaks about consent being given on behalf of the suspect-see pages 287 and 288 of the proceedings dated 24.11.2015.

Towards the end of his order, he treats the consent given by the Attorney-at-Law on behalf of the accused, as the consent of the Petitioner. The question before this court is whether a verbal expression as was given to court on behalf of the accused can be treated as the consent of the accused in terms of section 148 (4) (a) (ii) of the Code. The said provision of the Code reads as follows:

Where the accused –

- (i) is absconding or has left the island; or
- (ii) is unable to attend or remain in court by reason of illness and either has consented to the commencement or continuance of the inquiry in his absence, or such inquiry may commence or continue without any prejudice to him; or
- (iii) by reason of his conduct in Court is obstructing or impeding the progress of the inquiry,

the Magistrate may, if satisfied of these facts, commence and proceed or continue with the inquiry in the absence of the accused.

Both the Code of Criminal Procedure (Special Provisions) Act No. 15 of 2005 and the Code of Criminal Procedure (Special Provisions) Act No. 2 of 2013 (the applicable Amendment Act relating to non-summary inquiries in the year 2015) also mirror the same language.

Section 6 (II) (a) of the Code of Criminal Procedure (Special Provisions) Act No. 2 of 2013 is to the following effect:

Where the accused –

- (i) is absconding or has left the island; or
- (ii) is unable to attend or remain in Court by reason of illness and has consented either to the commencement or continuance of the inquiry in his absence, such inquiry may commence or continue without any prejudice to him; or
- (iii) by reason of his conduct in Court is obstructing or impeding the progress of the inquiry,

the Magistrate may, if satisfied of these facts, commence and proceed or continue with the inquiry in the absence of the accused.

Thus the rule of thumb is that the presence of the accused is essential even in the case of a non-summary inquiry but the exceptional situation of commencing the inquiry or continuing the inquiry in his absence is provided for in the aforesaid section 6 (II) of the Code of Criminal Procedure (Special Provisions) Act No. 2 of 2013. The relevant provision applicable to the situation of the accused is section 6 (II) (a) (ii) which prescribes two ingredients for commencement or continuance of the non summary inquiry in the absence of the accused.

- (1) He must be unable to attend or remain in court by reason of illness;
AND
- (2) He must have consented either to the commencement or continuance of the inquiry in his absence.

The medical report submitted to court on 24.11.2015 does not indicate the inability of the Petitioner to attend or remain in court by reason of illness. On the contrary, the medical report, according to the learned Magistrate in his order, unambiguously stated that the Petitioner was able to travel to court.

In these circumstances, the first element necessary for commencement of the non-summary inquiry namely inability to attend or remain in court by reason of illness was patently absent and the learned Magistrate exceeded his jurisdiction when he proceeded to act on the mere *ipse dixit* of the Learned Attorney-at-Law to commence the non-summary inquiry. On the material available to him it was patently clear that the Petitioner was able to attend court and the learned Magistrate should have proceeded to secure the presence of the Petitioner or issue process on him. On the contrary he acted on the verbal expression of the Attorney-at-Law.

In my view the ingredients specified in Section 148 (4) (a) (ii) of the Code and Section 6 (11) (a) of the Code of Criminal Procedure (Special Provisions) Act No. 2 of 2013 are jurisdictional and they confer jurisdiction on the Magistrate to begin a non-summary inquiry in the absence of the accused only if the ingredients are fulfilled. The Magistrate cannot go wrong on jurisdictional facts and in administrative law if he gets it wrong on jurisdictional facts, all subsequent proceedings become a nullity.

A mere appearance of an Attorney-at-Law and his verbal undertaking to defend an absent accused are not sufficient to confer jurisdiction on a Magistrate to begin proceedings unless and until he is satisfied that there is material to establish the ingredients of inability due to illness and real consent of the accused. Neither ingredient was present before the Magistrate on 24.11.2015. Commenting on consent of an absent accused, I would proceed to observe that a mere appearance

and a verbal expression to defend are not sufficient. There must be real consent manifested by the accused and this could emanate only through a written communication from the accused. Section 148 (4) (a) (ii) of the Code and Section 6 (11) (a) of the Code of Criminal Procedure (Special Provisions) Act No. 2 of 2013 are emphatic that consent is imperative. This consent cannot be gleaned from a verbal communication. If consent is to be manifested it has to be voluntary and real. Reality of consent is not manifest upon a verbal expression of the Attorney-at-Law however laudable the Attorney-at-Law may be in his vigorous pursuit of justice for the accused.

So I conclude that the Magistrate had no jurisdiction to commence the non-summary inquiry in the way he did and concluded it on one single day as he acted in total disregard of statutory stipulations.

Such an assumption of jurisdiction to commence the non-summary inquiry resulted in abortive proceedings and further eroded the fair trial guarantees given to an accused even in relation to non-summary proceedings.

As a result of the learned Magistrate getting it wrong on the mandatory requirements of section 148 (4) (a) (ii) of the Code, there was a miscarriage of justice in that the Petitioner was deprived of an opportunity to make a statutory statement under section 151 (1) of the Code and it cannot be argued that in a charge laid under Sections 296 and 300 of the Penal Code, the accused can be deprived of this vital opportunity usually offered. Such a denial would also result in an illegality and not mere irregular proceedings. I would therefore state the culpable failure to have regard to the jurisdictional facts of section 148 (a) (ii), results in an illegality which nullifies the subsequent steps taken in regard to the Petitioner. It passes strange that when there are provisions in the Code that exclusively apply in favour of the accused, the Attorney-at-Law in this case should

have stated that the accused was innocent at page 164 of the proceedings. There is no warrant for such a procedure and it does not absolve the Magistrate from scrupulously observing the mandatory provisions of the law. In the circumstances, there was an illegal committal and the resultant indictment dated 01.08.2016 becomes null and void. Accordingly, this court proceeds to quash and set aside by certiorari the decision of the 1st Respondent to forward an indictment against the Petitioner.

PRESIDENT OF THE COURT OF APPEAL

Shiran Gooneratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL

Arjuna Obeyesekere, J.

I agree.

JUDGE OF THE COURT OF APPEAL