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

In the matter of an application under 140 of the Constitution for mandates in the nature of Writs of Certiorari and Prohibition.

CA /WRIT/0085/2020

Gihan Aruna Bandara Herath Pilapitiya,
No.10, Kassapa Road,
Colombo 05.

Petitioner

Vs.

1. Hon. M. M. M. Mihal,
   Learned Magistrate,
   Magistrate's Court,
   Nugegoda.

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

3. C. D. Wickramaratne,
   Acting Inspector General of Police,
   Police Headquarters,
   Colombo 01.

Respondents

Before : Sobhitha Rajakaruna, J.

Dhammika Ganepola, J.

Counsel : Romesh De Silva PC with Sudath Caldera and N. Ankatell for the Petitioner

Shahida Bary DSG for the 2nd Respondent

Uditha Egalahewa PC with D. Karunarathne for the 3rd Respondent

Decided on: 25.10.2021

Sobhitha Rajakaruna, J.

The Petitioner filed this application mainly seeking for a mandate in the nature of a Writ of Certiorari quashing the Order of the learned Magistrate (marked as P10) issued in case No. B/299/2020 in the Magistrate's Court of Nugegoda on 02.03.2020; and quashing the summons (marked as P11) issued against the Petitioner, by the said Magistrate's Court. Before this matter was formally fixed for argument, Petitioner filed the motion dated 16.09.2021 and moved for an Order from this Court directing the learned Magistrate of Nugegoda to discharge forthwith the Petitioner from the said proceedings. The Petitioner has filed the said motion on the strength of the affidavit dated 16.03.2021 filed in this application by the 3rd Respondent, Acting Inspector General of Police. The third Respondent in his affidavit has affirmed that no offence had been disclosed against the Petitioner as per the investigations conducted up to that date in the said case in the Magistrate's Court of Nugegoda. Additionally, the 3rd Respondent has filed a motion dated 21.09.2021 drawing the attention of this Court to the documents annexed thereto marked as X1, X2 & X3.

All parties, on 16.09.2021 informed this Court that the pleadings were completed and accordingly, moved that the instant application be dealt with and determined without hearing oral submissions. The learned President's Counsel for the Petitioner and the learned President's Counsel for the 3rd Respondent informed that no written submissions would be filed on behalf of those respective parties. However, they moved that this matter be determined based on the pleadings and on the contents of the motion dated 16.09.2021 filed by the Petitioner as well as on the contents of motion dated 21.09.2021 and the affidavit dated 16.03.2021 filed by the 3rd Respondent. The learned Deputy Solicitor General appearing for the 2nd Respondent requested this Court to consider the contents of the motion dated 27.09.2021 and the Statement of Objections filed on behalf of the 2nd Respondent in making a determination in this case.

When this matter was taken up for clarifications from the learned Counsel on 13.10.2021, the learned President's Counsel for the Petitioner moved that the Court be issued a writ of Prohibition as prayed for in the prayer of the Petition and also a direction be issued to the learned Magistrate to discharge the Petitioner forthwith. Anyhow, the Petitioner in the prayer of his Petition, seeks for a mandate in the nature of a writ of certiorari also to quash the order dated 02.03.2020 and the summons issued on the same date.

Atkin L.J., in ***R v. Electricity Commissioner*** [***(1924) 1 KB 171 p. 206***] has observed as follows;

"I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earliest stage. If the proceedings established that the body complained of exceeding its jurisdiction by entertaining matters which would result in its final decision being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction"[1].

Now it is important to ascertain whether there are grounds to issue a writ of prohibition or a writ of certiorari.

The Petitioner of the instant application has been made the 2nd suspect by the learned Magistrate in the relevant Magistrate's Court Case No.B/299/2020 as per the journal entry of 02.03.2020. The learned Magistrate has arrived at a conclusion in his order dated 02.03.2020 (P10) that adequate grounds exist to initiate proceedings in the said case against the Petitioner on the offences under sections 101, 113 A, 190 of the Penal Code. However, the 'B' Report against the main suspect (1st suspect[2]) in the said Magistrate's Court case, significantly, has not been filed on an offence under the Penal Code. The said 'B' report against the said 1st suspect has been filed on an offence under Article 111 C (2) of the Constitution of the Republic of Sri Lanka.

In terms of the said Article 111 C (2) every person who, without legal authority, interferes or attempts to interfere with the exercise or performance of the judicial powers or functions of any judge, presiding officer, public officer or such other person as is referred to in paragraph

[1] Also see – Coorey, Sunil F.A., Principles of Administrative Law in Sri Lanka, 4th Ed., Vol. II, 906.

[2] The name of the 1st suspect- Saddha Viddha Rajapakshe Palanga Pathira Amba Kumaaralaage Ranjan Leo Sylvester Alponsu Ramanayake alias Ranjan Ramanayake

(1) of the said Article, shall be guilty of an offence. The learned Magistrate has made the Petitioner a suspect mainly on offences of abetment and conspiracy. On perusal of the said order of the learned Magistrate and other documents in the case record, it appears that the learned Magistrate has identified exclusively the Petitioner as the 'judge' or 'the presiding officer' within the meaning of the said Article. It is apparent that it was because the 1st suspect was making inquiries from the Petitioner over the telephone about a case (filed by the Commission to Investigate Allegation of Bribery or Corruption) that came up before the Petitioner during the period he was serving as the Chief Magistrate of Colombo. Therefore, considering the nature of the said offence in the said Article 111 C (2), a question arises here as to whether an abetment charge could be brought in against the same judge who was influenced by another person (in this case the 1st suspect) in committing the said offence provided in the said Article.

Prof. Pieris,[3] in his celebrated book on Criminal Liability, says that 'both in English law and in our law, the appropriate test is whether the act abetted and the act done are so closely related, as to their nature and object, that the one could be considered a natural extension of the other. The essential elements of liability on the part of the abettor for the act done are;

i. That the abettor's influence continues to operate on the will of the person abetted and, to that extent, supplies or contributes to the motivation of the later in committing the offence, and;
ii. That the act done there is a reasonable relation to prosecution of the criminal object entertained by the abettor'

In terms of the aforesaid order of the learned Magistrate the 'abettor' seems to be the 1st suspect of the case in the said Magistrate's Court case and the 'person abetted' is the 2nd suspect (Petitioner). Therefore, when considering the elements of liability on the part of the 'person abetted' is based on the offence that would be committed or intended to be committed by the abettor. It is unique that, in the said Magistrate's Court case, the person who was subject to be interfered as per the said Article 111 C (2) has become the 'person

[3] Pieris, G.L., General Principles of Criminal Liability in Ceylon, 1980, Lake House Investments Ltd., p.407

abetted' upon the offence that would be committed or intended to be committed by the Abettor under the said Article. In other words, the 'victim' upon the offence described in the said Article 111 C (2) is going to be charged on the offence of abetment. In my view, such a scenario cannot be accepted in law based on the principles of criminal liability on the offence of abetment. Therefore, I am of the view that the decision of the leaned Magistrate to make the Petitioner a suspect in the said Magistrates Court case is ultravires as the 'B' report against the 1st suspect has been filed only under the offence in Article 111 C (2).

In ***The Queen v. D.D. Ginigandara and another (70 NLR 192***) Sansoni C.J. held that;

"The point argued by Mr. Chitty was that the first accused- appellant could not be convicted of using criminal force when the only charge framed against him was that of aiding and abetting the second accused-appellant in the offence of attempted murder. There is a decision of this court which we think is in point- the case of Queen v. D.K. Dhanapala[4] *, where it was held that on a charge of abetment of attempted murder, a person cannot be convicted of voluntarily causing simple hurt. We would follow that decision".*

Prof. Pieris says that the principle reflected in the above case is obviously in the interest of protection of the accused who has to be given the opportunity of informing himself of the nature of the charge against him and of preparing his defence adequately[5].

Now I turn to the matter of issuance of a writ of prohibition in addition to my above findings upon ultravires. The learned President's Counsel for the Petitioner made the application for a writ of prohibition and also a direction to the learned Magistrate to discharge the Petitioner, based on the statement of the 3rd Respondent's who says that there was no evidence against the Petitioner. The learned President's Counsel for 3rd Respondent categorically intimated to this Court that he has instructions from the 3rd Respondent to submit that there was no evidence to proceed with the said case in the Magistrate's Court Nugegoda against the Petitioner.

[4] (1964) 67 NLR 450
[5] Above note 2, p. 415

The second Respondent, Attorney General by way of his motion dated 27.09.2021 has drawn the attention of this court to two documents marked as 'X1' and 'X2'. By letter dated 14.07.2021 (X1) the second Respondent has advised the third Respondent to conduct further investigations against the Petitioner on matters mentioned in that letter. The third Respondent by his letter dated 26.07.2021 (X2) has intimated to the second Respondent that a question had arisen as to whether further investigation could be continued as a result of the stay order issued by this Court on 08.06.2020. However, the second Respondent has not responded to the said letter X2. When this matter was mentioned on 13.10.2021 for clarifications, the learned Deputy solicitor General tendered a copy of a very recent communication addressed to the second Respondent by the third Respondent. According, to the said letter dated 27.09.2021 which is filed of record now, the third Respondent reiterates the fact that there are no grounds to frame charges or to report to the Magistrate's Court against the Petitioner. Furthermore, the learned President's Counsel for the third Respondent submitted to Court on 13.10.2021 that the statement made by the third Respondent in X2 on the stay order of this court is only in respect to the investigations against the 1st suspect of the Magistrate's Court case and not with regard to any investigations against the 2nd suspect.

The second Respondent in his motion dated 27.09.2021 has expressly not objected to the application made by the learned President's Counsel to discharge the Petitioner from the Magistrate's Court proceedings and instead has requested this Court to consider the contents of the said motion in taking a decision on the application made by the Petitioner. Even on 13.10.2021 the second Respondent tendered only the said letter dated 27.09.2021 of the third Respondent and has not raised any objections.

The below mentioned passage in the article titled ***"The grounds for Certiorari and Prohibition"*** by ***D.C.M. Yardley*** *oxford* in '***Canadian Bar Review XXXVII'*** is in my view apt here.*"Where a jurisdiction depends upon a contingency which has been fulfilled, then the jurisdiction is as good as if it had existed ab initio, but there are occasions when the contingent jurisdiction rests upon acquiescence. Thus, where a summons to a defendant to appear before a county court was issued on 3rd January, 1850, but was based on an order made by the county court judge on 30th October, 1847, which had given the plaintiff leave to issue a summons, there was some doubt as to*

the validity of the order. Because of the delay in the issue of the summons it was submitted that a new order authorizing the summons should have been made. But it was held that the defendant had acquiesced in the procedure by leaving a notice with the clerk of the county court, stating that he intended to rely on the statute of limitations as a bar to the action, and he had thus waived his right to object to the jurisdiction of the county court[6].Similarly, an irregularity of procedure may be the subject of waiver, so as to preclude the granting of a prohibition after judgment[7]. But acquiescence will only make a contingent jurisdiction complete, and will not remedy a jurisdiction which is faulty ab initio. For example, in a case of 1855[8], the parties to a plaint in a county court appeared before the judge and consented to a reference to arbitrators, without objecting to the fact that there was a want of jurisdiction. One of the parties, however, during the progress of the reference, did object to the jurisdiction of the arbitrators, on the ground that title to land came in question, but the arbitrators proceeded with the reference. It was determined that the applicant was nevertheless entitled to the issue of a prohibition. Cave J., in Moore v. Gamgee, elaborated on the problem[9] :"

The acquiescence of the third Respondent is not that he does not object to the jurisdiction of the learned Magistrate; but particularly not to proceed against the second Respondent in the said Magistrate's Court case. The third Respondent submits that there is no evidence to proceed against the Petitioner whereas the second Respondent does not raise any objections or rather silently consent to the stance taken by the third Respondent. The writ of Prohibition which is a prerogative writ can be usually issued when the trial Judge is illegally presiding over the case. However, I am of the view that a writ of Prohibition can be issued even when the Court has lost legal jurisdiction to try the case. Therefore, based on the above grounds the learned Magistrate has lost legal jurisdiction to try the case against the Petitioner and it is an independent ground, in my view, to issue a writ of Prohibition in this case without issuing a specific direction to release the Petitioner from those proceedings.

In the circumstance, I issue a writ of Prohibition prohibiting the first Respondent from proceeding against the Petitioner in case bearing No. B/299/2020 on the grounds mentioned in the first Respondent's order dated 02.03.2020.

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[6] Re Jones v. James (1850), 19 L.J.Q.B. 257
[7] Mouflet v. Washburn (1886), 54 L.T. 16 following Re Jones v. James
[8] Re Knowles v. Holden (1855), 24 L.J. Ex.223
[9] (1890), 25 Q.B.D. 244 at p. 246

For the reasons adduced above, I proceed to issue a writ of certiorari also;

(i) quashing the orders of the learned Magistrate made on 02.03.2020 in respect of the Petitioner, including the order by which the Petitioner was made the 2nd suspect in the case bearing No. B/299/2020

(ii) quashing the summons marked as P11

I make no order for costs.

Judge of the Court of Appeal

Dhammika Ganepola, J.

I agree.

Judge of the Court of Appeal