

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 in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA No: WRIT/354/2022

Pallewaththa Gamaralalage Maithreepala
Yapa Sirisena,
C 79, Hector Kobbekaduwa Mawatha,
Colombo 07.

Accused-Petitioner

Vs.

1. Honourable Magistrate,
from Magistrate's Court, Colombo 01.
2. The Registrar
from Magistrate's Court, Colombo 01

Respondents

3. Rev. Cyril Gamini Fernando
The Residence of his Eminence the Cardinal
Gnanartha Pradeepa Mawatha,
Colombo 08.
4. Jesuraj Ganeshan
No. 75/16,
Paramananda Vihara Mawatha,
Colombo 13.

Complainant-Respondents

Before: N. Bandula Karunarathna J. (P/CA)

&

M.Ahsan.R. Marikar J.

Counsel: Faisz Musthapa PC, with Faizer Musthapa PC, Pulasthi Rupasinghe AAL, K. Thilakarathne AAL for the Petitioner.

Rohantha Abeysuriya PC, ASG, and S. Dunuwille SC for the Attorney General
R. Arsecularatne PC, with T. Punchihewa AAL, for the 3rd Respondent

Suren Gnanaraj AAL, with Roshini Dias AAL, instructed by Chinthaka Karunanayake for the Interventient Petitioner

Written Submissions: By the Petitioner – Not filed
By the Attorney General – Not filed
By the 3rd Respondent – Not filed
By the Interventient Petitioner – Not filed

Supported on : 07.03.2023

Decided on : 14.03.2023

N. Bandula Karunarathna J. P/CA

Motion dated 30.01.2023 filed by the 3rd respondent was supported by the learned President's Counsel Mr. Rienzie Arsecularatne under article 146 of the constitution.

In the present Writ Application the 3rd and 4th Respondents have filed a Private Plaint in the Fort Magistrate's Court on 16.09.2022 by way of the case bearing No. 23084/2022, in terms of section 136(1)(a) of the Code of Criminal Procedure Act No. 15 of 1979 against the petitioner of the instant application. The said respondents alleged, that the petitioner has committed an offence under section 298 of the Penal Code by doing negligent acts causing the death of the persons described in the 1st schedule to the plaint. Further, it was indicated in the said Private Plaint that the petitioner has committed an offence under section 329 of the penal code by doing acts negligently causing grievous hurt to the persons described in the 2nd schedule to the plaint.

The learned Magistrate heard the oral submissions on behalf of the 3rd and 4th respondents and made an order on 16.09.2022 issuing summons on the petitioner requiring the petitioner to be present in the Magistrate's Court on 14.10.2022. The petitioner by way of this application is seeking to quash the said order, claiming that the learned Magistrate has failed to exercise the discretion reposed in him in terms of section 139(1) (ii) of the Code of Criminal Procedure Act, in failing to consider whether he should examine on oath the complainant or some material witnesses before issuing summons against the petitioner.

The 3rd and 4th respondents argued that the said acts of omission by the petitioner named, resulted in causing the deaths of 296 persons and causing grievous or simple hurt to 596 persons. The deaths and grievous or simple hurt by the said explosion of bombs were dastardly acts committed on the general public of this Country, particularly the Catholic community on

Easter Sunday. The 3rd and 4th respondents further says that the said acts of criminal negligence have rendered many individuals invalid for life and has rendered many parents to lose their children and many children to lose their parents.

The learned President's Counsel for the 3rd and 4th respondents further says that the issuance of the summons by the learned Magistrate was, *inter alia*, based on a report compiled by the Commission of Inquiry appointed by the petitioner to inquire into and report or take necessary action on the bomb attacks on 21.04.2019.

Paragraph 19 of the said report recommended to the Hon. Attorney General to take action to institute criminal proceedings against the petitioner under any suitable provision of the penal code. The Attorney General has so far not taken any steps to implement the recommendation made by the said Commission of Inquiry in respect of the petitioner. The said case bearing No. MC Fort 23084/2022 instituted by the 3rd and 4th respondents is the only criminal case that has been instituted against the petitioner.

In the course of the hearing of the said application, the learned President's Counsel on behalf of the petitioner has taken the following position;

- (i) that the contents of the said report can only be used by the Hon. Attorney General in terms of section 24 of the Commission of Inquiry Act No 17 of 1948 as amended and the 2nd respondent is not entitled to rely on the contents of the said report.
- (ii) that the order made by the 1st respondent is not in conformity with the decision of the Court of Appeal in the case of Malinie Gunaratne, Additional District Judge, Galle vs. Abeysinghe and Another 1994 3 SLR 196.

The bench hearing this case by their order dated 21.01.2023 held that their Lordships have not yet decided to follow or not to follow the decision in the said case of Malinie Gunaratne (*supra*). In view of the gravity and the magnitude of the offences committed by the petitioner who was the Minister of Defence during the period, January 2015 to November 2019, and the Minister of Law and Order during the period, from October 2018 to November 2019, the public importance of this case and in view of the above questions of law that has to be determined, the learned President's Counsel for the 3rd and 4th respondents requests from this court that it is appropriate that this application be determined by a full bench of this court.

Acting in terms of article 146 of the constitution, the learned President's Counsel for the 3rd and 4th respondents moved to nominate a full bench to hear and determine this application.

According to the Eleventh amendment to the Constitution, article 146 of the Constitution is amended by the repeal of paragraph (2) of that article, and the substitution therefor, of the following paragraph: –

” (2) The jurisdiction of the Court of Appeal may be exercised in different matters at the same time by the several judges of the Court sitting apart:

Provided that-

- (i) its jurisdiction in respect of

- (a) judgments and orders of the High Court pronounced at a trial at Bar shall be exercised by at least three Judges of the Court; and
- (b) other judgments and orders of the High Court shall be exercised by at least two Judges of the Court;
- (ii) its jurisdiction in respect of its powers under article 144 shall be exercised by the President of the Court of Appeal or any Judge of that court nominated by the President or one or more of such Judges nominated by the President of whom such President may be one;
- (iii) its jurisdiction in respect of other matters shall be exercised by a single Judge of the Court unless the President of the Court of Appeal by general or special order otherwise directs."

Learned President's Counsel for the 3rd respondent requests that as there is a serious legal issue to be decided in this Writ Application, it is appropriate for a full bench of this court to be nominated to hear and determine about this matter.

Learned counsel for the 4th Respondent is also of the same view as the learned President's Counsel for the 3rd Respondent.

Learned President's Counsel for the petitioner vehemently objects to the said Application as it was previously decided on 26.01.2023 by another division of this court. When considering the said order dated 26.01.2023, it is my view that as there is a serious legal issue to be decided in this Writ Application, under article 146 (2) proviso (iii) of the Constitution the President of the Court of Appeal has the authority to nominate a full bench by general or special order otherwise directs.

It is important to note that page 3 of the order dated 26.01.2023 refers to the following sentence;

"However, this order should not be an impediment for the 3rd respondent to make an appropriate application to H/L the President of the Court of Appeal in view of getting a divisional bench appointed on a different ground, according to law."

Cases which deal with important matters are likely to have a significant impact are usually heard by larger benches. However, there have been instances when smaller benches of two or three judges have been assigned crucial issues with wide impact. Further, I wish to say that in terms of article 146 (iii) there is no legal barrier for the President of the Court of Appeal to nominate a full bench by general or special order.

Considering the circumstances of this case and the legal arguments raised by the learned counsel for the petitioner, I am of the view that this matter should be referred to a full bench which comprises the 5 most senior sitting Justices in the Court of Appeal.

Learned President's Counsel for the petitioner requests to make an order that until the final determination of this Writ Application, Fort Magistrate's Court case bearing No. 23084/2022, should not be preceded and should not take any further steps by serving the charge sheet and commencement of the trial, against the petitioner.

It is important to note that until the final conclusion of this matter if the Fort Magistrate's Court case bearing No. 23084/2022 commences its proceedings against the petitioner, the final outcome of this case would be negated. Therefore, giving a meaningful and a wider interpretation for the order dated 26.01.2023 this court directs the learned Magistrate – Fort, to lay by the said case bearing No. 23084/2022 until this court gives further directions, at the end of the conclusion in this present Writ Application.

The registrar of this court is directed to inform the learned Magistrate – Fort, about this order forthwith by telephone, fax, email, registered post and courier service.

The petitioner should bear the expenses for the said communication. Further, we direct the registrar of this court to issue certified copies of this order to all parties upon payment, except for the Attorney General.

President of the Court of Appeal

M.Ahsan.R. Marikar J.

I agree.

Judge of the Court of Appeal