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 a Writs of *Certiorari*, *Mandamus* and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Wickrama Arachchi Athukoralage Asantha Udayakara,
Bilingahawattha, Panthiya,
Matugama.

PETITIONER

Vs.

Court of Appeal Case No:
CA/WRIT/725/24

1. Mr. Priyantha Weerasooriya,
   Inspector General of Police,
   York Street,
   Colombo.

2. Senior Deputy Inspector General of Police (Western Province),
   Senior Deputy Inspector General of Police Office,
   No. 47, Old Kottawa Road,
   Nugegoda.

3. Deputy Inspector General of Police (Kalutara Divison),
   Deputy Inspector General of Police Office,
   Prison Road, Kalutara North,
   Kalutara.

4. Senior Superintendant of Police (Kalutara Division),
   Senior Superintendant of Police Office,
   Nagoda,
   Katukurunda.

5. Assistant Superintendent of Police (Kalutara Division 01),
   Assistant Superintendent of Police Office,
   Kalutara.

6. Assistant Superintendent of Police (Matugama Division),
   Assistant Superintendent of Police Office,
   Matugama.

7. Head Quarters in Charge,
   Matugama Police Station,
   Matugama.

8. Registrar,
   Magistrate's Court,
   Matugama.

9. Registrar,
   High Court of Kalutara.

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

RESPONDENTS

Before:	S.U.B. Karalliyadde, J Mayadunne Corea, J
Counsel:	Harshana Ananda instructed by Dulshan Katugampola for the Petitioner.
Supported on:	25.11.2024
Decided on:	30.01.2025

Mayadunne Corea J

The Petitioner in this Application, among other prayers, sought the following reliefs:

"(e) Grant and issue an order in the nature of Writ of Certiorari to quash the B-report bearing number 1371/19 dated 2019.10.19 which was filed before Magistrate Court of Matugama.

(f) Grant and issue an order in the nature of Writ of Certiorari to quash the entire proceedings of non-summary inquiry bearing number 75477/21 of Magistrate Court of Matugama.

(g) Grant and issue an order in the nature of Writ of Certiorari to quash the order of Learned Magistrate dated 2024.04.29 for the commitment for this matter for trail before the High Court.

(h) Grant and issue an order in the nature of Writ of Prohibition to the Hon. Attorney General (10th Respondent) prohibiting the issuance of indictment by the High Court of Kalutara with related to the non-summary inquiry bearing number N.S. 75447/21 and the B-report bearing number 1371/19 of the Magistrate Court of Matugama.

(i) Or alternatively call for a quash by way of an order Writ of Certiorari against the indictment if the indictment is already issued pertaining to the non-summary inquiry bearing number N.S. 75477/21 in the Magistrate Court of Matugama by the 10th Respondent.

(j) Grant and issue an order in the nature of Writ of Mandamus compelling 1st to 7th Respondents and 10th Respondent, any one or more of them to discharge the Petitioner from all allegations in relation to this alleged incident of the non-summary inquiry bearing number N.S. 75477/21 and the B-report bearing number 1371/19 of the Magistrate Court of Matugama.

(k) *Grant and issue an order in the nature of Writ of Prohibition directing 1st to 7th Respondents and 10th Respondent, any one or more of them not to take any further action against the Petitioner in relation to the non-summary inquiry bearing number N.S. 75477/21 and the B-report bearing 1371/19 of the Magistrate Court of Matugama*."

The facts of the case briefly are as follows. The Petitioner had retired from services at the Sri Lanka Air Force and started work as a "Kapu Mahatha". The Petitioner states that one Lakmali Ratnayake who will hereinafter be referred to as the Virtual Complainant (victim) paid several visits to obtain the Petitioner's services. It is submitted that these frequent visits developed into an emotional bond between the Petitioner and the Virtual Complainant (victim). It is alleged that the parties had gone on pilgrimages and visited guesthouses together. Subsequently, the Virtual Complainant (victim) filed a complaint at the Police Station, Matugama stating that the Petitioner had raped her at knifepoint. The Petitioner was then produced before the Magistrate's Court under the B-report marked as X12. Following the conclusion of the non-summary inquiry, the Magistrate ordered the matter to be committed for trial before the High Court. Hence, among other reliefs, this Writ Application is to prevent the Attorney-General from indicting the Petitioner.

The Petitioner at the commencement of his submissions submitted that at this stage he is not seeking an interim order as prayed for in the prayer but is seeking only notice. The Petitioner's main contention is that the relationship the Petitioner had with the Virtual Complainant (victim) is consensual, hence the charge of rape cannot be sustained. The learned Counsel submitted the relationship the Petitioner had with the Virtual Complainant (victim) was with an intention to marry her. It is further submitted that the Virtual Complainant (victim) is married and has a young child.

The Petitioner contends that the police filing the B-report was on the instigation of his own family and the family of the Virtual Complainant (victim). However, this Court observes, subsequent to the filing of the B-report a non-summary inquiry had commenced. At the said non-summary inquiry, the Petitioner had been represented by an Attorney-at-Law. At the conclusion of the evidence the learned Magistrate had come to the conclusion that there was sufficient evidence to commit the case to the High Court.

It is pertinent to note that the Petitioner made several allegations against the inquiring officers and as a result of his complaint to the IGP, a separate inquiry had commenced against the inquiring police officers. The Petitioner conceded and also it is evident as

per the marked documents that the said inquiry against the police officers had ended in the exoneration of the police officers. Although the Petitioner pleads that inquiring officers have violated the provisions enumerated in Chapter XI of the Code of Criminal Procedure, the subsequent police inquiry has found no such violation. In any event, even if this Court is to consider that there was a violation of Chapter XI of the Code of Criminal Procedure (the conclusion which the Court is not inclined to arrive at) that stage has now passed, and at present what is before the Court is a committal by a learned Magistrate after recording the evidence of witnesses.

The B-report

At this stage let me consider the submissions of the learned Counsel appearing for the Petitioner. It is the contention of the Petitioner that the initial B-report filed on 19.10.2019 should be quashed. The contention of the Petitioner is that the said report has been filed by the police on the instigation of interested parties. It is observed by this Court that the B-report sought to be quashed is dated 19.10.2019. Upon perusal, the Court observes the said report is where the police reported the facts pertaining to the complaint to the Magistrate.

According to Dr. Sunil Cooray in '*Principles of Administrative Law in Sri Lanka*' [Vol. II, 4th edn, (2020) Page 911:

> "*The circumstances in which certiorari and prohibition will be available have been summed up by Lord Justice Atkin, an English judge, in the following famous words which on numerous occasions have been cited and followed by our Courts:*
>
> > *'Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these Writs.'* [***R v. Electricity Commissioners*** **(1924) 1 KB 171**]
>
> *This dictum has been analyzed as follows as laying down four conditions which must be satisfied for certiorari or prohibition to issue:*
>
> > *'Whenever any body of persons, (firstly) having legal authority, (secondly) to determine questions affecting the rights of subjects, (thirdly) having the duty to act judicially, (fourthly) act in excess of their legal authority, they are subject to the controlling jurisdiction exercised by*

these writs.' [***Dankoluwa Estates Co Ltd v. The Tea Controller*** **42 NLR 197**]"

It is observed the said report consists of facts only, and there are no charges against the Petitioner. The said report does not have any decisions or conclusions against the Petitioner. As per the above definition, I am of the view that there cannot lie a Writ of Certiorari to quash the facts that are reported to the Magistrates Court.

The non-summary inquiry

It is also observed that subsequent to the B-report, a non-summary inquiry had commenced. At the conclusion of the non-summary, the Petitioner had been committed to stand trial before the High Court. As per the Order of the learned Magistrate he had come to the conclusion that as per the available evidence against the accused (the Petitioner in this case) in the non-summary inquiry, the accused cannot be discharged under Section 153 of the Code Criminal Procedure. Hereinafter the accused in the non-summary inquiry will be called the Petitioner. Accordingly, the learned Magistrate had inquired as to whether the Petitioner intends to call any witnesses. It is apparent that the learned Magistrate had been satisfied that as per the available evidence that he cannot act under Section 153 and has acted pursuant to Section 154 and committed the Petitioner to stand trial. By this order made pursuant to Section 154(1) it is obvious the Magistrate had come to the conclusion that there is sufficient evidence to commit the accused. In any event, when the learned Magistrate after hearing evidence comes to the conclusion that there is sufficient evidence against the Petitioner to commit him to the High Court, the Petitioner's relief prayed in prayer (e) has to fail. It is also pertinent to note that the Petitioner has failed to establish any grounds for this Court to interfere with the reporting of initial facts to the Magistrates Court.

As per the submissions of the Counsel, the Petitioner has taken part in the non-summary inquiry and had been represented by an Attorney-at-Law. Although the Petitioner, by prayers (f) and (g) has sought to quash the non-summary proceedings and the committal order, the Petitioner has failed to plead any grounds to challenge the non-summary inquiry proceedings or the committal order. The learned Counsel failed to demonstrate any error or procedural irregularity or the conduct of the inquiry. In my view, the learned Counsel was silent in his submissions on any ground that would help him to impugn the committal order or the inquiry proceedings. Hence in my view, the Petitioner has failed to demonstrate any ground to substantiate his relief prayed under prayer (f) and (g).

It is also appropriate to state that this Court cannot agree with the learned Counsel's submission that when the case is committed to the High Court it ends up in an indictment being served. Once the case is committed under Chapter XXXIII of the Code of Criminal Procedure, the Attorney General will have to form his own opinion on the evidence as to whether there is an offence disclosed against the Petitioner. This Court observes that pursuant to Section 393(1) of the Code of Criminal Procedure it is within the powers of the Attorney General to exhibit information, present indictments and to institute, undertake, or carry-on criminal proceedings. In the event, the Attorney General finds that there is insufficient evidence to warrant a commitment for trial, the Attorney General has the power to quash the committal pursuant to Section 396 of the Code of Criminal Procedure. In addition, under Section 397 of the Code of Criminal Procedure, the Attorney General also is empowered to direct the recording of further evidence if he deems necessary.

The learned Counsel did not cast any doubt on the discharge of the functions of the Hon. Attorney General. Although the Petitioner pleads that he has information that the 10th Respondent would indict the Petitioner, no material was submitted to this Court nor did the Counsel make any submission on this ground.

The Petitioner also submitted that he is seeking a Writ of Prohibition against the 10th Respondent from indicting him and, alternatively, a Writ of *Certiorari* to quash the indictment if it is already issued. The said reliefs are pleaded in prayers (h) and (i). It appears that the Petitioner himself is unaware whether an indictment has already been dispatched. In a Writ Application the burden of proving his case lies with the Petitioner. In coming to the above conclusion the court has considered the cases of ***Saranguhewage Garvin De Silva v. Lankapura Pradeshiya Sabha and others*** **SC Appeal 10/2009 decided on 15.12.2014**, where it was held that,

> "*The burden of proof in any application for prerogative writ including mandamus is on the person who seeks such relief, to prove the facts on which he relies*"

In this context, the Petitioner has failed to demonstrate that an indictment has been served. If an indictment has not been served, then the necessity to quash the said indictment will not arise. Hence, the alternative relief preyed becomes a premature application. In ***Ceylon Mineral Waters Ltd v. The District Judge, Anuradhapura*** **(1966) 70 NLR 312** it was held that

> "*an application for Writs of Certiorari and Prohibition should not be made prematurely*."

Further the relief prayed in prayer (h) is misconceived as by the said relief the Petitioner is seeking a Writ of Prohibition to prohibit the Attorney General from "*prohibiting the issuance of indictment by the High Court of Kalutara"*. In my view this prayer has to fail for two reasons. Firstly, the Petitioner himself is unaware as to whether an indictment has been drafted and sent to the High Court of Kalutara or not. Secondly, the Attorney General's Department and the High Court are two different institutions. Once an indictment is sent to the High Court the process of serving the indictment is within the High Court. It is pertinent to note pursuant to Section 195 of the Code of Criminal Procedure upon the inducement being received by the High Court, it is the duty of the Juge of the High Court to serve the copy of the indictment with annexures on the accused (Section 195 (b)). The said Section reads as follows;

> *"Upon the indictment being received in the High Court, the Judge of the High Court presiding at the sessions of the High Court holden in the judicial zone whereat the trial is to be held shall –*
>
> *(a)….*
>
> *(b) cause a copy of the indictment with its annexes to be served on each of the accused who will be tried upon that indictment;"*

Hence, issuing a writ of prohibition against the 10th Respondent to prevent the High Court of Kalutara from issuing the indictment is futile. Therefore, the prayer as it is pleaded is misconceived in law, accordingly the said prayer has to fail.

The Petitioner also sought a Writ of Prohibition to be issued against the 10th Respondent to prevent him from indicting the Petitioner. It appears that the Petitioner by this Application is seeking this Court's intervention to prevent the 10th Respondent from discharging his prosecutorial discretion. Yet by his pleadings or by his submission he failed to give cogent reasons for this Court to interfere with the said discretion. As stated above the Petitioner has failed to demonstrate to this Court any ground to establish that the 10th Respondent has decided to act in pursuance of Section 397 of the Code of Criminal Procedure other than his apprehension that the 10th Respondent has decided to indict the Petitioner.

It is also observed that even if the 10th Respondent had decided to indict, to obtain a Writ of Prohibition the Petitioner has to satisfy this Court as to why this Court should prohibit the 10th Respondent from discharging his duty. The Petitioner by his pleadings or his submissions has not attacked the decision-making process of the 10th Respondent. There were no allegations made against the 10th Respondent on forming an opinion under Section 397 of the Code of Criminal Procedure. There is no allegation of illegal

exercise of power by the 10th respondent. In my view, the learned Counsel for the Petitioner failed *prima facie* to demonstrate any ground as to why this Court should intervene and grant a Writ of Prohibition to prohibit the 10th Respondent from discharging his duties envisaged under the Code of Criminal Procedure.

It is also pertinent to observe that the Supreme Court has held in ***Victor Ivan v. Sarath N. Silva*** **1998 (1) SLR 340** that the prosecutorial discretion of the 10th Respondent is neither absolute nor unfettered. However, in this instance have the Petitioner demonstrated a case that warrants the intervention of this Court? The answer to this question would be in the negative for the reasons stated below.

In my view, it is pertinent to note that it is not for the Court to interfere in the exercise of such discretion unless there is grave abuse by the 10th Respondent in discharging the said discretion. This Court comes to the said conclusion after considering the decisions in ***King v. Baba Singho 21 NLR 142***, ***Velu v. Velu 76 NLR 221*** and the recent decision in ***Ajahangardiye Punchihewa v. Officer In Charge of Financial Investigations Unit111 CA Writ 311/19, CA minutes of 18.06.2020*** where the Court held:

> "…*it is clear that the prosecutorial discretion is reviewed in English Courts as well as in Sri Lanka, In exercising its powers of judicial review only when there is material to satisfy that the decision to prosecute was taken in extreme situations akin to 'dishonesty or malafides or an exceptional circumstances' warranting effective judicial intervention."*

In the present case before this Court the learned Counsel for the Petitioner neither alleged dishonesty nor *mala fides*. The Petitioner has failed to demonstrate that the 10th Respondent has or is about to act in violation of the statutory provisions.

The learned Counsel's contention is that the complaint against the Petitioner is false and fabricated, and therefore an indictment should not be served. This Court is mindful that it is not for this Court to consider whether the allegation is fabricated or correct as it has to be established through evidence at the correct forum. In view of the learned Magistrate forming an opinion to commit the Petitioner and the above submission of the learned Counsel appearing for the Petitioner it clearly demonstrates that the crucial facts pertaining to this case are in dispute. It is trite law that when the material facts of a case are in dispute the Writ Court will be reluctant to exercise its Writ jurisdiction as held in ***Dr. Puvanendran and another v Premasiri and two others (2009) 2 SLR 107,***

"The Court will issue a writ only if (1) the major facts are not in dispute and the legal result of the facts are not subject to controversy and (2) the function that is to be compelled is a public duty with the power to perform such duty."

It is also pertinent to note that even if this court is to assume that the Petitioner's above contention is correct, though the learned Magistrate who held the non-summary inquiry had formed a different opinion, still the Petitioner can stand trial. In this instance, this should be the correct remedy available to the Petitioner.

Dr. Sunil Cooray in his book '*Principles of Administrative Law in Sri Lanka*' (supra) states that:

"*For Certiorari to issue, there must already be a determination of rights, and not a mere decision on a question of law which may ultimately be the basis of the later determination of rights*."

In this instance, this Court observes that by the committal to the High Court the Petitioner's rights are not finally decided. It is pertinent to note that as stated above the committal of the Magistrate can be quashed pursuant to the provision of the Code of Criminal Procedure by the Attorney General, or even if the indictment is served still, he can stand trial before the High Court.

Are necessary parties before the Court?

It is also pertinent to note that the Petitioner has failed to name the Virtual Complainant (victim) in the Magistrates Court case a party to this Application. In the view of this Court, the Orders sought by the Petitioner if granted would affect the said complainant. It is the Virtual Complainant (victim) who complained to the police pertaining to the alleged rape. However, for the reason best known to the Petitioner, he has failed to name the said Virtual Complainant (victim) as a party to this Application. It is my considered view that the said Virtual Complainant (victim) should have been made a party to this Application and hence, the Petitioner has failed to add necessary parties to this Application. It is trite law that the failure to add necessary parties is fatal to a Writ Application.

In ***Rawaya Publishers and another v. Wijeyadasa Rajapaksa*** **(2001) 3 SLR 213** it was held,

"*In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings."*

By prayer (j) the Petitioner is seeking a Writ of Mandamus compelling the 1st to 7th and 10th Respondents to discharge the Petitioner from all allegations in relation to the alleged incident of the non-summary inquiry and the B-report. It is observed by this Court that the filing of the B-report stage in the Magistrate's Court is now long concluded and also the non-summary inquiry too has concluded and the Petitioner has been committed to the High Court. Hence, seeking a Mandamus at this stage becomes futile. It is also observed that the Petitioner has failed to demonstrate any legal right that is owed to him which has not been complied to obtain the said relief. It is also observed that the Petitioner has failed to demonstrate any ground for the issuance of a Writ of Prohibition pertaining to prayer (k). For the above stated reasons this Court is of the view that prayers (j) and (k) have to fail.

Accordingly, the Petitioner has failed to demonstrate a *prima facie* case that warrants the intervention of this Court. Hence for the reasons stated above this Court refuses to issue formal notices and proceeds to dismiss this Application.

Judge of the Court of Appeal

S.U.B. Karalliyadde, J

I agree

Judge of the Court of Appeal