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

Udaya Prabhath Gammanpila,
65/14, Wickremasinghe Mawatha,
Kumaragewatta Road, Pelawatta,
Battaramulla.

Presently at :
Magazine Prison,
Colombo 08.

Petitioner

S.C. F.R. Application No. 207/2016 Vs***.***

1. M.D.C.P. Gunathilake,
   Inspector of Police,
   Special Investigation Unit,
   Police Headquarters,
   Colombo 01.

2. Mevan Silva, Senior Superintendent of Police,
   Director,
   Special Investigation Unit,
   Police Headquarters,
   Colombo 01.

3. Pujitha Jayasundara,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

4. Brian John Shaddick,
   2, Martins Knockrow,
   New South Wales 2479,
   Australia.

5. Lasitha Indeewara Perera,
   726 Sri Nanda Mawatha,
   Madinnagoda Road,
   Rajagiriya.

6. J.C.P. Jayasinghe,
   20 Tickell Road,
   Colombo 08.

7. Bandara,
   Assistant Superintendent of Police,
   Special Investigation Unit,
   Police Headquarters,
   Colombo 01.

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

Respondents.

BEFORE **:** K**.** Sripavan, C.J.
U.Abeyrathne. J.

COUNSEL : Romesh de Silva, P.C., with Sugath Caldera for the Petitioner.

Ayesha Jinasena, Senior Deputy Solicitor General with Sahanya Naranpanawe, State Counsel for the 1st, 2nd, 3rd, 7th and 8th Respondents.

Amarasiri Panditharathne with Sanjeewa Kaluarachchifor the 5th Respondent.

Manohara de Silva, P.C.,with Arindra Wijesurendra for the 6th Respondent.

ARGUED ON : 29.06.2016

WRITTEN SUBMISSIONS
FILED ON : : 01.07.2016 (By the Petitioner, Attorney-General and the 5th Respondent)

DECIDED ON **:** **11.07.2016**

K. SRIPAVAN, C.J.,

On a complaint made by the 4th Respondent to the Criminal Investigation Department on the ground that shares of Pan Asia Bank Ltd. worth $ 100,000 held by the 4th Respondent had been sold by the Petitioner, allegedly using a fraudulent Power of Attorney, the Petitioner was summoned before the 1st Respondent for purposes of recording a statement. Counsel

submits at the investigation before the 1st Respondent the Petitioner denied any involvement in the share-transaction using a fraudulent Power of Attorney.

The Petitioner at Paragraph 59 of the Petition alleges that another complaint was made by the 5th Respondent that the shares of Pan Asia Bank worth $ 1,000,000 had been sold illegally by the Petitioner using a fraudulent Power of Attorney.

Learned President's Counsel submits that the 1st, 2nd and 3rd Respondents sought the advice of the Attorney-General to arrest the Petitioner, inter alia, on charges of fraud and/or forgery of documents.

It is alleged that the Petitioner was arrested by the Special Investigation Unit of the Police by the 1st and the 7th Respondent on 18.06.2016. On the same day, a "B" report was filed before the Colombo Fort Magistrate's Court, and the learned Magistrate placed the Petitioner on remand until 01.07.2016.

The legal position appears to be that if an offence is disclosed, the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed. If the Court interferes with the proper investigation where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of justice suffers. The Court emphasizes that when a "B" Report is filed, the Magistrate has to apply his judicial mind to the said Report and give appropriate directions to the Police if further investigations are necessary. The Magistrate shall not make orders mechanically without applying his judicial mind.

In *Dayananda* Vs. *Weerasinghe and Others* (1983) 2 S.L.R. 84, the Petitioner filed application under Article 126 of the Constitution alleging violation of his fundamental rights under Article 13(2) of the Constitution on the ground that, based on the false reports made by the 1st and 2nd Respondents, the Magistrate had made orders for remand. The Petitioner's case was that the remand orders made by the learned Magistrate were due to false and malicious reports filed by the 1st Respondent who was aided and abetted by the 2nd Respondent who in addition made false statement to the Magistrate in Open Court. It was contended that

these actions of the 1st and 2nd Respondents resulted in the Petitioner being deprived of his personal liberty.

Ratwatte, J. (with Colin Thome, J. and Rodrigo, J. agreeing) at (1983) 2 S.L.R. 90 noted as follows :

> *"The question that arises for consideration is whether though the remand orders were made by a judicial officer, the Petitioner is entitled to relief on the ground, as alleged by him, that the remand orders were made as a result of the wrongful acts of the 1st and 2nd Respondents. This question is now covered by authority . In S.C. Application No. 54/82 a similar question arose for decision. The Petitioner in that case alleged that among the fundamental rights infringed was the fundamental right declared by Article 13(2). It was held in that case that there had been a "violation of the fundamental rights guaranteed by Article 13(2) of the Constitution, but this violation has been more the consequence of the wrongful exercise of judicial discretion as a result of a misleading Police report". In view of this, this Court went on to state that it was unable to grant the Petitioner the relief prayed for by him. In my view this judgment is directly in point. I do not think it is necessary to consider the allegations of the Petitioner that the 1st and 2nd Respondents were actuated by malice and ill will towards him. The fact remains that the remand orders were made by the Magistrate in the exercise of his judicial discretion. Even if such orders were made on false or misleading reports it does not help the Petitioner in this case because orders made by a Judge in the exercise of his judicial discretion do not come within the purview of the special jurisdiction of the Supreme Court under Article 126 of the Constitution,* ***even though such orders may be the result of a wrongful exercise of the Judge's judicial discretion. In such an event an aggrieved person's remedy is to invoke the appellate or revisionary powers of the Appellate Courts. For these reasons we are unable to hold that the petitioner is entitled to any relief on this application."*** (emphasis added)

The argument of the Counsel for the Petitioner was that the judicial order concerned was "in consequence of executive and administrative acts". The Court held that the order in question was made in the exercise of the Magistrate's discretion and as such it was not the consequence of an executive action.

It may be relevant to consider the observations made by Wanasundera, J. in the case of *Joseph Perera* Vs. *The Attorney-General and Others* (1992) 1 S.L.R. 199 at 236 –

> "*The principles and provisions relating to arrest are materially different from those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting-point of criminal proceedings while the other constitutes the termination of those proceedings and is made by the judge after hearing submissions from all parties.* ***The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand, for an arrest a mere reasonable suspicion or a reasonable complaint of the commission of an offence suffices.*** *I should however add that the Test is an objective one."* ……
>
> ……..
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> *"This wider discretion vested in the Police is logical and is also necessary for the proper performance of the functions of the Police and for the maintenance of the law and order in the country."* (emphasis added)

In the case in hand, the Petitioner was arrested on 18.06.2016 and produced before the Magistrate on the same day. In the words of Wanasundera, J. in Joseph Perera's case "*that this is not a case of the Police riding roughshod over the rights of the citizens. The Police action was bona fide and within the scope of their functions and the outcome of the case has depended on a legal issue."*

The fundamental rights jurisdiction under Article 126 of the Constitution vis-à-vis the judicial orders made by a Magistrate was considered by Colin-Thome, J. in the case of Leo Fernando Vs. Attorney General (1985) 2 S.L.R. 341 by a Bench of Five Judges. At page 357 Colin-Thome J. observed as follows :-

> "*Within the framework of our Constitution there is a fundamental reason for excluding judicial action from review under the procedure provided for in Article 126. Articles 138 and 139 invest the Court of Appeal with an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution. Under Article 128 an appeal shall lie to the*

Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal which involves a substantial question of law. ***In the circumstances there is no basis for a collateral jurisdiction in respect of such action under Article 126.*** *In the case of Naresh S. Murajikar v. State of Maharashtra , AIR [1967] S.C. 1(ii) heard by a Bench of nine Judges, it was held by a majority of eight to one, that the remedy in respect of judicial action is by way of appeal and not by way of writ-petition for a violation of fundamental rights. Similar reasoning was adopted in the decision of the Privy Council in Chokalinge* Vs. *Attorney General of Trinidad and Tobago* (1981) 1 All E.R. 244."(emphasis added)

In a separate judgment, Ranasinghe, J. at page 368 noted as follows :-

"Section 70 of the Penal Code protects a judge from criminal liability in respect of acts done by him in good faith when acting judicially.

On a consideration of the foregoing, I am of opinion that, under our law, a judge is immune from claims for damages in respect of anything said or done by him bona fide in his capacity as a judge in the discharge of judicial functions. "

On a similar line of reasoning, Ameratunga, J. (with S.N. Silva, C.J. and Raja Fernando, J. agreeing) in *Divalage Upalika Ranaweera* Vs. *Sub-Inspector Vinisias & Others* [S.C. Application 654/2003 – S.C. Minutes on 13.05.2008] stated thus :-

"Under the Roman Dutch Law, which is the Common Law of Sri Lanka, a Judge enjoys complete immunity from civil liability for the acts done in the exercise of his judicial functions. "No action lies against a judge for acts done or words spoken in honest exercise of his judicial office." ***R.W. Lee. An Introduction to Roman Dutch Law 5th Edition page 341. _Section 70 of the Penal Code extends the same protection against criminal liability. Since judicial acts do not fall within the ambit of Article 126 of the Constitution, a Judge is not liable for the violation of fundamental rights arising from a judicial act."*** (emphasis added)

Learned Senior State Counsel in the course of her argument relied on the observation made by Seneviratne , J. *in the Case of Withanachchi* Vs. *Herath* (1988) II C. A.L.R. page 170 at 181 –

> *"In the sphere of criminal law there are varying degrees of proof that is sufficient in law in the circumstances…. "beyond reasonable doubt", "has reason to believe", "is probable" and "has reason to suspect". In this instance the Court has to consider the degree of proof "has reasonable ground for suspecting". In these degrees of proof "suspicion" seems to be the lowest degree of proof required by law in certain instances. Section 32(1) of the Code of Criminal Procedure Act No. 15 of 1979 lays down as follows:*
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> > *"(a) Any peace officer may… without a warrant arrest any person.*
> >
> > *(b) … **a reasonable suspicion** exists of having been so concerned in any cognizable offence."* (emphasis added)

The question therefore arises whether investigators had sufficient material giving reasonable suspicion to the 1st and the 7th Respondents to cause the arrest of the Petitioner. It is not the duty of the Court to determine whether on such available material the arrest should have been made or not made.

Learned Senior State Counsel, inter alia, submitted that the Petitioner bought 2 Million shares from Nandadeva Perera for a sum of Rs. 22 Million on 15th May 1997. On 3rd August 1997, Petitioner bought 50,000 shares from Upulwan Welaratne for a sum of Rs. 500,000/-. Again, on 11th August 1997, 50,000 shares were bought from Lalitha Siritunga for a sum of Rs. 500,000/- . All these shares were bought in the name of Digital Nominees [Pty] Ltd. using Power of Attorney dated 18th April 1997 marked **P3.** The Petitioner claims that, on 25th September 1997 using the same Power of Attorney marked **P3**, the Petitioner transferred 2.1 Million shares to Vanik Incorporation Ltd. in settlement of the financial facilities that had been obtained by the 6th Respondent. The Power of Attorney marked **P3** was registered at the Registrar-General's Office only on 17th January 2000. Thereafter, in July 2000, the Petitioner sold 2 Million shares to Dhammika Perera for a sum of Rs. 20 Million using the said Power of Attorney marked **P3,** as evidenced by the share transfer form marked **P10.** The Proceeds of Rs. 20 Million were never credited to the account of Digital Nominees (Pty)

Ltd. In these circumstances, the investigators are under a legal duty to ascertain as to what happened to the proceeds of Rs. 20 Million obtained by the Petitioner on behalf of Digital Nominees (Pty) Ltd., especially when a complaint was lodged by the 4th Respondent through his Attorney namely, the 5th Respondent with the I.G.P. regarding the loss caused to him due to alienation of the said shares. Thus, when the proceeds so received by the Petitioner had not been credited/ handed over to its owner, namely, Digital Nominees (Pty.) Ltd., a reasonable suspicion may arise whether an offence of criminal misappropriation has been committed by the Petitioner.

Learned President's Counsel for the Petitioner submitted that the said sum of Rs. 20 Million was given to the Power of Attorney holder of the Digital Nominees (Pty.) Ltd. , namely, the 6th Respondent who holds a Power of Attorney to conduct and manage the affairs of Digital Nominees (Pty.) Ltd. in Sri Lanka.

Learned Senior State Counsel, on the other hand, submitted that investigations have revealed of a close association between the Petitioner and the 6th Respondent, therefore, a reasonable suspicion arises whether the Petitioner and the 6th Respondent together with a common purpose acted in conspiracy to commit the offence of criminal breach of trust. An investigation into the matter therefore necessarily follows in the interest of justice. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. It is on this basis of principle that the Court normally does not interfere with the investigations of a case where an offence has been disclosed. The report of the investigation was filed before the learned Magistrate, when the Petitioner was produced. The learned Magistrate exercising her judicial discretion decided to remand the Petitioner till 1st July 2016. Thus, one does not find fault with the investigators for arresting the Petitioner and producing him before the learned Magistrate on the same day. While I agree with the learned President's Counsel for the Petitioner, that the Petitioner shall be pronounced innocent until he is proved guilty, such fundamental right recognized in Article 13(5), shall be subject to such restrictions as my be prescribed by law. Otherwise, as Wanasundera, J. noted in *Joseph Perera's Case* (supra) no Police Officer would be inclined to perform his functions not only in doubtful cases but practically in all cases,

thereby bringing the administration of justice to a standstill. It had to be remembered that in the public interest, it is important that Police Officers should be protected in the reasonable and the proper execution of their duties. They should not be unfairly criticized if they act on a reasonable suspicion.

Learned President's Counsel for the Petitioner contended that if the Petitioner has forged documents, then the remedy available to the party suffered by such forgery was civil and not criminal.

The facts in the present case have to be appreciated in the light of various decisions of this Court cited above. When somebody suffers injury to person, his property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. There are a large number of cases where criminal law and civil law can run side by side. The two remedies are not mutually exclusive but clearly co-extensive and essentially differ in their content and consequence. The object of the criminal law is to punish the offender who commits an offence against a person, property or the state for which the accused, on proof of the offence is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred.

Learned President's Counsel for the Petitioner strenuously argued that this Court could grant bail to the Petitioner, exercising its jurisdiction under Article 126(4) of the Constitution. Considering the judicial decisions and the ambit of Article 126(2), I do not think that this Court while exercising its jurisdiction under Article 126(1) of the Constitution can interfere with any "judicial orders" made by Magistrates. If the Petitioner is not satisfied with the Order made by the Magistrate, he is free to seek further remedies as provided by law. I must however, emphasize that the Powers of Magistrates while dealing with the applications for grant of bail are regulated by the punishment prescribed for the offence in which bail is sought. The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner.

While granting bail, Court has to keep in mind the nature of the accusations, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character, the standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the prevention of further crime and obstruction of Police inquiries etc.

The only question to be considered is whether the Petitioner was informed of the reason for his arrest. While at Paragraph 95 of the Petition, the Petitioner alleges that he was not informed of any reasons for his arrest, learned Senior State Counsel tendered to Court a document marked **'G'** and argued that the nature of the allegations or the charges were explained to the Petitioner, prior to his arrest. The Court does not have any affidavit from the Respondents with regard to this matter. Accordingly, the Court grants leave to proceed for the alleged violation of the Petitioner's fundamental right as enshrined in Article 13(1) by the First and the Seventh Respondents.

CHIEF JUSTICE

U. ABEYRATHNE,J.

I agree.

JUDGE OF THE SUPREME COURT.