

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/233/2022

Marasinghage Premasiri
358/B,
Kotugodella Road,
Galagedara,
Padukka.

Petitioner

Vs.

1. C. I. Alagiyawanna
Officer In-charge
Divisional Crime Investigation
Bureau,
Vavuniya.
2. Sugath Galagamage
Senior Superintendent of Police,
Vavuniya Division,
Vavuniya.
3. C. D. Wickramaratne
Inspector General of Police,
Police Headquarters,
Colombo 01.
4. Attorney General
Attorney General's Department,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Gamini Perera with Prasanna Arampath and Wijitha Salpitikorala for the
Petitioner.
Shaminda Wickrama, SC for the 1st to 4th Respondents.

Supported on : 14.09.2022

Decided on : 26.09.2022

Sobhitha Rajakaruna J.

The Petitioner on 03.04.2022 has received some information on an illegal excavation by four suspects in a land belonging to the Kanagarayankulam Agrarian Service Center while he was serving as the Officer in-charge ('OIC') of the Police Station of Kanagarayankulam, The Petitioner has seized the properties used for excavation including the vehicle the suspects arrived in and later on produced the suspects to the Magistrate's Court of Vavuniya and filed a 'B' report under case No. B/524/22.

The Petitioner has requested on 11.04.2022 the learned Magistrate to call for a report to assess whether the said excavation site falls within the Antiquities Ordinance and also to obtain an opinion from the Department of Archaeology in that regard. It was later confirmed that the place where the excavation took place was of archaeological value.

As per the 'B' reports, it appears that the investigations are still pending and it is yet to be determined whether the offences committed by the suspects fall within the (a) Sections 410 & 433 of the Penal Code, (b) Section 6 of the Antiquities Ordinance and (c) Increase of Fines Act No.12 of 2005 (to be read along with Section 15(1)(a) of the Antiquities Ordinance).

At the time of filing of the said case, the Petitioner was on a routine transfer to the Nugegoda Police Division. By that time the 2nd Respondent had entrusted the 1st

Respondent to perform the investigations through the respective division of the Divisional Crime Detective Bureau under section 125 of Code of Criminal Procedure Act No. 15 of 1979. Subsequently, the 1st Respondent started handling the matters relating to the court proceedings of B 524/22 filed in Magistrate's Court of Vavuniya.

The Petitioner contends that he has become aware that he had been named as a suspect in the Case No. 52213 (B 524/22) of the Magistrate's Court of Vavuniya. It is noted that the Petitioner has been named as a suspect along with the other four suspects who were in remand custody.

The Petitioner claims that in consequence to the above circumstances there is an imminent danger of him being arrested and being produced before the said Magistrate's Court at any moment. In this application, the Petitioner is seeking, inter alia, for a writ of Certiorari quashing the order of the learned Magistrate, dated 06.06.2022. A writ of Prohibition is also being sought to prohibit the arrest of the Petitioner.

The Respondents in their limited Statement of Objections filed on 09.09.2022 has raised the following preliminary objections in respect of the maintainability of this application;

- i. the Petitioner has suppressed and/or misrepresented material facts from Court in relation to Minor Offence Investigation Book ('MOIB') extracts marked as 2R1, 2R2, 2R3, 2R4 and 2R5;
- ii. the Petitioner has committed an offence prior to invoking the jurisdiction of this Court;
- iii. the Petitioner has failed to come before this Court with clean hands therefore he has no right to seek the reliefs prayed for in the Petition;
- iv. the Petitioner's application is futile;
- v. the Petitioner is guilty of laches.

The Respondents contends that on 03.04.2022 the four suspects were first in the custody of the 1st Respondent and later handed over to the custody of the Petitioner who claimed to be there on a tip off of his own. (Vide-MOIB extract marked '2R6'). The Respondents further states that during the investigation it has been revealed that the 2nd suspect while in the custody of the 2nd Respondent has contacted the Petitioner, consequent to which the Petitioner has arrived at the scene of the crime. Further, the Respondents contend that

there are number of telephone records which showcase that the Petitioner and the 2nd suspect had personal contacts even one and a half months prior to the supposed crime and such telephone conversations have mainly been initiated by the Petitioner through his personal as well as his official telephone numbers.

The Respondents assert that the Petitioner has not produced the mobile phones which were seized from the suspects to the learned Magistrate during the initial 'B' report even though such were categorized as Productions. The Respondents state that the Petitioner was transferred to the Nugegoda Police Division consequent to the letter dated 24.04.2022 sent by the Deputy Inspector General of Police In-charge of the Vavuniya Division since the Petitioner was hindering the ongoing investigations.

The Respondents' contention in a nutshell is that the Petitioner was named as a suspect in the said case due to reasonable suspicion and prima facie evidence based on the statements of the 1st Respondent, the statements of the 5 other police officers, statement of a civilian and detailed call logs of the 2nd suspect and the Petitioner.

In terms of Article 140 of the Constitution, the Court of Appeal shall have full power and authority, inter alia, to grant and issue orders in the nature of writs of Certiorari and Prohibition against the judge of any Court of first instance or tribunal. As per the said Article such power and authority should be exercised by this Court only according to law.

The main issue which requires consideration of this Court is whether the decision making process of the learned Magistrate is flawed for illegality/irrationality/procedural impropriety.

The main contention of the Petitioner is that the learned Magistrate has not expressly made the Petitioner a suspect in the said case. In other words, the Petitioner asserts that there is no order made by the learned Magistrate making the Petitioner a suspect.

On a careful perusal of the 'B' report and further reports filed by the Police, it appears that several entries have been made against the Petitioner in order to make him a suspect in the said case. On 23.03.2022 after filing further 'B' reports, the Police has sought an order from the Magistrate's Court preventing the Petitioner from leaving the country. Although, the journal entry of the case record does not show the Petitioner's name under the list of

suspects, the learned Magistrate has referred to the Petitioner as the 5th suspect and issued an order imposing a travel ban on the Petitioner. Anyhow, the learned Magistrate has ordered to arrest the Petitioner only if the Petitioner attempts to leave the country and however, no specific order to arrest him has been made.

The Petitioner's name appears as the 5th suspect in the journal entry dated 06.06.2022. The learned Magistrate has ordered on 06.06.2022 to take appropriate steps in respect of the Petitioner who has been named as the 5th suspect. The relief sought by the Petitioner is to quash the same order of the learned Magistrate. However, it is observed that the Petitioner has failed to substantiate his argument as to why the impugned orders made by the learned Magistrate on 06.06.2022 are unlawful. It is abundantly clear that the only order made by the learned Magistrate in respect of the Petitioner on that specific day is to 'take appropriate steps in respect of the Petitioner'.

In the circumstances, I cannot see any vital ground for the Petitioner to invoke the writ jurisdiction of this Court against the said order dated 06.06.2022 made by the learned Magistrate. The Petitioner has failed to disclose any error of law made by the learned Magistrate.

It is very much pertinent to bear in mind that this is a judicial review application and judicial review is about the decision-making process, not the decision itself and accordingly, the role of this Court is to consider whether the learned Magistrate has exceeded his powers when making the impugned orders. In my view, there should be a blatant error made by the learned Magistrate in exercising his jurisdiction or any abuse of power or authority for the Petitioner to invoke the supervisory jurisdiction of this Court.

As I have noted in *Johnston Xaviour Fernando vs. C. D. Wickramaratne and others, CA/Writ/200/2022 decided on 21.06.2022*, 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.

It is observed that the Bail Act No. 30 of 1997 (as amended) does not apply to any person accused or suspected of having committed or convicted of an offence under;

1. the Prevention of Terrorism (Temporary Provisions) Act no.48 of 1979.
2. regulations made under the Public Security Ordinance.
3. any other written law which makes express provisions in respect of the release on bail of persons accused or suspected of having committed or convicted of offences under such other written law.

Similarly, the attention should be drawn to Section 15C of the Antiquities Ordinance which makes express provisions in respect of release on bail of persons charged with or accused of offences under the said Ordinance. Therefore, persons charged with or accused of offences under the Antiquities Ordinance falls within the 3rd category above. As a result, the provisions of the Bail Act do not apply to persons charged with or accused of offences under the Antiquities Ordinance.

Hence, based on the circumstances of this case, I am of the view that it is very much premature to decide whether the Petitioner is guilty or not of the alleged illegal excavation and further, it is not this Court but the learned Magistrate is the best person to assay the actions of the Petitioner and decide whether he has been a party to the said excavation.

Moreover, the Petitioner has failed, prima facie, to establish that the learned Magistrate has made an order against the law or the learned Magistrate has exceeded his powers in exercising his jurisdiction. Therefore, I am of the view that the Petitioner has not submitted an arguable case which warrants this Court to issue formal notice of this case on the Respondents. Hence, I proceed to refuse the application of the Petitioner.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal