

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Application under and in
terms of Articles 17 and 126 of the Constitution
of the Democratic Socialist Republic of Sri Lanka.

Kaluhath Ananda Sarath de Abrew,
No. 4/1, Attidiya Road,
Ratmalana.

Petitioner

Vs.

S.C. F/R No. 424/2015

1. Chanaka Iddamalgoda,
Chief Inspector of Police,
Head Quarters Inspector,
Police Station,
Mount Lavinia.
2. Wanasinghe,
Chief Inspector,
Officer in Charge of the Murder
Investigation Unit,
Criminal Investigation Department,
Colombo 01.
3. B.R.S.R. Nagahamulla,
Director,
Criminal Investigation Department,
Colombo 01.
4. N.K. Illangakoon,
Inspector General of Police,
Police Headquarters,
Colombo 01.
5. Karunathilake,
Officer-in-Charge,
Public Complainants Unit,
Criminal Investigation Department,
Colombo 01.
6. C.W. Wickremasekera,
Assistant Superintendent of Police,
Criminal Investigation Department,
Colombo 01.

7. The Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

BEFORE : K. Sripavan, C.J.
P. Jayawardena, P.C., J.
U. Abeyrathne, J.

COUNSEL Manohara de Silva, P.C. with Uditha Egalahewa P.C.,
U.D.Z. Gunawardena, Daya Guruge, Luxman
Amarasinghe, David Weeraratne, Ranga Dayananda and
Arinda Wijesurendra for the Petitioner.

Y. Kodagoda, P.C., A.S.G. with Yuresha de Silva, S.S.C.
and Janaka Bandara, S.S.C. for the Respondents.

J.C. Weliamuna with Pulasthi Hewamanne for the
aggrieved party (Complainant)

ARGUED ON : 04.12.2015, 08.12.2015 and 11.12.2015

WRITTEN SUBMISSIONS) : 17.12.2015 by the Petitioner
FILED ON) : 21.12.2015 by the Respondents.

DECIDED ON : 11.01.2016

PRIYANTHA JAYAWARDENA, PC, J.

The Petitioner preferred this application in terms of Article 126 (1) of the Constitution alleging violation of his fundamental rights guaranteed under Articles 12(1), 13(3) and 13(5) of the Constitution as the 7th Respondent has taken a decision to indict the Petitioner under Section 365B of the Penal Code as amended and also has issued instructions to prosecute the Petitioner in the Magistrate's Court of Mount Lavinia under Section 314 of the Penal Code as amended, without conducting a fair and proper investigation.

The Petitioner, inter-alia, prayed for a declaration that the 7th Respondent violated or infringed and/or will imminently infringe the fundamental rights of the Petitioner as guaranteed by Articles 12(1), 13(3) and 13(5) of the Constitution by issuing instructions to prosecute the Petitioner for an alleged offence under Section 314 of the Penal Code in the Magistrate's Court of Mount Lavinia in addition to the Petitioner being indicted in the High Court of Colombo.

The Petition and the Submissions made by the Counsel for the Petitioner

The Petitioner stated in his Petition that he was looking for a domestic servant to take care of his wife and daughter and therefore placed an advertisement in the Silumina newspaper of 14.06.2015 to find a domestic servant. Consequent to the said advertisement the Petitioner received response on the very next day from one female named Mathotage Nilusha Damayanthi (hereinafter referred to as the Complainant) who visited the Petitioner's residence and sought employment. She had mentioned that she was living in separation from her husband and four grown up children. As the Petitioner was in dire need of domestic help to take care of his wife and daughter the Petitioner was compelled to employ her after obtaining personal details furnished by her in her own hand writing although she had no character certificates or testimonials of her past service or conduct.

The Petitioner stated that on or about 27.06.2015, a B-Report had been filed bearing No. B/2049/15 by the aforementioned 1st Respondent in the Magistrate's Court of Mount Lavinia informing Court that the Petitioner was, inter-alia, involved in the committing of an offence under Sections 314, 316 and 486 of the Penal Code. The Petitioner stated that the aforementioned B-Report had been filed on a purported complaint received from the aforementioned domestic maid employed by him.

The Petitioner in paragraph 12 of the Petition further stated that the said B-Report, inter-alia, stated that:-

- i. The Complainant was employed by the Petitioner on 15.06.2015 when she responded to an advertisement placed by the Petitioner in the Silumina newspaper dated 14.06.2015'.
- ii. her duties involved taking care of the Petitioner's mentally unstable child and the Petitioner's sick wife,
- iii. the Complainant was confined to the Petitioner's residence and was not allowed to go out,
- iv. the Petitioner's child frequently assaulted the Complainant and the Petitioner was a silent observer of these assaults,
- v. thereafter on several days, the Petitioner had struck the Complainant with his pistol and as a result she suffered swelling on those areas including

- around her eye and the Complainant stated that she was purportedly beaten severely at 2 p.m. on 26.06.2015'
- vi. consequent to this assault she had difficulty in her vision,
 - vii. further, as a result of the said assault, her chest bore scratch marks,
 - viii. in the circumstances, the Complainant had run away from the Petitioner's house and made a complaint to the Police, consequent to which she had admitted herself to hospital,
 - ix. the said crime constitutes an offence under Section 314, 316 and 486 of the Penal Code.
 - x. Landebandarage Dilip Nuwan Kumara [Civil Defense Guard T 75920] of the Mount Lavinia Police Station, in his statement had stated that he was on duty from 10 p.m. on 26.06.2015 until 6 a.m. the following day and that he heard a shout at about 10.30 p.m. from inside the Petitioner's house, but similar shouts were heard regularly and therefore he did not take any notice of the same.

The Petitioner further stated that the aforementioned B-Report did not contain any allegation that the Petitioner in anyway sexually harassed or assaulted the Complainant as falsely alleged by the Complainant subsequently.

The Petitioner also stated in paragraph 16 of the Petition that :

- i. on 16.06.2015, the Complainant had sent a short message (SMS) to the Petitioner's mobile phone stating that;

"Sir, baba cool drink genath dunnenehe kiyala Kaden apita Naraka wachana walin banala Gahanna enawa, room ekata gihin dora wahagannawa.

Mokada karanne, mata nam bayai."

The Petitioner stated that the said 'SMS' was sent by the Complainant on the very next day she is said to have been sexually harassed by the Petitioner.

- ii. on 21.06.2015, the Complainant had sent another short message (SMS) to the Petitioner's mobile phone stating that;

"I am sorry sir, I want to go home. I can't stay here" (sic)

From her mobile number 076609559. The Petitioner immediately

telephoned the Complainant to inquire the reason for sending the said message and the Complainant informed the Petitioner that the Petitioner's daughter was quarrelling with the Complainant and that she cannot bear any further.

Thereafter, on the night of the 26th of June, 2015, the Complainant left the Petitioner's premises being annoyed with the Petitioner and on the same night had lodged the aforesaid complaint with the 1st Respondent against the Petitioner. The Petitioner stated that a further statement had been recorded from the said Complainant on or about 30.06.2015 by the 2nd Respondent, falsely introducing further offences and/or graver charges alleged to have been committed by the Petitioner as evinced by the Report dated 30.06.2015 filed by the 2nd Respondent.

The Petitioner further stated that according to the evidence placed before the Magistrate's Court of Mount Lavinia, the alleged sexual abuse had taken place on 15.06.2015. However, the Complainant did not make such allegation on the first opportunity when she made the complaint on 26.06.2015. It was the position of the Petitioner that the allegation of sexual abuse is totally belated and has been made after the Criminal Investigation Department (CID) took over the investigation.

The Petitioner claimed that he was not against an investigation being conducted into the purported complaint made against the Petitioner, but there was no fair and exhaustive investigation conducted. The Petitioner stated that he instructed his Attorneys-at-Law to make representations to the Attorney-General against any decision to indict the Petitioner without first properly concluding a comprehensive investigation wherein statements from all material witnesses are recorded in order to confirm the veracity of the complaint before arriving at a decision to institute criminal proceedings against the Petitioner. Accordingly, by letter dated 20.07.2015, the Petitioner's Attorneys-at-Law requested for an interview with the Attorney General.

Subsequently, President's Counsel on behalf of the Petitioner made representations to the Attorney General to have the statements of several material witnesses referred to by the Petitioner recorded in order to properly determine whether criminal proceedings should

be instituted against the Petitioner.

In the meantime, the Petitioner's Attorney-at-Law filed motion dated 11.09.2015 and moved the Learned Magistrate of Mount Lavinia to direct the CID to obtain statements from witnesses set out therein to verify the statement of the Petitioner and to submit a further report to the Magistrate's Court. The witnesses set out in the motion include;

- 1) Mr. Damith, Manager, Interfashion Textile Shop, No. 129/28, Old Galle Road, Moratumulla.

To establish that on the 24th of June, 2015, the Petitioner, the Petitioner's wife and daughter took the complainant for shopping to the aforesaid textile shop and bought clothes approximately in a sum of Rs. 15,000/- for the complainant as well;

- 2) Dr. Harsha Gunasekera, Neurologist, Jayawardenapura Hospital.

To establish that on the evening of the 18th of June 2015, 19th of June 2015 and 22nd of June 2015 when the Petitioner's daughter was taken for medical examination to Norris Clinic, Nawaloka Hospital, Durdans Hospital and Sri Jayawardena Hospital, the complainant accompanied the Petitioner, Petitioner's wife and daughter.

- 3) Dr, Ruwan Ekanayake, Cardiologist, Norris Clinic, Colombo 08.

To establish that on the evening of the 18th of June 2015, 19th of June 2015 and 22nd of June 2015 when the Petitioner's daughter was taken for medical examination to Norris Clinic, Nawaloka Hospital, Durdans Hospital and Sri Jayawardena Hospital, the complainant accompanied the Petitioner, Petitioner's wife and daughter.

- 4) Prof. Saman Gunathilake, Consultant Neurologist, Durdans Hospital.

To establish that on the evening of the 18th of June 2015, 19th of June 2015 and 22nd of June 2015 when the Petitioner's daughter was taken for medical examination to Norris Clinic, Nawaloka Hospital, Durdans Hospital and Sri Jayawardena Hospital, the complainant accompanied the Petitioner, Petitioner's

wife and daughter.

5) Mr. Sarath de Silva, No. 9, 4th Lane, Ratmalana.

To establish the demeanour of the complainant towards the Petitioner as he accompanied the Petitioner, Petitioner's wife, daughter and the complainant on 22.06.2015 when they visited the Sri Jayawardenapura Hospital .

6) Mr. Wijesena, proprietor of Flower Plant Nursery, Piliyandala Road, Katubedda.

To establish that the Petitioner, together with the Petitioner's daughter and the complainant purchased several flower pots for the Petitioner's residence.

7) A detailed bill from Dialog Company in respect of all the incoming and outgoing calls and SMS between 14.06.2015 and 30.06.2015 by the mobile number of the Complainant bearing No. 0766095559. [Vide Paragraph 51 of the Petition]

Accordingly, the Learned Magistrate of Mount Lavinia made order on 18.09.2015 directing the prosecution (C.I.D.) to take necessary action and submit a further report on 09.11.2015.

Learned Additional Solicitor General however argued that the direction made by the Learned Magistrate on 18.09.2015 did not amount to an order made, to record the statements of the aforesaid witnesses but an order for the C.I.D. to inform the next step in respect of the request of the Petitioner, after consulting the Attorney-General.

When the case was called again on 09.11.2015, a further report was filed by the C.I.D. informing Court that the request of the defence has been brought to the notice of the State Counsel handling the file and the advice of the Attorney General is awaited. The Court therefore adjourned the matter till 11.01.2016 for a further report to be filed by the C.I.D. informing the advice of the Attorney General.

Submissions made by the Counsel for the aggrieved Party

The Counsel for the aggrieved party made an application to Court that he be heard in terms of Article 134(3) of the Constitution as his client's rights may be affected as a result of the outcome of this application. His application for a hearing was allowed by Court. In his submissions Counsel urged that a serious crime has been committed against the Complainant and there was sufficient material to institute criminal proceedings and the Attorney General was required under the law to institute criminal proceedings against the

Petitioner.

Submissions made by the Counsel for the Respondents

During the course of the submissions the Learned Additional Solicitor General, handed over the file maintained at the Attorney General's Department to be perused by the Bench along with the file containing the statements recorded from various persons by the Police in respect of the investigation.

The minutes in the said file revealed that the file had been allocated to a Senior State Counsel to study the facts and to submit a report based on the said facts. The Senior State Counsel recommended that the Petitioner be charged under Section 365B and Section 486 of the Penal Code as amended, read with Section 44(b) of the Fire Arms Ordinance.

Thereafter, the matter had been considered by a Senior State Counsel, Senior Additional Solicitor General, Additional Solicitor General, Solicitor General and the Attorney-General. The Attorney-General, after considering the views of the five officers of the Department took a decision to prefer an indictment under Section 365 (b)(2)(A) of the Penal Code and charge the Petitioner under Section 314 of the Penal Code in the Magistrate's Court.

Powers of the Attorney-General

The statutory framework seems to envisage a significant role for the Attorney-General during the pre-trial investigation stages. Section 393(5) of the Code of Criminal Procedure Act as amended imposes upon the Superintendent or the Assistant Superintendent in charge of any Police division the duty to report to the Attorney-General. The Attorney-General's advice can be given *ex mero motu* or on an application. The Attorney-General has the right, by virtue of Sections 393(2) and 393(3) to summon any officer of the State or of a Corporation or of the Police to attend his office with the relevant books and documents to facilitate the exercise of his powers to advise State Departments, Public Officers in any criminal matter of importance or difficulty. It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. What is not permitted by Section 393

should be taken as forbidden and struck down by Court.

Can the decision of the Attorney-General be reviewed in these proceedings ?

In an application in respect of an infringement or imminent infringement of a fundamental right the focus shall be on the executive and administrative action whereby the Petitioner's fundamental right which is claimed infringed or about to be infringed by the decision of the Attorney-General without properly concluding an investigation. (Vide Paragraph 52 of the Petition). The question therefore is whether the Attorney-General when exercising his statutory powers abused the discretion conferred on him by acting in bad faith or with an ulterior motive or whether he has reached a decision based on objective facts.

While I agree with the submissions made by the Learned President's Counsel for the Petitioner that every power must be exercised by the authority fairly, reasonably and lawfully, the mere fact that the statements of witnesses of the defence has not been recorded as claimed by the Petitioner cannot make the decision of the Attorney-General unsustainable. The Attorney-General's decision to indict the Petitioner may be vitiated if a conclusion is arrived not on an assessment of objective facts or evidence but on subjective satisfaction. The reason is where the decision is based on subjective satisfaction if some of the statements turn out to be irrelevant, it would be impossible for a Superior Court to find out which of the statements are relevant or irrelevant, valid or invalid had brought about such satisfaction. But in a case where a conclusion is based on a collective assessment such difficulty would not arise. If it is found that there was evidence before the Attorney-General and such evidence had been considered by several officers of the said Department and a final decision was reached by the Attorney-General based on the views of the said officers, the Superior Court would not interfere and would hesitate to substitute its own view in place of the Attorney-General.

It may be appropriate to quote the following passage from H.W.R. Wade on Administrative Law – 11th Edition at Page 259.

“An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The

principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the Courts are rigorous in requiring the power to be exercise by the precise person or body stated in the statute....”

The Attorney-General's Departmental file handed over to this Court on a confidential basis, shows that the decision to indict the Petitioner in the High Court and to charge him under Section 314 of the Penal Code as amended, in the Magistrate's Court was arrived at after several Officers of the said department have gone through the I.B. extracts, the statements forwarded by the C.I.D. and the representations made by three President's Counsel on behalf of the Petitioner. The main concern of the President's Counsel was to record the statements from certain witnesses including several Medical Practitioners. On 14.10.2015, the Senior State Counsel brought to the notice of Attorney-General the concerns of the President's Counsel and made the following minute :-

“It is highly illogical and unrealistic to say that the said Consultants observed the behavior of the victim in their busy schedule of rushing to the next patient in the private channeling que. (sic).

If the suspect is so insisting of getting down the “required” witnesses to testify on his behalf, he can easily do so, at the trial stage whilst confronting the victim on the said issues during her testimony. The same principle applies to the Manager of the Textile Shop and the owner of the Plant Nursery as well.”

The Attorney-General had considered the views expressed by the Senior State Counsel and having given his mind to it, decided not to record the statements of the said witnesses. The Court while anxious to safeguard Petitioner's fundamental right will not interfere with the decision taken by the Attorney-General unless there are cogent reasons to do so. The Petitioner is entitled to resist any unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion. It is a fundamental requirement of the rule of law, viewed as a safeguard against arbitrary power that decision makers act within the powers conferred on them by law and do not exceed those powers.

Article 12(1) of the Constitution states that “all persons are equal before the law and are entitled to the equal protection under the law.” The Constitution therefore accepts the right of equality and equal protection. Article 13(3) of the Constitution recognizes the need for a fair trial. Sri Lanka has an adversarial system of justice which rests on the premise that the best way to ascertain the truth is for the parties to present their respective cases before a Judge or a jury who has to ascertain the truth from the presentations submitted by both sides. On the totality of the circumstances, I am unable to hold that the Attorney-General has violated the provisions contained in Section 393 of the Code of Criminal Procedure Act as amended.

Learned President’s Counsel for the Petitioner heavily relied on the case of *Victor Ivon Vs. Sarath Silva, Attorney General & Another* (1998) 1 S.L.R. 340. At page 341 Fernando, J. noted as follows:-

*“In order to determine the nature of the discretion to file an indictment, and whether it is reviewable, and if so, in what circumstances and to what extent, it is useful first to examine the discretion to grant sanction: because it is difficult to see on what principle the Attorney General could conclude that a prosecution was not warranted and therefore refuse to grant sanction, but nevertheless file an indictment. Let me begin with an extreme hypothetical case. If a person complains that he was criminally defamed at a public meeting, at which he was not present, and the only witness he has, as to the actual words spoken, is a person who is quite hard of hearing, could sanction be granted, without any further investigation, and without the statement of the accused having been recorded? **A decision to prosecute in such circumstances would be, prima facie, arbitrary and capricious,**” [emphasis added]*

The significant feature in *Victor Ivon’s* case is that the Court exercising its just and equitable jurisdiction, declined to review the decision of the Attorney-General to forward an indictment, even after the Court came to a finding that the alleged lack of proper investigation resulted in the reports not being made available to the Attorney-General. The Court noted at page 349, that “... it does not appear, prima facie the lapse on the part of the State Counsel in not calling for further material has caused any prejudice whatsoever in regard to two of the three allegations. Errors and omissions do occur, and by themselves are not proof that the impugned decision was arbitrary, capricious, perverse or

unreasonable on intended to interfere with the Petitioner's freedom of speech."

The case in hand is different from the hypothetical case referred to in *Victor Ivon's* case . In this case, the statement of the accused was recorded, investigation was conducted and the statements of several persons were recorded and all information together with the statements were sent to the Attorney-General in terms of Section 393(6) of Code of Criminal Procedure Act. Having considered the said material furnished, the Attorney-General made the following minute in the Departmental file on 30.10.2015 –

"I am satisfied that if charges under Section 365B(1)(a) and Section 314 are preferred against the suspect there is a realistic prospect of conviction...."(sic)

The Court cannot therefore hold that the power or discretion of the Attorney-General had been exercised in violation of the fundamental right of the Petitioner.

The Attorney-General acts as the sentinel of professional Code of Conduct and is required to protect the rights and privileges of the lawyers as well as the purity and dignity of the profession. He is the "keeper of the conscience" and the guardian of the interests of the members of the public. Where the legislature has confided the power on the Attorney-General to forward indictment with a discretion how it is to be used, it is beyond the power of Court to contest that discretion unless such discretion has been exercised mala fide or with an ulterior motive or in excess of his jurisdiction. Upon the available material the Court is unable to conclude that the Attorney-General has exercised his discretion upon unreasonable grounds and in an arbitrary and capricious manner.

The Supreme Court of Nigeria on 25th February 1983 in the case of *The State (Appellant) Vs. S.O. Lori and Others (Respondents)* by a seven judge decision made the following observation with regard to the powers and functions of the Attorney-General.

".....As the Chief Law Officer of the State, the Attorney-General has always exercised the powers with regard to the public interest, interests of justice and the need to prevent abuse of legal process. But what happens is that he takes sole responsibility in coming to a decision, in the exercise of his discretion, as to what amounts to public interest, interests of justice and the need to prevent abuse of legal process. It is in his taking this responsibility, that he is a master of his house and a law unto himself.

Whether or not he makes any consultation is a matter peculiarly within his discretion, but whatever decision he arrives at is his responsibility.”

The aforesaid observation applies with equal force to this application as well. It clearly explains that in order to secure proper administration of justice, the Attorney-General must be left to exercise his discretion according to his own judgment, neither acting on any rule of thumb nor taking into account any other consideration other than what is provided by law and the public interest. Certainly, the Petitioner’s remedy is not to ask this Court to question or review the exercise of the powers of the Attorney-General unless the Attorney-General has exercised his powers in bad faith or with an ulterior motive or in excess of his powers.

For the reasons adduced above, the Court is unable to hold that the Attorney-General in exercising his discretion acted in bad faith or with an ulterior motive or in excess of his powers.

Leave to proceed is therefore refused.

K SRIPAVAN, C.J.

I agree.

U. ABEYRATHNE, J.

I agree.

JUDGE OF THE SUPREME COURT.

CHIEF JUSTICE

JUDGE OF THE SUPREME COURT.