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

In the matter of an Application for Special Leave to Appeal under and in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Wickremasinghage Francis Kulasooriya

2. Devamuni Lakshman De Silva

Presently remanded at;
Remand Prison, Mahara.

Petitioners

SC Appeal 52/2021

SC (SPL) LA No. 410/2018
CA (Writ) Application No. 338/2011

Vs,

1. Officer-in-Charge,
   Police Station, Kirindiwela.

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

3. W. Aravinda Perera,
   The Magistrate of Pugoda,
   Magistrate's Court of Pugoda,
   Pugoda.

3A. D. A. R. Pathirana,
   The Magistrate of Pugoda,
   Magistrate's Court of Pugoda,
   Pugoda.

4. Amaraginghe Arachchige Simon Amarasinghe,
   172B, Siyabalagahawatta,
   Pepiliyawala.

Respondents

And now Between

1. Wickremasinghage Francis Kulasooriya
   49/1, Kathuruwatte, Mudungoda, Gampaha.
2. Devamuni Lakshman De Silva
   No. 246/A, Kudagoda, Horampella, Minuwangoda.

Petitioner- Petitioners

Vs,

1. Officer-in-Charge,
   Police Station, Kirindiwela.
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.
3. W. Aravinda Perera,
   The Magistrate of Pugoda,
   Magistrate's Court of Pugoda,
   Pugoda.

3A. D. A. R. Pathirana,
   The Magistrate of Pugoda,
   Magistrate's Court of Pugoda,
   Pugoda.

4. Amaraginghe Arachchige Simon Amarasinghe,
   172B, Siyabalagahawatta,
   Pepiliyawala.

Respondents-Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice E.A.G.R. Amarasekara
Justice K.K. Wickremasinghe

Counsel: Shantha Jayawardena with Chamara Nanayakkarawasam instructed by S. Kaluarachchi for the Petitioner-Appellants

Rohantha Abeysuriya, PC, ASG, with Malik Azeez, SC, for the 1st and 2nd Respondent-Respondents

Pulasthi Hewamanna with Ms. Fadhila Fairoze for the 4th Respondent-Respondent

Argued on: 13.09.2022

Decided on: 14.07.2023

Vijith K. Malalgoda PC J

The Petitioners to the instant application namely, Wickremasinghage Francis Kulasooriya and Devamuni Lakshman De Silva had sought special leave to appeal against the Judgment by the Court of Appeal in CA Writ Application 338/2011 dated 22.10.2018.

This Court after considering the material placed on behalf of all parties, decided to grant special leave to appeal on the questions of law referred to in paragraph 10 (a) and (c) of the petition dated 03.12.2018 which reads as follows;

10 (a) Did the Court of Appeal err in law in failing to appreciate that in view of the extraordinary circumstances, the Petitioners' application was a fit and proper case for the Court of Appeal to exercise its writ jurisdiction under Article 140 of the Constitution?

(c) Did the Court of Appeal err in law in failing to appreciate that the mere availability of an alternative remedy does not prevent the Court of Appeal from exercising Writ Jurisdiction under Article 140 of the Constitution?

As revealed before us the 1st Petitioner was a Sub-Inspector of Police and the 2nd Petitioner was a Police Constable serving at the Kirindiwela Police Station. According to the two Petitioners, while they were on mobile duty on 13.08.2010, at about 20.55 hours they were informed by the Kirindiwela

Police Station that a person under the influence of liquor was behaving violently and causing a nuisance to the public close to the Pepiliyawala Junction within the Police area of Kirindiwela. The Petitioners who proceeded to the Pepiliyawala Junction in a single cab of Kirindiwela Police Station arrested one Amarasinghe Arachchige David Amarasinghe for his unruly behavior under the influence of liquor. When the cab proceeded towards Kirindiwela Police Station after getting him into the rear portion of the cab, the suspect jumped out of the moving cab and was lying on the road with bleeding injuries. With the assistance of the public, the injured were rushed to Radawana Hospital. The injured who was transferred to Gampaha Hospital and thereafter to National Hospital succumbed to his injuries in the early hours of 14th August 2010.

On the 14th itself, the Officer in Charge of the Police Station Kirindiwela had reported the facts before the learned Magistrate Pugoda by way of a 'B' Report. the Acting Magistrate before whom the 'B' Report was called, had made two orders, one was to the J.M.O Colombo to hold the Post Mortem Examination and the other was a directive for the Police Officers who were on mobile duty on the 13th to be present before the Magistrate for inquest proceeding.

The inquest proceedings were commenced on 18.08.2010 before Magistrate Pugoda and the evidence of several witnesses was recorded during the inquest proceedings. Some of the witnesses who testified before the Magistrate gave versions different from what was reported to the Magistrate in the 'B' Report. After recording the evidence of several witnesses, the Magistrate made an order remanding the two Police Officers who were engaged in the arrest of the deceased person and discharged the Police Driver who drove the police cab at the time the deceased was said to have jumped out from the police cab.

As revealed before us, on behalf of the two Police Officers (the two Petitioners before this Court) an application was made for bail before the Magistrate on 23.08.2010 but the said application was refused by the Magistrate as the investigations were incomplete at that time. The Revision Application filed against the Order of the Magistrate too was rejected by the High Court Judge of Gampaha on 24.11.2010. Magistrate Pugoda by order dated 28.04.2011 decided to commence a non-Summary proceeding for the death of Amarasinghe Arachchige David Amarasinghe.

Whilst the non-summary proceedings were pending before the Magistrate's Court of Pugoda, a fresh bail application was filed on behalf of the two suspects before the High Court of Gampaha but the

said application too was rejected by the High Court on 25.02.2011 despite Hon. Attorney General informing Court that there is no objection for granting bail.

In the meantime, the Hon. Attorney General had called for the original case record acting under Section 398 (1) of the Code of Criminal Procedure Act No. 15 of 1979 (as amended).

As submitted before us, the Hon. Attorney General After considering the material available to him at that time, formed an opinion that the said material was insufficient to establish a *prima-facia* case against the two accused, (the two Petitioner-Petitioners before this Court) and has sent the following instruction to the Officer in Charge of Police Station Kirindiwela by letter dated 28.02.2011 with a copy to the Magistrate Pugoda.

"පූගොඩ මහේස්ත්‍රාත් අධිකරණයෘ - නඩු අංක 678/10

පහත සඳහන් චූදිතයින්ට විරුද්ධව තවදුරටත් නීති මඟින් කටයුතු කිරීමට අදහස් නොකරන බවත් ඔවුන් නිදහස් කල හැකි බවත් මහේස්ත්‍රාත් වෙත දැන්විය යුතුය. මේ සම්බන්ධව මහේස්ත්‍රාත් අධිකරණය වෙත වාර්තා කිරීමෙන් පසුව ඒ පිළිබඳව අධිකරණය ගත් ක්‍රියා මාර්ගය මේ සමඟ අමුණා ඇති ආකෘතිය මඟින් මෙම ලිපිය ලැබී දින දාහතරක් (14) ඇතුළත දී මා වෙත වාර්තා කල යුතුය.

1. උ.පොෘප. වික්‍රමසිංහගේ ප්‍රැන්සිස් කුලරත්න
2. පොෘකොෘ. 47797 දේවමුණි ලක්ෂ්මන් සිල්වා"

During the argument before us, the learned Additional Solicitor General who represented the Hon. Attorney General took up the position that the Hon. Attorney General had made the above order acting under section 398 (2) of the Code of Criminal Procedure Act No. 15 of 1979 (as amended) and therefore the learned Magistrate was bound to act on the said directive.

However as submitted by the Petitioners, the learned Magistrate Pugoda had refused to act on the above instructions, when the Officer in Charge of Kirindiwela Police Station had reported the above position before the Magistrate on 03.03.2011. On a directive made by the Magistrate Pugoda, an Officer from the Attorney General's Department was present before the Magistrate's Court of Pugoda on 31.03.2011 and explained the reasons and the legality of the directive dated 28.02.2011 but the Magistrate had refused to act on the said directive. By his order dated 28.04.2011, he ordered the non-summary inquiry to proceed against the two Petitioner-Petitioners.

As admitted by all parties before us the said order of the learned Magistrate was not a final order but was amenable to the revisionary jurisdiction of the High Court. However, as it appears from the

material before us, neither the aggrieved party nor the Hon. Attorney General filed papers before the High Court in order to revise the order of the Magistrate dated 28.04.2011.

However, the two Petitioners invoke the writ jurisdiction of the Court of Appeal and filed a Writ Application seeking the following relief,

a) A Writ of *Certiorari* to quash the proceedings in case No. NS/577 in the Magistrate's Court of Pugoda;
b) A Writ of *Certiorari* to quash the order of the 3rd Respondent refusing to discharge the Petitioners in Case No. NS/577 in the Magistrate's Court of Pugoda;
c) A Writ of *Prohibition* prohibiting the 3rd Respondent from refusing to discharge the Petitioners in Case No. NS/577 in the Magistrate's Court of Pugoda;
d) A Writ of *Mandamus* directing the 3rd Respondent to discharge the Petitioners from the proceedings in Case No. NS/577 in the Magistrate's Court of Pugoda;

When the said matter was argued before the Court of Appeal, parties argued the jurisdiction of the Court of Appeal to issue orders in the nature of writs against an order of the courts of first instance and whether the Magistrate is bound to act on the directive issued by the Attorney General.

However, as a preliminary matter Court decided to consider, whether the Court should use its discretion and issue orders in the nature of writs when the Petitioners had failed to make use of the alternative remedies available to them. It was submitted that in the instant case, the Petitioners had failed to make use of revisionary jurisdiction under Article 138 of the Constitution before invoking writ jurisdiction under Article 140 of the Constitution.

Both remedies referred to above are remedies identified in the Constitution and the relevant Article of the Constitution reads as follows;

Article 138 (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in the law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision, and *restitutio in integrum*, of all causes, suits, actions,

prosecutions, matters, and things [of which such High Court, Court of First Instance] tribunal or other institution any have taken cognizance;

Provided that no judgment, decree, or order of any Court shall be reversed or varied on account of any error, defect, or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

(2) The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain.

Article 140 Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person

The plain reading of any of the above constitutional provisions does not explain the characteristics of each remedy but our Courts have decided/explained the parameters within which these remedies will be available to an aggrieved party.

The revisionary jurisdiction of the Court of Appeal is further explained under Article 145 of the Constitution as follows;

Article 145 The Court of Appeal may *ex mere motu* or on any application made, call for, inspect and examine any record of any Court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require.

When considering the above two provisions, it appears that the revisional power of the Court is very wide but when implementing those powers our Courts were careful in discharging them.

In the case of ***Gnanapandithan and Another V. Balanayagam and Another (1998) 1 Sri LR 391 at 397 GPS de Silva CJ*** observed the following;

> "On consideration of the proceedings in this case, I hold that there had been a miscarriage of justice, the object of the revision as stated by Sansoni CJ in *Mariam Beebee V. Seyed Mohomed*. "Is the due administration of justice…." In the words of Soza J in Sommawathie and Madawala and Others "The Court will not hesitate to use its revisionary power to give relief where a miscarriage of justice has occurred Indeed the facts of this case cry aloud for the intervention of this Court to prevent what otherwise would be a miscarriage of justice" The words underline above are equally applicable to the present case.
>
> I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its revisionary power having regard to very special and exceptional circumstance of this partition case."

In the case, ***Don Chandra Maximan Elangakoon V. OIC Eppawala and another CA PHC APN 99 2006*** CA Minute 04.10.2007 Sarath Abrew Judge of the Court of Appeal (as he then was) had observed the tests that should be used in granting relief in a revision application. Whilst giving reference to a series of cases decided by the Court of Appeal, his Lordship has identified some of the tests that should be applied as follows;

> The Petitioner should plead or establish exceptional circumstances warranting the exercise of the revisionary power,
>
> There should not be any unreasonable delay in filing the application
>
> There should be full disclosure of material facts and show *uberrima fide* as non-disclosure is fatal.

With regard to the powers vested with the Court of Appeal under Article 140 in issuing orders in the nature of writs, it is well settled that when an alternative and equally efficacious remedy is available to a party, the party should be required to pursue that remedy before invoking the writ jurisdiction.

This position was considered by Shirani Thilakawardena J in the case of Ishak V. Lakshman Perera Director of Customs and Others (2003) 3 Sri LR 18 as follows;

> "Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the Courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the Court is coming to a discretionary decision." Where there is a choice of another separate process outside the Courts, a true question for the exercise of discretion exists. For the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with the **judicial review being properly regarded as being a remedy of last resort.** It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used, in exercising its discretion the Court will attach importance to the indication of Parliament intention." (Emphasis by me)

Her ladyship had considered invoking the writ jurisdiction as the "last resort." In the above circumstances, it is necessary for the Petitioners in a writ application either to aver that the party had exhausted the alternative remedy or explain why the party decided to invoke writ jurisdiction without resorting to the alternative remedy available to them.

As observed by the Court of Appeal, the Petitioners before the Court of Appeal were silent regarding their decision to invoke the writ jurisdiction of the Court of Appeal without resorting to the revisionary jurisdiction of the High Court, which is an equally effective remedy available to them. When responding to the above and whilst challenging the decision by the Court of Appeal, before the Supreme Court, the Petitioners have submitted that;

a) Court of Appeal also conceded the non-availability of judgments where writ applications were rejected for failure to exercise revisionary jurisdiction as an alternative remedy
b) The judgment in ***Halwan and Others V. Kaleelful Rahuman (2000) 3 Sri LR 50*** relied upon the Court of Appeal in the impugned judgment is also not a case where writ application

was dismissed on the basis that there was the possibility of instituting a revision application

c) At the time the impugned order was made by the learned Magistrate refusing to comply with the directive given by the Attorney General, the Petitioners were under continuous remand custody and their bail application to the High Court had also been refused. In the circumstances, the Appellants opted to come before the Court of Appeal by way of a Writ Application as that would be the most efficacious remedy

d) Revisionary jurisdiction of the Court of Appeal under Article 138 of the Constitution or the revisionary jurisdiction of the Provincial High Court in terms of Article 154 (3) of the Constitution read with High Courts of Provinces (Special Provision Act No 19 of 1990) are discretionary remedies

e) Litigant must establish exceptional circumstances to invoke Revisionary jurisdiction

and argued that there is no necessity for the Petitioners to give reasons before the Court of Appeal when they invoke the writ jurisdiction since it was the most efficacious remedy available to them.

As already observed above, it appears that each remedy referred to above has its own characteristics which need to be fulfilled when invoking the said jurisdiction. As further observed by this Court both, revisionary jurisdiction and the writ jurisdiction are discretionary remedies and when granting such relief, the Court will consider whether the party who invoke the relevant jurisdiction had fulfilled the requirements to invoke the said jurisdiction.

A party who invokes the revisionary jurisdiction is required to satisfy Court that there are exceptional circumstances for the party to invoke such jurisdiction and the Court will use its discretion when deciding to grant such relief. Similarly, a party invoking the writ jurisdiction of the Court of Appeal is necessary to satisfy Court that the said party had exhausted all equally efficacious remedies available to them before invoking the writ jurisdiction. In other words, failure by a party to make use of equally efficacious remedies available to them will become a ground for the Court to use its discretion and refuse to grant such relief.

As further observed by this Court the party who does not wish to invoke the jurisdiction of an alternative remedy available, the said party, should give reasons as to why the party had decided to

invoke the writ jurisdiction of such Court and the Court is free to make use of its discretion when considering the reasons placed before Court.

The Petitioners argued, that the revisionary jurisdiction being a discretionary remedy where the parties who invoke the revisionary jurisdiction need to establish exceptional circumstances, it cannot be considered as an effective alternative remedy to oust the writ jurisdiction of the Court.

In this regard, the Petitioners tried to compare the appellate jurisdiction of the Court and argue that the cases relied on by the Respondents before the Court of Appeal had been decided based on the failure of Petitioners in those cases to make use of the appellate jurisdiction available to them by a statute.

Unlike in a statutory appeal where the Appellant should act within a specific period and within the framework identified in the statute, the revisionary jurisdiction of the Court has a wide range where it will be available for litigants who do not have any other remedy to address them. It is well-settled law that revisionary jurisdiction is available to a litigant when he failed to exercise his statutory remedy within the stipulated period and also in a situation similar to the instant case where the order challenged before Court is not a final order amenable to a final appeal.

As guided by the Court of Appeal in the instant case, I do agree and would be happy to be guided by the decision in the case of ***Mariam Beebee V. Seyed Mohomed and Other 69 CLW 34*** to the effect;

> "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this court. Its object is the due administration of justice and the correction of the errors, sometimes committed by this Court itself, in order to avoid a miscarriage of justice"

In the above context when using the extraordinary power vested with the Court, the law requires the Court to be vigilant on the wide discretion given to such Court and that is why our Courts expect the parties who invoke the revisionary jurisdiction to establish "exceptional circumstances" under which the party wishes to invoke the revisionary jurisdiction of the said Court.

Therefore, I cannot agree when the petitioners submitted that the revisionary jurisdiction is not an effective alternative remedy since the party who invoke the revision jurisdiction need to establish exceptional circumstances, whereas no such requirement is to be fulfilled when invoking writ jurisdiction. The extraordinary nature of the revisionary jurisdiction as discussed above clearly establishes that the revisionary jurisdiction is an equally efficacious jurisdiction when compared to writ jurisdiction.

Even though the petitioners have failed to explain the reason for them to invoke the writ jurisdiction of the Court of Appeal without resorting to the revisionary jurisdiction of the High Court, it was submitted before us on behalf of the Petitioners that, the writ jurisdiction was the most effective remedy compared to a revision application since the Petitioners moved the Court of Appeal to issue a writ of *certiorari* quashing the decision of the Magistrate to proceed with the non-summary inquiry ignoring the directive of the Hon. Attorney General and to issue a writ in the nature of a *mandamus* directing the Magistrate to act on the directive of the Hon. Attorney General and discharge the Petitioners.

As already referred to in this judgment, writ jurisdiction of the Court of Appeal too has its own characteristics and the party who invokes writ jurisdiction must necessarily satisfy that the said party had exhausted all equally efficacious remedies available to him.

Similarly, Courts are reluctant to grant orders in the nature of writs when the matters on which the relief is claimed are in dispute or in other words when the facts are in dispute.

This was considered in the following terms by Ranasinghe J (as he then was) in a celebrated case of ***Thajudeen V. Sri Lanka Tea Board [1981] 2 Sri LR 471***;

> "A comparison of the respective positions taken up by the Respondents and the Petitioner unmistakably shows that the claim of the Petitioner, that he is entitled to the amount set out in his Petition, is denied by the Respondents and that such denial is not based only upon questions of law alone. One of the main grounds of objections raised in respect of the said claim is that the said sum of money is not, in fact, due. This objection is one based upon questions of fact. The Respondents dispute the correctness of the figures relating to the purchases of the green tea leaf. They deny that such

> quantities of green tea leaf were in fact purchased as claimed by the Petitioner. The very foundations of fact, which the Petitioner must establish to prove that he is, in fact, entitled to claim the payment of the sum of money, which he seeks to compel the Respondents to pay him, are therefore, not only not admitted by the Respondents but are also very strenuously denied and disputed by the Respondents. The basic of fundamental issues of fact the proof of which is essential, to the claim for the relief the Petitioner seeks in these proceedings, have in the first instance to be established by the Petitioner. In the absence of incontrovertible proof or an admission by the respondents of such matters of fact, the petitioner's claim to the payment of the said sum of money cannot be maintained. **All such disputed matters of fact must be resolved before a mandatory order, such as is claimed by the Petitioner in these proceedings and goes out from this court.** The issuance of such an order carries with it the implication that this Court is satisfied that the said amount is in fact due to the Petitioner and that there is no question about the basic primary questions of fact upon which the Petitioner's claim is founded. When, however, such questions of fact are in dispute they can and must only be settled by a regular action between the disputants before the appropriate Court of First Instance. Such questions, the decision of which calls for the leading of evidence, both oral and documentary, and the cross–examination of witnesses are all questions that can be best decided by way of regular procedure falling within the ordinary jurisdiction of the Courts of First Instance. (Emphasis added)

The Petitioners before the Court of Appeal had made the learned Magistrate Pugoda as the 3rd Respondent in the said application and the 3rd Respondent in his affidavit submitted to the Court of Appeal has taken up the position that there was no directive made by the Hon. Attorney General directing the Magistrate to conduct and/or conclude and/or terminate the non-summary proceeding under section 398 (2) of the Code of Criminal Procedure Act No. 15 of 1979, as amended. Even though the Officer in Charge of the Police Station Kirindiwela had filed a communication received by him from the Attorney General, it was the position of the 3rd Respondent that the said communication cannot be construed as a directive issued under section 398 (2)

As further observed in this judgment it was transpired at the inquest proceeding held before the Magistrate Pugoda, that there were witnesses who contradicted the version given in the 'B' Report

with regard to the incident that took place on 13.08.2010. These are factual matters that need to be considered in a regular action but not in an application for judicial review.

When considering the matters already discussed in this judgment it appears to me that the Court of Appeal was correct in refusing to entertain the application filed before the said Court, for the failure by the Petitioners to invoke revisionary judicial of the High Court which is an equally effective remedy available to them.

In the said circumstances, I answer the first question of law in negative. I will not be answering the 2nd question of law under which the leave was granted since I cannot agree with the term used by the Petitioners "mere availability of an alternative remedy "as against "equally effective remedy."

As already discussed in this Judgment, the Court of Appeal was mindful of this fact and had correctly decided the case.

The appeal is dismissed/ No Costs.

Judge of the Supreme Court

Justice K.K. Wickremasinghe,

I agree,

Judge of the Supreme Court

E. A. G. R. Amarasekara, J.

I had the privilege of reading the Judgment written by His Lordship Justice Vijith. K. Malalgoda in its draft form. I am in agreement with his lordship's final conclusion to dismiss the appeal without costs. I intend to set down in writing following reasons to fortify my view that this appeal should be dismissed.

1. The Petitioners' case is based on the premise that the communication from the Honourable Attorney General to the SSP Gampaha Dated 28.02.2011 is a directive issued in terms of

section 398(2) of the Criminal Procedure Code and the learned magistrate was bound to act on the said directive. The Position of the Petitioners is that by refusing to discharge the petitioners and proceeding with the non-summary inquiry made the proceedings before the magistrate court ultra vires and hence the better remedy was to file a writ application when compared with other available remedies.

2. For the reasons mentioned below, I do not see that the said communication can be considered as a directive issued in terms of section 398(2) of the Criminal Procedure Code.
    a) Firstly, it is addressed to the SSP, Gampaha Division and not the Magistrate. It directs the said SSP to inform the magistrate that the magistrate may discharge the petitioners since further legal proceedings are not intended against the petitioners. This communication may be considered as a directive to the SSP to convey the opinion contained therein to the relevant magistrate but it cannot be considered as a directive issued to the magistrate as it is not addressed to the magistrate concerned.
    b) Secondly, the Contents of the said communication state that the magistrate may discharge the Petitioners (ඔවුන් නිදහස් කල හැකි බව දැන්විය යුතුය). The use of the word “May” indicates that it gives a discretion to the magistrate. The contents do not compel the magistrate to discharge the petitioners. When the words used has given a discretion to the magistrate, one cannot say that the proceedings became ultra vires by not following the instructions. The character of the said communication does not change merely because a state counsel appeared on a subsequent date and confirmed the opinion expressed in the said communication.

Hence, the first question of law has to be answered in the negative and it is sufficient to dismiss the appeal.

Appeal dismissed without costs.

Judge of the Supreme Court