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 Habeas Corpus* under and in terms of Article 141 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (HCA) 06/2011

&

C.A. (HCA) 07/2011

Nandasena Gotabhaya Rajapaksa
No. 26,
Pangiriwatta Road,
Mirihana,
Nugegoda
PETITIONER

-Vs-

Arumugam Veeraraj
SiriniwasaWatte,
Lower end WelipennaWaga
PETITIONER-RESPONDENT

1. **Major General Mahinda Hathurusinghe**
   Jaffna Army Commander
   Sri Lanka Army,
   Military Headquarters,
   Jaffna.
2. **Lt. Gen. Jagath Jayasuriya**
   Army Commander
   Sri Lanka Army,

Baladaksha Mawatha,
Colombo 03.

3. Officer-in-Charge
Atchuvely Police Station,
Jaffna.

4. N.K. Illangatilake
Inspector General of Police
Police Headquarters,
Colombo 01.

5. Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT- RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J (P/CA) &
Sobhitha Rajakaruna, J.

COUNSEL : Romesh de Silva PC., M.U.M. Ali Sabry PC., Sugath Caldera and Ruwantha Cooray for the Petitioner.

Nuwan Bopage with Chathura Wettasinghe for the Petitioner-Respondent

Wasantha Perera SSC for the 1st – 5th Respondent-Respondents

Argued on : 14.07.2020

Written Submissions

For the Petitioner -Respondent	: 28.07.2020
For the Respondent-Respondents	: 26.08.2020
For the Petitioner	: 29.09.2020
Decided on	:24.11.2020

A.H.M.D. Nawaz, J. (P/CA)

Two very important questions arise for consideration in this case. When this matter was taken up before this court on 14.07.2020, this court directed the parties to address court on these two important questions of law, namely,

(1) Should a Magistrate apply his mind before issuing summons on a witness or send summons to any witness as a matter of course?

(2) Whether the Magistrate could issue summons on the Petitioner who is now the incumbent President of this country?

In fact, this application impugns the summons issued on the Petitioner by the Magistrate's Court of *Jaffna* in case bearing No. 25585. This court has already issued an order staying the summons that had been issued by the learned Magistrate on 28.03.2019.

Before this court proceeds to answer the two questions that arise in this application let me summarize in a conspectus the facts immanent in the case.

The original Petitioner, one Arumugam Veeraraj, had filed an original application under Article 141 of the Constitution *inter alia* seeking a writ of *habeas corpus*. Having examined the application, which had been filed in the year 2011, this court directed the learned Magistrate, *Jaffna* to hold an inquiry in pursuance of the powers vested in

this court under Article 141 of the Constitution and as is customarily the case in these applications, this court directed the learned Magistrate, *Jaffna* to report to this court its findings after the inquiry. The facts and circumstances that are material to a careful consideration of the questions of law I have adumbrated above could be set out now.

The present Petitioner had been functioning as the Secretary, Defence from 24.11.2005 to 01.01.2015. It has to be noted that while he was holding the office of Secretary, Defence, the original application for *habeas corpus* was filed in the year 2011. It was only the 1st to 5th Respondent-Respondents who were made party Respondents to the original application. The current Petitioner to this application was not a party Respondent to the original application for *habeas corpus* nor were any allegations made against him in the original application.

In such a backdrop how the learned Magistrate of *Jaffna* came to issue the impugned summons on the Petitioner needs narration.

It was when Mr. Keheliya Rambukwella was giving evidence in the Magistrate's court of *Jaffna* on 13.05.2016, he stated that based on the information he had received from the government and the Defence Secretary, he was giving certain answers regarding the corpus. A careful perusal of the proceedings in the Magistrate's Court dated 13.05.2016 reveals that no application was made to have summons issued on the Petitioner immediately after the conclusion of the evidence of the aforesaid witness, Mr. Keheliya Rambukwella or thereafter. In other words, no attempt was ever made to summon the then incumbent Secretary, Defence to give evidence in the year 2016, even though the evidence of Mr. Keheliya Rambukwella led before the Magistrate on 13.05.2016. was of a hearsay nature

It bears recapitulation that it was only on 28.03.2019, after a lapse of almost three years, an Attorney-at-Law moved court to have summons issued on the present Petitioner. The journal entry dated 28.03.2019 clearly indicates that the

Attorney-at-Law, one Mr. Manivannan submitted a motion to summon Mr. Gotabhaya Rajapaksa the then Secretary, Defence to give evidence. On the same day, the learned Magistrate ordered summons on the current Petitioner without recording any further details as to why he was ordering summons on the Petitioner. Even the motion filed by the Attorney-at-Law had not set out any reasons as to why the Petitioner had to be called.

The Petitioner was simply directed by P6 (the summons) to be present in court on 27.09.2019. It bears attention that by 28.03.2019, the day on which the summons was ordered on the Petitioner, the Petitioner had already made a declaration that he would contest the then upcoming Presidential Election in November 2019. It passes strange that the timing of the motion, just after the Petitioner had declared his intention to contest the forthcoming Presidential election, can be said to be coincidental.

It would appear that the Petitioner filed this application on 18.10.2019 against the issuance of summons on him and in response, the original Petitioner for *habeas corpus* filed limited objections. It was vehemently contended that the summons issued on the present Petitioner, to be called as a witness, is in prosecution of a collateral purpose, with a view to politically discrediting the present Petitioner and tarnishing his image and allegations of *mala fides* have also been made in both the petition and the written submissions.

Upon this matter being supported, this court had issued a stay order of the summons on 24.09.2019. The question before this court is whether the learned Magistrate is empowered to issue summons automatically or after critically addressing his mind to the purpose for which the witness is sought to be summoned. I take the view that a duty is cast upon the learned Magistrate to examine the purpose for which a witness is sought to be summoned and that purpose has to be specified, drawing the attention of the witness to the issues on which the witness is summoned to give evidence.

A summons in English law is defined in the *Black's Law Dictionary* (Eleventh Edition, 2019 at p. 1737) as an application to a common law judge on which an order is made. It is also defined as a notice requiring a person to appear in court as a juror or witness.

It would appear whether it be a summons on a witness or an accused, the requisites of summons are given in section 44 of the Code of Criminal Procedure Act, No. 15 of 1979 (the Code) and the said provision states as follows:

> *44. (1) Every summons issued by a court under this Code shall be in writing in duplicate and signed by the Registrar issuing the summons or such other officer as such court may appoint and shall be in the prescribed form.*

The prescribed form for summons on an accused is found in Form No. 1 in the Second Schedule to the Code of Criminal Procedure Act, No. 15 of 1979, whereas the form pertaining to summons to a witness is prescribed in Form No. 8 of the Second Schedule to the Code. Both these forms quite explicitly provide for the purpose to be set out in the said summonses. For instance, Form No. 8 which is the prescribed form of summons to a witness is given as follows:

SUMMONS TO A WITNESS

In the Magistrate's Court of *Colombo.*

To *Don Charles Appuhamy of No. 179, Galle Road, Colombo, Boutique Keeper*

Whereas complaint has been made before the Magistrate's Court of the division of *Colombo* for that (*here state as in the summons or warrant issued against the accused*), and it has been made to appear to a Magistrate for the said division, that you are likely to give evidence for the prosecution (*or* defence):

These are therefore to require you to be and appear at the court house at Hulftsdorp, Colombo, on the ..... day of ..... 19..... at ten o'clock in the forenoon before such Magistrate as may then be there, to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court : and you are hereby warned that if you shall, without just excuse ; neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand this .....day of ..... 19..... at Hulftsdorp, in the division aforesaid.

(*Signed*) *X.Y.*
Magistrate/ Authorized Officer

A perusal of the above summons given in the Code makes it crystal clear that the summons to a witness must be quite explicit as to why the witness is being summoned. The content of the summons is determined by either section 44 or section 255 of the Code and the combined effect of the two provisions of the Code entails that material particulars have to be specified in the summons. It is for this reason that Dias, J., in the case of ***Perera v. Rupesinghe*** (6 Tambyah's Reports 17) declared that if the summons is wanting in the initials of an accused who is summoned, the summons issued becomes invalid. This was a case where a summons addressed to a person namely "*Rupesinghe*" without giving any initials, was served on the accused, the accused was held justified in refusing to accept the summons.

From the foregoing reasoning and based on what I discuss below, I conclude that a summons under section 44 of the Code should set down the purpose and reason for summoning a witness.

The fact that a Magistrate cannot be mechanical and automatic in sanctioning a summons is also apparent upon a perusal of section 255 which appears under Chapter XXI of the Code. Section 255 comes into operation when a Magistrate issues process, upon the application of a prosecutor or an accused, to compel the attendance of a witness or the production of any document. In such a situation Section 255 (1) mandates the Magistrate to record his reasons for issuing the process unless for reasons to be recorded by him he deems it unnecessary so to do and section 44 which is *in pari materia* has to be construed together, so that section 44 must be deemed to impose a requirement of setting out the reasons or purpose for summoning a witness.

If one takes a common sense view of summons to be issued on a witness, it becomes correspondingly clear that such a summons should furnish sufficient information to the witness who has been summoned. For instance, if a juror is summoned to serve on a jury, the purpose is mentioned in the summons. Summoning a very high official such as a Defence Secretary, would require preparation on the part of the Defence Secretary to meet the purpose for which he has been summoned and in my view, a

summons issued on a witness will be deficient if it does not disclose the reasons for summoning the witness. One may pose the question, what would be the content of information the Defence Secretary was required to proffer and provide by way of his testimony? If the summons, as was issued in this case, was to be acted upon by such a high official as the Defence Secretary, a perusal of the summons would make no sense at all as it does not give even bare essentials as to why the Defence Secretary was being summoned and it is quite clear that if one were to go by the summons issued in this case, a witness would be left in a state of doubt as to what kind of evidence the witness was expected to furnish on the day he was required to be present.

Merely asking the witness to be present in court would not suffice. Even if one looks at summons served in civil cases on a defendant subsequent to a plaint, the summons is very explicit as to what the Defendant is required to do. This court takes the view that a summons could not be issued as a mere routine and it cannot rubber stamp a motion filed by a party to the case to summon a witness.

In the circumstances, I take the view that the summons dated 28.03.2019, issued on the Petitioner without specifying any purpose or reason, is defective and should be quashed for illegality and procedural impropriety.

Our attention has been drawn to the Indian case of ***K. Somasundaram v. Gopal and Another*** reported in 1958 SCC ONLINE MAD 25 : 1958 MWN (CRI) 59 (HC) which succinctly puts the issue in a nutshell.

> *"When the Magistrate is asked to summon fresh witnesses, he must certainly apply his mind to the application, and has a duty to do so. For one thing he must weed out obviously frivolous names. Thus, if the complainant frivolously summons the Prime Minister of India or the President of the Indian Republic, or the accused's wife, as supplemental witnesses the Magistrate may refuse to summon them. It is not a case where the Magistrate has no right at all to apply his mind, as contended for by the learned counsel for the complainant....Before this court applies its mind about summoning the witnesses named in the additional list filed, no notice of the list of the additional*

witnesses need to the accused (and the accused heard about it) any more than in the case of the list originally filed under s. 204 (1) of the Criminal Procedure Code."

The English and Scots Law part of *The Reader's Digest Great Encyclopedic Dictionary* (2nd Edition, 1971, Volume 3, p1198) defines summons to mean a document calling upon a person before a judge, magistrate, etc., for a certain purpose. I hold that what exactly is the act that the witness is required to do in court has to be specified by the judge because the purpose for which the summons is issued cannot be foreseen by a witness.

I can see a rationale why the substance of section 44 of the Code does not prescribe a specific purpose for which summons could be issued. The legislature has left it open textured so that a witness can be summoned for many a purpose. In my view it is a sensible course for the legislature to have left the purpose open because it is for a multitude of reasons that summons could be issued. The legislature cannot foresee these multitude of reasons and therefore it has left it open for the judges to supplement the reasons and purpose of the summons. Since the legislature cannot foresee the situations, it is for the judge to summon the witness for a particular purpose. Therefore, the summons must set out the reasons as to why a person is being summoned. It is meaningless to get down a witness by summons alone if he is not told in specific terms as to why he is being summoned. When one peruses the impugned summons issued by the Magistrate, *Jaffna*, one cannot unerringly pinpoint the purpose for which the then Secretary, Defence was being summoned. If the judge who issued the summons did not himself know why he issued the summons, then, how could the witness who was summoned have any clue as to why he was summoned?

It is irrational and meaningless because the man who gets the summons will be nonplussed as to why he was getting the summons if reasons are not set out in the summons. So I take the view that section 44 of the Code does not authorize the learned Magistrate to issue summons without a proper reason or purpose. In the

circumstances, the summons issued by the learned Magistrate, *Jaffna* on 28.03.2019 is blatantly outside the four corners of the Code of Criminal Procedure Act, No. 15 of 1979 and even in terms of administrative law, it is illegal in the *Wednesbury* sense because the Magistrate misunderstood the scope and ambit of section 44 of the Code. If a decision maker misunderstands or misconstrues a particular provision of a statute, it would amount to illegality in the wider sense of *Wednesbury* unreasonableness which in the end taints the issuance of the summons dated 28.03.2019.

In the circumstances this court exercising its jurisdiction under Article 145 of the Constitution proceeds to set aside the summons dated 28.03.2019.

The above is sufficient to dispose of the case on the ground of illegality and noncompliance with the statutory provisions of the Code but independently of this there was also a second question which was posed in the course of these proceedings namely, whether the Magistrate could issue summons on the Petitioner who is now the incumbent President of this country. All the parties to the case focused on Article 35 of the Constitution which reads as follows:

> *"While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity."*

This provision was commented upon by a five judge bench in ***Mallikarachchi v. Shiva Pasupathy*** (1985) 1 SriLR 74:

> *"Article 35 (1) confers upon the President during his tenure of office an absolute immunity in legal proceedings in regard to his official acts or omissions and also in respect of his acts or missions in his private capacity. The object of this Article is to protect from harassment the person holding the*

high office of the Executive Head of the State in regard to his acts or omissions either in his official or private capacity during his tenure of office of President."

The Chief Justice of the day, Sharvananda, CJ., proceeded to explain the rationale for the doctrine stating that;

"Such a provision in Article 35 (1) is not something unique to the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978. There was a similar provision in Article 23 (1) of the Constitution of 1972. The corresponding provision in the Indian Constitution is Article 361. The principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Britain he can do no wrong. The rationale of this principle is that persons occupying such high office should not be amenable to the jurisdiction of any but the representatives of the people by whom he might be impeached or removed from office."

There is a slew of cases which reiterate the principle that the issue of immunity is not a privilege exercised by the Petitioner but afforded in the public interest. Even in the case of ***Victor Ivan and Others v. Hon. Sarath N. Silva and Others*** (2001) 1 Sri LR 309 at 320, Wadugodapitiya J., stated;

"The Attorney General's contention is that by virtue of Article 35 of the Constitution, the President enjoys absolute immunity from suit in any Court of Law, in respect of her act in appointing the 1st Respondent as Chief Justice under Article 107 (1), which act she performed while she was holding office of President. This immunity is clearly and unambiguously spelled out in Article 35(1), and both Articles 35 (2) and 35 (3) confirm the fact of absolute immunity granted under Article 35 (1)."

Since Article 35 (1) was relied upon by all Counsel in the proceedings, I have to observe that it is not a provision which is couched in some inscrutable language. A

mere reading of Article 35 (1) gives personal immunity to the President, during the tenure of his office, from any proceedings in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity but the pervasive spirit behind Article 35 (1) is inescapable in that legal processes cannot be issued against the President to be summoned to court personally to justify his actions. It is undeniable that no one in this case had ever made a complaint against the former Secretary, Defence who has since become the President. The hearsay statement emanating from a witness in the *habeas corpus* inquiry in the Magistrate's Court, *Jaffna* was so imprecise that it is unthinkable that a rather inordinately delayed motion should be filed almost three years later to summon the then Defence Secretary in 2019, when he had already announced his candidature at the forthcoming Presidential Election. The motion was so imprecise and devoid of any purpose that it does not inspire any confidence in the manner in which the motion was filed after a long lapse of time.

All that Chief Justice Sharvananda stated in the case of ***Mallikarachchi v. Shiva Pasupathy*** would ring true of the application made by the Attorney-at-Law. In the circumstances it would be incongruous with the doctrine of comity to vex the President with the process of court in the circumstances in which it was issued and even on this second question, this court would hold that the summons issued is invalid and cannot be enforced-*See* an instructive article titled ***Executive Officials and Process of Subpoena to Testify*** [Virginia Law Review, Vol. 2, Issue 4, pp. 270-275] where it has been asserted that even if courts have issued subpoenas even to the President or Governor, in no case have the courts attempted to enforce subpoenas to the President or Governor. So I take the view that the summons issued cannot be enforced against the Petitioner who today holds the office of the President.

In the circumstances, this court proceeds to set aside the summons issued against the Petitioner and allows this application.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE COURT OF APPEAL