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

In the matter of an Application under and in terms of the Judicature Act, No.2 of 1978 as amended, and especially section 46 thereof, for the transfer of Magistrate's Court of Mount Lavinia Case No. B/24121/MT/23.

Officer-in-Charge
Wellawatte Police Station
Wellawatte

Complainant

Vs.

CA Application No: CA/TRF/18/2025
Magistrate's Court of Mount Lavinia
Case No. B/24121/MT/23

D.W. Ravindra Bandara Senevirathne
M/27/8/5, Span Towers, Vandevort Place,
Dehiwala.

Respondent

AND NOW BETWEEN

D.W. Ravindra Bandara Senevirathne
M/27/8/5, Span Towers, Vandevort Place,
Dehiwala.

Accused - Petitioner

Vs.

1. Officer-in-Charge
   Wellawatte Police Station
   Wellawatte

Complainant - Respondent

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

Respondent

Before:	Mayadunne Corea, J Mahen Gopallawa, J
Counsel:	Suren Fernando with Asoka Obeysekera and Shiloma David for the Accused – Petitioner. Riyas Barrie D.S.G. for the Respondent.
Inquiry on:	03.02.2025
Order delivered on:	09.02.2026

Mayadunne Corea J

The Petitioner in the instant case has made this application pursuant to section 46 of the Judicature Act, No. 02 of 1978 as amended, and sought to transfer this case from the Additional Magistrate's Court of Mount Lavinia.

As per the submissions of the learned Counsel for the Petitioner, the Petitioner had met with an accident on 29.10.2023 and subsequent to a breathalyser test, had been produced before the learned Magistrate. It was further contended that the Police on the same date had filed a B-report and facts had been reported. The learned Counsel contended that the breathalyser test that had been carried out too, had been carried out not in compliance with the rules and regulations made by the Police Department. However, this contention has to be raised at the trial.

The learned Counsel for the Petitioner submitted that the accident did not result in injuries to any person but had caused damage to two vehicles. Upon being produced before the Magistrate, the Petitioner had been remanded and subsequently enlarged on bail. The learned Counsel for the Petitioner contended that subsequent to the accused being enlarged

on bail and the case being fixed for a particular date, the case had been called on a date that had not been informed to the Petitioner, and in the absence of the Petitioner, the alcolizer tube containing the breathalyser test had been produced. The Counsel for the Petitioner contended that the prosecution had failed to tender the breathalyser test kit when the Petitioner was produced before the Magistrate, as well as on the date that the Petitioner was enlarged on bail, but that the said alcolizer tube had been subsequently tendered to Court and the results of same recorded without the knowledge of the Petitioner and in his absence before the Magistrate's Court. Hence, he submitted that it was doubtful whether the alcolizer tube tendered was of the test taken from the Petitioner. However, these are matters that have to be taken up before the trial Judge.

It is the contention of the Petitioner's Counsel that an undue and unusual interest had been taken in the particular case prejudicial to the Petitioner.

It is further submitted that upon a complaint being made to the Police by the Petitioner pertaining to the arrest and the unusual interest taken by the prosecution, an inquiry had commenced by the Crimes Division and a report had been tendered. Subsequent to the said report, it was contended that the Police had sought the advice of the Attorney General, and the Attorney General had called for the case record and had advised the Police that it would be difficult to maintain a charge pursuant to section 151(1) of the Motor Traffic Act since the chain of production in tendering the evidence pertaining to the breathalyser test had been compromised. On the said advice, subsequently, when the case was taken up before the Magistrate's Court, the prosecution had made an application to amend the charges. It is the contention of the learned Counsel that the learned Magistrate had adjourned proceedings to make an order pertaining to the said application to 14.05.2025.

On 14.05.2025, the Court delivered an order rejecting the application to amend the charges on the basis of the Attorney General's advice to the Police. Thereafter, the case has been fixed for trial. It is pertinent to note that this Court is mindful of the fact that the framing of charges under section 182(1) of the Criminal Procedure Code is by the learned Magistrate.

It was further submitted by the learned Counsel for the Petitioner that subsequently, an opinion had been sent by the Attorney General to the learned Magistrate regarding the maintainability of the charges pursuant to section 151(1) of the Motor Traffic Act in view of the production being compromised.

Subsequent to the said opinion it is strenuously contended by the learned Counsel for the Petitioner that the learned Magistrate, upon an application again pertaining to the amendment of charges, had given an order rejecting the said application on the basis that the Attorney General's letter is only an opinion and not an advice. Following the said order (P14), an application had been made by the Defence Counsel to transfer the case to another Court on the basis that the Court was having an opinion prejudicial to the suspect, and therefore, the defence was apprehensive of having a fair trial.

The learned Counsel brought to our attention the order marked as P16 whereby, the learned Magistrate had given an order directing the Registrar of the Court to send a letter to the Attorney General in his personal name to his official address requesting for a clarification as to whether the letter regarding the amendment of charges was an advice or an opinion. It was also contended that in the said order, a direction had been given to deliver the said letter to the Attorney General through an officer of the Court on the following day itself. This order was delivered on 25.06.2025, and the case was adjourned to 10.09.2025 for trial.

The Counsel for the Petitioner contended that thereafter a journal entry had been made dated 30.06.2025 reflected on page 81 of the brief, whereby the Court had given a further order stating that there was no necessity to issue the letter as ordered on 25.06.2025. It was further submitted that by this journal entry, an order made in open Court had been reversed and that the said entry made on the 30.06.2025 has been made in the absence of parties on a date that was neither a trial date nor a mention date.

The Petitioner's Counsel strenuously argued that, in view of the proceedings that took place in the Magistrate's Court, the Petitioner was apprehensive of whether there is prejudice towards the Petitioner that would deprive him of a fair trial. On the said ground the Counsel had made an application for recusal. However, it was submitted that the last journal entry at page 81 of the brief where the Court on its own and in the absence of the parties by changing its own order made in open Court adds to the said apprehension, and contended that the said ground cannot be ignored by this Court in the instant application. Hence, it was his contention that the case should be transferred to any Court in any place other than the Court before it is being heard.

It was the contention of the learned Counsel for the Petitioner that in considering the above-mentioned facts in the circumstances, the Petitioner cannot expect a fair trial, and therefore,

an application has been made to transfer the said case pursuant to section 46(1) of the Judicature Act.

The learned Deputy Solicitor General (DSG) appearing for the Respondents submitted that upon advice sought by the Police, the Attorney General has given an opinion after giving due consideration to facts as presented in the case record.

The learned DSG also contended that the Court had failed to consider the opinion of the Attorney General and the reasons stated therein. Further submissions were made by the DSG pertaining to the order issued in open Court to send a letter directly to the Attorney General in his personal name and cancellation of that order on a date when the case was not called, and contended that the said two grounds create an apprehension of the availability of a situation contemplated undersection 46(1) of the Judicature Act. Considering the above-mentioned grounds, the learned DSG submitted that he had no objection in transferring the said case from the Additional Court to another Court. It was also brought to our attention by the learned DSG that the closest Court was the Chief Magistrate's Court of Mount Lavinia.

This Court is mindful that in this instance the learned Judge who made the impugned orders is not a party to this application and therefore, the reasons for her to make such an order cannot be verified. However, it should not deter this Court from objectively considering the said orders in the light of the submissions made by the Counsel for the Petitioner as well as the Respondents and the material tendered to this Court.

This Court has considered the sequence of events that had taken place, as narrated by the Counsel for the Petitioner with reference to the proceedings. Keeping it as it may, this Court has considered the submissions made by the learned DSG and the objections filed. In the objections, it is observed, the learned DSG brings to the attention of Court the following;

> *"16. The Respondents further state that, the learned magistrate has however, by journal entry dated 17th of June 2025, had cancelled the previous order addressed to the registrar without reasons being mentioned.*

17. The Respondents by way of answer, therefore stated that the following two grounds on which this application is based for a transfer needs to be considered in view of the sequence of events.

a. The order refusing to amend the charge which was intimated by the Respondents on the maintainability of count 02 and 03 based on the integrity of the production.

b. Subsequent cancellation of the order made by the learned magistrate for the clarification sought from the Respondents, on the basis of bias.

18. The Respondents further state that, the opinion given to the Learned Magistrate and the advice to the Police by the Respondent are well within the ambit of the legal provisions, considering the facts that a number of judicial decisions have held the importance of maintaining the chain of custody which reflects the integrity of the production."

This Court is in agreement that the Magistrate's Courts decision of not to implement its own order amounts to a cancellation of an order made in open Court. As submitted, it is observed, this has been done on the learned Magistrate's own initiative not on a date that the case was adjourned to hence it has been done in the absence of parties. As contended, a question arises as to why the said order reflected in page 81 was not made on the date the case was adjourned to where all the parties would have been present. It was also contended that in any event, the said minute had been made five days after the order marked as X3 has been made which demonstrates that the order has not been carried out even as at that date, and hence the necessity for the said order to be minuted in the absence of the parties, and at the expiry of five days of the order reflected in X3. In doing so it appears that the Magistrate's Court on its own had recalled the record of the particular case and had made the second order.

In the circumstances, the learned DSG submits that he is in agreement that this would attract a situation contemplated under section 46(1) of the Judicature Act and agrees with the submission to transfer. Before this Court concludes this order, it is pertinent to note the observation the Court made in the case of ***Kumarasena v. Data Management Systems Ltd*** **[1987] 2 SLR 190**. In the said application, the application for transfer was not considered favourably. However, the Court set out the course of action a Court can resort to when the issue of lack of confidence is raised. Gunewardena J. opined:

"It is however open to the District Judge, if he thinks it prudent to do so having regard to the lack of confidence in his impartiality expressed by one of the parties, to disqualify himself and direct that further proceedings be had before another, taking also into account that if he were to hold against the party so complaining at the conclusion of the trial, he could lay himself open to a further charge of prejudice against such party consequent upon such allegation being made. ....."

In the said case of ***Kumarasena v. Data Management Systems Ltd,*** *Gunewardena J.* quoting Lord Denning further opined;

"*Lord Denning M. R. in* ***Metropolitan Properties v. Lannon*** *(12) (at page 599) which in the contention of Paul Jackson are those there that support his view that there is in reality only one test. "In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself..... It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit..... There must appear to be a real likelihood of bias. Surmise or conjecture is not enough..... There must be circumstances from which a reasonable man would think it likely or probable that the justice ..... would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did".*

This Court is mindful of forum shopping and the advantages it confers to one party to the detriment of the other party and this Court is firmly of the view that such practice should not be allowed. However, in the instant case, the Petitioner is seeking a transfer to any Court before any other judicial officer for the reasons stated above. Moreover, in view of the orders marked as P4 and the order reflected at page 81 of the brief, in the instant case, the learned DSG for the Respondents too does not object to the case being transferred.

In this instance, Court also considers the following frequently quoted dictum in ***Rex v. Sussex Justices, Ex parte McCarthy*** **[1924] 1 KB 256;**

"*It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

Since the learned DSG appearing for the Respondents too has no objection to the case being transferred, and considering the aforementioned submissions made by the Counsel for the parties and our determinations thereon, we decide to make an order under section 46 of the Judicature Act to transfer the said case from the Additional Magistrate's Court of Mount Lavinia to the Chief Magistrate's Court of Mount Lavinia.

The Registrar of this Court is directed to communicate this order to the Registrar of the Magistrate's Court of Mount Lavinia for necessary action.

Judge of the Court of Appeal

Mahen Gopallawa, J

I agree

Judge of the Court of Appeal