

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

In the matter of an application for mandate in the nature of a writ of certiorari and prohibition under the Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

**Court of Appeal case no. CA 391/2017**

Gotabaya Nanadasena Rajapaksha  
No.26 A, Pengiriwatta Road, Mirihana.

**Petitioner**

**Vs.**

1. Pujith Jayasundara,  
Inspector General of Police,  
Police Headquarters, Colombo 1.
2. Shani Abeysekara,  
Director, Criminal Investigation  
Department,  
Colombo 1.
3. Ravi Widyalkara,  
Deputy Inspector General of Police,  
Financial Crime investigation Division,  
Chatham Street, Colombo 1.
4. Kamal Paliskara,  
Assistant Superintendent of Police,  
Financial Crime investigation Division,  
Chatham Street, Colombo 1.

5. Hon. Attorney General,  
Attorney General Department,  
Colombo 12.

**Respondents.**

**Before** : L.T.B. Dehideniya J. (P/CA)  
: Shiran Gooneratne J.

**Counsel** : Romesh De Silva PC and M.U.M.Ali Sabry PC with  
Sugath Caldera with Ruwantha for the Petitioner.

**Argued on** : 28.11.2017

**Decided on** : 29.11.2017

**L.T.B. Dehideniya J. (P/CA)**

This is an application for a mandate in the nature of a writ of certiorari to quash the certificate marked as A30 with the petition, issued under section 8(1) of the Offences Against the Public Property Act, by the 4<sup>th</sup> Respondent, certifying that there is dishonest misappropriation of public property (money) worth of Rs. 90,831,165.02.

The Petitioner's contention is that there is no misappropriation of any money in the transaction. It is only a commercial transaction. Further the certificate on the face of it is wrong.

The Sri Lanka Land Reclamation and Development Corporation (Corporation) was established under the Act No. 15 of 1968. The Corporation has the power to enter into construction contracts.

The Petitioner's contention is that the D.A.Rajapaksa Foundation (Foundation) had entered into a contract with the Corporation to

construct a Monument on a cost of Rs. 33 million. The Petitioner has not submitted any written construction contract to establish the contract. He states that it was a verbal contract. To establish that there was a contract, he submitted the minutes of the Corporation where the Corporation had decided to go ahead with the construction and to recover the agreed amount of Rupees 33 million later. This decision was taken at the 537<sup>th</sup> meeting of the Board of Directors of the Corporation held on the 26<sup>th</sup> February 2014, the minutes were filed of record at page 270 and the said decision is at page 273. A direct contract with the Foundation is not establish even by this decision of the Corporation but it is clear that the construction was undertaken by the Corporation with the intention of recovering the money later. Thereafter the Corporation had constructed the monument. The Foundation on 4<sup>th</sup> August 2015 sent a letter to the Corporation requesting them to submit a bill for the construction. The letter is in the page 275/352 of the record. In reply to this letter, the Corporation has sent an interim reply on 21<sup>st</sup> August 2015 indicating that the final bill is under preparation and requested the Foundation to pay Rupees 25 million as a part payment, where the Foundation had paid on 31.08.2015. (page 345) The Foundation had paid Rupees 8,944,741.60 too as a part payment as per the page 350 of the record, where the date of payment (the year) is not clear. In the meantime, the Corporation had forwarded the final bill amounting to Rupees 81,313,374.14. The learned President's Counsel submits that the Foundation admits the liability to pay, but they contest the balance amount. The Attorney at Law for the Corporation had send a letter of demand dated 1<sup>st</sup> June 2016 marked as A29 to the Foundation requesting them to pay the balance of Rupees 56,313,374.14 which is in accordance with the final bill submitted by the Corporation, and informed that in failure to comply, legal action will be instituted to recover the same. Interestingly, this letter was addressed to

the Chairmen of the Foundation and copies were sent to the Council members including the Petitioner.

The learned President Counsel submits that this is a commercial transaction entered into by and between the Corporation and the Foundation. The minutes of the Corporation indicate that the Corporation had commenced the construction work with the intention of recovering the money later and the Foundation had made payments according to their estimation. There is no agreement as to the balance amount due. The Corporation had issued a letter of demand to the Foundation claiming the balance according to their calculation, with a threat of instituting legal action if fails to comply. All these sequential steps have been established by the Petitioner by tendering the relevant evidence.

The learned President's Counsel further argues that there is no dishonest misappropriation. Under section 22 of the Penal Code, dishonesty is defined as "*Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly"*". In the instant case the Petitioner had not gained anything wrongfully and there is no wrongful loss to any person. The Counsel further argues that there is no misappropriation. Counsel argues that it to be a misappropriation, firstly there should be an appropriation of the money for his own use, but in the instant case there is no appropriation by the Petitioner.

In the instant case, the monument was constructed by the Corporation on a contract entered into with the Foundation and the Foundation had no intention of defrauding.

In the case of Attorney-General v. Dewapriya Walgamage and another [1990] 2 Sri L R 212 it was held that;

1. (a) *There are two basic ingredients to the offence of criminal misappropriation under S. 386 of the Penal Code*

i. *A mental element of dishonesty, and*

ii. *An act of misappropriation or conversion of movable property to his own use by the accused.*

In the present case there is evidence to establish that there was no mental element of dishonesty and no misappropriation.

The amount of money that was said to have dishonestly misappropriated by the Petitioner is mentioned in the certificate as Rupees 90,813,165.02. As per the final bill of the Corporation the total bill was Rupees 81,313,374.14. Out of this amount, Rupees 33 million had been paid in two occasions. Even if the total amount is considered as due, it is not the amount mentioned in the certificate.

Attorney General Palitha Fernando PC (as he was then) in a discussion paper on "Prosecutorial Discretion: The Sri Lankan Aspect" published in the Junior Law Journal 2013 Vol. IV, expressed the view that in exercising the prosecutorial discretion "*The decision should be based on the available evidence, the admissibility of the evidence and the possibility of securing a conviction on the basis of such material.*" I agree with the view expressed by the former Attorney General and this should apply not only to the Attorney General but in the equal force to the other prosecutors such as the Police Officers who take part in the prosecution process.

Under these circumstances, the impugned certificate marked A30 issued by the 4<sup>th</sup> Respondent is ex facie wrong and the evidence available is contrary to the correctness of the facts contained in the certificate.

The Petitioner has established a prima facie case that the certificate marked A30 is incorrect. If an interim order is not issued, the application will become nugatory.

I issue an interim order as prayed for in the paragraph (d) of the prayer to the petition to be valid until the next date of hearing.

I further order to issue notice to the Respondents.

President of the Court of Appeal

**Shiran Gooneratne J.**

I agree.

Judge of the Court of Appeal