

**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
Article 140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

CA/WRIT/291/2022

Dassanayake Mudiyansele Deepal Pushpa
Kumara
No. 54/5,
Sri Seelalankara Mawatha,
Malaviyakanda Mawatha,
Mulegama,
Homagama.

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. Abeyrathne Jayasundara Panditha Hearth
Bandaranayake Mudiyaselage Ranjith
Senaka Bandara
“Indunil”, Bogahakumbura,
Welimada.
4. Kobewattage Sumith Priyantha Upasena
No. 31/1, Old Veyangoda,
Nittambuwa.
5. Chandra Withana Eric Wilfred
No. 199, Batakathara,
Madapatha.
6. Thuwan Sahara Bahar
No. 98/4, Melrose Park,
Seeduwa Road,
Kotugoda.
7. Nawagamuwage Gerad Perera
No. 187/07, Gemunu Mawatha,
Kiribathgoda.
8. Duminda Lanka Liyanage
No. 54/22A, Kumarage Watta,
Pelawatta,
Battaramulla.

9. Nimavin Developers (Private) Limited
No. 187, Ward Place,
Colombo 07.

Presently at;
No. 54 /22A, Kumarage Watta,
Pelawatta,
Battaramulla

10. The Registrar
High Court of Colombo,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Upul Kumarapperuma with Radha Kuruwitabandara and Duvini Godagama
for the Petitioner.

Madhawa Tennakoon DSG with Ridma Kuruwita for the 1st Respondent.

Supported on : 24.11.2022 and 30.11.2022

Written Submissions: Petitioner -16.12.2022

Respondents- --

Decided on : 27.01.2023

Sobhitha Rajakaruna J.

The Petitioner has joined the 9th Respondent Company namely, Nimavin Developers Pvt. Ltd. ('Company') as a temporary employee in the capacity of a site supervisor in the year 2010. The 8th Respondent is the sole Director of the Company which engages in the business of construction development and real estate. The Petitioner was given a permanent appointment ('P2') on 03.01.2012 as the Marketing Manager of the Company by the 8th Respondent.

The Company initiated several housing projects during the years 2012 and 2013 and however, the Company has failed to handover the apartments to the relevant buyers as per the terms and conditions of the respective Agreements entered into between the said buyers and the Company. Thereafter, the 8th Respondent was indicted based on the complaints made to the Fraud Investigation Bureau by the 3rd, 4th, 5th, 6th and 7th Respondents alleging that the 8th Respondent has committed an offence under section 403 of the Penal Code as he has cheated and thereby dishonestly induced the complainants deceived to deliver houses upon payment of certain amounts of money. Subsequently, the Petitioner was also indicted in the High Court of Colombo based on charges under section 102 (read together with section 403) of the Penal Code alleging that he has abetted the 8th Respondent to commit above offences.

The Petitioner is seeking in the instant Application inter alia for writs of Certiorari quashing the Indictments against him and quashing such Indictments in so far as it relates to the Petitioner. The impugned Indictments bearing case Nos. HC 3817/22, HC 3819/22, HC 3820/22, HC 3813/22 and HC 3815/22, in the High Court of Colombo, are marked as 'X1', 'X2', 'X3', 'X4' and 'X5' respectively.

The Petitioner pleads that the 3rd Respondent, in the relevant complaint, has made no allegation against the Petitioner other than mentioning the fact that the Petitioner had signed

the Agreements in place of the 8th Respondent. Further, the Petitioner states that the complaints made by the 4th to 7th Respondents which led to indict the Petitioner in case Nos. HC 3819/22, HC 3820/22, HC 3813/22 and 3815/22 are also similar to the complaint made by the 3rd Respondent and expound the involvement of the Petitioner at the initial stages of the process of signing the Agreements and do not proclaim of any further communications with the Petitioner.

The Petitioner asserts that the above complaints have no direct implication against him and only his name has been mentioned in reference to his involvement at the pre agreement and agreement process. The Petitioner contends that he has strictly confined himself to the lawful discharge of his duties as an employee of the Company and had neither foreseen nor abetted in any fraudulent act as alleged in the Indictments.

The Petitioner's contention is that he signed the relevant Agreements acting in the capacity of the Marketing Manager of the Company upon the power conferred to him by the 8th Respondent by way of the 'Letter of Authorization', marked 'P4' and it was due to the unavailability of the 8th Respondent at the time of entering into such Agreements with the relevant buyers. It is observed that the Petitioner has signed the Agreements with the 3rd, 6th and 7th Respondents on behalf of the 8th Respondent upon the said Letter of Authorization and has only witnessed the other two Agreements with the 4th and 5th Respondents. The Petitioner further contends that the Indictments served on him are illegal, and null & void as much as he has been merely acting within the Contract of Employment and neither had any knowledge of an alleged misconduct by the 8th Respondent nor has abetted the 8th Respondent despite his performance as an employee of the Company.

Now, I advert to the Petitioner's challenge to the validity of the decisions of the Attorney General to indict the Petitioner. I am mindful of the precedent laid down in several judgements including *Land Reform Commission vs. Grand Central Limited (1981) 1 Sri. L.R. 250* wherein the norm that the Attorney General has wide powers in exercising his prosecutorial discretion has been well established. However, superior courts have found that the Attorney General's discretion in regard to institution of criminal proceedings cannot be

considered as absolute, unfettered or unreviewable. The review courts have adopted several grounds based on the circumstances of the respective cases to review the Attorney General's prosecutorial discretion. (Also see-*Saroja Govindasamy Naganathan alias Maharachchige Sarojani Perera and others vs. Hon. Attorney General and Wasantha Kumara Jayadewa Karannagoda, CA/WRIT/424/21 decided on 10.11.2021*)

In a nutshell the vital ground that needs consideration of this Court, at this stage is what prejudice would be caused to an accused who has been indicted, by placing his defence through evidence/material before the trial court rather than applying to the review court. Similarly, it is important to consider whether the review court can play the role of a trial judge and analyze evidence in respect of an alleged offence. After a wide reading on principles relating to prosecutorial discretion enunciated by courts in various jurisdictions, I take the view that the following guidelines or criteria are fit and proper to be adopted in the instant Application when considering the vires of the decisions of the Attorney General, particularly, in respect of the impugned indictments served on his behalf. Those should be applicable in addition to the traditional grounds of review in respect of an application for judicial review. Thus, it is appropriate to examine whether merely leading evidence for the prosecution in the trial court;

- i. is for the purpose of establishing the ingredients of the charge against the accused
- ii. could establish the ingredients of the charge
- iii. will be sufficient for the Trial Judge to efficaciously and adequately determine any primary issue with mixed facts and law or an issue of law.

If leading evidence for the prosecution does not fulfil the above requirements, my view is that there is a possibility to review the prosecutorial discretion exercised by the Attorney General. Similarly, when a decision/certificate of a public authority is material in order to establish the ingredients of a charge, it is necessary to examine whether the trial court could adequately and efficaciously review such decision and whether the trial court has power to review such decision/material. In light of the above, it is important to ascertain as to whether there is any

reasonable question in the instant Application which falls within any of the limbs of the above criteria.

Based on the submissions made on behalf of the Petitioner and on the pleadings, it appears that a question arises in the instant Application whether the Petitioner being a mere employee who is not in the capacity of leading the mind of the Company be liable to be indicted upon the criminal liability of the Company. It is noted that although the 8th Respondent is the sole Director of the Company, the Petitioner is merely an employee who was serving under a Contract of Employment. Another facet of this question is whether charges on abetting can be formulated against the Petitioner based on the criminal liability of the Company in which the 8th Respondent is the sole Director.

This Court at this threshold stage heard submissions only on behalf of the Petitioner and the 1st Respondent-Attorney General and however, the 2nd to 10th Respondents were absent and unrepresented. I am unable to find a strong ground to dismiss the instant application in limine. Hence, this Court should arrive at a final determination on the above questions after considering the affidavits of the Attorney General and/or other Respondents. It seems that no preliminary affidavit or any other documents have been filed on behalf of the Attorney General. Thus, on an overall conspectus of the submissions made by the learned Counsel of the Petitioner and the learned Deputy Solicitor General, I take the view that this Court should fully consider the questions discussed above on affidavits at a final hearing.

Having considered the issuance of notice, the question arises whether this Court should grant the interim relief that the Petitioner has sought. This Court is guided by the principle of balance of convenience in respect of the interim relief prayed for by the Petitioner. Thus, the Court will have the task of weighing the gravity of the aforesaid questions which needs consideration of this Court against the possible prejudice that would be caused to the Petitioner. As regard to the purported prejudice that would be caused to the Petitioner, this Court has drawn the attention to the sequence of events that took place from the time the Petitioner was produced before the Magistrate's Court.

In the circumstances, I am not inclined to issue an interim order to stay the proceedings of the pending cases against the Petitioner in the Colombo High Court. Anyhow, this Court expects all the parties would render their fullest corporation and assistance to hear and determine this Application expeditiously in order to avoid any unfavourable consequences due to non-issuance of an interim relief at this stage.

Hence this Court decides to issue formal notice on the Respondents.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal