

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

*In the matter of an application in the nature
of Revision in terms of Article 138 of the
Constitution the Democratic Socialist
Republic of Sri Lanka.*

Court of Appeal No:

CA/CPA/0060/22

HC Gampaha

Case No. 251/20

Mohamed Imad Ibthisam Fakhir,

No.26/2A, Sumanarathne Mawatha,

Off Kalubowila Road,

Dehiwela.

PETITIONER

Vs.

1. Honourable Attorney General,
Attorney General's Department,
Colombo 12.

2. The Director,
Terrorism Investigation Division,
2nd Floor, New Secretariat Building,
Colombo 01.

3. Officer-In-Charge,
Unit 2,
Terrorism Investigation Division,
2nd Floor, New Secretariat Building,
Colombo 01.

RESPONDENTS

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : H. Ghazadi Hussain with Ashiq Hassim for the
Petitioner
: Sudharshana De Silva, DSG for the Respondents

Argued on : 16-03-2023

Written Submissions : 12-09-2022 (By the Petitioner)

Decided on : 23-05-2023

Sampath B. Abayakoon, J.

This is an application by the petitioner seeking to invoke the discretionary power of revision vested with this Court in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Petitioner is seeking to revise and set aside the order dated 01-04-2022 pronounced by the learned High Court Judge of Gampaha, in the High Court of Gampaha case number 251/2020.

This Court had the benefit of listening to the learned Counsel for the petitioner, as well as the learned Deputy Solicitor General (DSG) who represented the respondents, in order to determine the application.

The petitioner had been indicted by the Hon. Attorney General before the High Court of Gampaha, of the indictment dated 30th September 2020, on the following count.

1. “වර්ෂ 2017ක් වූ ජූලි මස 1 වන දින සිට වර්ෂ 2017ක් වූ දෙසැම්බර් මස 31 වන දින අතර කාලසීමාව තුළදී මෙම අධිකරණයේ බල සීමාව තුළ පිහිටි මල්වානහිදී යුෂ්මතා යම් තැනැත්තෙක් එනම් මොහොමඩ් තාසීම් මොහොමඩ් සහරාන් යන අය 1982 අංක 10 සහ 1988 අංක 22 දරන පනත් වලින් සංශෝදිත 1979 අංක 48 දරන ත්‍රස්තවාදය වැළැක්වීමේ (තාවකාලික විධිවිධාන) පනතේ 2 (1) (ඌ) වගන්තිය යටතේ වන වරදක් සිදු කිරීමට එනම් ISIS සංවිධානය සමග සම්බන්ධව මෙරට කණ්ඩායම් සංවිධානය කිරීමට සුදානම් වන බවට දැනුවත්ව හෝ ඒ බව විශ්වාස කිරීමට සාධාරණ හේතු ඇතිව එය පොලිස් නිලධාරියෙකුට දන්වා සිටීම පැහැර හැරීමෙන් එකී පනතේ 5 (අ) (2) වගන්තිය උල්ලංගනය කර බැවින් එකී පනතේ 5 වන වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදු කර බවය.”

Although the petitioner had been in remand custody when the indictment was forwarded to the High Court of Gampaha, he has been subsequently released on bail.

The indictment, together with its annexures had been served on the petitioner on 4th August 2021, and read over and explained to him. The learned Counsel who represented the petitioner has taken up a preliminary objection to the charge before the petitioner entering his plea on the basis that the charge preferred against the petitioner has no validity before the law, and cannot be maintained, therefore, the indictment should be rejected.

After having considered the basis for the objection raised on behalf of the petitioner, and having considered the submissions of both parties, the learned High Court Judge of Gampaha has overruled the said preliminary objection by the impugned order.

It is on the basis of being aggrieved by the said order, the petitioner has come before this Court.

At the hearing of this matter, the main argument of the learned Counsel for the petitioner was that the charge against the petitioner is on the basis that he failed to provide information to the authorities that the person mentioned in the indictment was in the process of organizing groups in collaboration with the organization called ISIS, but during the relevant time period mentioned in the indictment, the said organization named ISIS was not a prohibited organization in Sri Lanka.

He drew the attention of the Court to the Extraordinary Gazette No. 2223/3 of the Democratic Socialist Republic of Sri Lanka dated 13-04-2021, where it has been declared that any person who conspires to commit or attempts, abets or engages in any conduct in preparation to commit an offence in contravention of Regulation 3 of that Regulations, commits an offence, and shall on conviction by the High Court of the Western Province established under Article 154P of the Constitution holden in Colombo, be sentenced to a term of imprisonment not exceeding 10 years. The Gazette has provided the list of proscribed organizations for which the regulations become applicable.

The term ISIS is the reference to the organization called the Islamic State of Iraq and Syria *alias* Al-Dawlah al-Islamia Dawlah Islamia, which is one of the organizations proscribed.

It was the position of the learned Counsel that the mentioned ISIS was not a prohibited organization during the time relevant to the charge against the petitioner. The charge preferred against him was a charge unknown to the law, hence, there was no basis for the Hon. Attorney General to prefer an indictment against the petitioner.

It was his contention that the learned High Court Judge of Gampaha was misdirected as to the relevant legal principles when the preliminary objection was overruled.

It was pointed out by the learned DSG that the petitioner has challenged the same indictment by way of an application for a mandate in the nature of a writ of certiorari in terms of Article 140 of The Constitution before the Court of Appeal in CA (WRT) Application No. 74/2021, where their lordships of the Court of Appeal, after having considered the relevant legal provisions had dismissed the application on 26-03-2021.

It was the view of the learned DSG that knowing very well that his application for a writ of certiorari to quash the indictment has been dismissed by the Court of Appeal, the petitioner has taken up the same objection before the High Court of Gampaha and the learned High Court Judge of Gampaha has correctly overruled the objection. It was the position of the learned DSG that there exists no basis for the petitioner to succeed in this application, and it was his view that the application should be dismissed.

The mentioned Court of Appeal Writ Application judgement dated 26-03-2021 is filed of record. It is clear from the judgement that the petitioner has gone before the Court of Appeal seeking a writ of certiorari after the indictment was sent to the High Court of Gampaha, but before the indictment was served on him by the learned High Court Judge of Gampaha. It is also clear that the indictment has been served on the petitioner on 4th August 2021, after the petitioner's challenge to the indictment before the Court of Appeal was decided on 26-03-2021.

It needs to be noted that the same learned Counsel has appeared for the petitioner in the Court of Appeal application as well as before the learned High Court Judge of Gampaha when this preliminary objection was raised. Therefore, it is quite apparent that it was well within the knowledge of the learned Counsel the fact that his application for a writ of certiorari to quash the indictment has been unsuccessful. In fact, it had been brought to the notice of the learned High Court Judge when this objection was raised before the High Court of Gampaha.

The learned Counsel for the petitioner has raised the preliminary objection on the basis that the charge cannot be maintained because the mentioned

organization of ISIS was not a prohibited organization during the period relevant to the charge and the relevant Gazette has no retrospective effect. Hence, urging the learned High Court Judge of Gampaha to reject the indictment.

It is clear that the Gazette relied on by the learned Counsel for the petitioner to argue that the indictment should be rejected was not in existence when the Hon. Attorney General decided to indict the petitioner by the indictment dated 30-09-2020. The relevant Gazette is a Gazette published by the President of the Republic as the subject Minister, under the powers vested in him to make regulations in terms of section 27 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

For better understanding of the said Regulation, I will now reproduce it, which reads as follows.

27. (1) The Minister may make regulations under this Act for the purpose of carrying out or giving effect to the principles and provisions of this Act.

(2) Every regulation made by the Minister shall be published in the Gazette and shall come to operation on the date of such publication or on such later date as may be specified in the regulation.

(3) Every regulation made by the Minister shall as soon as convenient after its publication in the Gazette be brought before the Parliament for its approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of disapproval but without prejudice to anything previously done thereunder. Notification of the date on which a regulation is deemed to be rescinded shall be published in the Gazette.

In the Gazette relied on by the petitioner, the subject Minister has identified certain offences under the 3rd Regulation. In terms of the 5th Regulation, it has been promulgated that any person who conspires to commit or attempts, abets

or engages in any conduct in preparation to commit an offence in contravention of Regulation 3 of these Regulations, commits an offence, and shall on conviction by the High Court for the Western Province established under Article 154P of The Constitution holden in Colombo, be sentenced to a term of imprisonment not exceeding 10 years.

It is abundantly clear that by publishing these Regulations on 13-04-2021, the Minister under the powers vested in him in terms of section 27 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 has identified and determined that any person who engages with the organizations proscribed under the Regulations in the manner set out in Regulation 3 shall be punished after conviction before the High Court of the Western Province holden in Colombo as provided by Regulation 5 of the same Gazette.

The indictment under consideration is not an indictment preferred by the Hon. Attorney General in terms of the Regulations made under the Gazette mentioned by the learned Counsel for the petitioner. The indictment has been preferred in terms of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended. (Hereinafter referred to as the PTA).

The relevant section 2(1)(h) of the PTA under which the alleged offence committed by the petitioner has been described reads as follows;

2 (1) (h). Any person who by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups...shall be guilty of an offence under this Act.

It is abundantly clear the indictment has been so drafted to provide further specific information as to the allegation against the petitioner, for him to further understand the charge against him by informing that he failed to disclose to a police officer, knowing well that the mentioned Mohamed Thassim Mohamed

Saharan in collaboration with an organization called ISIS attempting to organize groups within Sri Lanka in order to commit a crime.

It is the view of this Court that whether the organization called ISIS was a proscribed organization within Sri Lanka or not is immaterial for the purpose of filing an indictment against the petitioner in terms of section 05 of the PTA. It is a matter for the prosecution to prove that fact, if it becomes a relevant fact to prove the charge against the petitioner only at the trial stage of the action.

It is also clear from the indictment; the intention of the Hon. Attorney General has been to charge him for the offence mentioned on the basis of the penalty for failure to give information as provided for in section 5 of the PTA where a specific penalty has been provided.

In terms of section 5 (1) (a) of the PTA,

Any person who knowing or having reasonable cause to believe that any person is making preparation or is attempting to commit an offence under this Act, fails to report the same to a police officer shall be guilty of an offence and shall on conviction, be liable to imprisonment either description for a period not exceeding 07 years.

It is clear that the Hon. Attorney General, after having considered the relevant material placed before him, especially the confession alleged to have been made by the petitioner has decided to indict him before the High Court of Gampaha for an offence as mentioned in the indictment.

I am of the view that the position of the learned Counsel for the petitioner that the indictment was wrong since the organization called ISIS was not a proscribed organization during the time relevant to the charge has no merit.

It is my considered view that when the indictment was preferred to the High Court, the Attorney General had the prosecutorial power to consider the offence in terms of the mentioned sections of the PTA.

In the case of **Vanik Incorporation Ltd. Vs. Jayasekara (1997) 2 SLR 365**, it was held that;

“Revisionary powers should be exercised where a miscarriage of justice has been occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice.”

As considered above, I am of the view that no positive miscarriage of justice has been occasioned to the petitioner due to the order of the learned High Court Judge to overrule the preliminary objection raised on behalf of him.

The application for revision is, therefore, dismissed.

The Registrar of the Court is directed to forward a copy of this judgement to the High Court of Gampaha for necessary information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal