IN THE COURT OF APPEAL OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for revision in terms of Article 138 and 145 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 365 of the Code of Criminal Procedure Act No. 15 of 1979 as amended.

C A (MC Revision) Application

No. 17 / 2014

W Maheshika Madhubhashini,

Magistrate's Court,

Attanagalla case;

No. B/926/2014

151,

Kithulwala,

Mirigama.

AGGRIEVED PARTY - PETITIONER

-Vs-

I. W D J Welagedera,
(Police Constable 53411),
Police Station,
Nittambuwa.

SUSPECT- RESPONDENT

II. C E Widisinghe,
Senior Superintendent of Police,
Kelaniya Division.

COMPLAINANT - RESPONDENT

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

RESPONDENT

Before: Vijith K. Malalgoda PC J (P/CA)

P. Padman Surasena J

Counsel: Anura Maddegoda for the Petitioner

Amila Palliyage with Upul Dissanayeka for Bar Association of Sri Lanka

Nalinda Indatissa with Kavishka Gunawardena for the 1st Respondent

Dilan Rathnayeka DSG for the Attorney General.

Argued on : 2016-09-21

Decided on : 2017-03-02

JUDGMENT

P Padman Surasena J

1. BACK GROUND FACTS

The Petitioner is the wife of P Prabath Indika Jayasinghe whose death was the subject matter of the inquest proceedings conducted by the learned Magistrate of Attanagalla in this case.[1]

[1] Case No. B/ 926/ 2014

The 1st Respondent is a Police Constable attached to Nittambuwa Police Station who was produced before the Magistrate as a suspect in this case.

The 2nd Respondent being the Senior Superintendent of Police of Kelaniya Division had conducted investigations into this incident.

Assistant Superintendent of Police, Gampaha had filed the 1st report dated 2014-06-12, reporting to the Magistrate's Court that the death of P Prabath Indika Jayasinghe, had been caused in an incident where the Suspect Respondent had opened fire whilst being on duty. The report describing the background of the said incident had stated that the Suspect Respondent along with another Police Officer namely PC 85874 Nuwan Thilakarathne had been on duty at Pasyala in Nittambuwa police area on the Colombo Kandy main road. These two police officers were at that time, engaged in duties pertaining to checking negligent driving, driving under the influence of liquor, breaking traffic laws etc. According to that report, the shooting incident had occurred around 1.30 PM on 2014-06-11. The report further states that the Suspect Respondent was compelled to open fire with his official revolver at the deceased, who, being the rider of a motor bicycle, not only failed to obey the orders of Police Officers to stop but also attempted to knock them down. The said report contains a

summary of statements given by the Police officer PC 85874 Thilakarathne and Heripitiyalage Sachin Chaturanga who was the pillion rider of the motor bicycle ridden by the deceased.

A second report had also been filed subsequently by the 2nd Respondent, but the date on which it was filed is not clear. However, it would appear from the contents of that report that the Suspect Respondent was produced before the learned Magistrate along with that report. The journal entry dated 2014-06-16 of the case record shows that the Suspect Respondent was produced before the learned Magistrate on 2014-06-16. Thus it can be concluded on these facts that it is on 2014-06-16 that the 2nd Respondent had filed the 2nd report. It is on that day that the learned Magistrate had commenced recording evidence of the witnesses.

The 2nd Respondent (His report indicates that he is a Senior Superintendent of Police in-charge of Kelaniya Police Division although he has been named in the caption of the petition filed in this Court as an Assistant Superintendent of Police. He has also informed this position to this Court when he had appeared in this court on 2014-09-01[2]) had also filed a 3rd report on 2014-06-17 on which date the learned Magistrate had resumed

[2] Vide journal entry dated 2014-09-01 of the docket.

the inquest proceedings and had proceeded to record the evidence of few more witnesses.

The Journal entry dated 2014-06-17 of the case record shows that the further inquest proceedings on that day had resumed at 1430 hrs. Therefore, it can reasonably be concluded that the impugned order had been made by the learned Magistrate towards the end of the day's proceedings on the same day[3] as evidence of six witnesses had been recorded on that day.

A closer look at the 2nd report filed by the 2nd Respondent on 2014-06-16 shows that, that report had also stated that it is for an offence punishable under section 298 of the Penal Code that the Suspect Respondent is liable. It is to be noted that the second report contains summaries of three more witnesses not mentioned in the 1st report while the 3rd report contains names of 4 more witnesses[4] to be called as witnesses at the inquest proceedings.

[3] i.e. 2014-06-17

[4] In addition to the witnesses mentioned in the two previous reports.

2. COMPLAINT BY THE PETITIONER

At the end of the said inquest proceedings learned Magistrate had delivered the impugned order dated 2014-06-17 in which she had held that the death of the deceased was due to hemorrhage from internal injuries caused to the body of the deceased due to gunshot injuries.

Learned counsel for the Petitioner had no complaint with regard to the above finding by the learned Magistrate as it is perfectly within the purview of the powers and duties entrusted to an inquirer[5] by virtue of section 370 of the Code of Criminal Procedure Act No. 15 of 1979 (hereinafter sometimes referred to as the 'Act').

However the learned Magistrate in the course of her order, has also held

i. that the evidence given by the pillion rider (Heripitiyalage Sachin Chaturanga) cannot be accepted as a truthful testimony,
ii. that the said pillion rider by giving false evidence before Court, had deliberately attempted to show that this incident is a murder,
iii. that this incident is not a murder,

[5] As per section 370(4), nothing in section 370 shall preclude a Magistrate from holding an inquest.

iv. that this incident may have occurred due to shooting by Police Officers as the deceased had failed to obey the orders to stop,

v. that this incident had occurred due to the negligence of the Suspect Respondent in handling his fire arm.

It is this part of the learned Magistrate's order that the Petitioner is seeking to revise in this application.

It is the submission of the learned counsel for the Petitioner that the learned Magistrate had failed to keep herself within the scope of Chapter XXX of the Code of Criminal Procedure Act No. 15 of 1979. Thus, it is the complaint of the learned counsel for the Petitioner that the learned Magistrate had acted in excess of jurisdiction.

3. RESPECTIVE POSITIONS TAKEN UP BY THE RESPONDENTS

It is appropriate at this stage to briefly identify the positions taken up on behalf of the 1st Suspect-Respondent and the 2nd and 3rd Respondents respectively.

A. ON BEHALF OF THE 1ST SUSPECT-RESPONDENT

Learned counsel for the Suspect-Respondent has taken up the position:

i. that the inquest proceedings cannot be challenged by way of a revision application;

ii. that the findings arrived at, by the learned Magistrate is well within the law as section 370(3) empowers a Magistrate to take steps if the report or other material before him discloses a reasonable suspicion that a crime has been committed and it is exactly that step that the learned Magistrate in this case had taken;

iii. that it was necessary for the learned Magistrate to decide on the offence in order to decide whether the suspect should be enlarged on bail or not;

iv. that as neither the report nor the evidence in this case discloses an offence punishable under section 296 of the Penal Code learned Magistrate had taken a judicial decision after evaluating all the material before her;

v. that all the material before the learned Magistrate favoured a finding under section 298 rather than a finding under section 296 of the Penal Code.

B. ON BEHALF OF THE 2ND AND 3RD RESPONDENTS

Learned Senior State Counsel appearing for the 2nd and 3rd Respondents, has advanced before this Court several arguments. When turning to those arguments, it can be seen that he has launched three-pronged attack on the case of the Petitioner. They are briefly as follows.

I. Revisionary jurisdiction of this Court does not lie to revise a verdict of an inquirer at an inquest,

II. There are no exceptional circumstances pleaded in the petition,

III. Any pronouncement by this court on the legality of the impugned order would only be academic since the Petitioner does not pursue prayers (c), (d) and (e) of the Petition.

4. APPLICABLE LAW

Bearing in mind above mentioned respective positions advanced by the parties, it is convenient to commence evaluating the submissions of the

learned counsel for all the parties, by reproducing section 370 of the Code of Criminal Procedure Act No. 15 of 1979. They are as follows;

Section 370

"Duty of inquirer

(1) Every inquirer on receiving information that a person -

(a) has committed suicide; or

(b) has been killed by an animal or by machinery or by an accident; or

(c) has died suddenly or from a cause which is not known,

shall immediately proceed to the place where the body of such deceased person is and there shall make an inquiry and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury, as may be found on the body and such marks, objects and circumstances as in his opinion may relate to the cause of death and stating in what manner such marks appear to have been inflicted.

(2) The report shall be signed by such inquirer and shall be forthwith

forwarded to the nearest Magistrate.

(3) If the report or other material before him discloses a reasonable suspicion that a crime has been committed the Magistrate shall take proceedings under Chapter XIV and XV and in such event the record of the inquiry and the inquirer's report shall be annexed to the record of the proceedings before the Magistrate.

(4) Anything herein contained shall not preclude a Magistrate from forthwith holding an inquiry under the powers vested in him by section 9, whenever any of the events mentioned in paragraphs (a), (b) and (c) of subsection (1) of this section have been brought to his notice.

(5) Any inquirer may, for the purpose of any inquiry under this Chapter, if he considers it expedient, issue process to compel the attendance of any witness to give evidence before him, or to produce any document or other thing.

(6) If any person so summoned fails or neglects to attend at the time and place specified in such summons, the inquirer may issue his warrant for the apprehension and production before him of such person.

(7) Every person who so fails to attend, or who refuses to take the oath of a witness, or refuses to answer any question which shall be legally asked of him, or fails or refuses to produce any document or other thing, shall be guilty of an offence, and shall be liable on conviction thereof to a fine not exceeding one hundred rupees, or to imprisonment of either description for any period not exceeding three months, or to both."

5. DIFFERENCE BETWEEN 'INQUIRER' AND 'MAGISTRATE'

It would be prudent at the outset to observe that the duties section 370 entrusts to an inquirer are different at some occasions, to the duties it entrusts to a Magistrate. Further, such different sets of duties could easily be separated from each other as they are required to be performed at two different stages of the inquest proceedings.

It is section 370(1) which basically refers to the duty of an inquirer. Thus one needs to distinguish and clearly identify the nature of the office of 'inquirer'. Section 2 of the Act has defined who an 'inquirer' is. According to section 108 of the Act it is the Minister who appoints any person by

name or office to be an inquirer for any area the limits of which shall be specified in such appointment. It must be stressed here that the inquirer's duty as set out in section 370(1) is to draw up a report of the apparent cause of death.

In addition to the distinction between an inquirer and a Magistrate referred to above, another occasion at which such distinction could be observed is section 371 of the Code of Criminal Procedure Act. For convenience that section is reproduced below:

S. 371.

"(1) When any person dies while in the custody of the police or in a mental or leprosy hospital or prison, the officer who had the custody of such person or was in charge of such hospital or prison, as the case may be, shall forthwith give information of such death to a Magistrate of the Magistrate's Court within the local limits of whose jurisdiction the body is found, and such Magistrate shall view the body and hold an inquiry into the cause of death.

(2) For the purposes of an inquiry under this section a Magistrate shall

have all the powers which he would have in holding an inquiry into an offence."

Accordingly, in any of the situations set out in the above section,[6] it is only a Magistrate and not an inquirer who is not a Magistrate who can conduct an inquiry into a death of such person.

Of course it must be stressed here for the avoidance of doubts that nothing contained in section 370 shall preclude a Magistrate from forthwith holding an inquiry under the powers vested in him by section 9 of the Act, whenever any of the events mentioned in paragraphs (a), (b) and (c) of subsection (1) of section 370 have been brought to his notice.[7] Indeed it is noteworthy that by virtue of section 9 of the Act a Magistrate's Court anyway has jurisdiction to inquire into sudden or accidental deaths[8] of persons.

Towards the facilitation of the due performance of the duty, section 373(1) has empowered an inquirer, if he considers it expedient, to call upon the Government Medical Officer of the district, or any other medical

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[6] section 371
[7] Section 370 (4) of Code of Criminal Procedure Act No. 15 of 1979.
[8] Described in section 9(b) (iii).

practitioner, to hold a post mortem examination of the dead body, and to report to such Magistrate or inquirer regarding the cause of death.

6. DIFFERENCE BETWEEN 'CAUSE OF DEATH' AND 'APPARENT CAUSE OF DEATH'

It is to be noted that the meaning of the term "cause of death" in section 373(1) is different to the term "apparent cause of death" in section 370(1) of the Act.

What is contemplated in section 373(1) is the cause of death determined by a Medical Officer upon performing a post mortem examination. In other words, it is the cause for that person's death which is generally described in medical terms by a Doctor. It must also be borne in mind that a Medical Officer is not engaged in hearing evidence etc., in the run up to his conclusion regarding the cause of death referred to in section 373(1) of the Act. It would only be the conduct of the post mortem examination and the analysis reports if any, prepared pursuant to

laboratory tests of any sample that he may have obtained and forwarded for analysis during the conduct of the post mortem examination which would form the basis for his finding of the cause of death.

On the other hand, what section 370(1) contemplates is the apparent cause of death as revealed by all the material available. This material would include the evidence of witnesses who may have testified before the inquirer. The apparent cause of death set out in the report drawn up by an inquirer referred to in section 370(1) of the Act goes a step beyond the threshold of cause of death referred to in section 373(1) reported by a Medical Officer. 'The former is declared after consideration of the latter', is how this Court could express this phenomenon in the briefest possible way. In other words, the cause of death referred to in section 373(1) reported by a Medical Officer upon performing a post mortem examination is made use of by the inquirer in the process of his arriving at a finding regarding the apparent course of death as per section 370(1).

7. IMPUGNED PART OF THE ORDER

As has been mentioned earlier in this judgment learned counsel for the Petitioner did not seek to challenge the verdict returned by the learned Magistrate at the inquest proceedings. This verdict is clearly mentioned at page 22 of the proceedings. (1st and 2nd paragraphs of the impugned order).

What the inquirer must do once he has completed the inquiry and drawing up of the report setting out the apparent cause of death of the deceased, is described in section 370(2).

According to section 370(2) the inquirer, once the report under section 370(1) has been drawn up shall sign the said report and shall forthwith forward it to the nearest Magistrate.

It is at this moment that the role of the Magistrate (as opposed to an inquirer) begins. According to section 370 (3), the Magistrate shall take proceedings under Chapter XIV and XV, if the report or other material before him discloses a reasonable suspicion that a crime has been

committed. It has to be re-iterated that this function is a function that has exclusively been entrusted to the Magistrate and not to the inquirer.

Thus provisions in section 370(2) and 370(3) could be described as another occasion which distinguishes duties of an inquirer from that of a Magistrate.

It would be in order to consider at this juncture, the effect of the impugned order made by the learned Magistrate in the instant case. What the learned Magistrate had done after returning the verdict, has amounted to;

i. an evaluation of evidence given by the witnesses and deciding on the credibility of their evidence,
ii. deciding firmly, the offence that the suspect had committed,
iii. deciding firmly, that this incident is not a murder,
iv. making a firm conclusion regarding the way this incident has occurred (i.e. due to shooting by Police officers as the deceased had failed to obey the orders to stop),

v. deciding firmly, the intention the Suspect Respondent has had (i.e. the decision that this incident had occurred due to the negligence of the Suspect Respondent in handling his fire arm).

In this backdrop, the task before this Court at this moment would be to decide whether the learned Magistrate is permitted by law to arrive at the above findings.

8. ROLE OF THE MAGISTRATE UNDER SECTION 370 (3)

As has been mentioned above, what section 370 (3) requires a Magistrate to do, if the report or other material before him discloses a reasonable suspicion that a crime has been committed is to take proceedings under Chapter XIV and XV. Therefore, it is necessary to ascertain the nature of proceedings under Chapter XIV and XV.

Chapter XIV of the Code of Criminal Procedure Act deals with the ways of institution of proceedings and it is section 136 which is relevant at this instance.

Accordingly, proceedings in a Magistrate's Court shall be instituted as per section 136, in one of the following ways: -

(a) on a complaint being made orally or in writing to a Magistrate of such court that an offence has been committed which such court has jurisdiction either to inquire into or try :

(b) on a written report to the like effect being made to a Magistrate of such court by an inquirer appointed under Chapter XI or by a peace officer or a public servant or a servant of a Municipal Council or of an Urban Council or of a Town Council; or

(c) upon the knowledge or suspicion of a Magistrate of such court to the like effect:

(d) on any person being brought before a Magistrate of such court in custody without process, accused of having committed an offence which such court has jurisdiction either to inquire into or try; or

(e) upon a warrant under the hand of the Attorney-General requiring a Magistrate of such court to hold an inquiry in respect of an offence which such court has jurisdiction to inquire into; or

(f) on a written complaint made by a court under section 135.

Section 136(3) insists that no written complaint shall be entertained by a Magistrate except as provided in section 136(1)

Chapter XV of the Code of Criminal Procedure Act deals with the institution of Non-Summary proceedings. The relevant section therein is section 145 which is to the following effect:

"When the accused appears or is brought before the Magistrate's Court, the Magistrate shall in a case -

(a) where the offence or any one of them where there is more than one, falls within the list of offences set out in the Second Schedule to the Judicature Act; or

(b) where the Attorney-General being of opinion that evidence recorded at a preliminary inquiry will be necessary for preparing an indictment, within three months of the date of the commission of the offence so directs,

hold a preliminary inquiry according to the provisions hereinafter mentioned.

9. WHETHER A FINDING REGARDING 'APPARENT CAUSE OF DEATH' BY AN INQUIRER BE REVISED.

Learned Senior State Counsel who appeared for the 2nd and 3rd Respondents relying on the case of G A D Seneviratne Vs The Attorney General[9] sought to argue that the revisionary powers of this court cannot be invoked to quash a finding made by a Magistrate or an inquirer at the end of an inquest proceeding.

The basis for the above decision that the revisionary powers do not extend to findings at inquest proceedings even when such inquest proceedings had been conducted by a Magistrate is the fact that a Magistrate holding an inquest proceeding is considered no more than an inquirer performing the same function. Hence such Magistrate at such occasion cannot be said to be acting judicially. The inquirer's role is confined to a restricted duty. That is only to conduct an inquiry in order to draw up a report regarding the apparent cause of death of the deceased.

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[9] 71 NLR 439

It is to be noted that the judgment in the case of G A D Seneviratne Vs The Attorney General[10] was pronounced by Court in respect of two applications filed before it. One is an application for revision and the other is an application for a writ of Certiorari. The relief claimed in both of those applications was the same and that relief was to have the findings made by the joint Magistrate- Colombo on 1966-09-15, at the conclusion of an inquest held under chapter 32 of the then Criminal Procedure Code quashed.

It must be noted that in that case, there had been two different verdicts pronounced. The first was pronounced subsequent to the inquiry held in April 1966 and the second made on 15th September 1966. The first verdict was to the effect that it is a case of suicide while the second verdict was to the effect that it is a case of culpable homicide. As has been mentioned above the purpose of those two applications was to have the subsequent verdict (i.e. the verdict that it is a case of culpable homicide) quashed. Such a move if successful would leave the first verdict (i.e. the verdict that it is a case of suicide) in force.

It is therefore clear that the purpose of those applications was to have the

[10] Supra

verdict of the inquirer changed into a verdict the petitioners in those cases would have preferred to. Thus, in the light of those facts, the judgment in that case is quite justifiable, understandable and perfectly in accordance with law. Further this Court in similar circumstances would also have done the same.

Therefore, this court is in full agreement with the judgment of that case and hence by no means is attempting to deviate from the principle that a verdict returned at the inquest of proceedings cannot be challenged in a revision application. Further it must be borne in mind that the inquirer conducting an inquest performs more an administrative function thus his decision in an inquest proceedings is a decision made in the course of such function and not a judicial decision made by a Magistrate.

10. WHETHER AN ORDER MADE UNDER SECTION 370(2) A JUDICIAL ORDER.

It is to be observed that both the learned counsel for the Suspect - Respondent and the learned Senior State Counsel in their respective written submissions filed before this court, have submitted that any order

made by a Magistrate after the inquiry report is submitted to him under section 370(2) would be a judicial order which would be made in terms of the powers vested in the Magistrate by virtue of section 373(1) of the Code of Criminal Procedure Act.[11]

As has been pointed out before, the power given under section 370 (3) of the Act, has to be exclusively exercised by a Magistrate after consideration of the inquiry report or other material before him.

This means that the impugned part of the order of the learned Magistrate is a judicial order. Therefore, such an order could be revised by a Court exercising revisionary powers. Further, it is clear that the impugned part of the order does not form part of the verdict or finding with regard to the apparent cause of death pronounced in terms of section 370(1) of the Act.

This in turn establishes that the nature of the order that is being impugned in this case is different from the nature of the order that was impugned in the case[12] relied upon by the Respondent.

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[11] Paragraph 17 of the written submission filed by the Suspect Respondent and Paragraph 3(ii) of the written submission filed by the Complainant Respondent.

[12] G A D Seneviratne Vs The Attorney General (supra)

11. EFFECT OF PETITIONER NOT PURSUING PRAYERS (C), (D) AND (E).

Although the prayers in this application have focused to have the order granting bail to the Suspect Respondent set aside, at the time of argument, learned counsel for the Petitioner stated to Court that he would not pursue a cancellation of bail already granted to the Suspect Respondent, but would focus on setting aside the finding by the learned Magistrate which he submitted fell outside the scope of Chapter XXX of the Act.

It must be borne in mind that the basis upon which the Petitioners have prayed for cancellation of bail granted to the Suspect Respondent is the illegality of the finding arrived at by the Magistrate. Therefore, it cannot be said that the Petitioners have materially deviated from the grounds they had based their petition at the inception. Indeed, if this court is to hold that the bail granted to the Suspect Respondent should be cancelled, it probably would have to pronounce on the legality of the finding of the learned Magistrate that the offence the Suspect Respondent had

committed is an offence punishable under section 298 of the Penal Code. It is exactly this course of action that the Petitioner is now pursuing before this court. Hence, the 3rd ground of attack by the learned Senior State Counsel is not sufficient for this Court to halt the exercise of its revisionary powers since the character and nature of this proceeding has not changed.

12. FAILURE TO PLEAD EXCEPTIONAL CIRCUMSTANCES.

Although the learned Senior State Counsel has taken up the position that no exceptional circumstances have been pleaded by the Petitioner. This court at the first instance[13] on 2014 - 08 - 29 had decided to entertain this application considering the seriousness of it. It is recorded in following terms:

".....Heard Counsel in support of the application. Even though, generally in matters like this where parallel jurisdiction is exercised both by the High Court and this Court, Court opts to refer it back to the High Court. However, taking into consideration the seriousness of the complaint

[13] On the date Petitioner supported this application in this court for notices.

and the application of the petitioner that the original record be called for inspection. Court is of the opinion that it is appropriate to entertain the application by this Court and proceed on the matter. Registrar is directed to issue notice on the parties and the complainant-respondent is directed to appear in person on the next date which order to be communicated through the SSP Gampaha over the phone and by way facsimile.

The complainant-respondent is directed to produce the I.B. reports for information of Court and also the statement if any made by the suspect-respondent to the police. ....."

In addition, it must also be stated here that invoking revisionary jurisdiction is a power that has been vested in the hands of courts rather than in the hands of a party. This could be further illustrated by a reference to a right of appeal that is vested in the hands of a party aggrieved with an order of Court and not in the hands of a Court. If the party aggrieved, does not prefer an appeal the Court will not be able to assume jurisdiction to hear any appeal thereof. It is not the case in the exercise of revisionary powers and that is why an application for revision unlike an appeal must be supported in court. That is to satisfy court that it

should issue notices on the Respondent. The court will decide to issue notices on the Respondents only if it is satisfied that it is a fit case that the court must look into in the exercise of its revisionary powers. If the Court is not satisfied that there is a fit case to be looked into, that would be the end of the revision application.

In these circumstances the fact that the petitioner has not pleaded any exceptional circumstances cannot and should not stop this court in exercising the revisionary powers the law has vested in it, in case this Court finds the impugned order to be illegal and thus, would be having far reaching consequences.

13. CONSIDERATION OF BAIL TO THE SUSPECT

At the end of the order the learned Magistrate had directed that the Suspect Respondent be enlarged on bail as he had been produced before Court in respect of an offence punishable under section 298 of the Penal Code.

Question as to whether the Court should grant bail to the suspect produced before it would be the next immediate issue that the Magistrate

will have to decide at this stage. Indeed that is what appears to have bothered the mind of the learned Magistrate. That appears to be the underlying reason for the learned Magistrate to have proceeded to arrive at a definite conclusion as what offence the Suspect Respondent had committed. That is because the question of bail will be dependent on the nature of the offence he is alleged to have committed.

It would be necessary at this stage to refer to few provisions in the Bail Act as in terms of section 27 of the Bail Act, it is the provisions of the Bail Act which shall have effect notwithstanding anything to the contrary in the Code of Criminal Procedure Act No. 15 of 1979 with regard to the question of bail pertaining to this case.

The section which is on the point is section 13 of the Bail Act which states that a person suspected or accused of being concerned in committing or having committed, an offence punishable with death or with life imprisonment shall not be released on bail except by a judge of the High Court.

In view of the above section of the Bail Act it becomes necessary for the learned Magistrate to ascertain whether the Suspect Respondent is a

person suspected or accused of being concerned in committing or having committed an offence punishable with death or life imprisonment. This is because the offence of murder is an offence punishable with death under section 296 of the Penal Code.

Thus, it would be incumbent upon the learned Magistrate to decide after considering the report of the inquirer and other material before him, whether the suspect can be categorized as a person suspected of being concerned in committing or having committed an offence of murder. It would be this decision that would determine whether he should enlarge the Suspect Respondent on bail.

Therefore the role of the Magistrate at this point, would be to ascertain whether the Suspect Respondent could be reasonably suspected or accused of being concerned in committing or having committed, an offence punishable with death or with life imprisonment. If the Suspect Respondent falls under this category he shall not be released on bail except by a judge of the High Court.

It would be useful at this stage also for learned Magistrate to bear in mind that his role is only to ascertain whether there is a reasonable suspicion

that any offence has been committed. It is thus, important to understand that there is no necessity for a Magistrate to arrive at a firm conclusion at this stage as to the nature of the offence that has been actually committed.

The importance of the restrictions placed on the scope of the duty of the Magistrate is justifiable by the fact that the investigation has to proceed beyond this point also until it reaches its completion.

In view of this section what is necessary to be decided by the Magistrate is exactly what appears in that section. In other words, it would suffice at this stage if the learned Magistrate only makes a decision as to whether the Suspect Respondent is a person who is suspected of being concerned of an offence punishable under section 296 of the Penal Code. This in all probability could have been done without the impugned conclusions.

It must be noted in this case that the evidence given at the inquest by one of the witnesses who was the pillion rider of the motor cycle has suggested that the accused Respondent deliberately shot the deceased without a justifiable reason. However, another witness who was a three-wheeler driver has testified to the effect that the shooting by the Accused

Respondent was not deliberate but may have been accidental. That is a special feature in this case. In the light of the two rival positions being taken up by two different witnesses, question arises as to which set of evidence the learned Magistrate should adopt to base his decision regarding bail to the Suspect Respondent. This assumes some importance, as pointed out before also, as the law relating to bail will vary with the nature of the offence the Suspect Respondent is suspected to have committed.

It must be remembered at this stage also that what the learned Magistrate is expected to do under section 370(3) of the Act is to ascertain whether the report or other material before him, discloses a reasonable suspicion that a crime has been committed. In this case, available material discloses a suspicion that a crime has been committed. That suspicion is a reasonable suspicion because it is supported by evidence.

As has been mentioned above, it has become necessary for the learned Magistrate to ascertain whether the Suspect Respondent could be categorized as a person who is suspected or accused of being concerned in committing or having committed the offence of murder. Therefore, the

task before the learned Magistrate is to ascertain whether the report or other material before him discloses a reasonable suspicion that an offence of murder has been committed.

14. CONCLUSION

It would be relevant at this stage to reproduce the following passage from the case of G A D Seneviratne Vs The Attorney General[14].

" ..... However, it must be noted immediately that the function of an inquirer or a Magistrate acting under Chapter 32 of the Criminal Procedure Code is not to investigate an alleged crime or offence. Indeed, the whole inquiry proceeds upon the basis that the cause of death is yet to be ascertained. The learned Magistrate was mistaken when in his second 'verdict' he stated "The court is required only to ascertain whether the evidence discloses a "reasonable suspicion" that an offence has been committed." It is clear from the sections of law quoted above that the function of an inquirer or Magistrate under Chapter 32 is to hold an enquiry into the cause of death and to state as a finding what in his

[14] supra

opinion was the cause of death. The recording of the finding concludes the inquest of death. If the finding of an inquirer forwarded to a Magistrate under section 362(2) or of a Magistrate acting under section 9 or 363 of the Code gives rise in the Magistrate's mind to a reasonable suspicion that the crime has been committed, the Magistrate may assume the powers of a Magistrate's Court under section 148(1)(c) and initiate criminal proceedings himself, but the right to initiate criminal proceedings that is available to an inquirer under section 148(1)(b) and to a Magistrate under section 148(1)(c) cannot alter the nature of an inquest of death that may precede such initiation of criminal proceedings; it only emphasizes the investigative nature of those proceedings.[15] ....."

When considering the totality of the circumstances emerged in this case, it is the view of this court that it has not become really necessary for the Magistrate to come to a finding whether some witnesses have deliberately given false evidence. It has also not become necessary to decide the exact manner in which the shooting had occurred at this stage. This is so in view of the fact that the function of the learned Magistrate at this stage is only to ascertain whether the report or other material before him discloses a

[15] At page ....

reasonable suspicion that a crime has been committed. If the learned Magistrate is satisfied that such report discloses a reasonable suspicion that a crime has been committed, the next course of action which is open to him is to take proceedings under chapter XIV and XV.

The scope of steps contemplated in chapter XIV and XV were discussed earlier in this judgment.

In this case the step that the learned Magistrate should take is to institute proceedings in this case in terms of section 136(1) (b) as it empowers a Magistrate to institute proceedings on a written report indicating that an offence has been committed made to such court by an inquirer appointed under chapter XI.

Although the order of the learned Magistrate reveals that the medical officer has tendered the cause of death of the deceased to Court, there is no indication that the post-mortem report has been received by the learned Magistrate by the time she made the impugned order. Perusal of the post mortem report assumes an importance due to the fact that some of the witnesses appear to give the impression that the Suspect Respondent opened fire shooting the deceased at close range. The post

mortem report if available could be expected to reveal some forensic evidence which would be of some assistance to the evaluation of the said rival positions. Therefore, the impugned conclusion that there is no offence punishable under section 296 of the Penal Code becomes a premature conclusion arrived at without consideration of any such possible revelations of the post-mortem report. It would not be in the best interest of justice to make such pre mature conclusions at such preliminary stages of such proceedings in rather desperation. The post mortem report, pertaining to this case when made available might sometime prove that the learned Magistrate is right in her conclusion. However the question which troubles this Court is; What if the post mortem report corroborates the testimony of the witness which the learned Magistrate disbelieved? Things would then turn in a different direction in such a situation. The conclusion by the learned Magistrate may then lead to an injustice. Such injustices could be averted if the Magistrates take care to ensure that they do not step outside the scope of the duty that the law has entrusted to them under section 370 of the Act.

The Magistrates, when called upon to ascertain, as required by section 370(3) of the Act, whether the report of an inquirer discloses a reasonable

suspicion that a crime has been committed, must be mindful of the followings:

I. that their function is to ascertain whether the report or other material before him discloses a reasonable suspicion that a crime has been committed;

II. that the investigation in most case will have to continue after this finding also;

III. the witnesses who have testified before the inquirer have not been subjected to cross examination;

IV. that the non-summary inquiry and sometimes the trial will have to be conducted in courts at a subsequent occasion;

V. that there is likelihood of a full drawn criminal trial in the High Courts.

VI. credibility of the witnesses will be tested in the course of the trial;

VII. that the consideration of charges must best be done after a proper investigation is completed.

/III. that it is the Attorney General who will decide on the charges to be included in the indictment filed in the High Court.

Magistrates must in these circumstances, take utmost care to guard against any prejudice that could be caused to the future steps of the case.

It could be seen that there is no difficulty to conclude that the report and the other material before the learned Magistrate in the instant case discloses a reasonable suspicion that an offence under section 298 of the Penal Code has been committed. However, the question here is whether the learned Magistrate could totally ignore the assertions by the pillion rider of the motor cycle that the shooting was deliberate. If the learned Magistrate entertained doubts with regard to the veracity of this position of the three-wheeler driver, she could have said so in rather a lighter tone than saying that she disbelieved that witness altogether. There cannot be any difficulty in such a move as her role should only be to ascertain whether there is a reasonable suspicion that an offence has been committed.

Towards the end of the learned Magistrate's order it appears that the main reason she has given for releasing the Suspect Respondent on bail is the fact that the police report states that it is an offence punishable under

section 298 of the Penal Code that the Suspect Respondent is alleged to have committed. If that is the sole reason for her decision, and if she had chosen to accept and act upon that report, there is no necessity for her to go into the question of credibility of the witnesses. It is relevant to note that at no time no charge punishable under section 296 was ever mentioned as the offence that the Suspect Respondent is suspected to have committed in any of the reports filed by police.

In these circumstances, it is the view of this court that the impugned findings set out below; made by the learned Magistrate cannot be justified.

Further, it would be inevitable that certain parts of the impugned findings of the learned Magistrate would adversely affect any prosecution that may be launched subsequently against the suspects as the learned Magistrate has already held that some of the witnesses had given false evidence.

For the foregoing reasons, we are of the view that the following conclusions arrived at by the learned Magistrate namely,

i. that the evidence given by the pillion rider(Heripitiyalage Sachin Chaturanga) cannot be accepted as a truthful testimony;

ii. that the said pillion rider had deliberately attempted to show to court, by giving false evidence that this incident is a murder;

iii. that this incident is not a murder;

iv. that this incident may have been occurred due to shooting by Police officers as the deceased had failed to obey the orders to stop;

v. that this incident had occurred due to negligence of the Suspect Respondent Police officer in handling his fire arm,

has been arrived at without any jurisdiction on her part to do so.

Therefore, acting in revision, we set aside the above conclusions arrived at by the learned Magistrate.

We further direct the learned Magistrate to take the next step according to law i.e. to take proceedings under Chapter XIV and XV, of the Code of Criminal Procedure Act.

Before parting with this judgment this Court needs to state here for avoidance of any misinterpretation of this judgment, that it is purely due to the inappropriacy of the aforementioned conclusions that this Court decided to exercise its revisionary jurisdiction. As has been submitted

before us by the learned Deputy Solicitor General, this matter is already under consideration by the Hon. Attorney General who would decide the next course of action to be taken by him. Thus it would only be the aforementioned specific conclusions that would be set aside by this judgment.

Further, this Court also has to emphasize that this judgment should not be interpreted either as having effected an alteration of the finding with regard to the apparent cause of death by the learned Magistrate, or as having held that the Suspect Respondent is alleged to have committed a particular offence[16].

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL

[16] an offence punishable under either section 296 or 298 of the Penal Code