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

In the matter of an Application for a mandate in the nature of a Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 74/2021

Mohamed Imad Ibthisam Fakhir,
No. 26/2A, Sumanarathne Mawatha,
Off Kalubowila Road,
Dehiwela.

Currently held at the Kuruwita Remand Prison.

PETITIONER

Vs.

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

RESPONDENT

Before: **Arjuna Obeyesekere, J / President of the Court of Appeal**
Mayadunne Corea, J

Counsel: Ghazzali Hussain with Thusara Warapitiya for the Petitioner

Sudharshana De Silva, Deputy Solicitor General for the Respondents

Supported on: 10th March 2021

Written Submissions: Tendered on behalf of the Petitioner on 23rd March 2021

Decided on: 26th March 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner holds a Bachelor of Science Degree in Aircraft Maintenance Engineering from the University of Glamorgan and a Post Graduate Diploma in Business Management from the Cardiff Metropolitan University, England.

The Petitioner states that on 27th April 2019, several Officers of the Terrorism Investigation Division (TID) arrived at his house and *arrested* the Petitioner and his wife on suspicion that they had aided and abetted the several terrorist attacks that took place on Easter Sunday - 21st April 2019.

The Petitioner states that he was thereafter detained at the TID on a detention order marked '**P4**' for a period of three months on the basis that he was connected with or concerned in the *spreading of Muslim ideologies, aiding and abetting and conspiring to cause bomb explosions on 21st April 2019 and concealing such information from security Forces.*

The Petitioner states that he and his wife were produced together with fourteen others in the Magistrate's Court, Mount Lavinia on 31st July 2019 under 'B' Report No. B/917/19. Having done so, the Petitioner claims that the TID had sought permission to have the Petitioner discharged from the said case, and to produce him before the Hon. Magistrate of Colombo in relation to another investigation relating to the said terror attacks. The Petitioner had thereafter been produced before the Magistrate's Court, Colombo in Case No. B 15761/08/19, where the Petitioner had been remanded by the Hon. Magistrate.

Upon completion of the investigations, the TID had sought the advice of the Attorney General. While the advise was pending, the Petitioner had filed Writ Application No. 43/2020 in this Court seeking a Writ of Certiorari to quash the detention order and a Writ of Mandamus on the Attorney General to tender his advise to the TID. The Petitioner states that while that application was pending, he learnt that the Attorney General was in the process of taking steps to indict him.

It is admitted that the Attorney General filed an indictment against the Petitioner in the High Court of Gampaha on 3rd September 2020, marked '**P10**'. Aggrieved by the

decision of the Attorney General to indict him, the Petitioner has filed this application seeking a Writ of Certiorari to quash the said decision.

The principal submission of the learned Counsel for the Petitioner was that the Attorney General could not have reasonably formed an opinion to indict the Petitioner, and that there is no factual basis to sustain the charge contained in the indictment.

Section 393 of the Code of Criminal Procedure Act No. 15 of 1979, as amended provides that it shall be lawful for the Attorney General to present an indictment in any of the situations provided therein. While the Attorney General has the discretion to institute criminal proceedings, such discretion is generally referred to as the *prosecutorial discretion* in the Common law jurisdictions, with the Attorney General or the Director of Public Prosecution, as the case may be, being conferred with the prosecutorial powers to institute criminal proceedings .

It would therefore be appropriate to consider at the outset whether the power of the Attorney General to forward indictment against persons who are suspected to have committed an offence is amendable to the Writ jurisdiction conferred on this Court by Article 140 of the Constitution, and if so, the circumstances in which a Court will interfere with that power by way of judicial review.

I shall begin by considering the judgment of the Supreme Court in **Victor Ivan v Sarath N. Silva, Attorney General & Another**.[1] This was a case where the decision of the Attorney General to indict the petitioner, who was at that time the Editor of the *Ravaya* newspaper, in respect of several defamatory articles he had published in the said newspaper was challenged by the petitioner on the basis that the said decision was in violation of his fundamental rights guaranteed under the Constitution. The contention of the respondent that the Attorney General's decision to grant sanction to prosecute, or to file an indictment, or the refusal to do so are absolute, unfettered and unreviewable was rejected by Mark Fernando J, who stated as follows:

> *"…the Attorney General's power to file (or not to file) an indictment … is a discretionary power, which is neither absolute nor unfettered. It is similar to*

[1] [1998] 1 Sri L.R. 340.

other powers vested by law in public functionaries. They are held in trust for the public, to be exercised for the purpose for which they have been conferred, and not otherwise."

In **Sarath de Abrew v Iddamalgoda and six Others**,[2] the petitioner argued that the decision taken by the Attorney General to indict him under Section 365B of the Penal Code and to direct the Police to institute proceedings before the Magistrate's Court was in violation of his fundamental rights.

Priyantha Jayawardena, J held as follows:

"*While I agree with the submissions made by the learned President's Counsel for the Petitioner that every power must be exercised by the authority fairly, reasonably and lawfully, the mere fact that the statement of witnesses of the defence has not been recorded as claimed by the Petitioner cannot make the decision of the Attorney General unsustainable.* ***The Attorney General's decision to indict the Petitioner may be vitiated if a conclusion is arrived not on an assessment of objective facts or evidence but on a subjective satisfaction.*** *.... If it is found that there was evidence before the Attorney General and such evidence had been considered by several officers of the said Department and a final decision was reached by the Attorney General based on the views of the said officers, the Superior Court would not interfere and would hesitate to substitute its own view in place of the Attorney General."*

A review of the English cases in this area show that while judicial review is available in respect of the prosecutorial discretion in order to prevent any abuse by the prosecuting authorities, the English Courts are mindful of its impact on the criminal justice system, and has therefore clearly indicated its *extreme reluctance* to intervene by way of judicial review.[3]

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[2] S.C (FR) Application No. 424/2015 – SC Minutes of 11th January 2016.

[3] See Sharma v Deputy Director of Public Prosecutions & Others [2006] UKPC 57 where the Privy Council, having considered previous judicial pronouncements identified the reasons that demonstrated the "extreme reluctance" shown by Courts to disturb decisions to prosecute, by way of judicial review. See the judgment of this Court in Ajahn Gardiye Punchihewa v. The Officer-In-Charge, Financial Investigation Unit III and Others [CA (Writ) Application No. 311/19; CA Minutes of 18th June 2020]

A similar approach has been taken by the Supreme Court of our country in respect of decisions of the Attorney General. In **The King v Fernando**[4] Layard CJ stated that:

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

The discretion of the Attorney General to decide to which Court he should commit cases was considered in **The King v Baba Singho**[5] where it was held as follows:

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

In **Velu v Velu and Another**[6] Weeramantry J, having considered the powers of the Attorney General to direct a Magistrate to commit an accused who had been discharged after the preliminary inquiry, held that:

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

The current position in Sri Lanka has been summarised by Wengappuli, J in **Ajahn Gardiye Punchihewa v. The Officer-In-Charge, Financial Investigation Unit III and Others**[7] in the following manner:

> "*In view of these pronouncements, it is clear that the prosecutorial discretion is reviewed in English Courts as well as in Sri Lanka, in exercising its powers of*

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[4] 8 NLR 354.
[5] 21 NLR 142.
[6] 76 NLR 21.
[7] Supra.

judicial review only when there is material to satisfy that the decision to prosecute was taken in extreme situations akin to "dishonesty or mala fides or an exceptional circumstance" warranting effective judicial intervention."

It is significant to note that the learned Counsel for the Petitioner is not alleging *dishonesty or mala fides* on the part of the Attorney General in indicting the Petitioner, but, as I have already stated, is only complaining that there is no factual basis to sustain the charge against the Petitioner.

I shall now consider the submission of the learned Deputy Solicitor General as to how the Attorney General formed an opinion to indict the Petitioner, and the factual basis to sustain the charge. He submitted that the Petitioner has made a confession to an Assistant Superintendent of Police on 19th September 2019 where the Petitioner has *inter alia* stated as follows:[8]

> "2017 වසරේ අවසානයේ නවුපර් මවුලව් ගේ ප්‍රධානත්වයෙන් අපේ කණ්ඩායමට මල්වාන ප්‍රදේශයේ ෂසිනිගේ ගෙවල් ලග තියෙන ස්පෝට් කම්පෙලෙක්ස් නැමැති ස්ථානය සුදානම් කලා. මේ සදහා හෝල් එකට සල්ලි එකතු කරන කොට මමත් රුපියල් 2000 ක් දුන්නා. එම දේශනය සදහා මම, අබුහයිතම් (හිලාම්), ජමිල්, අක්‍රම් අහ්කම්, ඉන්සාජ්, ඉහ්සාන් අහම්ඩ්, ෂස්නි, අහමඩ්, මුආද්, ඉන්ෆාස්, ඉල්හාම්, හසන් යන අය ගියා. මෙම දේශනය එදින පැය 03 ක් විතර කාළයක් පැවැත්තුනා. මෙම දේශනයේදි මුලින්ම කතා කලේ මිල්හාන්. ඔහු විසින් සහරාන්, නවුපර් මවුලව් යන අය හදුන්වා දුන්නා. සහරාන්ගේ දේශනයේදි ශ්‍රී ලංකාවට ISIS සංවිධාන විසින් නායකයකු පත්කර ඇති බව කිව්වා. ඒ කව්ද කියලා කිව්වේ නැහැ. මෙහිදි සහරාන් වවිසින් සියලුම දෙනා එකතු වි එකමුතුව වැඩ කලයුතු බවත් ඉදිරියේදි ඒ සදහා පන්ති පවත්වන බවත් කිව්වා. සියලුම දෙනාම එකතු කර දිවුරුමක් දුන්නා මම ඒකට කැමති වුනේ නැහැ. ඒ වගේම මම හොදින් හදුනන අයගෙන් 2019.04.21 වන ජමිල් දෙහිවල ටොපිකල් හෝටලයෙත්, මුආද් කොච්චිකඩේ පල්ලියේදිත්, සහරාන් සහ ඉල්හාම් යන අය ශැංගිල්ලා හෝටලයේදිත්, ඉල්හාම්ගේ මල්ලි සිනමන් ග්‍රෑන්ඩ් හෝටලයේදිත්, මරාගෙන මැරුනු බව මට පසුව මාධ්‍යයෙන් දැන ගත්තා."

The learned Deputy Solicitor General submitted further that the decision of the Attorney General to indict the Petitioner is based *inter alia* on the above contents of the said confession.

The charge in the indictment '**<u>P10</u>**' reads as follows:

[8] A copy of the said confession of the Petitioner has been tendered to this Court by the Attorney General with his motion dated 12th March 2021.

“වර්ෂ 2017 ක්වූ ජූලි මස 01 වන දින සිට වර්ෂ 2017 ක්වූ දෙසැම්බර් මස 31 වන දින අතර කාල සීමාව තුළ දී මෙම අධිකරණයේ බල සීමාව තුළ පිහිටි මල්වාන හී දී යුෂ්මතා යම් තැනැත්තෙක් වනම් මොහොමඩ් තාසිම් මොහොමඩ් සහරාන් යන අය 1982 අංක 10 සහ 1988 අංක 22 දරණ පනත්වලින් සංශෝධිත 1979 අංක 48 දරණ ත්‍රස්තවාදය වැලැක්වීමේ (තාවකාලික විධිවිධාන) පනතේ 2(1)(ඌ) වගන්තිය යටතේ වන වරදක් සිදු කිරීමට එනම් ISIS සංවිධානය සමග සම්බන්ධව මෙරට කන්ඩායම් සංවිධානය කිරීමට සූදානම් වන බවට දැනුවත්ව හෝ ඒ බව විශ්වාස කිරීමට සාධාරණ හේතු ඇතිව එය පොලිස් නිලධාරියෙකුට දන්වා සිටීම පැහැර හැරීමෙන් එකී පනතේ 5(අ)(II) වන වගන්තිය උල්ලංඝනය කළ බැවින් එකී පනතේ 5 වන වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදු කළ බව ය.”

Section 2(1)(h) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, as amended, (the PTA), reads as follows:

> “*Any person who by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups shall be guilty of an offence under this Act.*”

In terms of Section 5(1)(a) of the PTA:

> “*Any person who knowing or having reasonable cause to believe that any person is making preparation or is attempting to commit an offence under this Act, fails to report the same to a police officer shall be guilty of an offence and shall, on conviction be liable to imprisonment of either description for a period not exceeding seven years*”

The charge against the Petitioner is that he failed to disclose to the Police the fact that Zaharan was organising groups of persons having connections to ISIS, an international terrorist group, with a view of committing an offence coming within Section 2(1)(h) of the PTA. The factual basis for the said charge is borne out from the confession that the Petitioner is said to have made, the relevant parts of which I have already referred to.

Section 16(1)(a) of the PTA states that any statement, whether it amounts to a confession or not, may be proved as against such person if it is not irrelevant under Section 24 of the Evidence Ordinance. Section 17 of the PTA provides that Sections

25, 26 and 30 of the Evidence Ordinance do not apply to proceedings under the PTA. Section 16 (2) places the burden of proving that any statement is irrelevant under Section 24 of the Evidence Ordinance on the person asserting it to be irrelevant.

As submitted by the learned Deputy Solicitor General, it is clear that the decision to file the indictment '**P10**' has been taken on the contents of the above confession. While I therefore do not see any merit in the submission of the learned Counsel for the Petitioner that the Attorney General could not have formed an opinion in the absence of any factual basis, I must say that I am in agreement with the submission of the learned Deputy Solicitor General that the decision of the Attorney General to indict the Petitioner based on the contents of his confession is reasonable. It is certainly not a decision that attracts the definition of unreasonableness set out by Lord Greene in **Associated Provincial Picture Houses Limited v. Wednesbury Corporation**.[9]

I shall now consider a matter that has been raised by the learned Counsel for the Petitioner in his written submissions. The learned Counsel for the Petitioner submitted that having received the said confession,[10] he had carried out a comparison with the contents of the 'B' Report dated 6th August 2019 filed in Case No. 15761/8/19 by the Director, TID. Having done so, he submitted that the contents of the said confession *is a copy and paste of the contents of the said 'B' Report*, which was dated more than a month prior to the said confession. The learned Counsel for the Petitioner has thus submitted that the said confession is *questionable* and that it is not safe to indict the Petitioner on such a confession.

Having examined the said confession and the 'B' Report, I must note that while some of the incidents referred to in the 'B' Report have been referred to in the confession as well, it does not appear to me that the confession is a *cut and paste* of the 'B' Report. Having said so, this issue raised by the learned Counsel for the Petitioner is a matter that must be raised before the Hon. High Court Judge when an application is made to read in evidence the said confession. If it's the position of the Petitioner that he did not make the confession or that the confession is not voluntary, he can object

[9] [1948] 1 KB 223 at 229 – Unreasonableness has been defined as '*something so absurd that no sensible person could ever dream that it lay within the powers of the authority*.

[10] Ibid.

to the said confession being marked, which would then require the learned Trial Judge to determine the voluntariness and relevance of the said confession at a *voir dire* inquiry.

In the above circumstances, I do not see any legal basis to issue formal notice of this application on the Respondent. This application is accordingly dismissed, without costs.

President of the Court of Appeal

Mayadunne Corea, J

I agree

Judge of the Court of Appeal