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

In the matter of an Application for Orders in the nature of Writs of Certiorari, Prohibition and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA (Writ) Application No. 338/2011

1. Wickremasinghage Francis Kulasooriya,

2. Devamuni Lakshman de Silva

   Presently remanded at
   Remand Prison, Mahara.

PETITIONER

Vs.

1. Officer-In-Charge
   Police Station,
   Kirindiwela.

2. Hon. Attorney General,
   Attorney General's Department
   Colombo 12.

3. W. Aravinda Perera
   The Magistrate of Pugoda,
   Magistrate's Court, Pugoda.

3A. D.A.R Pathirana
The Magistrate of Pugoda
Magistrate's Court, Pugoda.

4. Amarasinghe Arachchige Simon Amarasinghe
172B, Siyambalagahawatta,
Pepiliyana.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Shantha Jayawardena with Chamara Nanayakkarawasam for the Petitioners

Ms. Nayomi Wickramasekara, Senior State Counsel for the 1st and 2nd Respondents

Uditha Egalahewa, P.C, with Hemantha Gardihewa for the 3rd Respondent

J.C.Weliamuna, P.C, with Pasindu Silva and Thilini Vidanagamage for the 4th Respondent

Argued on: 18th June 2018

Written Submissions of the Petitioner tendered on: 20th July 2018

Written Submissions of the 1st and
2nd Respondents tendered on: 10th September 2018

Written Submissions of the 3rd
Respondent tendered on: 16th July 2018

Written Submissions of the 4th
Respondent tendered on: 20th July 2018

Decided on: 22nd October 2018

Arjuna Obeyesekere, J

By an amended petition dated 31st May 2011, the Petitioners have sought the following relief:

a) A Writ of Certiorari to quash the proceedings in Case No. NS/577 in the Magistrate's Court of Pugoda;

b) A Writ of Certiorari to quash the Order of the 3rd Respondent[1] refusing to discharge the Petitioners in Case No. NS/577 in the Magistrate's Court of Pugoda;

c) A Writ of Prohibition prohibiting the 3rd Respondent from proceeding with Case No. NS/577 in the Magistrate's Court of Pugoda;

[1] The 3rd Respondent was the Magistrate of Pugoda who made the said Order.

d) A Writ of Mandamus directing the 3rd Respondent to discharge the Petitioners from the proceedings in Case No. NS/577 in the Magistrate's Court of Pugoda;

e) An interim order suspending and/or staying further proceedings in Case No. NS/577 in the Magistrate's Court of Pugoda until the final determination of this application.

The application for interim relief had been supported on 3rd June 2011. This Court, having heard the learned Counsel for the Petitioners and the Hon. Attorney General had issued the aforementioned interim order. Taking into consideration the circumstances of this case, this Court had issued a direction to release the Petitioners from the proceedings of Case No. NS/577 in the Magistrate's Court of Pugoda, with a further direction to the Petitioners to appear in the Magistrate's Court when noticed.

The facts of this case very briefly are as follows.

The 1st Petitioner was a Sub-Inspector of Police and the 2nd Petitioner was a Police Constable serving at the Kirindiwela Police Station at the time the incident, which is the subject matter of this application, arose. According to the Petitioners, while they were on mobile duty on 13th August 2010 at about 2055 hours, they had been informed by the Kirindiwela Police Station that a person under the influence of alcohol was behaving violently and causing nuisance to the public, close to the Papiliwela junction in the Kirindiwela area. The Petitioners, together with Police Driver Dharmasiri had proceeded to the

said location, arrested the said person, Amerasinghe Arachige David Amerasinghe and put him inside the rear of the Police Cab. The Petitioners claim that while they were proceeding to the Kirinidiwela Police Station, Amerasinghe had jumped out of the Police Cab. The Petitioners claim further that Amerasinghe sustained injuries and was bleeding from his ear and that with the assistance of the persons who were around, they had taken Amerasinghe to the Radawana Government Hospital. In view of the serious injuries sustained by Amerasinghe, he was transferred to the Gampaha National Hospital and thereafter to the National Hospital, Colombo where he succumbed to his injuries at about 5.30am on 14th August 2010.

On the same day, i.e. 14th August 2010, the Officer-in-Charge of the Kirindiwela Police Station had reported facts by way of a "B" Report filed in the Magistrate's Court of Pugoda Case No. B/678/2010. The Unofficial Magistrate had conducted his investigations the same day and after recording statements of several witnesses, had ordered that a post mortem examination be conducted. He had also directed that the Police Officers involved in the arrest of Amerasinghe be present in Court on 16th August 2010.

The Consultant Judicial Medical Officer of Colombo at that time had conducted the post mortem examination on 15th August 2010. The 'cause of death' form submitted by the Judicial Medical Officer to the Magistrate's Court on 16th August 2010 specified that there were head injuries due to blunt trauma and that the injury pattern is suggestive of a back fall and hitting the right side of the head.

At the Inquest conducted on 18th August 2010, several witnesses had given evidence, with some of them giving versions different to what was in the 'B' report, especially with regard to the manner in which Amerasinghe received his injuries.

In this factual background, when the case was called in the Magistrate's Court of Pugoda on 18th August 2010, the learned Magistrate had made an order remanding the Petitioners. The application for bail had been refused by the learned Magistrate as the investigations were continuing. The subsequent revision application filed by the Petitioners in the High Court of Gampaha seeking bail had been rejected by the learned High Court Judge.

The Post Mortem Report had been submitted to the Magistrate's Court of Pugoda on 9th September 2010. A copy thereof has been annexed to the petition marked '**P5**'. This Court has examined '**P5**' and notes that there were several external injuries on the body of Amerasinghe, which have been caused by blunt trauma. Although the cause of death has been given as head injuries due to blunt trauma, the Judicial Medical Officer had specifically stated that there was no evidence of injuries of intentional violence.

The Petitioners claim that by an order dated 22nd December 2010, the learned Magistrate had formed the opinion that the death of Amerasinghe was a homicide and decided to conduct a Non-Summary Inquiry (NSI), pending which both Petitioners were kept in remand custody. The charge sheet had been filed on 7th February 2011 against the Petitioners for causing the death of Amerasinghe, an offence punishable under Section 296 of the Penal Code.

The Petitioners state further that bail applications filed on their behalf in the High Court of Gampaha in January 2011 had been refused by the learned High Court Judge of Gampaha by his Order dated 25th February 2011, inspite of the Hon. Attorney General informing Court that there is no objection to the granting of bail.

While the above developments were taking place, by a letter dated 28th December 2010, the Hon. Attorney General had called for the original case record in the said case. By a letter dated 28th February 2011, the Hon. Attorney General had issued the following letter to the Senior Superintendent of Police, with a copy to the learned Magistrate:

"පූගොඩ මහේස්ත්‍රාත් අධිකරණය - නඩු අංක: බී. 678/10

පහත සඳහන් වුදිතයින්ට විරුද්ධව තවදුරටත් නීති මගින් කටයුතු කිරීමට අදහස් නොකරන බවත් ඔවුන් නිදහස් කල හැකි බවත් මහේස්ත්‍රාත් වෙත දැන්විය_යුතුය. මේ සම්බන්ධව මහේස්ත්‍රාත්_අධිකරණය වෙත වාර්තා කිරීමෙන් පසුව ඒ පිළිබඳව අධිකරණය ගත් ක්‍රියා මාර්ගය මේ සමග අමුණා ඇති ආකෘතිය මගින් මෙම ලිපිය ලැබී දින දාහතරක් (14) ඇතුළතදි මා වෙත වාර්තා කළ යුතුය.

01. උ.පො.ප විකුමසිංහගේ ප්‍රැන්සිස් කුලරත්න

02. පො.කො. 47494 දේවමුණි ලක්ෂ්මන් සිල්වා"

The contents of the said letter were conveyed to the learned Magistrate in open Court on 3rd March 2011 by the Inspector of Police appearing for the Prosecution. However, the learned Magistrate had wanted to clarify matters with the Hon. Attorney General and the matter had been refixed for 31st March 2011. This Court observes that in his affidavit submitted to this Court, the learned Magistrate has taken up the position that the Hon. Attorney

General has not issued any direct instructions to the Magistrate with regard to the conduct and/or conclusion and/or termination of the non-summary proceedings and therefore the said letter cannot be construed as a directive issued under the provisions of Section 398(2) of the Code of Criminal Procedure Act No 15 of 1979, as amended.

On 31st March 2011, a Senior State Counsel representing the Hon. Attorney General appeared before the learned Magistrate and made submissions on the legal position with regard to the aforementioned advise tendered by the Hon. Attorney General. By his order delivered on 28th April 2011, the learned Magistrate had refused to discharge the Petitioners and proceeded with the non-summary inquiry. This Court observes that on that date, the learned Magistrate had recorded the evidence of several witnesses including that of Kulatissa who had stated that he witnessed the 1st Petitioner assaulting the deceased Amerasinghe.

Being dissatisfied with the order of the learned Magistrate refusing to discharge them from the Non summary proceedings, the Petitioners invoked the Jurisdiction of this Court, seeking the aforementioned relief.

This matter was taken up for argument on 18th June 2018, at the conclusion of which the learned Counsel for all parties agreed to tender written submissions on the following:

1) Whether the Writ jurisdiction of this Court conferred under Article 140 of the Constitution would extend to review an order of the Magistrate's Court;

2) Whether a Magistrate is bound to comply with a direction issued by the Hon. Attorney General prior to the conclusion of a non-summary inquiry.

All parties had accordingly tendered written submissions. The learned President's Counsel appearing for the 3rd and 4th Respondents, while addressing the above two issues, had taken up the position that even though on a plain reading of Article 140 of the Constitution, the power to issue orders in the nature of Writs against any Court of first instance has been recognised, this Court should not exercise the discretion vested in this Court in this instance as the Petitioners had an alternative remedy by way of preferring an appeal or a revision application, seeking to set aside the impugned order of the learned Magistrate.

It has been held in several judgments delivered by this Court as well as by the Supreme Court that a Writ will not lie if an alternative remedy which is equally effective is available to the Petitioner. Thus, in the event of this Court upholding the said argument, the necessity to consider the aforementioned two questions would not arise. This aspect however, had not been addressed during the oral submissions. Hence, when this matter was mentioned for judgment on 20th September 2018, this Court requested the learned Counsel for the Petitioners to tender his response with regard to the said submission. Accordingly, the learned Counsel for the Petitioners has tendered several judgments in order to demonstrate that a Writ would lie even though an alternative remedy was available

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[2] or revisionary jurisdiction of this Court [or the High Court of the Province], as provided for in Article 138(1) of the Constitution, which reads as follows:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance tribunal or other institution may have taken cognizance:"

The power of this Court to make any order as the interests of justice may require, in the exercise of its revisionary jurisdiction, has been set out in Article 145 of the Constitution, which reads as follows:

> "The Court of Appeal may, *ex mero motu* or on any application made, call for, inspect and examine any record of any Court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require."

[2] Provided such a right is available.

This Court also observes that in terms of Section 364 of the Code of Criminal Procedure, the "Court of Appeal may call for and examine the record of any case, whether already tried or pending trial in the High Court or Magistrate's Court, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed therein or as to the regularity of the proceedings of such court."

The above provisions provide a person who is dissatisfied with an order of a Magistrate to invoke the revisionary jurisdiction of this Court, which has been explained by the Supreme Court in **Marian BeeBee Vs. Seyed Mohamed and others**[3] in the following manner:

> "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this court itself, in order to avoid miscarriage of justice."

The Petitioners however have not chosen the path of revision nor have they explained as to why they have not done so. It is in this background that this Court would like to consider the aforementioned preliminary issue.

The Respondents have referred this Court to several judgments in support of their argument. Although none of these judgments relate to revision, the principle laid down in these cases would be helpful in reaching a conclusion in this regard.

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[3] 69 C.L.W 34.

In **Halwan and Others v. Kaleelul Rahuman**[4], the petitioners had sought a Writ of certiorari to quash an order made by the Wakf Board. An objection was taken that in terms of the Muslim Mosque and Charitable Trusts or Wakfs Act, No. 51 of 1956 (as amended), a right of appeal is available to this Court from the said order and as the petitioners have in fact sought to exercise that right of appeal, the application for the Writ of Certiorari could not be maintained.

Justice Sarath Silva (as he then was) upheld the above argument, having held as follows:

> "A party dissatisfied with a judgment or order, where a right of appeal is given either directly or with leave obtained, has to invoke and pursue the appellate jurisdiction. When such party seeks judicial review by way of an application for a writ, as provided in Article 140 of the Constitution he has to establish an excuse for his failure to invoke and pursue the appellate jurisdiction. Such excuse should be pleaded in the petition seeking judicial review and be supported by affidavit and necessary documents. In any event, where such a party has failed to invoke and pursue the appellate jurisdiction the extraordinary jurisdiction by way of review will be exercised only in exceptional circumstances such as, where the court, tribunal or other institution has acted without jurisdiction or contrary to the principles of natural justice resulting in an order that is void. The same principle is in my view applicable to instances where the law provides for a right of appeal from a decision or order of an institution or an officer, to a statutory tribunal."

[4] 2000 (3) Sri LR 50 at page 61.

The learned Counsel for the Petitioner has referred to the judgment of the Supreme Court in **Sirisena vs Kotawera-Udagama Co-operative Stores Ltd**[5] where a Writ of Certiorari was sought to quash an award of an arbitrator to whom a dispute had been illegally referred under the Co-operative Societies Ordinance. In response to an objection taken that discretionary Writs such as Certiorari should not issue where another and equally effectual remedy was and is available to the Petitioner, Gratien J held as follows:

> "It is no doubt a well recognised principle of law that a Supreme Court will not *as a rule* make an order of *mandamus* or *certiorari* where there is an alternative and equally convenient remedy available to the aggrieved party. But the rule is not a rigid one. In R. v. Wandsworth Justices-ex parte Read[6] an application was made for an order of *certiorari* quashing a conviction made by the justices in excess of their jurisdiction. Objection was taken, *inter alia*, that as the accused had a right of appeal to quarter sessions, *certiorari* did not lie. Caldecote L.J., in over-ruling the objection, said "as to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, in such circumstances as these, if the applicant prefers to ask for an order of *certiorari* to quash the conviction obtained in the manner I have described, the Court should be debarred from making an order. In this case it has been admitted by the justices that a mistake was made. This Court is in a position to remedy that mistake by making an order of *certiorari* to quash the conviction, and that is the proper order which I think this Court should make ". Humphreys J.

[5] 51 NLR 262.
[6] (1942) 1 All E.R 56.

in a separate judgment expressed the view that "if a person can satisfy this Court that he has been convicted of a criminal offence *as the result of a complete disregard by the tribunal of the laws of natural justice,* he is entitled to the protection of this Court" *even though an alternative remedy was also available.* I think that these observations are appropriate to the present proceedings."

This Court observes that the above judgments arose from decisions of administrative bodies whereas the decision that is sought to be quashed in this application is an order made by a court of first instance.

Recourse to judicial review where an appeal to a higher court is available has been discussed in **Judicial Remedies in Public Law**[7] in the following manner:

"Judicial review is, in principle, available in relation to the acts and omissions of inferior courts such as the county court or magistrates' courts. In practice, the availability of judicial review is likely to be limited by the availability of other methods of challenge such as appeals. Judicial review will not normally be permitted if there are adequate alternative remedies available. There are rights of appeal against decisions of district judges and county courts, for example. Where the possibility of an appeal to a higher court exists, that route is the appropriate method of challenging the original decision rather than a claim for judicial review unless there are exceptional circumstances justifying bring a claim for judicial review."

[7] By Sir Clive Lewis [5th Edition] page 75.

"A court may, in its discretion, refuse to grant permission to apply for judicial review or refuse a remedy at a substantive hearing if an adequate alternative remedy exists, or if such a remedy existed but the claimant had failed to use it. The courts have evolved a general principle that an individual should normally use alternative remedies where these are available rather than judicial review. The courts take the view that: "...save in the most exceptional circumstances, judicial review jurisdiction will not be exercised where other remedies are available and have not been used."[8]

The question that arises for consideration in this application is what should a Court exercising Writ jurisdiction do, when confronted with an argument that an alternative remedy is available to the Petitioner and that such alternative remedy should be resorted to? This Court is of the view that a rigid principle cannot be laid down and that the appropriate decision would depend on the facts and circumstances of each case. That said, where the statute provides a specific alternative remedy, a person dissatisfied with a decision of a statutory body should pursue that statutory remedy instead of invoking a discretionary remedy of this Court. That remedy should be equally effective and should be able to prevent an injustice that a Petitioner is seeking to avert. Furthermore, if the Writ jurisdiction is invoked where an equally effective remedy is available, an explanation should be offered as to why that equally effective remedy has not been resorted to.

[8] Ibid; page 430.

This matter has been considered recently by this Court in **J.H.S Jayamaha vs Provincial Public Service Commission (North Western Province) and others**[9], where Justice Janak De Silva, after a careful consideration of the relevant authorities, held as follows:

> "However, as it is a general principle, Courts have recognized several qualifications in its application. There may be situations where the alternative remedy is not adequate and efficacious in which event judicial review is available[10]. It maybe that judicial review is capable of providing immediate means of resolving the dispute in which case it may be the more appropriate procedure. There may also be a need to obtain interim relief which may not be possible under the alternative procedure. This is not an exhaustive list and there are certainly other instances where judicial review may be granted even though an alternative administrative procedure exists."

This Court is in agreement with the above view and is also in agreement with the following statement of Lord Donaldson of Lymington M.R. in **Reg. v. Panel on Take-overs and Mergers *Ex Parte* Guinness Plc**[11], which has been referred to in **Jayamaha's** case:

> "I approach this appeal by reminding myself that the judicial review jurisdiction of the High Court, and of this court on appeal, is a supervisory or "long stop" jurisdiction... I also remind myself that, consistently with this "long stop" character, it is not the practice of the court to entertain

[9] CA(PHC)No. 188/2014; CA Minutes of 5th July 2018
[10] E.S. Fernando v. United Workers Union and another (1989) 2 Sri L.R. 199.
[11] (1990) 1 Q.B. 146 at 177 – 178.

an application for judicial review unless and until all avenues of appeal have been exhausted, at least in so far as the alleged cause of complaint could thereby be remedied. The rationale for this self-imposed fetter upon the exercise of the court's jurisdiction is twofold. First, the point usually arises in the context of statutory schemes and if Parliament directly or indirectly has provided for an appeals procedure, it is not for the court to usurp the functions of the appellate body. Second, the public interest normally dictates that if the judicial review jurisdiction is to be exercised, it should be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave to apply should be given."

That brings this Court to the facts of this application once again. The Petitioners complaint is that the learned Magistrate failed to comply with the decision of the Hon. Attorney General and discharge them from the non-summary proceedings. As the Petitioners were dissatisfied with the said decision, the Petitioners could have invoked the revisionary jurisdiction of the High Court of the Province, which is a statutory remedy provided by the Constitution. This Court is of the view that the revisionary jurisdiction is an equally effective remedy that the Petitioners could have resorted to, where the legality or propriety of the order of the learned Magistrate could have been considered. No explanation has been offered by the Petitioners as to why they did not invoke the revisionary jurisdiction, although this Court observes that the Petitioners did in fact file revision applications when the learned Magistrate refused to grant bail. Perhaps, the refusal of bail by the Provincial High Court may have prompted the Petitioners to file this application and seek the interim relief, which would then have the same effect as being released on

bail. In these circumstances and given the peculiar facts of this case, this Court is in agreement with the submission of the learned President's Counsel for the 3rd and 4th Respondents.

There are two other matters that this Court would like to advert to, in this regard. The first is that the Petitioners could have proceeded with the non-summary inquiry and permitted the learned Magistrate to make a suitable decision based on the evidence at the end of the inquiry. The learned Magistrate would then have been in a better position to decide whether the material is sufficient for him to act in terms of Section 154(1) of the Code of Criminal Procedure[12] and commit the Petitioners to stand trial in the High Court or else discharge them, for lack of evidence[13]. Thus, to some extent, this application is premature. The second matter is that the Hon. Attorney General can act in terms of Section 396 of the Criminal Procedure Code[14] and quash the committal, if the Hon. Attorney General is of the view that the evidence is insufficient to indict the Petitioners in the High Court.

For the reasons set out in this judgment, this Court upholds the aforementioned preliminary objection raised by the learned President's

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[12] Section 154(1) of the Code reads as follows: "If the Magistrate considers the evidence sufficient to put the accused on his trial, the Magistrate shall commit him for trial before the High Court."

[13] Section 153(1) of the Code reads as follows: " If the Magistrate considers that the evidence against the accused is not sufficient to put him on his trial, the Magistrate shall forthwith for reasons to be recorded by him order him to be discharged as to the particular charge under inquiry;"

[14] Section 396 reads as follows: "If, after the receipt by him of the certified copy of the record of an inquiry forwarded under Section 159, the Attorney-General is of the opinion that there is not sufficient evidence to warrant a commitment for trial, or if for any reason he is of the opinion that the accused should be discharged from the matter of the complaint, information or charge, and if the accused is in custody from further detention, he may by order in writing quash the commitment made by the Magistrate and may direct the Registrar of the High Court to return the record of the inquiry to the Magistrate's Court. The Attorney General shall in every such case issue to the Magistrate such directions as to the disposal of the complaint, information or charge against the accused as to him may seem expedient, and it shall be the duty of the Magistrate to comply with the directions so issued."

Counsel for the 3rd and 4th Respondents and therefore, is of the view that this is not a fit case where this Court should exercise the jurisdiction conferred on this Court by Article 140 of the Constitution.

In these circumstances, the necessity for this Court to consider this matter on the merits does not arise. Accordingly, this application is dismissed, without costs.

Judge of the Court of Appeal