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

In the matter of an application in the nature of Writs of Certiorari, Prohibition, and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/424/21

1. **Saroja Govindasamy Naganathan alias Maharachchige Sarojani Perera**
   No.87, Shoe Road, Kotahena,
   Colombo 13.

2. **Jamaldeen Jeni Fazleen Jenifer Weerasinghe**
   75/12, Maligakanda Road, Maradana,
   Colombo 10.

3. **Don Mervyn Premalal Weerasinghe**
   75/12, Maligakanda Road, Maradana,
   Colombo 10.

4. **Ameenathul Jiffriya Sabreen**
   189/c/2/2, Wajiragnana Mawatha,
   Colombo 09.

<u>Petitioners</u>

Vs.

1. **Hon. Attorney General**
   Attorney General's Department
   Colombo 12

2. **Wasantha Kumara Jayadewa Karannagoda**
   No.99/3, Baddegana North Road,
   Beddegana. Kotte.

<u>Respondents</u>

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Nuwan Bopage with Chathura Weththasinghe for Petitioners

Nerin Pulle ASG, PC with N. Perera SSC and Y. S. Abeywickrama SSC for the 1st Respondent.

Supported on: 29.10.2021

Written Submissions: Tendered on behalf of the Petitioner on 05.11.2021

Decided on:10.11.2021

Sobhitha Rajakaruna J.

The Petitioners state that; (i) the 1st Petitioner is the mother of late Rajiv Nagananda, (ii) the 2nd and 3rd Petitioners are the parents of late Mohommed Dilan, (iii) the 4th Petitioner is the mother of late Mohommed Sajid and that all those three deceased parties are the victims of the alleged crime related to the Case No. HC (TAB) 1448/2020 in High Court-at-bar, Colombo.

The Petitioners further state that the above victims including another two persons went missing on or around 7th September 2008. According to the Petitioners, the aforesaid victims were illegally detained in the premises called "GUN SITE" and the 2nd Respondent had the direct control over the affairs of the said premises. The Petitioners complain that, the 2nd Respondent had the knowledge of the abduction of the said victims and however, deliberately refrained from disclosing them and has refused to assist the investigations.

The 1st Respondent, the Attorney General indicted 14 accused including the 2nd Respondent and a trial-at-bar was constituted. (Case No. HC (TAB) 1448/2020). Meantime the 2nd Respondent filed an application bearing No. CA/Writ/77/2020 in this Court seeking a mandate, *inter alia*, in the nature of a Writ of Certiorari to quash the decision of the 1st Respondent to indict the 2nd Respondent (Petitioner in the said application) and also for an interim order to stay the proceedings against the Petitioner in the said Case No. HC (TAB)

1448/2020, High Court-at-Bar. This Court, in that case, on 25.06.2020, after hearing extensive submissions made by learned Counsel, issued an interim relief staying the proceedings against the 2nd Respondent in High Court-at-Bar. This Court, in the said application, has decided to issue the interim relief and also 'notice' upon a question of law that needed to be evaluated at the argument stage. The said question was twofold; "Is the decision to indict has been taken before the information is laid before his Lordship the Chief Justice? or Does the decision to indict and try a person crystallized upon his Lordship the Chief Justice constituting a trial-at-bar based on the information? In other words, the question of law that taken in to consideration by Court in the said application was whether the information exhibited is reviewable or unreviewable.

In the instant application the Petitioners are seeking *inter alia;*

(i) a mandate in the nature of writs of Certiorari ;

(a) to quash the decision recorded in the High Court-at-Bar in case No. HC (TAB) 1448/2020 on 04.08.2021 by the 1st Respondent to withdraw the indictment against 2nd Respondent

(b) to quash the decision of the 1st Respondent to withdraw the indictment in the said case

(ii) a mandate in the nature of a writ of Mandamus directing the 1st Respondent to proceed the above-mentioned High Court case against the 2nd Respondent based on the indictment dated 03.01.2020

The learned Counsel for the Petitioner argues that the facts specifically mentioned in paragraph 7 of the Petition of the Petitioners, were revealed during the investigations related to Colombo Fort Magistrate's Court Case No. B 732/09. He submits that the statements given by the naval personnel of Sri Lanka Naval and Marine Science Faculty confirmed the fact that many persons including the aforesaid victims had been detained in the said premises called "GUN SITE". He further asserts that the 2nd Respondent had direct control over the affairs of the said premises and illegal detention centers thereof, and also that the 2nd Respondent was aware that the victims were illegally detained at the said premises. The learned Counsel further submits that the 1st Respondent, having being satisfied with evidence transpired during investigations carried out for more than 10 years, decided to

indict 14 accused including the 2nd Respondent and therefore the current decision to withdraw the indictment against the 2nd Respondent is unreasonable, bias, illegal, unlawful and politically motivated.

It is important to note that this Court is empowered to exercise its jurisdiction upon the application filed by the Petitioners only under Article 140 of the Constitution of the Republic. An application filed in this court is different from an 'action' filed in a Court of first instance. This Court has full power and authority under the provisions of the said Article to grant and issue, **according to law**, orders in the nature of writs of *Certiorari, Mandamus etc.,* subject to the proviso to the said Article. Hence, this court can issue orders in the nature of such writs only **according to law**.

At this stage this Court needs to take in to account the question whether the application for notice sought by the learned Counsel for the Petitioner, relates to a matter that ought to be resolved after full argument. I am reminded of the following passage in ***A.M.C. Bandara Adhikari v. A.M. Kapila Adhikari, Chief Inspector of Police and others CA (Writ) 216/2020 decided on 25.08.2020*** in which the arguability principle upon issuance of notice has been adopted by this Court based on its contents (at page 14);

> *"In other words, at the notice stage, the court considers whether the matter brought before it is arguable. That entails the conclusion that notice should not be granted if the application for judicial review is unarguable- see* ***R v. Legal Aid Board ex p Hughes (1993) 3 Admin LR 623 at 62SD*** *in which Lord Donaldson MR held that Notice/ Permission should be granted if an application is prima facie arguable. The permission judge needs to be satisfied that there is a proper basis for claiming judicial review, and it is wrong to grant notice without identifying an appropriate issue on which the case can properly proceed-see* ***R v Social Security Commissioner ex p. Pattni (1993) 5 Admin LR 219 at 223G****. However voluminous the papers, or complex the putative issues, the task remains the same-****R v Local Government Commission ex p. North Yorks County Council (unreported) 11 March 1994,*** *per Laws J. For a compendious account of principles that should guide an administrative law court in issuing notice see the illuminating article entitled "Arguability Principles" by Michael Fordham QC in (2007) Judicial Review 12:4, 219-220."*

The learned Additional Solicitor General (ASG), who appears for the 1st Respondent, vehemently opposing the application for issuance of notice, moves that the application be dismissed *in limine*. He raised several preliminary objections and the attention of Court was drawn to the order issued in ***Victor Ivon v. Sarth Silva, Attorney General and others (1998) 1 Sri LR*** by which Mark Fernando J. has refused leave to proceed in that case. The important question observed by the Supreme Court in that case was whether the Attorney General's discretion in regard to the institution of criminal proceedings is absolute, unfettered and unreviewable, in which event whether leave to proceed must be refused without further ado. According to Fernando J., the question is not simply whether a decision to file an indictment can be reviewed but whether a decision to grant sanction to prosecute, or to file and indictment, or the refusal to do so, can be reviewed.

The learned ASG making extensive submissions on prosecutorial discretion of the Attorney General, emphasizes the fact that the Attorney General's prime intention is not to procure a conviction but to convict only the right person. He drew the attention of this Court to the following passages in ***The Attorney General v. Sivapragasam et al, 60 NLR 468*** where Sansoni J. referring to the prosecutorial discretion of the Attorney General has said; (at page 470 &471);

> *"Mr. Nadesan argued that it is not open to a Crown Counsel who claims to appear and conduct a prosecution to say that he is not leading evidence. He went so far as to say that no prosecutor, not even the Attorney-General, has a discretion in the matter; and that if there is evidence available he must lead it, and if he does not lead it he ceases to appear and conduct the prosecution and the complainant or his pleader would then be entitled to prosecute and lead evidence. With respect, I entirely disagree with this proposition. The logical result of accepting it would be to place a duty on prosecuting counsel to lead evidence even when he knows that all the available evidence will fail to establish the charge against the accused. No prosecuting counsel with any regard for the Court or his own position as an officer of justice need follow such a course. The only object of leading evidence for the prosecution is to establish the ingredients of the charge, and if counsel is not satisfied in his own mind that the totality of the evidence available will achieve that result, he will be failing in his duty to the Court and to the accused if he were to insist on a fruitless recording of evidence and a senseless waste of time. It is*

quite wrong to suppose that a prosecuting counsel's duty is a mere mechanical leading of evidence regardless of the object for which evidence is led. If he is satisfied that the evidence is insufficient to prove the charge and insists on leading evidence, how can he in conscience ask the Court to convict the accused?"

"I have not seen the duties and responsibilities of prosecuting counsel set out better than in an article written by Mr. Christmas Humphreys Q. C. when he was Senior Prosecuting Counsel, Central Criminal Court [Criminal Law Review (1955) page 739]. His view, and it is one with which I respectfully agree, is that "the prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor feel pride or satisfaction in the mere fact of success .... His attitude should be so objective that he is, so far as is humanly possible, indifferent to the result". He continues: "I have never myself continued a prosecution where I was at any stage in genuine doubt as to the guilt, as distinct from my ability to prove the guilt, of the accused. It may be argued that it is for the tribunal alone, whether magistrate or jury, to decide guilt or innocence. I repeat that the prosecutor is fundamentally a minister of justice, and it is not in accordance with justice to ask a tribunal to convict a man whom you believe to be innocent."

"The obligation of prosecuting counsel to maintain scrupulous fairness in every case he handles is all the greater when he is Crown Counsel representing the Crown in a prosecution. For "the Crown is interested in justice, the defence in obtaining an acquittal within the limits of lawful procedure and Bar etiquette". As Lord Hewart L.C.J. said in Sugarman [2 (1935) 25 Cr. App. Rep. page 115], "It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown is not interested in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known and that justice should be done". I cannot see how the jury can honestly be asked even to consider convicting the accused if counsel for the Crown is satisfied that such a result should not follow upon the evidence available to the Crown. He must first be satisfied that there is a prima facie case against the accused before he enters on the task of leading evidence."
[Emphasis added].

Another argument formed by the learned ASG, by way of a preliminary objection, is that the Petitioners were not entitled to maintain their application as the 1st Respondent had not

made any application to the said High Court-at-Bar to withdraw the indictment against the 2nd Respondent as stated in the prayer of the Petition of the Petitioners. Accordingly, he says that the relief sought by the Petitioners for a mandate in the nature of writs of Certiorari to quash a purported decision to **withdraw** the indictment against the 2nd Respondent is not tenable. The learned ASG points out that a Senior State Counsel on 04.08.2021 has only informed the High Court-at-Bar, by virtue of section 194(1) of the Code of Criminal Procedure Act, that the 1st Respondent had taken a decision that he would not further prosecute the 14th accused (the 2nd Respondent in the instant application) upon the respective indictment. The said section 194(1) reads;

> *"At any stage of a trial before the High Court under this Code before the return of the verdict the Attorney-General may, if he thinks fit, inform the court that he will not further prosecute the accused upon the indictment or any charge therein, and thereupon all proceedings on such indictment or charge as the case may be against the accused shall be stayed and he shall be discharged of and from the same."*

It is observed that the section 194(3) of the said Criminal Procedure Act provides for withdrawal of an indictment or any charge therein. Such withdrawal can be done by the prosecuting counsel, at any stage of the trial before the return of the verdict. However, a withdrawal of an indictment or any charge therein, under that section, can be done with the consent of the presiding Judge whereas such a consent is not necessary when the Attorney General informs his decision under section 194(1). A salient feature in the said section 194(1) is that the legislature has bestowed the full discretion upon the Attorney General by incorporating the words **"*if he thinks fit*"** to decide not to further prosecute an accused. The other aspect is when the Attorney General informs his decision under section 194(1), all proceedings on such indictment or charge against the accused **shall** be stayed and the accused **shall** be discharged of and from the same. Moreover the discretion of the prosecuting Counsel or of the Attorney General under section 194(3) is restricted to a certain extend as the existence of the consent of the presiding Judge is required.

In addition to the above statutory discretion of the Attorney General, the section 160 of the Code of Criminal Procedure Act provides that if the Attorney General **is of opinion** that a

case is one which should be tried upon indictment before the High Court, an indictment shall be filed.

Samarakoon CJ, in ***Land Reform Commission v. Grand Central Limited (1981) 1 Sri LR 250*** has stated that the Attorney General is the Chief Legal officer and advisor for the State and thereby to the sovereign and is in that sense an officer of the public; the Attorney General of this country is a leader of the bar and the highest legal officer of the State. This predominance of the Attorney General is a common feature in many common wealth countries.

This theme of 'prosecutorial discretion' of the Attorney General came under review in applications against infringement of fundamental rights and also in application for judicial review under Article 140 of the Constitution. It is important to note that the judicial review is concerned, not with the decision but with the decision making process[1]. The scope of judicial review has been expanded through judicial creativity during past decades and the Judges have exercised the freedom of employing various theories in reviewing the discretionary power of public authorities. It is observed that the current position in respect of prosecutorial discretion is that the Attorney General's power to file or not to file an indictment is a discretionary power, which is neither absolute nor unfettered[2]. Therefore, as I observed in ***Ranjith Keerthi Tennakoon v. Attorney General, Inspector General of Police, Ajith Nivard Cabral and others CA/Writ/417/2021 decided on 03.11.2021*** each case that challenges such discretion should no doubt be decided on its own merits.

I now turn to the grounds for judicial review of the prosecutorial discretion of the Attorney General. In an article written by Osita Mba under the heading of '***Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: an Imperative of the Rule of Law', (2010) Oxford U Comparative L Forum 2***

[1]See Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141, 154-155 , HL (Lord Brightman; R v. Panelon Take-overs and Mergers, ex p Datafin plc [1987] QB 815, 842 (Sir John Donaldson); Lonrho plc v. Secretary of State for Trade and Industry [1989]2 All ER 609, 617 (Lord Keith of Kinkel).

[2] See Victor Ivon v. Sarath N Silva, Attorney General and another (1998) 1 Sri LR 340, Kaluhath Ananda Sarath De Abrew v. Chanaka Iddamalgoda and others SC FR No. 424/2015, SC minutes of 11.01.2015, T. M. Janaka Bandara Tennakoon v. Attorney General CA/Writ/335/2016 decided on 20.11.2020, Chaminda Bandara Adikari v. Kapila Adikari and others CA/Writ/2016/2020 (CA minutes 25.08.2020), R v. Anderson Supreme Court of Canada (2014) 2 SCR 167

at ***ouclf.law.ox.ac.uk*** views have been expressed on the prosecutorial powers of the Attorney General. The following passage where the grounds for judicial review of the prosecutorial powers has been recognized is very much befitting to the instant application;

> *'Some of the grounds for judicial review of the prosecutorial powers of Director of Public Prosecutions under the Constitution of Fiji, which are similar to the powers of the English and Nigerian Attorneys-General, were listed in Matalulu v. DPP*[3]*. In a passage that was cited and endorsed by the Privy Council in Mohit*[4]*, and adopted by the House of Lords in R (Corner House Research and another) v. Director of the Serious Fraud Office (the BAE case)*[5]*, the Supreme Court of Fiji stated that a purported exercise of power would be reviewable if it were made:*
>
> 1. *In excess of the DPP's constitutional or statutory grants of power – such as an attempt to institute proceedings in a court established by a disciplinary law ….*
> 2. *When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act upon a political instruction the decision could be amenable to review.*
> 3. *In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.*
> 4. *In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.*
> 5. *Where the DPP has fettered his or her discretion by a rigid policy – eg one that precludes prosecution of a specific class of offences.'*

Further, our Supreme Court in ***Kaluhath Ananda Sarath De Abrew v. Chanaka Iddamalgoda and others SC FR No. 424/2015, SC minutes of 11.01.2015*** has considered the issue as to whether the decision of the Attorney General be reviewed in those proceedings and has found similar grounds for challenge as follows;

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[3] [2003] 4 LRC 712.
[4] [2006] UKPC 20, [2006] 1 WLR 3343 ('*Mohit*') (Lords Bingham, Hoffmann, Hope, Carswell and Brown).
[5] [2008] EWHC 714 (Admin) paragraphs 30-31.

*'where the legislature has confided the power on the Attorney General to forward indictment with a discretion how it is to be used, it is beyond the power of Court to contest that discretion unless such discretion has been exercised **mala fide** or an **ulterior motive** or in **excess of his jurisdiction'**.*

In the backdrop of the legal position set out above on prosecutorial discretion of the Attorney General, we have to ascertain whether the Petitioners have submitted a case which is suitable for full investigation and a hearing after issuing notice on all the Respondents. In this regard, the Court should be satisfied that there is a prima facie case that ought to be resolved after full argument.

The learned Counsel for the Petitioner, in paragraph 2 of his written submissions, asserts that the evidence laid down in the said paragraph has been transpired during the investigation against the 2nd Respondent. He has referred to evidence given by Rear Admiral Pravice Jerome Syanduru Sennaiyya, M.A.D.M. Sampath Munasinghe, W.W.J. Shavendra Fernando and make allegations that the 2nd Respondent was aware about the purported abductions and he has willfully suppressed material evidence and refrained from assisting the investigations. The learned Counsel submits that the 1st Respondent decided to file indictment on 3rd January 2020 against 14 accused including the 2nd Respondent after being satisfied with the material available and also that the 1st Respondent has filed an extensive statement of objections resisting the 2nd Respondent's application in CA/Writ/77/2020. Based on those grounds the learned Counsel for the Petitioners argues that, the decision of the 1stRespondent not to further prosecute the 2nd Respondent is irrational.

The learned ASG in his submissions opposing the application for notice intimated to Court that he would be able to make available an internal report submitted by an Additional Solicitor General whose recommendations were material for the Attorney General to decide not to further prosecute the 2nd Respondent. The ASG on 02.11.2021 tendered on confidential basis, only for perusal of both of us, copies of two reports addressed to the Attorney General by the said Additional Solicitor General. Those two reports are dated 7th November 2019 and 27th July 2021 respectively. The learned Counsel for the Petitioner indicated on 02.11.2021 that he has no objections for the learned ASG to tender such reports on confidential basis only for our perusal. Even in the case of ***Victor Ivon v. Sarth***

Silva, Attorney General and others (1998) 1 Sri LR, late Mr. K C Kamalasabesan (then Additional Solicitor General) has tendered on confidential basis, reports submitted to Attorney General by two State Counsel. Mark Fernando J., in that case, has considered the contents of those reports and refused leave without fixing the matter for argument. In ***Janaka Bandara Tennakoon v. Attorney General CA/Writ/335/2016 decided on 20.11.2020,*** a divisional bench of this Court comprising of their Lordships, Justice A.H.M.D. Nawaz, Justice Shiran Gooneratne and Justice Arjuna Obeyesekere have perused, before delivering the judgement, two files of the Attorney General's Department that made available to Court by Mr. Dilan Rathnayake, Deputy Solicitor General.

However, we are mindful of the fact that we have to examine here only the decision making process of the 1st Respondent when taking a decision not to prosecute against the 2nd Respondent.

The said Additional Solicitor General upon the reasons set out in both his reports has found that there was no basis to contemplate criminal charges against the 2nd Respondent. He is of the view that imputation of criminal liability on the basis of the knowledge of the commission of an offence must be clearly perceived by the witness who is testifying to that effect. According to him, the 2nd Respondent has not referred to such knowledge even in his initial statement in 2016.

The said Additional Solicitor General disagreeing with an opinion formed by a Senior State Counsel (SSC) who is junior to him, categorically set out that the contents of SSC's report display a manifest inadequacy to consider charges against the 2nd Respondent.

As the learned Counsel for the Petitioners in his oral submissions very correctly showed that there is an organizational structure in the Attorney General's Department when reaching at a final decision in respect of a matter in issue. The following passage in the article –***'The Role and Function of Prosecution in Sri Lanka' by D. P. Kumarasingha (then Additional Solicitor General) 107th International Training Course visiting experts' papers – resource material series no. 53*** is apt here;

> *'Once a file reaches the Attorney General's Department, it is registered and sent to an allocating officer who is a senior officer in the Department. He allocates it to a State Counsel for necessary*

action. The State Counsel studies the case and submits a report to his supervising officer who in invariably a Senior State Counsel.'

It is a common phenomenon at the Attorney General's Department the existence of varying opinion on issues of law and fact, before reaching a finality by the senior officer or by the Attorney General. This mechanism, in my view, always caters towards the advancement of law and also to uphold the rule of law. The learned ASG firmly invited this Court to peruse the documents filed of record in the said application CA/Writ/77/2020 in which the learned Counsel for the Petitioners appears for an intervenient party. The 1st Respondent in paragraph 33 of his statement of objections filed thereto explains the consultative process in respect of files maintained by the Attorney General's Department.

The said Additional Solicitor General whose reports are before us has extensively analyzed the observations made by the Junior Counsel. He is of the view that the recommendations by the said SSC is based on the hypothesis of knowledge that the 2nd Respondent ought to have had about the abductions of victims: their confinement; and, their subsequent murder on unspecified dates in May 2009. Thus, he has found no basis to impute knowledge of any abduction or a subsequent detention or a killing against the 2nd Respondent and also found no basis to consider naming him as a suspect. According to the said report, the Additional Solicitor General does not subscribe to the view that the examination of the material and the concerns of the 2nd Respondent should be brushed–aside in the way that the Junior Counsel had obdurately asserted in their report. He further emphasizes that each and every matter that has been raised at the representations made to the Attorney General by the 2nd Respondent must be considered in order to see whether the prosecution could withstand the test of sustainability and to ensure the reasonable prospect of a conviction before proceeding any further with the matter.

The learned Counsel for the Petitioner in his written submissions intimates that the reports of former Attorneys General who took decisions to indict the 2nd Respondent have not been made available for the perusal of this Court. To our mind, the Attorney General who was holding office during the time such decision to prosecute the 2nd Respondent has been taken, undoubtedly could take cognizance of whatever recommendations available to him in favour of his final decision.

In view of the submissions made by the learned ASG, it is apparent that the present Attorney General in making the impugned decision, has considered the representations made to him by the 2nd Respondent as well as the matters referred to by the 2nd Respondent in the application No. CA/Writ/77/2020 along with the well considered recommendations made in the aforesaid reports of the Additional Solicitor General.

It is noted that the SSC when providing information to the High Court-at-Bar under the said section 194(1), has given reasons also for such decision of the 1st Respondent. Those reasons are elaborated in proceedings dated 04.08.2021 in X17 annexed to the Petition.The Senior State Counsel has stated therein:

> ගරු මැතිණියනි, මෙම 14 වන චූදිත විසින් සී. ඒ. රිට් 77/2020 යටතේ මේ වනවිට ගරු අභියාචනාධිකරණයේ රිට් අයදුම්පත්‍රයක් ගොනු කර තිබෙනවා. එම රිට් අයදුම්පත්‍රය සළකා බලලා මුල් අවස්ථාවේදීම අතුරු තහනම් නියෝගයක් නිකුත් කරලා තිබෙනවා. මෙම 14 වන චූදිත සම්බන්ධයෙන් වන නඩු කටයුතු මෙම අධිකරණය තුළ නවත්වන්න.
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> මේ වන විට මෙම රිට් අයදුම් පත්‍රයේ කටයුතු ගරු අභියාචනාධිකරණය ඉදිරියේ ක්‍රියාත්මක වෙනවා සහ මිළඟ දිනය වශයෙන්, අගෝස්තු මාසයේ 30 වනදා මා දන්නා තරමට කැඳවීමට නියම කරලා තිබෙනවා, නිතීපතිවරය විසින් එම පෙත්සම්කරු නැතිනම්, 14 වන චූදිත සම්බන්ධයෙන් ගනු ලබන ස්ථාවරය දැනුම් දීම සඳහා.
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> ඒ අතරතුර ගරු මැතිණියනි, මෙම 14 වන චූදිත විසින් ලිඛිත සැළකිරීම් කරනු ලැබුවා නීතිපතිවරයා වෙත. ඒ ලිඛිත සැළකිරීම් ඇතුළු අනෙකුත් සියලුම අවස්ථානුගත කරුණු පොලිස්පතිවරයා මාර්ගයෙනුත් යොමු කර තිබුණා. ඒ අනුව ඒ සියලුම අවස්ථානුගත කරුණුත් රිට් අයදුම්පත්‍රයට අදාළව ඉදිරිපත් කරන ලද කරුණුත් සමස්ථයක් වශයෙන් සළකලා බලලා නීතිපතිවරයා තීරණය කරලා තිබෙනවා අපරාධ නඩු විධාන සංග්‍රහ පනතේ 194 (1) වගන්තිය ප්‍රකාරව මෙම 14 චූදිතට විරුද්ධව තවදුරත් අපරාධ චෝදනා මෙහෙයවනු නොලැබිය යුතුයි කියලා. ඒ අවස්ථානෝචිත තත්ත්වය යටතේ තීරණය කරලා තිබෙනවා. එම නිසා එම කරුණ දැනුම් දීම සඳහා තමයි ගරු මැතිණියනි, මෙම මොෂන් පත්‍රය ඉදිරිපත් කළේ.

It is remarkable that the above-mentioned Additional Solicitor General in his reports referred to the same Senior State Counsel who made the above application before the High Court-at-Bar. This clearly shows that the said SSC has changed his mind in respect of his previous findings against the 2nd Respondent, for reasons not known to us.

The Petitioners raised an additional question as to whether the Attorney General could delegate his powers to a State Counsel in providing the information under the said section 194(1) to Court. It is a matter for the Hon. Judges of the High Court-at-Bar to decide in view of the provisions of section 194(2) when they choose to consider the application made by the 1st Respondent or on his behalf.

In light of these facts, we are unable to accept the submissions of the learned Counsel for the Petitioners who asserts that the 1st Respondent's decision not to continue with the prosecution against the 2nd Respondent is irrational. Petitioners have also averred in their Petition – 'bias', 'illegality', 'unlawfulness' and 'political motivation' as grounds for challenge. However, the written submissions filed on behalf of the Petitioners have addressed only on the aspect of 'irrationality' and no adequate material have been furnished to establish any of those grounds that averred in the Petition. The threshold of a successful challenge of the Attorney General's prosecutorial decisions must be manifestly higher owing to the pre-eminence attached to the functions, powers and duties attached to the office of Attorney General by tradition as well as by statutory provisions both in the past and at present.[6]

In those circumstances we take the view that it does not appear, prima facie, any procedural error in the decision making process of the 1st Respondent when taking the decision not to continue with the prosecution against the 2nd Respondent in the Case No. HC/TAB/1448/2020 at High Court-at-Bar. On perusal of the documents annexed to the Petition, it is apparent that it does not emanate prima facie evidence or any proof to grant any relief to the Petitioners as prayed for in the prayer of the Petition.

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[6]The above functions, powers and duties attached to the office of Attorney General as well as by statutory provisions have been discussed in the Land Reform Commission v. Grand Central Limited (1981) 1 SriLR 250

The learned ASG, apart from the objections raised against the relief sought by the Petitioners for a writ of Certiorari, contends that the Petitioners are not entitled even to seek for a Mandamus upon the discretionary powers of the 1st Respondent. In this regard, he relies upon the judgement of Sarath N. Silva CJ. in ***Abeyrathne v. Minister of Lands and others, S.C. (SPL) LA No. 197/08 SC minutes 01.06.2009.***

In those circumstances, we are inclined to accept the propositions of the learned ASG that this Court should not intervene to usurp the prosecutorial discretion exercised by the 1st Respondent depending on the circumstances of this case.

Therefore, this Court takes the view that there is no proper basis for claiming judicial review in the instant application and also the case is not suitable for full investigation at a hearing. Hence, this Court is not inclined to issue notice and accordingly the application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola, J.

I agree.

Judge of the Court of Appeal