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

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 read with Article 126(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/200/2022

Johnston Xaviour Fernando
527, Rosewood Estate, Rathkarauwa,
Maspotha,
Kurunegala.

Petitioner

Vs.

1. C. D. Wickramaratne
   Inspector General of Police,
   Sri Lanka Police Headquarters,
   Colombo 01.

2. Prasad Ranasinghe
   Deputy Inspector General,
   Criminal Investigation Department,
   Colombo 01.

3. U. B. Galwala
   Officer In charge,
   Special Investigations Division (III),
   Criminal Investigation Department,
   Colombo 01.

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

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Manohara De Silva PC with Boopathy Kahathuduwa for the Petitioner.

Vikum De Abrew, ASG PC with Lakmini Girihagama, DSG for the 4th Respondent.

Renzie Arsecularatne PC and Sarath Jayamanne PC for the parties sought to be intervened.

Supported on : 09.06.2022

Decided on : 21.06.2022

Sobhitha Rajakaruna J.

The Petitioner in this application seeks, *inter alia*, a mandate in the nature of a writ of Prohibition, prohibiting the Respondents from arresting the Petitioner based on the speech made by the Petitioner on 09.05.2022 at Temple Tress (official residence of the Prime Minister). Petitioner has annexed to his Petition a Compact Disk ('CD') marked 'P4a' and claims that the said CD contains the full speech he made at the said meeting. The Petitioner has given his own explanation in the instant application as to why he was compelled to make such a speech.

The Petitioner states that a protest campaign on Galle face Green was organized by a set of protestors who were demanding the resignation of His Excellency the President ('President') and it was not a peaceful protest but a protest that unleashed derogatory remarks against the Venerable Maha Sangha, President, Prime Minster and Members of the Parliament. The Petitioner further states that the law-abiding citizens were utterly disappointed that the President was not taking steps to uphold the rule of law and was allowing unruly mobs in the guise of protests to violate the law and order in broad day light.

The Petitioner in this Petition divulges that he had a genuine fear that the President who did not have any previous experience in holding public office would not be able to bring the situation under control which would ultimately lead to a lawless anarchy.

According to the Petition of the Petitioner there has been a rumor, that the President on or about 08.05.2022 had requested the then Prime Minister, Hon. Mahinda Rajapakshe (former Prime Minister) to resign from his position as a solution to the present crisis in the country. The Petitioner states that the said decision of the President created much displeasure amongst the supporters of Sri Lanka Podujana Peramuna ('SLPP') and in such circumstances Local Government Members Association (which is supposed to be an affiliated organization of the SLPP), organized a meeting on 09.05.2022 at Temple Trees to persuade the said former Prime Minister to take the initiative and provide a solution to the political and economic crisis of the country without resigning and also, to bid farewell to the said Prime Minster if he decides to resign.

Admittedly, the Petitioner has made his controversial speech at the said meeting which commenced around 10.20 am on 09.05.2022. The Petitioner alleges that later during the day he learnt that there had been a clash between the aforesaid protestors at the Galle Face Green and a portion of the crowd who attended the said meeting at Temple Trees.

As a consequence of the said clash on 09.05.2022, the Criminal Investigation Department ('CID') filed a 'B' Report in the Magistrate's Court of Fort under case No. B 22046/22 in reference to the attack against the peaceful protestors and causing damages to property. Thereafter, the CID filed further 'B' Reports as well. As per the said 'B' Reports, the Petitioner has been identified as a person who had addressed the above mentioned gathering at the Temple Trees and accordingly, the learned Magistrate has issued an order on 12.05.2022 to the Control of Immigration and Emigration, preventing the Petitioner from leaving the country.

The Petitioner has annexed a copy of the letter dated 16.05.2022 (marked 'P17'), addressed to the CID by the Attorney General who has stated in its paragraph 5 and 6 as follows;

> 5. *You are hereby advised to consider with the aid of the direct, circumstantial and technical evidence available thus far whether a reasonable suspicion exists in the conduct of the above mentioned person in the commission of one or several offences referred to in your B and further reports filed in the Magistrate's Court on any other offence on which you are yet to report to Court.*

6. *When the investigators identify reasons for their reasonable suspicion in identifying the suspects, they may be arrested as soon as possible and produced before Court in terms of the provisions of the Code of Criminal Procedure Act No. 15 of 1978 (as amended).*

The Petitioner pleads that the direction given by the Attorney General to the CID to arrest suspects as soon as possible after identifying the suspects, is an act in excess of his powers to unduly influence the investigation to deprive the statutory discretion vested with the police and/or the 2nd and/or 3rd Respondents. In view of the 'B' report filed on 01.06.2022, marked as 'P14', the Petitioner has been identified as a suspect in the said case bearing No. B 22046/22. Furthermore, the Petitioner claims that if the Petitioner is to be arrested on the basis that he is named a suspect of the said Magistrate's Court case, then the respective decisions are unlawful, mala fide, unreasonable and shall cause irremediable damages to him.

Based on the above factual matrix, the Petitioner is seeking from this Court, *inter alia*, for a mandate in the nature of a writ of Certiorari to quash the said 'B' report, marked 'P14', to the extent it is applicable to the Petitioner and also for a mandate in the nature of a writ of prohibition, prohibiting the 1st to 3rd Respondents from arresting the Petitioner based on the speech made by the Petitioner on 09.05.2022 at Temple Trees as reflected in 'P14A' & 'P14B'. Additionally, the Petitioner is seeking for a writ of Certiorari to quash the decision of the Attorney General, embodied in 'P17'.

The CID in the said 'B' Report, marked 'P14', has reported to Court that they would study further the statement made by the Petitioner on 09.05.2022 (at Temple Trees) and further steps would be taken after continuous investigations. It has not been divulged in any of the reports filed by CID in the Magistrate's Court case that the Petitioner had physically engaged in the attack against the peaceful protestors at Galle Face Green.

The main contention of the learned President's Counsel for the Petitioner is that the words spoken by the Petitioner will not amount to intimidation and the said speech was merely to persuade the former Prime Minister not to resign. Referring to the controversial words used by the Petitioner in his speech, the said learned President's Counsel made submissions justifying all such words. He submitted that the Petitioner has used the word "සටන" ('Satana') to refer to a purported clash with the President and has used the words "සුද්ද කරනවා" ('sudda karanawaa') to insist that the Petitioner and his supporters should be given the opportunity if the President cannot 'clear it'. The learned President's Counsel

submitted that when comparing the words in paragraph 9(II) of the 'B' Report marked 'P14' with the speech in 'P4b', the Petitioner's speech has been distorted when reporting facts to the learned Magistrate.

The other important assertion of the Petitioner is that there is no material available in the record of the said Magistrate's Court case that the Petitioner committed an offence warranting the arrest of the Petitioner. The Petitioner's contention is that such arrest on the basis of a speech made by him is a gross violation of Section 32 of the Criminal Procedure Code and also the institution of proceedings by 'P14' is in violation of its Section 136. Further, the Petitioner submits, as per the 'B' Report marked 'P14', that the learned Magistrate has been informed by the CID that the investigations are being conducted in regard to the commission of an offences under Sections 113(b), 140, 146, 314, 316, 410, 418, 486 and 300 of the Penal Code (to be read with Section 102 of the Penal Code) and accordingly, none of the allegations contained in the 'B' Report marked 'P14' constitute an offence against the Petitioner.

The learned Additional Solicitor General ('ASG') at the inception of his submissions divulged that the learned Magistrate had issued a warrant on 08.06.2022 to arrest the Petitioner and accordingly, he asserted that the instant application of the Petitioner has become futile. The learned ASG submits that it is premature for the Petitioner to formulate any argument in view of the provisions of the Section 136 of the Code of Criminal Procedure Act No. 15 of 1979 ('CCPA') and also that several other remedies such as filling a revision application or surrendering and getting the warrant recalled are available to the Petitioner than recoursing to this Court by way of a judicial review application.

It is to be noted that no warrant has been issued by the learned Magistrate to arrest the Petitioner at the time the Petitioner filled the instant application in this Court (on 06.06.2022). Anyhow due to the interim orders issued by this Court the warrant issued after filling this application has not been executed so far. The question that has to be examined at this threshold stage is whether there is any prima facie material available in the 'B' Report marked 'P14' to the effect that the Petitioner committed an offence warranting the arrest of him.

It is very much pertinent to bear in mind that this a judicial review application and the judicial review is about the decision-making process, not the decision itself and accordingly, the role of this Court is to consider whether the Respondents have exceeded their powers. Therefore, there should be a blatant error made by the Respondents

executing their duties or any abuse of power or authority in order to exercise the supervisory jurisdiction of this Court.

The trite law is that there should be (a) a reasonable complaint, (b) credible information or (c) a reasonable suspicion to arrest a person without a warrant. The said principle is embodied in Section 32(1) (b) of the CCPA. The Petitioner doesn't challenge the warrant issued by the learned Magistrate on 08.06.2022 and however, it is appropriate to consider whether any of the above grounds were also in existence in order to arrest the Petitioner without a warrant at the time the Petitioner filled the instant application. It's a basic principle that the rights of parties should be decided as at the date of the institution of the proceedings or the action.

It appears to Court, the accusations against the Petitioner revolves around the said speech made by the Petitioner on 09.05.2022 at Temple Trees. The identification of the accused is one of the prime burdens of the prosecution in criminal cases. The question as to who committed the offence is a matter that would arise during the course of investigation and the duty of the learned Magistrate is to decide whether the respective accused before Court committed the offence. The main allegation against the Petitioner, as I understand, is that the Petitioner has instigated the crowd who attended the meeting at Temple Trees on 09.05.2022 to attack the aforesaid peaceful protestors at Galle Face Green later that day.

At the time of supporting this application by the learned President's Counsel for the Petitioner, this Court did not have the privilege to listen to the CD marked 'P4A' in open Court other than listening to his oral submissions personifying the words of the Petitioner consolidated in 'P4B' which is the typed written version of the said speech. My brother and myself very carefully listened to the contents in the said CD in my Chambers through the official computer available in my Chambers. Having listened to the contents of the said CD, I take the view that the mere reading of 'P4B' would not suffice to arrive at a conclusion whether a reasonable suspicion exists against the Petitioner in view of committing an alleged offence and it is mandatory to consider the level of the volume, rhythm of the sound, pattern, speed and emphasis of the said speech of the Petitioner. The background noises and the response of the crowd gathered there also, in my view, is material in arriving at decisions based on the special circumstances of this case.

I am mindful that this Court should be extremely careful in taking in to consideration any public opinion on a matter very much detriment to the best interest of the citizens and the Country. However, I am aware that a considerable component of countrymen & women

have watched the speech made by the Petitioner via mass media. Thus, I am of the view that it is not reasonable for the Petitioner to raise an argument that he was unaware of any suspicion against him on a possible crime.

Further, on perusal of the Magistrate's Court case record, it is apparent that the learned Magistrate has already issued some orders under Section 124 of the CCPA to media institutions, the Secretary to the Prime Minster, Indian High Commission, American Embassy, Shangrila Hotel etc. to hand over unedited video footage & data recorded on Closed-Circuit Television (CCTV) etc. to the respective investigating officers.

Hence, based on the circumstances of this case, I am of the view that it is not this Court but the learned Magistrate is the best person to assay the said speech in such lines upon the material submitted before the Magistrate's Court by the prosecution, in order to arrive at decisions as to whether the Petitioner has committed an offence. Similarly, it is in the hands of the prosecution or 2nd to 4th Respondents to ascertain whether a credible information or reasonable suspicion exists against the Petitioner and moreover, I am of the view, based on my above reasoning that there exists a reasonable suspicion that the Petitioner has committed an offence.

My view is that when taking decisions in reference to the case No. B 22046/22, the cumulative effect of all the circumstances and the nature of those circumstances of the events taken place on 09.05.2022 at Galle Face Green based on evidence will have to be taken into consideration and the matters should be adjudged having regard to the ordinary course of human conduct.

Additionally, I see there is no reason to interfere in to the prosecutorial discretion of the Attorney General in this case as there is no blatant error made by the Attorney General in his decisions and prima facie, no evidence is available to show that he has exceeded his powers. I drew my attention to the provisions of Section 393 of the CCPA also in this regard.

In the circumstances, I am of the view that it is not possible for this Court to arrive at a decision that the Petitioner has satisfied the minimum threshold requirement which warrants this Court to issue formal notice of this application to Respondents. Thus, I refuse the application of the Petitioner for notice.

Having considered the issuance of notice, it is necessary, based on the special nature of the interim orders made by this Court on 09.06.2022 to consider the aftermath consequences

of the said interim orders in view of terminating these proceedings fully and finally for the best interest of justice.

When issuing interim orders, we are guided by the Rules of the Court of Appeal and by the principle whether the Court's final order would, if the Petitioner is successful, be rendered nugatory. Judicial Review jurisdiction is not a discrete part of our legal system and its roots emerges from constitutional law which is enriched with constitutional theories. Although, there are classifications as civil law jurisdiction and the criminal law jurisdiction etc., when it comes to the concept of 'Rule of Law', there should be only one jurisdiction. This Court made such interim orders on 09.06.2022 merely to uphold the Rule of Law, in which, one of the underline concepts is that no man may be punished in body or goods except for a distinct breach of law established by ordinary procedure before the ordinary Courts. In the same line, it is imperative to assay whether the Rule of Law will be affected due to the interim orders made by this Court after determining on the issuance of notice of this case on the Respondents. In a broader sense, Rule of Law[1] means that Law is supreme and is above every individual; no individual whether if he is rich, poor, rulers or ruled etc. are above law and they should obey it.

Ordinarily, when the main case is dismissed, an interim/stay order issued before the final order eventually gets ineffective. However, when the main case is being dismissed, the interim relief should also become inoperative without creating any adverse effect to the concept of Rule of Law. In the circumstances, I now advert to examine as to whether any adverse effect would be created due to the fact that the interim orders issued by this Court becoming inoperative based on the termination of proceedings of the instant application.

On 09.06.2022, this Court has directed the Petitioner to surrender before the learned Magistrate of the Fort Magistrate's Court before 8.00 pm on the same day. The record of the said case bears the fact that the Petitioner has surrendered complying to the said order of this Court.

On perusal of the case record of the Magistrate's Court case, it appears that the learned Magistrate, upon the Petitioner been surrendered on 09.06.2022, has released the Petitioner on bail in view of the interim order of this Court issued on the same day. The learned Magistrate in the journal entry dated 09.06.2022 has mentioned that he

[1] The term "Rule of Law" is derived from the French phrase 'La Principe de Legality' (the principle of legality) which refers to a government based on principles of law and not of men.

understands that the order of the Court of Appeal implies not to make any order to arrest or detain the Petitioner. The relevant wordings of the learned Magistrate in the said journal entry are as follows;

> "අභියාචනාධිකරණ රිට් 200/2022 නඩුවේ නියෝගය අද සවස Fax මඟින් කොටුව මහේස්ත්‍රාත් අධිකරණයට ලද අතර, අධිකරණයේ රෙජිස්ට්‍රාර් විසින් එම නියෝගය මා වෙතට යොමු කරන ලදී. එකී නියෝගය අනුව අද රාත්‍රී 8 ට පෙර සැකකරු මහේස්ත්‍රාත් අධිකරණයට භාර වීමට නියෝග කර ඇති අතර. සැකකරු භාර වීමෙන් පසුව සැකකරු අත් අඩංගුවට ගැනීම සම්බන්ධව තවදුරටත් කිසිදු නියෝගයක් නොකරන ලෙසට නියම කර ඇත.
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> එසේම සැකකරු මහේස්ත්‍රාත් අධිකරණය ඉදිරියේ පෙනී සිටීම පිනිස අවශ්‍ය නියෝගයන් නිකුත් කිරීමට ද නියම කර ඇත.
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> මෙම නියෝගය අනුව මා වෙත වැටහෙන්නේ සැකකරු අත් අඩංගුවට ගැනීම සහ තවදුරටත් රඳවා ගැනීම පිණිස නියෝගයන් නොකළ යුතු බවත්, භාර වූ සැකකරු අධිකරණයට කැඳවා ගැනීම පිණිස වූ නියෝගයන් කරන ලෙසත්ය. මේ අනුව ඉහත කී අභියාචනා නියෝගය පරිදි සැකකරු ඇපමත මුදා හරිමි."

It is to be noted that this Court has specifically mentioned in the order dated 09.06.2022 that the said order should not be construed as that this Court has raised any prima facie doubt on the validity of the arrest warrant issued by the learned Magistrate. This Court made that observation as no order on issuance of notice had been made by that time.

Whenever any person suspected or accused of, being concerned in committing or having committed a non-bailable or bailable offence appears, is brought before, or surrenders, to the Court having jurisdiction, the Court may release such person in terms of the provisions of Section 7 of the Bail Act No. 30 of 1997 (as amended). Therefore, when such persons mentioned above are brought before the relevant Court or when such persons surrender to the Court such Court may make necessary orders in terms of the said Section 7. The act of surrendering to Court envisaged in the said section is obviously tantamount to a 'voluntary surrender'. However, the Petitioner surrendering to Court on 09.06.2022 cannot be considered as a voluntary surrender and the Petitioner has surrendered in compliance to an order of this Court.

Therefore, I am of the view that the discretion of the learned Magistrate to exercise his powers to grant bail or refuse bail or make any such order in terms of the Section 7 of the Bail Act has been curtailed as the Petitioner has not surrendered on his own accord or the Petitioner has not been brought before the learned Magistrate as a consequence of the interim orders issued by this Court. The reasons given above, by me, in refusing formal notice on the Respondents and also the fact that the learned Magistrate has issued the warrant on 08.06.2022 on the basis that the Petitioner had absconded, also should be taken in to consideration when assessing the possible breakdown of the Rule of Law. In the circumstances, I am of the view that the learned Magistrate should make fresh orders, according to law, when the Petitioner appears before the learned Magistrate or when he is being brought before the Magistrate in due course. In any event, the provisions of the Sections 14 & 15 of the Bail Act are inclined to refusal, cancellation or recession or variation of a subsisting bail order.

In my view, the rationale of issuing such an order by this Court has been identified in Rule 5 of the Court of Appeal (Appellate Procedure) Rules 1990, wherein the Court is empowered to impose terms and conditions as it thinks just in order to avoid or to mitigate hardship or possible hardship to any Respondent in the order granting interim relief. It is no doubt that the said Rule is applicable for a pending application. However, I take the view that this is a fit case to adopt the same rationale to avoid any adverse effects in order to maintain the Rule of Law, even after terminating the proceedings by way of a dismissal or otherwise.

In the circumstances, I am of the view that the bail conditions or the order releasing the Petitioner on bail are of no avail in law from the time this Court refuses issuing formal notice on the Respondents because the learned Magistrate has made such orders on 09.06.2022 merely on the influence of the interim order made by this Court and further, the Petitioner surrendered not on his own accord but as a result of the said interim order of this Court. In view of the foregoing, the learned Magistrate is ought to make fresh orders in terms of law when the Petitioner appears before the learned Magistrate or the Petitioner is being brought before the learned Magistrate in due course. I am of the view that if this Court does not arrive at the above conclusion, the concept of Rule of Law as mentioned above will be adversely affected.

The clear intention of this Court is to bring back the status quo of the issues raised by the Petitioner in the instant application as it was existing at the date of the filing of this application.

The application of the Petitioner is refused subject to the above order made by this Court today in reference to the interim orders issued on 09.06.2022.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal