

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

In the matter of an application under 140 of the
Constitution for mandates in the nature of writs
of certiorari and prohibition

CA Writ Application: 207/2023

Deshabandu Tennakoon
No.59 C, Keppetipola Mawatha,
Colombo 5

PETITIONER

-Vs-

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
2. C. D Wickremaratne,
Inspector General of Police,
Police Headquarters,
Colombo 01.
3. Prasad Ranasinghe,
Deputy Inspector General,
Criminal Investigations Department,
4th Floor, New Secretariat Building,
Colombo 1
4. W.C.I. Nalani Dissanayake,
Officer-in-Charge
Special Investigations Unit 3,
Criminal Investigations Department 4th Floor,
New Secretariat Building,
Colombo 1

RESPONDENTS

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

&

M. Ahsan R. Marikar J.

Counsel: Dr. Romesh De Silva, PC for the Petitioner

Suharshi Herath, DSG for the Respondents

Written Submissions: By the Petitioner – 16.06.2023

By the Respondents – 15.06.2023

Supported on : 05.06.2023

Decided on : **26.06.2023.**

N. Bandula Karunarathna J. P/CA

The Petitioner supported this application on 24.04.2023, seeking interim relief and notices against the Respondents prayed for in the prayers of the petition dated 24.04.2023.

The Learned President's Counsel appearing for the Petitioner informs Court that considering the urgency of the matter, they served the notices on the Attorney General at 09.00 am on the same day, namely 24.04.2023 and requested to support it at 12.30 pm.

The learned Deputy Solicitor General (DSG), who was before this Court to attend another matter, was directed by Court to take notice on behalf of the Attorney General. She said that she had not received any direct notice issued by the Petitioner regarding this Writ Application and sought permission to get instruction from the relevant authorities.

The Learned President's Counsel appearing for the Petitioner making submissions on behalf of the Petitioner indicated that this is an urgent matter and he wants to support it within the cause of the day. The court permitted the Learned President's Counsel to make his submissions *ex-parte* as the Respondents were absent and unrepresented. It is important to mention that as there were no instructions from the Respondents, the learned Deputy Solicitor General did not make any submissions.

Considering the submissions made by the Learned President's Counsel on behalf of the Petitioner, we decided to issue notices to all the Respondents and interim order under paragraphs G, H, I & J of the Petition dated 24.04.2023 only for 14 days.

Respondents were served all the documents, and they were represented by Learned Deputy Solicitor General on 10.05.2023. On that day, parties agreed that objections could be filed on or before 24.05.2023 at the registry, and counter objection could be filed, if necessary, on or before 31.05.2023. This matter was fixed for argument on 05.06.2023. The matter was argued on 05.06.2023, and all parties were permitted to file Synopsis on or before 15.06.2023. Judgment was reserved for 23.06.2023.

This is an application for a Writ of Certiorari to quash the letter dated 19.04.2023 marked P 4.

The petitioner further requests *inter alia* to grant the following reliefs;

- a) Issue notice on the Respondents;
- b) Call for and inspect the record;
- c) Grant a mandate in the nature of a Writ of certiorari quashing the letter/communication dated 19.04.2023 marked P 4 as far as the Petitioner is concerned and/or the reasons contained in P4 as far as it affects the Petitioner;
- d) Grant a mandate in the nature of a Writ of Prohibition prohibiting the Respondents and/or anyone and/or more of them from taking any further steps in respect of the Petitioner in consequence of and/or in respect of and/or in accordance with letter/communication dated 19th April marked P4;
- e) Grant a mandate in the nature of a writ of prohibition preventing the Respondents and/or anyone and/or more of them from arresting the Petitioner in respect of incidents on 09.05.2022;
- f) Grant a mandate in the nature of a writ of prohibition preventing the Respondents and/or anyone and/or more of them from naming the Petitioner, a suspect in respect of incidents on 09.05.2022 and/or 09.07.2022 in the relevant proceedings in the Magistrate's Court;
- g) Grant an interim order staying the effect of letter/communication dated 19.04.2023 marked P4 in respect of the Petitioner until the final hearing and determination of this application and/or an interim order pending the hearing and final determination of this application staying the effect of P 4;
- h) Grant an interim order restraining Respondents and/or anyone and/or more of them from taking any action whatsoever in consequence of or in respect of and/or in accordance with P 4 in respect of the Petitioner;
- i) Grant an interim order restraining Respondents and/or anyone and/or more of them from arresting the Petitioner;

- j) Grant an interim order retraining Respondents and/or anyone and/or more of them from naming the Petitioner a suspect in proceedings bearing No B.22046/22 and/or B 22516/22 pending in Magistrates Court of Colombo-Fort;
- k) Make an Order directing the 2nd to 4th Respondents to inform the Magistrate's Court that the Petitioner is not a suspect in respect of the incidents of 09.05.2022;
- l) Grant costs;
- m) Grant such other further and other reliefs as Your Lordships' court seems to meet.

The Petitioner states that he is the Senior Deputy Inspector General of Police and presently functions as the Senior Deputy Inspector General - Western Province (S/DIG/WP). He has a Bachelor of Arts Degree (Second upper) from the University of Colombo and a Master's degree from the University of Kelaniya. The Petitioner further says that he has an unblemished record in the Police Department. The Petitioner pleads that during his entire career as a police officer he has served the country and its people without any fear or favour and has consequently risen up the ranks in the police service. The Petitioner further states that he is in active service and no disciplinary action has been taken against him.

The 1st Respondent is the Hon. Attorney General.

The 2nd Respondent is the present Inspector General of Police.

The 3rd Respondent is the Deputy Inspector General of the Criminal Investigation Department (CID)

The 4th Respondent is the Officer-In-Charge of the Special Investigations Unit of the 3 Criminal Investigations Department, who has been reporting facts to the Court in the matter concerned herewith. The Petitioner pleads that the Petitioner verily believes that he has been considered for appointment as the Inspector General of Police. The Petitioner states that the Petitioner is known as an officer who is committed to the maintenance and to strict adherence to law and order.

The Petitioner states that for a certain period of time, certain parties who wanted to create a situation of anarchy in the country by interfering with government functions through illegal and undemocratic activities in the guise of public protests were against the appointment of the Petitioner as the Inspector General of Police.

The Petitioner states that false complaints and baseless allegations have been made against the Petitioner in this backdrop, and those allegations are in respect of two incidents that transpired on 09.05.2022 and 09.07.2022. There are two separate B Reports filed in the Fort Magistrate's Court pertaining to the incidents of 09.05.2022 and 09.07.2022: the first dealing with the assault of protesters in Galle Face by persons who had earlier assembled at Temple Trees and the second with

the storming of the President's House and Presidential Secretariat and incidents associated therewith.

The Petitioner pleads that **B 22046/22** deals with the 09.05.2022 incident where protestors at Galle Face Green were assaulted, and **B 22516/22** is regarding the storming of the President's House on the 09.07.2022. As far as **B 22516/22** is concerned and about the conduct of the learned Magistrate and orders made therein by the Learned Magistrate of Colombo Fort against the Petitioner, the Petitioner has instituted CA Writ 91/2023 before this Court, and Court was pleased to issue notice and interim orders as prayed for therein. The said matter now stands fixed for hearing on 19.05.2023, and objections of the Respondents and the Counter objections are respectively to be filed on 03.05.2023 and 10.05.2023.

The Petitioner pleads there was yet another Writ Application instituted before this Court bearing No CA Writ 437/22 emanating from the facts as reported in **B 22046/22** (Galle face incident on 09.05.2022) wherein the Petitioner has been made the 4th Respondent and this Court was pleased to dismiss the same on preliminary objections raised by the Respondents and the Hon the Attorney General.

The Petitioner pleads that the 1st Respondent represented the Criminal Investigations Department in the Magistrates Court in **B 22046/22** from the beginning and never made an application that the Petitioner be made a suspect in the proceedings. The learned Magistrate also did not make the Petitioner a suspect in the said matter. The Petitioner states that despite protests, the 2nd Respondent's tenure as the Inspector General of Police has been extended by 3 months from March 2023, and the same has been made public. In this backdrop, the 1st Respondent has suddenly sent a communication dated 19.04.2023, addressed to the 2nd Respondent, which, *inter-alia*, states as follows;

- a the Petitioner has abetted in the commission of offences punishable under sections 314,316,343 and 300 of the Penal Code within the meaning of section 100 of the Penal Code;
- b facts must be reported to the Magistrates Court after naming the Petitioner as a suspect;
- c a statement to be recorded from the Petitioner as a suspect;
- d a copy of the statement so recorded to be forwarded to the 1st Respondent thereafter.

The Petitioner states that to the best of his belief the CID did not seek such advice from the 1st Respondent, there was no evidence requesting for such advice and the 1st Respondent has, without being so requested, offered such advice as contained in P4. The Attorney General (the 1st Respondent) did not seek to make the Petitioner a suspect in the Magistrate's Court matter, and the last date in the said matter was 08.03.2023.

The Attorney General has no power or authority to have written P4 and, inter-alia, P4 is;

- a) Ultra vires the powers of the 1st Respondent, the Attorney General;
- b) Unreasonable in the circumstances of this matter

The petitioner's further states that P 4.

- a) Could be and would be used to prevent the Petitioner from being appointed as the Inspector General of Police;
- b) The Attorney General would have been aware and could not have been unaware that P4 would be used to prevent the Petitioner from being appointed as inspector General of Police.

The timing of P4 would cause a serious detrimental effect on the promotional prospects of the Petitioner. The evidence presently available does not disclose that the Petitioner in any way or manner has aided and abetted commission of any offences punishable under sections 314, 316, 343 and 300 of the Penal Code within the meaning of section 100 of the Penal Code.

It is important to note that there is no offence set out in sections 314, 316, and 343 of the Penal Code.

The Petitioner further pleads that:

- a) The Hon Attorney General the (1st Respondent) has acted ultra-wires his powers in writing the letter marked P 4 dated 19.04.2023;
- b) The 1st Respondent has failed to set out the offences which the 1st Respondent states that the Petitioner has abetted.

The Human Rights Commission of Sri Lanka, on a significant number of complaints received about the incidents that took place on the 09.05.2022, had appointed a Committee of Inquirers and conducted a thorough and comprehensive inquiry about the conduct of the Petitioner and exonerated the Petitioner from being guilty of any offence. As a result of a directive of the Hon. Attorney General contained in a letter dated 30.05.2022, a preliminary inquiry was conducted against the alleged conduct of Petitioner by a Senior Officer in the Ministry, and the Petitioner has been exonerated.

The Learned Magistrate of Colombo Fort had called for a report regarding alleged non-compliance with certain recommendations given by the Hon. Attorney General, and a comprehensive report had been issued by the Secretary to the Ministry of Public Security to the Court. Petitioner pleads that he has not interfered with any of the investigations conducted by the CID in respect of the incidents that took place on the 09.05.2022 and, in fact, as a witness, has fully cooperated in the investigations.

In the circumstances, the Petitioner says that he has acted duly and properly and discharged his functions according to the law. The Petitioner pleads that the Hon. Attorney General has failed to adhere to the rules of natural justice.

The petitioners pleads that the letter dated 19th April 2023 marked P4 is;

- a. Arbitrary;
- b. Unlawful, void ab initio and without force or effect in law;
- c. Contain errors on the face of the record;
- d. In breach. of the Petitioners' rights;
- e. Ultra vires;
- f. Unreasonable, irrational, capricious;
- g. In violation of the Petitioners' legitimate expectation;
- h. In violation of the rights of the Petitioners to natural justice;
- i. In violation of the principles of reasonableness, proportionality, the right to give reasons and the duty to act fairly.

The Petitioner further states that there is no offence disclosed against him in the Fort Magistrate's Court and that *ex-facie*, he cannot be guilty of committing and aiding and abetting the offences as alleged in P4 and be reasonably suspected of the same. The Petitioner says that *ex-facie* the Petitioner cannot be made a suspect in proceedings in **B 22046/22** in the Magistrates Court of Colombo-Fort. The Petitioner further submits that *ex-facie* the Petitioner is not guilty of any offence.

The Petitioner argued that grave and irreparable harm and damage would be caused to him, and this application would be rendered nugatory if interim relief prayed for is not granted. In the circumstances, the Petitioner states that there does not arise any reason or occasion for him to travel abroad save and except for official purposes and in any event, there has been a travel ban imposed against the Petitioner in the Magistrates Court. The Petitioner further states that there is no reason whatsoever to make him a suspect and arrest him.

At all times material, the Petitioner says that he has fully cooperated with the investigations and given several statements to the CID and is ready and willing at any given time to give any further statements if necessary. The Petitioner is coming before this Court regarding this matter within a short period of time as a matter of grave urgency and therefore reserves his right to amend the Petition and to furnish any material and documents and add the parties if the necessity arises.

On behalf of the Respondents, objections were filed along with an affidavit signed by the 2nd Respondent. The Respondents states that every reference to the averments in the Petition shall mean and include a reference to the corresponding averments in the Affidavit of the Petitioner, and an affidavit of the 2nd Respondent bears the facts enumerated in these Objections.

The Respondents raised 3 preliminary objections. They are as follows;

- a. The Petitioner is not entitled to obtain a Writ when major facts of the case are in dispute;
- b. The Petitioner has not exhausted other effective and alternative remedies available;
- c. At all times material to this application, the Petitioner has acted with ulterior motives and *mala fide*;

The Respondents admit that the Petitioner is the fourth most Senior Officer of the Sri Lanka Police as it stands today and further states that on the advice of the Hon. Attorney General a preliminary investigation was held in relation to the conduct of the Petitioner during the attack on the protest sites near Temple Trees Premises and the Presidential Secretariat on 09.05.2022.

The 2nd Respondent sought the approval of the National Police Commission through the Ministry of Public Security to hold a preliminary investigation on the conduct of the Petitioner. Accordingly, the National Police Commission, whilst approving the said request, nominated Mr. Saman Dissanayake, Additional Secretary to the Ministry of Defence, to be the inquirer of the said preliminary investigation.

Thereafter, the 2nd Respondent informed the National Police Commission in writing that such preliminary investigations are to be held through the Special Investigations Unit of the Police and included several examples of such preliminary investigations held against Senior DIG's in the past. However, the decision remained as an unprecedented and standalone decision to hold a preliminary investigation through an Additional Secretary to the Ministry of Defence who was nominated by the National Police Commission.

The Respondents state that the Special Investigations Unit is well equipped in knowledge and is specially established to conduct preliminary investigations against Police Officers. Thereby reception of testimonies on Police procedures and the findings are closer to home if it was handled by the SIU.

The Respondents are unaware of the averments contained in paragraph 9 of the Petition and states that the procedure of appointing the Inspector General of Police is constitutionally enumerated. According to the said Article of the Constitution, His Excellency, the President of Sri Lanka, is empowered to appoint the Inspector General of Police on the recommendation of the Constitutional Council. The Respondents states that the criterion of not recommending a nominee by the Constitutional Council is not known to them.

The Respondents admit the averments contained in paragraph 17 of the Petition and states that they were represented by the Hon. Attorney General in the application bearing number CA (Writ) 437/2022, which had been dismissed on preliminary objections taken up by the 1st - 4th Respondents regarding the maintainability of the said application and further states that to the best of the knowledge, this Court had held specifically that "In Sri Lanka, the power to initiate Criminal Proceedings against Public Officers is primarily vested with the Attorney General. "

Answering the averments contained in paragraph 18 of the Petition, the Respondents states that the Criminal Investigation Department was represented by State Counsel on several occasions before the Fort Magistrate's Court in relation to the case bearing number **B 22046/22**, and they are informed that the Hon. Attorney General has also on several occasions given advice in writing regarding the investigations conducted into the incidents which took place on the 09.05.2022 in terms of the powers vested with the Hon. Attorney General under the Code of Criminal Procedure Act, No. 15 of 1979. The affidavit of the Director of the Criminal Investigation Department contains details of all such advices that were sought and the manner in which the investigation was - conducted by the CID with the able guidance of the team of officers of the Attorney General's Department. The Learned Counsel for the Respondents says that all communication between the CID and the Attorney General's Department could be submitted to this Court under confidential cover for the perusal of this Court in order to arrive at a conclusion on the due process progressed between the CID and the Hon. Attorney General in a client-attorney relationship.

Answering paragraph 19 of the Petition, the Respondents state that the 2nd Respondent received his service extension from His Excellency the President pursuant to a recommendation by the Constitutional Council and that the 2nd Respondent will serve the public lawfully without fear or favour until the end of his term as extended. The Respondents admit the receipt of the letter marked P 4 to the Petition and state that by the said letter the Hon. Attorney General had advised the 2nd Respondent on the investigations handled by the CID as follows;

- a. That there is adequate evidence in relation to 32 suspects to institute criminal proceedings;
- b. To Discharge 4 suspects who were named previously for want of sufficient evidence;
- c. That evidence has transpired that the Petitioner had failed and omitted to act to prevent the commission of certain offences cited therein, as the person having authority to do so, and thereby abetted to the commission of such offences within the meaning of Section 100 of the Penal Code;
- d. Accordingly, to report facts to the Fort Magistrate's Court in terms of the Code of Criminal Procedure Act, No. 15 of 1979, having named the Petitioner a suspect in the case bearing number **B22046/22**;
- e. To record a statement of the Petitioner after having named him as a suspect;
- f. To forward such statement to the Hon. Attorney General.

The Respondents deny the averments contained in paragraph 21 and state that the Criminal Investigation Department has submitted all the Information Book extracts relevant to the investigations conducted and have requested the advice of the Hon. Attorney General for the consideration of preferring charges or to provide any advice on any further investigations. The affidavit marked 2R1 herewith provides details of the submission of Information Book Extracts to the Hon. Attorney General by the Criminal Investigation Department.

The Respondents deny as they are unaware of the averments contained in paragraphs 22 and 23 of the Petition and state that the Hon. Attorney General has wide powers vested in him under Section 393 of the Code of Criminal Procedure Act, No. 15 of 1979. Answering the averments contained in paragraphs 29 and 30 of the Petition, the Respondents state that the findings of the Human Rights Commission or the Preliminary Inquirer are not final and conclusive in respect of the criminal culpability of the Petitioner and the procedure followed in the fact-finding mission are different to criminal investigations conducted by the Sri Lanka Police, as per the provisions of the Code of Criminal Procedure Act. Such findings cannot be considered as a decisive matter in the criminal investigations done as per the provisions of the Code of Criminal Procedure Act, No. 15 of 1979.

Answering the averments contained in paragraph 32 of the Petition, the Respondents state that they are aware that the Petitioner has given several statements to the Criminal Investigation Department at different instances. The Respondents deny the averments contained in paragraph 33 of the Petition and state that the Hon. Attorney General, having considered the investigative material submitted to him by the Criminal Investigation Department, has advised naming the Petitioner as a suspect in MC Fort Case B22046/22. The statements recorded from the Petitioner and the material submitted by the Petitioner in support of his contention have been submitted along with other investigative material to the Hon. Attorney General for due consideration.

The Respondents deny the averments contained in paragraphs 36, 37 and 38 of the Petition and states that they strongly believe that Hon. Attorney General has given advice in terms of the law by letter marked P4, having considered all the material submitted to him by the Criminal Investigation Department. The Respondents further state that they have at all times acted according to the law and in the best interest of the public to ensure national security, public security and public safety.

In the aforesaid circumstances, the Respondents are advised to state that:

- a. The Petitioner has misrepresented facts in the Petition, and therefore, the application of the Petitioner should be dismissed in limine;
- b. The Application of the Petitioner is misconceived in law; and
- c. Therefore, the Petitioner is not entitled to any of the reliefs prayed for in his petition and thereby, the petition should be dismissed.

The Learned Deputy Solicitor General submitted in regard to the 1st Preliminary Objection that a Writ does not lie when the facts are in dispute. This Court has consistently held in numerous cases that the Court will not exercise its Writ Jurisdiction where facts are in dispute. In the case of Hettiarachchige Jayasooriya vs Gunawathie and others CA WRIT Application 63/2015 dated 26.09.2019, their Lordships' held that;

"Our courts have consistently held that it will not exercise writ jurisdiction where the facts are in dispute."

According to the available documents, the facts are not in dispute in regard to the incident that took place on 09.05.2022 and 09.07.2022, mainly focusing on the petitioner S/DIG. The respondents merely raised the said objection but unable to submit before this Court what are the disputed facts connected to the petitioner. If the respondents specifically indicated the facts which were in dispute connecting the petitioner to the incidents that took place on 09.05.2022 and 09.07.2022 in Colombo, then this Court is unable to exercise the writ jurisdiction considering the above authorities.

I am of the view that merely stating "the facts are in dispute" cannot be considered to dismiss the present Writ Application as the disputed facts in regard to the petitioner were not highlighted by the Learned Counsel for the respondents. The Learned Counsel appeared on behalf of the respondents and submitted various disputed facts in regard to the incidents that took place of 09.05.2022 and 09.07.2022, and it has no connection directly or indirectly against the Petitioner. When we considered the documents tendered to Court by both parties in the present Writ Application, it is crystal clear that the petitioner had acted reasonably and within the framework of his legal authority when he carried out his official duties.

The 2nd Preliminary objection raised by the Learned Deputy Solicitor General on behalf of the respondent was that a Writ would not lie if an alternative remedy which is equally effective is available to the Petitioner. What are the alternative remedies that the respondents are speaking of? This Court observes that any person dissatisfied with an order of a Magistrate can always invoke the appellate or revisionary jurisdiction of a Superior Court. The said provisions provide a person who is dissatisfied with an order of a Magistrate to invoke the revisionary jurisdiction of a Higher Court.

In the present case, after perusing the investigation reports filed by the various investigation units in the Police Department as well as the relevant administrative superiors, I am of the view that there is no evidence against the petitioner to punish him under section 100 of the Penal Code. It is important to reproduce the paragraphs of P 4 document, which are relevant to the present case. It is as follows;

My Reference: CR1/112/2022

P 4

Your Reference: DIG/CID/IGP/3399/22(3411)

19th April, 2023

Mr. C.D. Wickramaratne,
Inspector General of Police,
Police Headquarters,
Colombo 01.

MAGISTRATE'S COURT, FORT-CASE NO. B 22046/22

INVESTIGATION BY THE CID INTO INCIDENTS THAT TOOK PLACE ON 09TH MAY 2022

1. I refer to the notes of investigation and the information book extracts relating to the matter under reference.
2. Upon consideration of the material, I am of the view that there is evidence in relation to the commission of offenses punishable under sections 314, 316, 343 and 300 of the Penal Code against the following suspects whilst being members of an unlawful assembly along with others unknown. (32 names are mentioned)
3. Evidence also transpires that Mr. Deshabandu Thennakoon, Senior Deputy Inspector General of Police, (SDIG) had failed and/or omitted to act to prevent the commission of aforementioned offenses by the suspects above named along with the others unknown and had thereby abetted the commission of above offences within the meaning of Section 100 of the Penal Code.
4. Therefore, you are advised to report fax to the Magistrate Court under the Code of Criminal Procedure Act No. 15 of 1979 as amended, in case number B 22046/22 after naming Mr. Mr. Deshabandu Thennakoon as a suspect. Upon his statement being recorded as a suspect, please forward the same.
5. Examination of material does not disclose a sufficient basis to proceed against following suspect. (4 names are there)
You are advised to take steps to move for the discharge of the above 04 suspects on the basis of the discharge orders furnished herewith.
6. No further proceeding are contemplated against other persons except the 32 suspects noted above and Mr. Mr. Deshabandu Thennakoon, SDIG. Accordingly you are required to move the magistrate's Court for the lifting of travel bans on such other persons and to terminate proceedings against them.

Signed /
Sanjay Rajaratnam, PC
Attorney General

According to the above letter, the Hon. Attorney General has advised the Inspector General of Police (IGP) to name the Petitioner as a Suspect in MC Fort Case No. 22046/22 for aiding and abetting the commission of offences of hurt, grievous hurt and mischief on 09.05.2023 against those who were engaged in a lawful protest at the Galle Face Green, demanding former President, Gotabhaya Rajapaksa to step down.

It is important to mention that when I perused the **B** reports filed by the investigating authorities before the Fort Magistrate Court, there is no evidence against the Petitioner S/DIG, for aiding and abetting the commission of offences of hurt, grievous hurt and mischief on 09.05.2023 or

09.07.2023, against those who were engaged in protests demanding former President, Gotabhaya Rajapaksa to step down. When there is no evidence available with the investigators against the petitioner, there is no effective alternative remedy other than seeking a Writ of Certiorari and a Writ of Prohibition against the letter marked as P4. Therefore, the 2nd Preliminary Objection raised by the learned counsel for the Respondents cannot be sustained.

The 3rd Preliminary Objection raised by the Respondent is that the Petitioner has not come before this Court with clean hands (*uberima fides*)

The Learned Counsel for the respondents argued that from the inception of this application, the Petitioner has not been acting with clean hands before this Court. The Respondents submit that prayer "f" of the Petition of the Petitioner has sought the intervention of this Court to prevent the Petitioner from been made a suspect in relation to two incidents, which took place on 09.05.2022 and 09.07.2022. The Petitioner is well aware that the proceedings in MC Fort case bearing number **B 22046/22** is only in relation to the events which took place on 09.05.2022. It is further submitted that the document marked P4 by the Petitioner is specifically in relation to the said Magistrate Court Fort case on incidents that occurred on 09.05.2022.

The Learned Counsel further says that the Petitioner, while seeking this Court to quash the advice given by the Attorney General in relation to Magistrate Court Fort case number **B 22046/22**, which deals with the incidents that took place on 09.05.2022, is also seeking this Court to prevent any investigative body from making the Petitioner a suspect in relation to another incident which is no way connected to the document marked P4 by the Petitioner. Therefore, the Petitioner has attempted to use the prerogative relief that this Court is vested with by the Constitution to indirectly free him from any culpability in any future criminal proceedings he may be made a suspect. The Petitioner has therefore made this application before this Court with an ulterior motive and with *mala fides*.

I do not agree with the said argument considering all the B reports filed by the investigative bodies, as there is no evidence to charge the petitioner for abetting.

The other argument raised by the Learned Deputy Solicitor General under Rule 2(1) of the Appellate Rules cannot be considered against the Petitioner when depending on the proviso to this rule. It has to be noted that Rule 2(1) is the rule proper, and Rules 2(1) (a) and 2(1) (b) only serve as provisos to the rule proper. The effect of the proviso is that the court may grant interim relief "although such notice has not been given to some or all of the respondents" only when it is satisfied of the following two things.

They are as follows;

1. that there has been no unreasonable delay on the part of the applicant in giving such notice referred to in Rule 2(1)(a),

2. that the matter is of such urgency that the applicant could not reasonably have given such notice.

It is clear that the Learned President's Counsel made his submission on behalf of the petitioner on the 24.04.2023, upon satisfying this Court regarding the above-mentioned proviso. Therefore, I reject the 3rd Preliminary objection as there is no merit to it.

The Learned Counsel for the respondents further argued that the purpose of judicial review is keeping the powers of government within legal bounds so as to protect citizens against abuse by governmental functions. The judicial review is all about the decision-making process but not about the decision itself. This Court agrees with the said argument.

The contention of the Learned Deputy Solicitor General was that the judicial review is all about the decision being in valid but not about the decision being incorrect, and hence in the present instance, the decision of the Attorney General is only reviewable to the extent to see whether he had the power to issue such a letter at P 4.

It is my considered view that Section 393 of the Code of Criminal Procedure act has given powers to the Hon. AG and it should be implemented within the four corners of the Legal Frame work. The Hon. Attorney General has acted *ultra-vires* by issuing a P 4 letter specifically focusing on a Criminal liability against the petitioner when there is no evidence available against the petitioner in this case.

It was held in the case of R vs. DPP ex p Kebeline [1999] 3 WLR 972 that "decisions about prosecutions are not amenable to judicial review as complaints could equally be made at the trial. A review process by collateral proceedings unduly delays a trial affecting the administration of criminal justice system. The only exception that provided for is when there is manifest *mala fide* decisions or exceptional circumstances which warrant such review.

It is true and fair that the judicial review cannot be sought against the Hon. Attorney General where the discretion of the Hon. Attorney General has been exercised within his powers and *bona fide*. But considering the documents filed of this record, it is Crystal clear that the Hon. Attorney General has acted beyond his powers, and it is a manifest *mala fide* decision.

I wish to reiterate that in the present Writ Application the decision of the Hon. Attorney General marked as P 4 comes under exceptional circumstances as there is no evidence against the petitioner to charge him for abetting the offences punishable under sections 314, 316, 343 and 300 of the Penal code. I do not hesitate to state with great regret that the decision taken by the Hon. Attorney General to prosecute the Petitioner in this case is unjust and unjustified.

- a) For the reasons set out above, a Writ of Certiorari is issued quashing the letter/communication dated 19.04.2023 marked P4 as far as the Petitioner is concerned and/or the reasons contained in P4 as far as it affects the Petitioner;

- b) For the reasons set out above, a Writ of prohibition is issued prohibiting the Respondents and/or anyone and/or more of them from taking any further steps in respect of the Petitioner in consequence of and/or in respect of and/or in accordance with letter/communication dated 19th April marked P4;
- c) For the reasons set out above, a Writ of Prohibition is issued prohibiting preventing the Respondents and/or anyone and/or more of them from arresting the Petitioner in respect of incidents on 09.05.2022;
- d) For the reasons set out above, a Writ of Prohibition is issued prohibiting preventing the Respondents and/or anyone and/or more of them from naming the Petitioner, a suspect in respect of incidents on 09.05.2022 and/or 09.07.2022 in the relevant proceedings in the Magistrate's Court;
- e) For the reasons set out above, this court makes an Order directing the 2nd to 4th Respondents to inform the Magistrate's Court that the Petitioner is not a suspect in respect of the incidents of 09.05.2022;

Considering the circumstances of the case, we make no order for cost.

President of the Court of Appeal

M. Ahsan R. Marikar J.

I agree.

Judge of the Court of Appeal.