

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, under
and in terms of Articles 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.*

CA/WRIT/323/2022

Duminda Lanka Liyanage
No.54/22A, Kumarage Watta,
Pelawatta
Battaramulla.

Petitioner

Vs.

1. Hon. Attorney General
Attorney General's Department,
Colombo 12.
2. Director, Colombo Fraud
Investigation Bureau, No.182,
Elvitigala Mawatha, Colombo 08.
3. Nawagamuwage Gerad Perera
No.187/7, Gemunu Mawatha,
Kiribathgoda

4. Abeyrathne Jayasundara Panditha
Herath Bandaranayake
Mudiyanselage Ranjith Senaka
Bandara, “Indunil”,
Bogahakumbara, Welimada.
5. Kobewattage Sumith Priyantha
Upasena
No.31/1, Old Veyangoda,
Nittambuwa.
6. Manthre Withana Eric Wilfred
No.199, Batakathara,
Madapatha
7. Dassanayake Mudiyanselage
Deepal Pushpa Kumara
No.54/05, Sri Seelalankarama
Mawatha, Malawiyakanda
Patumaga, Mulalekanda,
Homagama.
8. The Registrar
High Court of Colombo,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Shehan De Silva with Naveen Maharachchige and Hemal Senevirathne for the Petitioner.

Shaminda Wickrama, SC for the 1st Respondent.

Supported and Decided on : 21.10.2022

Sobhitha Rajakaruna J.

Heard learned Counsel for the Petitioner in support of this application and the learned State Counsel who appears for the Respondents opposing this application.

The Petitioner in this application is seeking, inter alia, to quash the indictments marked 'P17' to 'P20' filed in the High Court of Colombo by the Attorney General. In view of the precedent established in several decided cases including *Victor Ivan vs. Sarath Silva Attorney General and others (1998) 1 Sri. L.R. 340*, the decision to file an indictment can be reviewed and the prosecutorial discretion of the Attorney General is not unfettered or unreviewable. However, when challenging the decision of the Attorney General to prosecute an accused or decide to serve an indictment, the review Court should examine carefully the grounds of challenge.

In the Supreme Court case of *Sarath de Abrew vs. Chanaka Iddamalgoda and others, SC/FR/424/2015 SC minutes 11/01/2015*, the Court has held that where the legislature

has confided the power of the Attorney General to forward the 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 with an ulterior motive or in excess of jurisdiction.

The learned Counsel for the Petitioner points out that the grounds of challenge raised by the Petitioner are pleaded in paragraph 41 and 42 of the Petition of the Petitioner. In terms of paragraph 42 of the Petition, the purported element of bias of the Attorney General and also the alleged negligence by disregarding evidence have been mentioned as grounds for review. Further, the purported negligence of the Attorney General by disregarding the elements necessary to establish the offence of cheating has also been raised as a ground of challenge. It is observed that all four impugned indictments have been served based on the provisions of the Section 403 of the Penal Code.

Based on the circumstances of this case, this Court is of the view that none of the grounds disclosed by the Petitioner are sufficient or adequate in order to establish mala fides or any ulterior motive of the Attorney General; or to establish the fact that the Attorney General has acted in excess of his jurisdiction.

According to Wade and Forsyth in '*Administrative Law*', 11th Edition, at page 230 "no evidence" takes its place as yet a further branch of the principle of ultra vires. The Petitioner has no reliance on the said rule and anyhow has failed even to establish the basic ingredients of "no evidence" rule. However, based on the pleadings and the documents annexed to the Petition and also based on the submissions made by the learned Counsel, this Court sees that no viable reason has been demonstrated to establish the fact that the

Attorney General had not taken relevant material or had taken irrelevant material into consideration in arriving at his decision to prosecute the Petitioner.

The learned Counsel for the Petitioner submits that the Attorney General has failed, among other grounds, to consider the “payment plan” that was divulged in the Commercial High Court. This Court takes into serious consideration the remarks made by the Hon. High Court Judge of the said Commercial High Court in his order marked ‘P9’ against the Petitioner. We are of the view that such payment plan cannot be considered in the instant application to undermine any kind of investigation on the criminal liability of the Petitioner.

In the *Attorney General vs. Sivapragasam 60 NLR 468*, Sansony J. has observed that ‘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 the justice should be done’.

The learned State Counsel vehemently objecting to the issuance of formal notice on the Respondents draws the attention of this Court to the Fundamental Rights Application bearing No. SCFR 25/2021 in which the Petitioner of this case was the 2nd Petitioner. The learned State Counsel submits that the Petitioner has filed the said Fundamental Rights Application based on the identical grounds as in the instant application and he refers to the paragraph ‘b’ and ‘f’ of the prayer of the Petition of the said Fundamental Rights Application. It is observed that the Petitioners in the said Fundamental Rights Application have sought an order to stay the indictment against the Petitioners by the Attorney General and also has sought for an order in reference to the decisions made by the Attorney General in the Department file under reference No. CR 2/45/2017. The learned State Counsel

further asserts that this file of the Attorney General's Department is directly in reference to the impugned indictments that were served on the Petitioner. It is important to note that the Supreme Court has refused to grant leave to proceed in the said Fundamental Rights Application.

In the circumstances, this Court is of the view that there is no reason to interfere into the prosecutorial discretion of the Attorney General in the instant application as there appears that no blatant error was made by the Attorney General in his decisions and prima facie no evidence is available to disclose that the Attorney General has exceeded his powers.

This Court has consistently dealt with arguability principles in a Judicial Review application and held that the vitiating ground must be arguably material to the impugned decision and such decision must be arguably amenable to judicial review (see- *Jinadasa vs. Weerasinghe* 31 NLR 33 and *Chief Rabbi ex. p. Wachmann* (1993) 2 All ER 249).

In the circumstances, we proceed to refuse this application.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal