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

Attorney General,
Attorney General's Department,
Colombo 12.
1st Respondent-Appellant

SC/APPEAL/104/2024
CA/WRIT/441/2021

Vs.

1. Sandresh Ravindra Karunanayake,
   1291/6, Rajamalwatte Road,
   Battaramulla.
   Petitioner-Respondent
2. The Registrar,
   High Court at Bar in Case No.
   HC (TAB) 2445/2021,
   High Court of Colombo.
3. Justice K.T. Chitrasiri,
   Retired Judge of the Supreme Court,
   Chairman, Commission of Inquiry
   appointed to investigate into and report on
   the issuance of treasury bonds,
   92/20, Thalapathpitiya Road,
   Udahamulla, Nugegoda.
4. Kandasamy Velupillai,
   Retired Deputy Auditor General,

Member of the Commission of Inquiry appointed to investigate into and report on the issuance of treasury bonds.

5. Secretary to the President,
Presidential Secretariat,
Colombo 01.

2nd to 5th Respondents-Respondents

Before: Hon. Justice S. Thurairaja, P.C.
Hon. Justice Janak De Silva
Hon. Justice Mahinda Samayawardhena

Counsel: Dilan Ratnayake, P.C., A.S.G., with Sanjeewa Dissanayake, D.S.G., Janaka Bandara, D.S.G., and Udara Karunathilake, S.S.C., for the 1st Respondent-Appellant.

Faisz Mustapha, P.C., with Razik Zarook, P.C., Faisza Markar, P.C., Riad Ameen and Zainab Markar for the Petitioner-Respondent.

Argued on: 10.02.2025

Written submissions:

By the Appellant on 06.01.2025 and 04.03.2025.

By the 1st Respondent on 22.01.2025 and 10.03.2025.

Decided on: 03.06.2025

Samayawardhena, J.

Background facts

The treasury bond scam of 2015–2016, involving grave irregularities in the issuance of treasury bonds at auctions conducted by the Central Bank of

Sri Lanka between 01.02.2015 and 31.03.2016, is widely regarded as the most serious financial scandal in the history of the country. The resultant economic loss to the Government and the public is estimated to run into several billions of rupees, thereby causing substantial harm to the national economy and public trust in financial governance. These events triggered a widespread public outcry.

On the one hand, pursuant to a written complaint made by the then Governor of the Central Bank, Dr. Indrajit Coomaraswamy, on 25.11.2016, the Criminal Investigation Department of the Sri Lanka Police commenced a criminal investigation. On the other hand, given the magnitude and complexity of the issue, the then President of the Republic appointed a Presidential Commission of Inquiry under section 2 of the Commissions of Inquiry Act, No. 17 of 1948, as amended, comprising two sitting Judges of the Supreme Court and a retired Deputy Auditor General, with a mandate to investigate, inquire into, and report on the issuance of treasury bonds during the relevant period. The final report of the Commission (P4) was handed over to the President on 30.12.2017 and has since remained in the public domain. The President, *inter alia*, referred the final report to the Attorney General for advice and appropriate action.

Initially, the Criminal Investigation Department reported facts to the Magistrate's Court of Fort in Case No. B/16089/2020, implicating several individuals as suspects, including the Minister of Finance at the material time, namely Ravi Karunanayake. Ravi Karunanayake succeeded in obtaining a writ of certiorari from the Court of Appeal quashing the arrest warrant issued against him by the Fort Magistrate's Court, in a separate writ application.

Thereafter, the Attorney General, under his hand, exhibited information dated 11.02.2021 to the High Court of Colombo (P10), comprising 26 typed pages, in terms of section 450(4) of the Code of Criminal Procedure Act, No.

15 of 1979. This document set out a summary of the investigation, including the names of 11 suspects and the alleged offences attributed to them. The Attorney General also transmitted the indictment to the High Court containing 32 counts wherein Ravi Karunanayake is named as the 2nd accused.

Section 450(4) of the Code of Criminal Procedure Act reads as follows:

> *Notwithstanding anything to the contrary in this Code or any other law, the Attorney-General may exhibit to the High Court information in respect of any offence to be tried before the High Court at Bar by three Judges without a jury.*

It is significant to note that in this information exhibited by the Attorney General, the Attorney General made it very clear that the said information and the indictment were based upon:

(a) the investigation conducted by the Criminal Investigation Department pursuant to the complaint made by Dr. Indrajit Coomaraswamy; and
(b) the material collected in the course of the inquiry conducted by the Presidential Commission of Inquiry.

Let me quote the introductory part of the information exhibited by the Attorney General to the High Court, which clearly identifies the sources of information:

> 1988 අංක විසිඑක දරණ පණතින් සංශෝධිත 1979 අංක 15 දරණ අපරාධ නඩු විධාන සංග්‍රහය පනතේ 450(4) වන වගන්තිය යටතේ ජූරි සභාවක් නොමැතිව මහාධිකරණයේ විශේෂ අධිකරණයක් ඉදිරියෙහි විනිශ්චකාරවරුන් තිදෙනෙකු විසින් නඩු විභාගයක් පැවැත්විය යුතු වරදවල් පිළිබඳව නීතිපතිවරයා විසින් මහාධිකරණය වෙත ඉදිරිපත් කරන තොරතුරු
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> ශ්‍රී ලංකා ප්‍රජාතන්ත්‍රික සමාජවාදී ජනරජයේ මහාධිකරණය වෙත

ශ්‍රී ලංකා ලංකා මහා බැංකුව විසින් භාණ්ඩාගාර බැඳුම්කර නිකුත් කිරීමේදී අනාවරණය නොකළ යුතු මූල්‍ය සංවේදීතාවයක් ඇති රහස්‍ය තොරතුරු ශ්‍රී ලංකා මහා බැංකුවේ යම් යම් පාර්ශවයන් විසින් ලබා දී තිබේද යන්න සම්බන්ධව විමර්ශනයක් සිදුකරන ලෙසට ඉල්ලා 2016.11.25 දිනැතිව ශ්‍රී ලංකා මහ බැංකුවේ හිටපු අධිපති ආචාර්ය ඉන්ද්‍රජිත් කුමාරස්වාමි මහතා විසින් පොලිස්පතිතුමා වෙත යොමු කර තිබෙන ලිඛිත පැමිණිල්ලකට අනුව අපරාධ පරීක්ෂණ දෙපාර්තමේන්තුව විසින් අපරාධ විමර්ශනයක් ආරම්භ කරන ලදී.

තවද, ඉහත විමර්ශනයට සමගාමීව හිටපු ගරු ජනාධිපති මෛත්‍රීපාල සිරිසේන මහතාගේ නියෝගයක් මත 2015.02.01 දින සිට 2016.03.31 දින දක්වා වූ කාලසීමාව තුළ භාණ්ඩාගාර බැඳුම්කර සම්බන්ධයෙන් විමර්ශනය කොට විභාග කර වාර්තා කිරීම සඳහා කොමිෂන් සභාවක් පත් කරන ලද අතර, එකී කොමිෂන් සභාවේ වාර්තාව 2017.12.30 වන දින හිටපු ගරු ජනාධිපති මෛත්‍රීපාල සිරිසේන මහතා වෙත එම කොමිෂන් සභාවේ කොමසාරිස්තුමන්ලා විසින් භාර දෙන ලදී.

හිටපු ගරු ජනාධිපතිතුමන් විසින් එම වාර්තාවේ සඳහන් නිර්දේශ ක්‍රියාත්මක කළ යුතු ආකාරය පිළිබඳව නීතිපතිවරයාගෙන් උපදෙස් පතා ඇති අතර, ඒ පිළිබඳව උපදෙස් ලැබීමෙන් අනතුරුව නීතිපතිවරයාගේ විෂය පථයට වැටෙන නිර්දේශ ක්‍රියාත්මක කිරීම සලකා බලන ලෙසට දන්වා ඇත.

භාණ්ඩාගාර බැඳුම්කර නිකුත්වන් සහ ඊට අදාළ ගනුදෙනු පිළිබඳව විමර්ශනය කොට විභාග කිරීම සඳහා පත්කරන ලද ජනාධිපති කොමිෂන් සභාව ඉදිරියේ ලබාදෙන ලද සාක්ෂි සහ ලකුණු කරන ලද ලේඛනද, අපරාධ පරීක්ෂණ දෙපාර්තමේන්තුව විසින් සිදු කරන ලද විමර්ශනවලදී සටහන් කර ගන්නා ලද ප්‍රකාශද අනුව පහත සඳහන් සාක්ෂි සහ කරුණු අනාවරණය වී ඇත.

It would not be inaccurate to make the observation that the *modus operandi* and the complex nature of the offences alleged to have been committed by the accused transcend the comprehension of an Attorney-at-Law and a Judge engaged in routine criminal matters in the ordinary course of duty.

Section 450(2) of the Code of Criminal Procedure Act reads as follows:

> *Where the Chief Justice is of the opinion that owing to the nature of the offence or the circumstances of and relating to the commission of the*

offence, in the interests of justice a trial at Bar should be held, the Chief Justice may by order under his hand direct that the trial of any person for that offence shall be held before the High Court at Bar by three Judges without a jury.

Recognising the gravity of the offences and the circumstances under which they were alleged to have been committed, the Chief Justice, by order dated 18.02.2021, acting under section 450(2) of the Code of Criminal Procedure Act, appointed a High Court at Bar by nominating three High Court Judges to hear and determine this special case without a jury.

While the case was pending before the High Court at Bar, Ravi Karunanayake (hereinafter referred to as "the petitioner"), invoked the writ jurisdiction of the Court of Appeal on 01.10.2021, naming the Attorney General, the Registrar of the High Court at Bar, and the Commissioners of the Presidential Commission of Inquiry as respondents, seeking to quash, by way of a writ of certiorari:

(a) the decision and the indictment and/or information filed/exhibited against the petitioner by the Attorney General; and

(b) the following "decisions" made in the report of the Commission of Inquiry against the petitioner [as identified by the petitioner in paragraph (g) of the prayer to the petition], namely:

  (i) that the petitioner gave assurances/undertakings at a meeting held on 28.03.2016 at the Ministry of Finance as aforesaid [i.e. that the petitioner instructed the representatives of the three state banks to only bid within specified yield rates given by the petitioner at the treasury bond auction to be held on 29.03.2016, and also assured them that only bids within that range would be accepted by the Central Bank at the auction]; and/or

  (ii) that the petitioner should have advised the Central Bank of Sri Lanka of such alleged assurances/undertakings; and/or

(iii) that the petitioner ought to have taken steps to ensure that the Central Bank of Sri Lanka honoured such assurances/ undertakings; and/or

(iv) that instructions to state banks to bid at low yield rates resulted in restricted bids for state banks resulting in other primary dealers [particularly, the 1st accused, Perpetual Treasuries Ltd., who allegedly used "inside information" and "market manipulation"] having an increased opportunity to have their bids accepted at the auction held on 29.03.2016.

By its judgment dated 28.02.2023, the Court of Appeal quashed, by way of certiorari, the information exhibited and the indictment filed against the petitioner by the Attorney General, but refused to quash the decisions of the Commission of Inquiry identified in paragraph (g) of the prayer to the petition. It is against this judgment that the Attorney General filed the present appeal with leave obtained. Notwithstanding the refusal to quash the aforesaid decisions of the Commission of Inquiry, the petitioner did not prefer an appeal. Accordingly, the only question that remains for determination in this appeal is whether the Court of Appeal was correct in quashing the information exhibited and indictment filed against the petitioner by way of certiorari.

Why was the indictment quashed?

Let me now consider the basis on which the Court of Appeal quashed the information exhibited and the indictment filed against the petitioner by way of certiorari. I must state at the outset that the reasoning of the Court of Appeal is not easily discernible, perhaps due to the inherently complex nature of the application presented by the petitioner before the Court of Appeal in the exercise of its writ jurisdiction. However, I will endeavour to distil and set them out in some logical sequence.

According to the indictment filed in the High Court, the petitioner has been charged with counts 1,3,14,15, and 16. These counts are as follows:

(01) වර්ෂ 2016 ක් වූ මාර්තු මස 03 වන දින සිට, වර්ෂ 2016ක් වූ මැයි මස 13 වන දින අතර කාලසීමාව තුළ දී මෙම අධිකරණයේ අධිකරණ බලසීමාව තුල පිහිටි කොළඹ හි දී, යුෂ්මතුන් පැමිණිල්ල නොදත් අන් අය සමඟ සමග වරදක් එනම්, ශ්‍රී ලංකා මහා බැංකුව විසින් පවත්වන ලද භාණ්ඩාගාර බැඳුම්කර වෙන්දේසියේදී පොදු දේපලක් වන රුපියල් බිලියන 36.98 ක මුහුණ වටිනාකමින් යුතු ISIN අංක LKB01025C157, LKB01226F014 හා LKB01530E152 දරණ භාණ්ඩාගාර බැඳුම්කර වංකව ව්‍යාපාරණය කිරීමට හෝ ඊට අනුබලදීම සඳහා පොදු අරමුණක් සහිතව කලින් සම්මුතියක් හෝ පිළියෙළ වීමක් ඇතිව හෝ නැතිව එක්ව ක්‍රියා කිරීමට එකඟ වීමෙන්, එකී වංක ලෙස ව්‍යාපාරණය කිරීමේ වරද සිදුකිරීමට හෝ ඊට අනුබලදීමට එකඟ වීමෙන්, එකී වරද සිදුකිරීමට හෝ ඊට අනුබලදීමට එකඟ වීමෙන් එකී වරද සිදුකිරීමට හෝ ඊට අනුබලදීමට කුමන්ත්‍රණය කළ බව, එම කුමන්ත්‍රණයේ ප්‍රතිඵලයක් වශයෙන් එම වරද සිදුකරන ලද බැවින්, යුෂ්මතුන් දණ්ඩ නීති සංග්‍රහයේ 113ආ, 102 සහ 386 වගන්තින් සමඟ කියවිය යුතු සංශෝධිත 1982 අංක 12 දරණ පොදු දේපළ විෂයෙහි ලා සිදු කරනු ලබන වැරදි පිළිබඳ පනතේ 5(1) වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදුකළ බවය.

(03) ඉහත පළමු වන චෝදනාවේ සඳහන් වේලාවේ දී, ස්ථානයේ දී සහ එකී ක්‍රියා කලාපය තුළදී ම, චූදිත වන සන්ද්‍රේෂ් රවින්ද්‍ර කරුණානායක වන යුෂ්මතා ශ්‍රී ලංකා ජනරජයේ මුදල් ඇමතිවරයා වශයෙන් සිටිමින්, රාජ්‍ය බැංකුව වන ලංකා බැංකුවට, මහජන බැංකුවට, හා ජාතික ඉතිරි කිරීමේ බැංකුවට 2016.03.29 වන දින ශ්‍රී ලංකා මහ බැංකුව විසින් පැවැත්වීමට නියමිත භාණ්ඩාගාර බැඳුම්කර වෙන්දේසියේ දී, ISIN අංක LKB01025C157, LKB01226F014 හා LKB01530E152 දරණ භාණ්ඩාගාර බැඳුම්කර සඳහා එදිනට පවතින වෙළඳපළ ඵලදා අනුපාතයට (Yield Rate) වඩා අඩු ඵලදා අනුපාත වලට එනම් පිළිවෙලින් 12.75% සිට 13.2% දක්වා, 12.8% සිට 13.6% දක්වා වන ඵලදා අනුපාත යටතේ ලංසු ඉදිරිපත් කිරීමට ප්‍රකාශ කිරීමක් පළමු චූදිතට දෙවන චෝදනාවෙහි සඳහන් වරද සිදුකිරීම සඳහා අනුබල දුන් බව ද එසේ අනුබලද දීමේ ප්‍රතිඵලයක් වශයෙන් පළමු චූදිත විසින් ඉහත දෙවන චෝදනාවේ සඳහන් වරද සිදුකරන ලද බැවින්, දෙවන චූදිත වන යුෂ්මතා දණ්ඩ නීති සංග්‍රහයේ 102 සහ 386 වගන්තියෙන් සමඟ කියවිය යුතු සංශෝධිත 1982 අංක 12 දරණ පොදු දේපළ විෂයෙහි ලා සිදුකරනු ලබන වැරදි පිළිබඳ පනතේ 5(1) වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදු කළ බවය.

(14) වර්ෂ 2016 ක් වූ මාර්තු මස 28 වන දින හෝ ඊට ආසන්න දිනයක දී, ඉහත පළමු චෝදනාවේ සඳහන් ස්ථානයේදී හා එම ක්‍රියා කලාපයේදී ම ඉහත නම් සඳහන් දෙවන චූදිත වන සන්දේෂ් රවීන්ද්‍ර කරුණානායක වන යුෂ්මතා ශ්‍රී ලංකා මහ බැංකුව විසින් 2016.03.29 වන දිනට පැවැත්වීමට නියමිත භාණ්ඩාගාර බැඳුම්කර වෙන්දේසියේ දී අඩු ඵලදානුපාතයකට ඉදිරිපත් කරන ලංසු පමණක් ලබා ගැනීමට නියමිත බව හා එම වෙන්දේසියේ දී මහජන බැංකුව, ලංකා බැංකුව, ජාතික ඉතිරිකිරීමේ බැංකුව විසින් ඉදිරිපත් කිරීමට නියමිත වූ සම්පූර්ණ ලංසු ප්‍රමාණයට අමතරව රාජ්‍ය මුදල් අවශ්‍යතාවය සම්පූර්ණ කිරීම සඳහා අනෙකුත් රාජ්‍ය ආයතන වල ලංසු පිළිගන්නා බවට පවසා මහජන බැංකුවේ සාමාන්‍යාධිකාරී වසන්ත කුමාර් යන අය රවටවා එකී වසන්ත කුමාර් යන අය නොරැවටී සිටියේ නම් නොකරනු ලබන ක්‍රියාවක් එනම්, 2016.03.29 වන දින ලංසු පැවති මහ බැංකු භාණ්ඩාගාර වෙන්දේසියේ දී රුපියල් බිලියන 8 ක් වටිනා ලංසු ඉදිරිපත් කිරීමට ඕනෑකමින් පෙළඹවීමෙන් සහ එකී ක්‍රියාවෙන් මහජන බැංකුවට රුපියල් මිලියන 255.1 ක අවස්ථික පාඩුවක් සිදු කිරීමෙන් යුෂ්මතා දණ්ඩ නීති සංග්‍රහයේ 398 වගන්තිය සමඟ කියවිය යුතු සංශෝධිත 1982 අංක 12 දරණ පොදු දේපළ විෂයෙහි ලා සිදුකරනු ලබන වැරැදි පනතේ 5(2) වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදු කළ බවය.

(15) වර්ෂ 2016 ක් වූ මාර්තු මස 28 වන දින හෝ ඊට ආසන්න දිනයක දී, ඉහත පළමු චෝදනාවේ සඳහන් ස්ථානයේ දී හා එම ක්‍රියා කලාපයේ දී ම ඉහත නම් සඳහන් දෙවන චූදිත වන සන්දේෂ් රවීන්ද්‍ර කරුණානායක වන යුෂ්මතා ශ්‍රී ලංකා මහ බැංකුව විසින් 2016.03.29 වන දිනට පැවැත්වීමට නියමිත භාණ්ඩාගාර බැඳුම්කර වෙන්දේසියේ දී අඩු ඵලදානුපාතයකටඉදිරිපත් කෙරෙන ලංසු පමණක් ලබා ගැනීමට නියමිත බව හා එම වෙන්දේසියේ දී මහජන බැංකුව, ලංකා බැංකුව, ජාතික ඉතිරිකිරීමේ බැංකුව විසින් ඉදිරිපත් කිරීමට නියමිත වූ සම්පූර්ණ ලංසු ප්‍රමාණයට අමතරව රාජ්‍ය මුදල් අවශ්‍යතාවය සම්පූර්ණ කිරීම සඳහා අනෙකුත් රාජ්‍ය ආයතනවල ලංසු පිළිගන්නා බවට පවසා ලංකා බැංකුවේ සභාපති රොනල්ඩ් පෙරේරා යන අය රවටවා එකී රොනල්ඩ් පෙරේරා යන අය නොරැවටී සිටියේ නම් නොකරනු ලබන ක්‍රියාවක් එනම්, 2016.03.29 වන දින පැවැති මහ බැංකු භාණ්ඩාගාර වෙන්දේසියේ දී රුපියල් බිලියන 3.55 ක් වටිනා ලංසුඉදිරිපත් කිරීමට ඕනෑකමින් පෙළඹවීමෙන් සහ එම ක්‍රියාවෙන් මහජන බැංකුවට රුපියල් මිලියන 217.476 ක අවස්ථික පාඩුවක් සිදුකිරීමෙන් යුෂ්මතා දණ්ඩ නීති සංග්‍රහයේ 398 වගන්තිය සමඟ කියවිය යුතු සංශෝධිත 1982 අංක 12 දරන පොදු දේපළ විෂයෙහි ලා සිදුකරනු ලබන වැරදි පනතේ 5(2) වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදු කළ බවය.

(16) වර්ෂ 2016 ක් වූ මාර්තු මස 28 වන දින හෝ ඊට ආසන්න දිනයක දී, ඉහත පළමු චෝදනාවේ සඳහන් ස්ථානයේ දී හා එම ක්‍රියා කලාපයේ දී ම ඉහත නම් සඳහන් දෙවන චූදිත වන සන්දේෂ් රවීන්ද්‍ර කරුණානායක වන යුෂ්මතා ශ්‍රී ලංකා මහ බැංකුව විසින් 2016.03.29 වන දිනට පැවැත්වීමට නියමිත භාණ්ඩාගාර බැඳුම්කර වෙන්දේසියේ දී අඩු ඵලදානුපාතයකටඉදිරිපත් කෙරෙන ලංසු පමණක් ලබා ගැනීමට නියමිත බව හා එම වෙන්දේසියේ දී මහජන බැංකුව, ලංකා බැංකුව, ජාතික ඉතිරිකිරීමේ බැංකුව විසින් ඉදිරිපත් කිරීමට නියමිත වූ සම්පූර්ණ ලංසු ප්‍රමාණයට අමතරව රාජ්‍ය මුදල් අවශ්‍යතාවය සම්පූර්ණ කිරීම සඳහා අනෙකුත් රාජ්‍ය ආයතනවල ලංසු පිළිගන්නා බවට පවසා ජාතික ඉතිරි කිරීමේ බැංකුවේ සභාපති අශ්වින් ද සිල්වා යන අය රවටවා එකී අශ්වින් ද සිල්වා යන අය නොරැවටී සිටියේ නම් නොකරනු ලබන ක්‍රියාවක් එනම්, 2016.03.29 වන දින පැවැති මහ බැංකු භාණ්ඩාගාර වෙන්දේසියේ දී රුපියල් බිලියන 8.53 ක් වටිනා ලංසු ඉදිරිපත් කිරීමට ඕනෑකමින් පෙළඹවීමෙන් සහ එම ක්‍රියාවෙන් මහජන බැංකුවට රුපියල් මිලියන 337 ක අවස්ථික පාඩුවක් සිදුකිරීමෙන් යුෂ්මතා දණ්ඩ නීති සංග්‍රහයේ 398 වගන්තිය සමඟ කියවිය යුතු සංශෝධිත 1982 අංක 12 දරන පොදු දේපළ විෂයෙහි ලා සිදුකරනු ලබන වැරදි පනතේ 5(2) වගන්තිය යටතේ දඩුවම් ලැබිය යුතු වරදක් සිදු කළ බවය.

The High Court at Bar, in a previous order, took the view that count 1, based on the Public Property Act, could not be maintained against a juristic person, Perpetual Treasuries Ltd., the 1st accused in the indictment. However, it appears that the appeal filed by the Attorney General against that order is pending before the Supreme Court.

I must state at the outset that charges 1, 3, 14, 15, and 16 of the indictment are directly or indirectly related to the decisions or findings made by the Commission of Inquiry, as enumerated by the petitioner in paragraph (g) of the prayer to the petition, quoted above. It is the petitioner himself who characterised those items set out in paragraph (g) as "decisions" made by the Commission of Inquiry in its final report. However, the Court of Appeal appears to have been reluctant to identify them as "decisions", and instead preferred to characterise them as "assertions". This is evident from several observations and findings made in its judgment, including the following: "*Hence, I am not inclined to accept the propositions of the Petitioner that the*

Commission of Inquiry has acted in violation of rules of Natural Justice, particularly in respect of the impugned assertions reflected in paragraph (g) of the prayer of the Petition." Towards the end of its judgment, the Court of Appeal identifies them as "*assertions or observations*." The petitioner identifies them as "decisions". The Court of Appeal identifies them as "assertions". I might identify them as "findings".

Whatever the label one may use, the Commission of Inquiry expressed such views in the final report. Otherwise, there would have been no reason for learned President's Counsel for the petitioner to have identified them as "decisions" and sought to quash them by way of certiorari. Once the Court of Appeal refused to quash those decisions/assertions/findings/views of the Commission of Inquiry, they remain valid.

The Attorney General is entitled to rely on the material collected in the course of the Commission of Inquiry in formulating charges against the petitioner, in terms of section 24 of the Commissions of Inquiry Act.

In that backdrop, the Court of Appeal could have dismissed the writ application allowing the Trial Court to determine those pure questions of fact at the trial. Such a course of action would not have prejudiced the rights of the petitioner, as he would have had the opportunity during the trial to challenge those facts and present his defence.

In discussing the boundaries of judicial review, *Administrative Law* by Sir William Wade and Christopher Forsyth, 11th Edition, page 533, citing in particular *R v. DPP, ex parte Kebelene* [1999] 3 WLR 972, states that "*The House of Lords has however held that decisions about prosecutions are not amenable to judicial review where the complaint could equally well be made in the course of trial, since otherwise trials would be unacceptably delayed by collateral proceedings*." This is precisely what has happened in the instant case. The House of Lords in that case affirmed the broad discretion

vested in the Director of Public Prosecutions in consenting to prosecutions and recognised that judicial review would only be warranted in instances of dishonesty, bad faith, or other exceptional circumstances. In the present case, there is no allegation that the Attorney General acted in bad faith or has abused his position.

Section 24 of the Commissions of Inquiry Act reads as follows:

> *Notwithstanding anything to the contrary in the Code of Criminal Procedure Act, No. 15 of 1979 or any other law, it shall be lawful for the Attorney-General to institute criminal proceedings in a court of law in respect of any offence, based on material collected in the course of an investigation or inquiry or both an investigation and inquiry, as the case may be, by a Commission of Inquiry appointed under this Act.*

The term "material" has not been defined in the Act, but in the Sinhala text of the Act it is expressed as "තොරතුරු", which suggests that the word is to be understood broadly, not narrowly.

Section 24 of the Commissions of Inquiry Act has previously been interpreted by Wengappuli J. in the Court of Appeal in *Punchihewa v. The Officer in Charge, Financial Investigation Unit III and Others* (CA/WRIT/311/2019, CA Minutes of 18.06.2020 at 17-18) as follows:

> *Plain reading of this section indicates that it empowers the 6th Respondent to institute criminal proceedings based "on material collected in the course of an investigation and or inquiry or both an investigation and inquiry…" by a Commission of Inquiry appointed under the said Act, in order to override the mandatory provision contained in Section 5 of the Code of Criminal Procedure Act. The said Section of the Code of Criminal Procedure Act imposes a mandatory duty that all offences, unless otherwise specially provided for, shall be investigated, inquired into, tried and otherwise be dealt with the*

provisions of that Code. It also imposes the condition that the investigations should be conducted either by the police or by an "inquirer" recognized by the Code. With this amendment to the Commissions of Inquiry Act, the 6th Respondent could consider "material collected in the course of an investigation and or inquiry or both an investigation and inquiry" by that Commission.

The intention of the Legislature in this regard is clearly reflected in the wording found in the Section 24 of the Commissions of Inquiry Act as it is stated that "notwithstanding anything to the contrary in the Code of Criminal Procedure Act, No. 15 of 1979 or any other law, it shall be lawful for the Attorney-General to institute criminal proceedings in a court of law in respect of any offence, …"

The Court of Appeal in the instant case took the view that "*the Attorney General also should be satisfied, based on whatever material collected, that an offence has been committed*", but found that the Attorney General had failed to satisfy the Court that there was "*adequate material and evidence*" against the petitioner to justify indicting him in the High Court at Bar.

I concur with the view that the Attorney General should not, without careful scrutiny, adopt the material collected in the course of an investigation or inquiry conducted by a Commission of Inquiry appointed under the Commissions of Inquiry Act when deciding whether or not to indict a person. The Attorney General is required to give due consideration to such material. Nevertheless, the decision to indict must be made by the Attorney General independently and upon a careful evaluation of the available evidence. However, on the facts and circumstances of this case, the Court of Appeal overstepped the boundaries of its writ jurisdiction when it quashed the indictment against the petitioner on the ground that there was insufficient material and evidence.

Prosecutorial discretion

The Attorney General performs a vital role in the administration of justice. As the principal legal officer of the State, the Attorney General occupies a unique position, entrusted *inter alia* with the responsibility of ensuring that the criminal justice process is carried out fairly, impartially, and in strict conformity with the law. In discharging that responsibility, the Attorney General exercises what is widely termed as "prosecutorial discretion".

In *Law Society of Alberta v. Craig Charles Krieger and the Minister of Justice and Attorney General for Alberta* [2002] 3 S.C.R. 372 at 395, the Supreme Court of Canada aptly summarised the concept of prosecutorial discretion in the following terms: "*Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for.*"

The wide powers exercised by the Attorney General are delineated *inter alia* in sections 393 to 401 of Chapter XXXIII of our Code of Criminal Procedure Act. I do not intend to reproduce all those provisions found in the Act but will set out below only a part of section 393 to understand the nature of discretion the Attorney General enjoys:

> *393(1) It shall be lawful for the Attorney-General to exhibit information, present indictments and to institute, undertake, or carry on criminal proceedings in the following cases, that is to say—*
>
> *(a) in the case of any offence where a preliminary inquiry under Chapter XV by a Magistrate is imperative or may be directed to be held by the Attorney-General;*
> *(b) in any case where the offence is not bailable;*
> *(c) in any case referred to him by a State Department in which he considers that criminal proceedings should be instituted;*

(d) in any case other than one filed under section 136(1)(a) of this Code which appears to him to be of importance or difficulty or which for any other reason requires his intervention;

(e) in any case where an indictment is presented or information exhibited in the High Court by him.

(2) The Attorney-General shall give advice, whether on application or on his own initiative to State Departments, public officers, officers of the police and officers in corporations in any criminal matter of importance or difficulty.

(3) The Attorney-General shall be entitled to summon any officer of the State or of a corporation or of the police to attend his office with any books or documents and there interview him for the purpose of—

(a) initiating or prosecuting any criminal proceeding, or
(b) giving advice in any criminal matter of importance or difficulty.

The officer concerned shall comply with such summons and attend at the office of the Attorney-General with such books and documents as he may have been summoned to bring.

The discretion which may be lawfully exercised by the Attorney General applies not only to the commencement of prosecutions, but also to the discontinuance thereof. In terms of section 194(1) of the Code of Criminal Procedure Act, at any stage of a trial before the High Court and before the return of the verdict, the Attorney-General can inform the Court that he will not further prosecute the accused upon the indictment or any charge therein. Upon such information, the accused shall be discharged therefrom.

As section 401 indicates, the Attorney General has the power to enter a *nolle prosequi*, thereby halting any prosecution pending before any Court. The Attorney General can also tender a pardon to an accomplice.

These examples underscore the breadth of the Attorney General's prosecutorial discretion and the confidence reposed in his office by the law, with a view to ensuring the effective administration of justice.

In the exercise of prosecutorial discretion, the Attorney General is required to act independently and free from extraneous influence or political pressure. This discretion is not merely administrative in nature but is quasi-judicial, involving the careful assessment of material to determine the important question as to whether a prosecution is warranted.

Once an indictment is presented, the Attorney General should continue to uphold the same standards of independence and objectivity throughout the trial. In *The Attorney General v. Sivapragasam* (1959) 60 NLR 468 at 471, Sansoni J. stated:

> *I have not seen the duties and responsibilities of prosecuting counsel set out better than in an article written by Mr. Christmas Humphreys Q.C. when he was Senior Prosecuting Counsel, Central Criminal Court [1 Criminal Law Review (1955) page 739]. His view, and it is one with which I respectfully agree, is that "the prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor feel pride or satisfaction in the mere fact of success… His attitude should be so objective that he is, so far as is humanly possible, indifferent to the result".*

In the recent Privy Council case of *Director of Public Prosecutions (Appellant) v. Chris Durham and Two Others (Trinidad and Tobago)* [2024] UKPC 21 at paragraph 41, Lady Carr stated:

> *The prosecutor acts independently of those responsible for investigation. Nor is it the prosecutor's duty to secure a conviction, but rather the duty is to act as a minister of justice (see for example Randall*

> *v The Queen [2002] UKPC 19; [2002] 1 WLR 2237 ("Randall"), para 10(i)). The role thus excludes any notion of winning or losing.*

As Samarakoon C.J. stated in *Land Reform Commission v. Grand Central Ltd.* [1981] 1 Sri LR 250 at 261:

> *The Attorney-General of his Country is the leader of the Bar and the highest Legal Officer of the State. As Attorney-General he has a duty to Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. It is for that reason that all Courts in this Island request the appearance of the Attorney General as amicus curiae when the Court requires assistance, which assistance has in the past been readily given.*

In *Centre for Environmental Justice (Guarantee Limited) and Others v. Minister of Buddhasasana, Religious and Cultural Affairs, and Urban Development and Economic Policies and Implementation and Others* [2021] 2 Sri LR 33 at 38, Janak de Silva J. stated:

> *The Attorney-General is vested with extensive statutory powers in relation to criminal investigations and prosecutions. Such powers are held in public trust. They must be exercised for the due administration of justice according to the rule of law which is the basis of our Constitution. Any type of dictation from whatever quarter will compromise the independence of the Attorney-General unless such dictation is permitted by law. Any compromise of the independence of the Attorney-General will have a negative impact on the rule of law.*

Monnin C.J., delivering the judgment of the Manitoba Court of Appeal in *Re Balderstone v. The Queen* (1983) 4 DLR (4th) 162 at 169 observed:

> *The judicial and the executive must not mix. These are two separate and distinct functions. The accusatorial officers lay information or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney-General—barring flagrant impropriety—he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.*

A finding or recommendation by a Commission of Inquiry to initiate criminal proceedings does not impose a legal obligation on the Attorney General to prosecute. Conversely, the absence of such a finding or recommendation, or the presence of observations favourable to an individual, does not preclude the Attorney General from instituting criminal proceedings. The Attorney General is not subject to the dictates of the Commission of Inquiry and is empowered to exercise independent judgment, having given due consideration to the material collected by the Commission of Inquiry in the course of the investigation, the inquiry, or both. Indeed, the language of section 24 of the Commissions of Inquiry Act itself affirms the discretionary nature of the Attorney General's prosecutorial powers. In the course of the argument before this Court, learned President's Counsel for the petitioner conceded that the Attorney General is entitled to act independently, without being bound by the findings or recommendations of the Commission of Inquiry.

It is imperative that the decisions of the Attorney General command the confidence of both the public and the judiciary. If such actions are viewed with suspicion or perceived as arbitrary *without compelling and cogent reasons*, it may undermine the credibility of the prosecutorial process and erode public confidence in the integrity of the whole justice system. Public

confidence is the foundation upon which the legitimacy of the justice system in any country rests. Once it is eroded, anarchy is not far behind.

Prosecutorial discretion is neither absolute nor unfettered

Judicial review is the mechanism by which superior Courts exercise supervisory jurisdiction over decisions and actions of public authorities, to ensure compliance with the principles of public law in the performance of their public functions.

It is settled law that the prosecutorial discretion of the Attorney General, though broad and statutorily recognised, is neither absolute nor unfettered. It remains subject to judicial review. Notably, the Attorney General does not dispute this position.

Judicial Remedies in Public Law by Clive Lewis (London Sweet & Maxwell 2000), page 24 states:

> *It is difficult, in principle, to see why the exercise of statutory or prerogative powers to institute proceedings is not justiciable and open to review in appropriate circumstances. Analogous common law and statutory powers to initiate or refuse to initiate proceedings are reviewable.*

In *Victor Ivon v. Sarath N. Silva, Attorney General and Another* [1998] 1 Sri LR 340 at 346, Mark Fernando J. held:

> *It is enough, for the purposes of this case, to say that the Attorney-General's power to file (or not to file) an indictment for criminal defamation is a discretionary power, which is neither absolute nor unfettered. It is similar to other powers vested by law in public functionaries. They are held in trust for the public, to be exercised for the purposes for which they have been conferred, and not otherwise.*

The fact that no public authority in the field of public law has absolute or unfettered discretion is a well settled principle of law which has long been recognised in the jurisprudence of this Court. (*Padmasiri and Others v. Inspector General of Police and Others* (SC/FR/46/2021, SC Minutes of 23.11.2022 at pages 35-40)

In *Premachandra v. Major Montague Jayawickrema and Another* [1994] 2 Sri LR 90 at 105, G.P.S. De Silva C.J. stated:

> *There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.*

In the Seven Judge Bench decision of this Court in *Rajavarothiam Sampanthan and Others v. Attorney General and Others* (SC/FR/351-356, 358-361/2018, SC Minutes of 13.12.2018 at page 67) it was held that "*our Law does not recognize that any public authority, whether they be the President or an officer of the State or an organ of the State, has unfettered or absolute discretion or power.*"

Administrative Law by Sir William Wade and Christopher Forsyth (op. cit.), page 295 states:

> *The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely—that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.*

The following observation made by Lord Wrenbury in *Roberts v. Hopwood* [1925] AC 578 at 613 eloquently summarises the standard expected in the exercise of discretion:

> *A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.*

How to assess whether discretion has been exercised reasonably? The most reliable method is to examine the reasons given for the decision. As held in *Sierra Construction Ltd v. Road Development Authority and Others* (SC/FR/135/2023, SC Minutes of 10.02.2025 at page 20):

> *It is widely accepted that ideally the decision-maker should give reasons at the time of making the decision and not afterwards. A decision devoid of reasons is fundamentally flawed and amounts to no decision. The requirement to provide reasons serves as a safeguard against arbitrariness and upholds the principles of justice, fairness and transparency in decision-making. However, if reasons were given but could not be communicated for some valid reason, the Court may allow the decision-maker to submit those reasons to the Court if the decision is challenged for failure to give reasons. Conversely, if reasons are suggested ex post facto for the first time in Court, they should be rejected as afterthoughts. The rationale is that reasons must precede the decision, not follow it. In other words, the decision-maker should not arrive at a decision based on extraneous factors first and then somehow attempt to justify it by contriving reasons.*

Judicial review may be sought through prerogative remedies such as certiorari, prohibition, procedendo, mandamus, and quo warranto, on several grounds conveniently summarised by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at 410 (commonly referred to as the *GCHQ* case), namely: illegality, irrationality, and procedural impropriety. As Lord Diplock himself observed, this categorisation is not exhaustive but was intended as a framework of convenience. He further noted that he had in mind, in particular, the potential future recognition of the principle of proportionality as an additional ground of judicial review.

Lord Diplock sought to explain the meaning he attributed to those terms. Briefly put, illegality refers to decisions made *ultra vires* or in breach of legal requirements or *mala fide*; irrationality concerns decisions so arbitrary and unreasonable that no reasonable decision-maker, properly directing his mind to the relevant matters, could have arrived at them; and procedural impropriety encompasses failures to comply with mandatory procedural requirements or breaches of the principles of natural justice.

Courts exercise caution in reviewing prosecutorial discretion

In general terms, the above grounds are applicable when challenging the prosecutorial discretion of the Attorney General by way of judicial review. However, as the Court of Appeal has rightly observed in its judgment, "*the judicial review applications challenging the prosecutorial discretion of the Attorney General has to be examined very carefully*", and not as a matter of routine. If every accused, upon the filing of an indictment, is entitled as of right to invoke the writ jurisdiction to challenge the Attorney General's discretion or the manner in which it was exercised, the prosecutorial process would be exposed to repeated collateral attacks, ultimately undermining public confidence in the justice system. The Court of Appeal has acknowledged this concern when it stated, "*I am aware that the Attorney*

General is not essentially bound to divulge evidence before a Review Court to justify his reasons to forward an indictment."

In *R (Corner House Research) v. Director of the Serious Fraud Office* [2008] UKHL 60 at paras 30 and 31, Lord Bingham highlighted the broad discretionary powers vested in the Director of the Serious Fraud Office and the complexity of the decision-making process involved, to emphasise that the Courts should not lightly interfere with the exercise of the prosecutorial discretion.

> *It is common ground in these proceedings that the Director [of Serious Fraud Office] is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: R v Director of Public Prosecutions, Ex p C [1995] 1 Cr App R 136, 141; R v Director of Public Prosecutions, Ex p Manning [2001] QB 330, para 23; R (Bermingham) v Director of the Serious Fraud Office [2007] QB 727, paras 63—64; Mohit v Director of Public Prosecutions of Mauritius [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fiji in Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 735—736; Sharma v Brown-Antoine [2007] 1 WLR 780, para 14(1)—(6). The House was not*

referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.

The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from Matalulu v Director of Public Prosecutions) 'the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits'. Thirdly, the powers are conferred in very broad and unprescriptive terms.

The office of the Attorney General in England and Sri Lanka shares some broad similarities in function but differs significantly in constitutional structure, powers, and degree of independence. In discussing the law in England, *De Smith's Judicial Review*, 8th Edition, at 125–126, under the sub-heading "Public functions outside the court's jurisdiction", observes as follows:

Challenges to certain decisions made by the HM Attorney General may also fall outside the court's supervisory jurisdiction. These are the functions, some derived from prerogative powers, others from statutes, in respect of which the Attorney General makes decisions independently of ministerial colleagues and for which he is responsible to Parliament including: entering a nolle prosequi to stop a prosecution on indictment (very rarely exercised, usually on the ground of the defendant's ill health); he may institute prosecution; direct the Director of Public Prosecutions to take over a prosecution; and give or withhold

> *his consent ("fiat") to a relator action brought by a person to enforce the law. The House of Lords in Attorney General v. Gouriet [1978] AC 435 at 487 (Viscount Dilhorne) held that "in the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts", though the Privy Council has subsequently highlighted that since the GCHQ case [1985] AC 374 put the matter beyond doubt, prerogative powers do generally fall with the court's jurisdiction, and there is no inherent objection to the court's jurisdiction being invoked where the Attorney General is exercising a statutory power. (footnotes omitted)*

In the same treatise, at pages 117–118, it is further observed as follows:

> *Even where matters are within the court's jurisdiction, there is a marked reluctance to exercise that supervisory jurisdiction over police decisions to investigate, charge, and administer cautions; and decisions of the DPP to prosecute, to continue or discontinue criminal prosecutions. The court will generally do so only if there is a grave abuse of power or a clear breach of the police or prosecuting authority's settled policy. (footnotes omitted)*

In the discussion under boundaries of judicial review, *Administrative Law* by Sir William Wade and Christopher Forsyth (op. cit.) at page 533 states that "*In general the courts are very slow to interfere on decisions to investigate and prosecute crime*."

Accordingly, in *S v. Crown Prosecution Service* [2015] EWHC 2868 (Admin), it was held by the High Court of England and Wales at para 15:

> *There is no doubt that decisions of the CPS [Crown Prosecution Service] are amenable to judicial review: see for example, R v DPP ex parte C [1995] 1 Cr App R 136 at 140-141. The potential grounds for challenge are, however, narrow not least because of the recognition of the*

> *constitutional significance of its independence. Clearly, if a policy is unlawful, the courts will intervene. The same approach will be adopted if the CPS fail to act in accordance with its set policy or they reach a decision not open to a reasonable prosecutor. When considering such challenges, it is clear that they will succeed only in very rare cases*.

In the recent Privy Council case of *Director of Public Prosecutions (Appellant) v. Chris Durham and Two Others (Trinidad and Tobago)* (supra) at para 6, Lady Carr stated:

> *It is common ground that, although a decision to prosecute (or to continue to prosecute) is in principle susceptible to judicial review, such relief will in practice be granted only extremely rarely. It is a "highly exceptional remedy" (see Sharma v Brown-Antoine [2006] UKPC 57; [2007] 1 WLR 780 ("Sharma") at para 14(5)).*

In *Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)* [2006] UKPC 57, Lord Bingham in the Privy Council at para 14(5) stated:

> *It is also well-established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: 'rare in the extreme' (R v Inland Revenue Comrs, Ex p Mead [1993] 1 All ER 772, 782); 'sparingly exercised' (R v Director of Public Prosecutions, Ex p C [1995] 1 Cr App R 136, 140); 'very hesitant' (Kostuch v Attorney General of Alberta (1995) 128 DLR (4th) 440, 449); 'very rare indeed' (R (Pepushi) v Crown Prosecution Service [2004] Imm AR 549, para 49); 'very rarely' (R (Bermingham) v Director of the Serious Fraud Office [2007] QB 727, para 63. In R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 371, Lord Steyn said 'My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance,*

the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.'

Referring to *Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)* (supra), the Privy Council in *Director of Public Prosecutions (Appellant) v. Chris Durham and Two Others (Trinidad and Tobago)* (supra) at para 60 stated:

Whilst the standard of review must not be set so high as to deprive an aggrieved citizen of their only effective remedy, the reasons for the highly restrictive approach confirmed in Sharma are well understood. In summary:

(i) The prosecutorial powers are entrusted to the DPP and to no one else;

(ii) The polycentric character of official decision-making in prosecutorial decisions, referred to above. It is within neither the constitutional function nor the practical competence of the courts to assess the merits of such decision-making;

(iii) The powers are conferred on the DPP in very broad and unprescriptive terms;

(iv) The delays inevitably caused to the criminal trial if judicial review proceedings proceed, and the desirability of all challenges taking place in the criminal trial or on appeal;

(v) The great weight to be accorded to the judgment of experienced prosecutors on whether a jury is likely to convict;

(vi) The fact that an independent prosecutor will be bound by a code of conduct;

(vii) The need to avoid undermining prosecutorial effectiveness by subjecting the prosecutor's motive and decision-making to outside inquiry.

The need for avoiding routine second-guessing of the exercise of prosecutorial discretion has been elucidated by the Supreme Court of Canada in *R v. Anderson* [2014] 2 S.C.R. 167 at paras 46 and 47:

> *[46] The many decisions that Crown prosecutors are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by the courts. The courts have long recognized that decisions involving prosecutorial discretion are unlike other decisions made by the executive: see M. Code, "Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg" (2009) 34 Queen's L.J. 863, at p. 867. Judicial noninterference with prosecutorial discretion has been referred to as a "matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice" which also recognizes that prosecutorial discretion is "especially ill-suited to judicial review":*
>
> *(….)*
>
> *[47] The Court also noted the more practical problems associated with regular review of prosecutorial discretion: The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution.*

There is ample local jurisprudence supporting this approach.

In *King v. Fernando* (1905) 8 NLR 354, the discretion of the Attorney General was challenged not on the basis that the accused ought not to have been prosecuted, but rather on the forum in which the proceedings were instituted. In that context, at page 355, Layard C.J. observed:

> *I do not think that it is desirable in every case to interfere with the discretion vested in the Attorney-General. The only cases in which this Court should interfere is when the Attorney-General has abused the discretion left to him, and these cases are very rarely likely to arise.*

Similar sentiments were echoed by Shaw J. in *King v. Baba Singho* (1919) 21 NLR 142 at 144:

> *With regard to the other objection, it is within the discretion of the Attorney-General to direct to what Court a case shall be committed and what offence he shall be indicted for, and it appears to me that it should only be in some extreme case that the Court of Appeal should interfere with the discretion so given to him and direct a trial in a different Court.*

Having considered *inter alia* the aforesaid authorities, in *Fakhir v. Attorney General* [2021] 1 Sri LR 230, Obeyesekere J. in the Court of Appeal rejected the application of the petitioner to quash the indictment filed against him, noting at 237-238:

> *[T]he decision of the Attorney General to indict the Petitioner based on the contents of his confession is reasonable. It is certainly not a decision that attracts the definition of unreasonableness set out by Lord Greene in Associated Provincial Picture Houses Limited v. Wednesbury Corporation, where unreasonableness has been defined as "something so absurd that no sensible person could ever dream that it lay within the powers of the authority."*

In *Sarath de Abrew vs. Chanaka Iddamalgoda, Chief Inspector of Police and Others* (SC/FR/424/2015, SC Minutes 11.01.2016 at page 12), Jayawardena J. stated:

> *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 an ulterior motive or in excess of his jurisdiction.*

The aforesaid principle has been reaffirmed by Aluwihare J. in *Ganeshan Samson Roy v. M.M. Janaka Marasinghe and Others* (SC/FR/405/2018, SC Minutes of 20.09.2023 at page 25):

> *Although the discretion of the Attorney General regarding forwarding of indictments is reviewable, the circumstances in which the Court will intervene are rare. Prosecutorial powers are entrusted to identified officers and no other authority can exercise them or make judgments; it is not within the Courts' constitutional function to assess the merits of the polycentric character of official decision-making in such matters. The Court will only intervene when the decision is prima facie, arbitrary, capricious, or unlawful.*

Having considered the facts of that case, Aluwihare J. took the view that the decision to indict the petitioner was unreasonable and arbitrary, stating *inter alia* that the indicting State Counsel and the officer who supervised and sanctioned the indictment, had failed in their duty to consider the facts objectively before taking the decision to indict the petitioner.

Court must intervene when the interests of justice demand

The above judgment underscores the important principle that Courts must not hesitate to intervene where circumstances so warrant.

If the Attorney General exceeds the lawful bounds of his authority, or fails to exercise prosecutorial discretion properly—whether by taking into account irrelevant factors, yielding to political pressure, acting on extraneous considerations, or the like—the Court is not only empowered but duty-bound to intervene. Whether such considerations have in fact

tainted the decision, thereby warranting judicial review, must be determined on a case-by-case basis.

In the House of Lords case of *R (Corner House Research) v. Director of the Serious Fraud Office* (supra) at para 32 it was held:

> *Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way*.

The Court of Appeal in the impugned judgment has expressed concerns regarding politically motivated prosecutions. It states, "*It is often seen that the change of Government is considered as a barren mandate to institute criminal proceedings or withdrawal of criminal proceedings by the authorities against respective political opponents based only on political motivation. This kind of unfortunate occurrences will never emerge if an unvarying due process and fairness is in its place steadily*."

Politically motivated indictments following regime change as well as the selective withdrawal of indictments for similar reasons, pose a serious threat to the rule of law and public confidence in the office of the Attorney General and the entire justice system. Judicial oversight plays a vital role in ensuring that prosecutorial discretion is exercised independently, fairly, and in compliance with the law.

Grounds of review identified by the Court of Appeal

The Court of Appeal in the impugned decision has enumerated the following grounds upon which the Attorney General's decision to forward an indictment may be challenged by way of judicial review:

(1) Whether mere objective of leading evidence for the prosecution in the trial court is not for the purpose of establishing the ingredients of the charge against the accused.

(2) Whether leading evidence for the prosecution in the trial court;

(i) Cannot establish the ingredients of the charge due to any restrictions of a written law.

(ii) Will not be sufficient for the Trial Judge efficaciously and adequately determine any primary issue with mixed facts and law or an issue of law.

(3) Applicability of the 'No evidence rule' in exceptional circumstances.

(4) If the Attorney General has taken a decision assuming a jurisdiction which he does not have or exceeding his jurisdiction.

(5) If the Attorney General has taken a decision exercising his prosecutorial discretion in bad faith/mala fide or with ulterior motive or with political motivation.

(6) The decision would amount to an abuse of process.

(7) Procedural irregularity or existence of any illegality during the decision making process.

(8) If there is a clear miscarriage of justice.

It appears that the Court of Appeal considered the Attorney General's discretion in the present case to be amenable to review under grounds (1), 2(i), and (3) above. In addition, the Court seems to have taken the view that the failure to adhere to "due process" constitutes a further ground that

renders the Attorney General's discretion invalid in this instance. I will advert to those matters later in this judgment.

The Court of Appeal in its judgment highlights:

> *The contention of the petitioner is that it is not lawful for the 1st respondent to exhibit information before the High Court at Bar based only on the material collected at the Commission of Inquiry as the Commission of Inquiry had not recommended to institute criminal action against the petitioner in respect of the meetings held on 28.03.2016 or 30.03.2016.*

Limits of writ jurisdiction

As previously stated, this is a complex case involving intricate financial offences. The investigation and prosecution of such offences require a certain degree of expertise and familiarity with financial and regulatory frameworks.

Just as the exercise of discretion is subject to limits, so too is the scope of judicial review. On the limits of Courts in the context of judicial review of administrative actions due to constraints of specialised expertise, the Supreme Court of India in *Tata Cellular v. Union of India* 1996 AIR 11 at 28 stated:

> *In Chief Justice Neely's words, "I have very few illusions about my own limitations as a Judge and from those limitations I generalize to the inherent limitations of all appellate courts reviewing rate cases. It must be remembered that this Court sees approximately 1,262 cases a year with five Judges. I am not an accountant, electrical engineer, financier, banker, stock broker, or systems management analyst. It is the height of folly to expect Judges intelligently to review a 5,000 page record addressing the intricacies of public utility operation." It is not the*

> *function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administrator.*
>
> *The result is a theory of review that limits the extent to which the discretion of the expert may be scrutinized by the non-expert Judge. The alternative is for the court to overrule the agency on technical matters where all the advantages of expertise lie with the agencies. If a court were to review fully the decision of a body such as State Board of Medical Examiners "it would find itself wandering amid the maze of therapeutics or boggling at the mysteries of the Pharmacopoeia". Such a situation as a State Court expressed it many years ago "is not a case of the blind leading the blind but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question."*

In the case of *Uflex Ltd. v. Government of Tamil Nadu & Ors* [2021] 7 SCR 571, which involved a challenge to a tender process issued by the Government of Tamil Nadu on the basis of unfair conditions, the Supreme Court reinforcing the limited scope of judicial review in technical matters at 579-580 stated as follows:

> *The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of*

> *commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.*
>
> *We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted" (Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517).*

In exercising its power of review, the judiciary is not expected to assume the role of a super-auditor. As observed by the Supreme Court of India in *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others v. Union of India and Others* (1981) 1 SCC 568 at 584:

> *We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquien system of separation of powers. The Court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Directorate of a Government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super-auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration.*

This Court has acknowledged the fact that in view of certain institutional limitations, caution must be exercised in revisiting decisions that are highly technical in nature. In this regard, this Court held in *Sierra Construction Ltd v. Road Development Authority and Others* (supra) at pages 10-11:

The petitioner did not file any report expressing expert opinion to the contrary. Neither the Court nor the petitioner possesses the requisite expertise, resources and capacity to challenge through a fundamental rights application the accuracy of the findings in the several reports filed by the Technical Evaluation Committee, the Ministry Procurement Committee, and the Expert Committee appointed by the Court. Based on the facts and circumstances of the case, the findings in those reports are not perverse and are prima facie acceptable to the Court. In such cases, in exercising its writ or fundamental rights jurisdiction, this Court must exercise caution in revisiting decisions that are highly technical in nature. This restraint is necessitated by the Court's institutional limitations.

De Smith's Judicial Review (op. cit.), page 206 states:

Judicial review has developed to the point where it is possible to say that no power—whether statutory, common law or under the prerogative—is any longer inherently unreviewable. Courts are charged with the responsibility of adjudicating upon the manner of the exercise of a public power, its scope and its substance. As we shall see, even when discretionary powers are engaged, they are not immune from judicial review. Discretion has been described as the "hole in the [legal] doughnut", but that hole is not automatically a lawless void. Nevertheless, there are certain decisions which courts cannot or should not easily engage. Courts are limited (a) by their constitutional role and (b) by their institutional capacity.

(……)

A second institutional limitation of the courts is lack of relative expertise. Particularly as the review of fact, or the merits of a decision,

> *is not routinely permitted in judicial review, there are some matters which are best resolved by those with specialist knowledge.*

In that context, there is absolutely no justification for the writ Court, before the case is taken up for trial in the Trial Court, to examine the limited set of documents selectively tendered by the parties for the purpose of the writ application and decide to quash the indictment on the basis that there is insufficient evidence to prosecute the petitioner in the High Court at Bar.

Writ will not lie where material facts are in dispute

The Court of Appeal rightly acknowledges the well-established principle that when major facts are in dispute, writ does not lie. The writ Court is not a Trial Court, and its role is not to evaluate contested evidence and determine the matter on its merits.

At page 24 of the impugned judgment, the Court of Appeal states:

> *I am mindful of the cardinal principle that where the facts are in dispute and in order to discover the truth, it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity to examine their witnesses. (see-Thajudeen vs. Sri Lanka Tea Board and another (1981) 2 Sri. L.R. 471). One may argue that the issues raised by the Petitioner can be easily and effectively canvassed before the relevant High Court-at-Bar. Anyhow, it is important to bear in mind that the 1st Respondent has decided to indict the Petitioner as a consequence to the Report of Commission of Inquiry*.

In *St Helens Borough Council v. Manchester Primary Care Trust & Another* [2008] EWCA Civ 931 at para 13 Lord Justice May stated:

> *Judicial review is a flexible, but not entirely unfenced jurisdiction. This stems from certain intrinsic features. The court's relevant function is to review decisions of statutory and other public authorities to see that*

> *they are lawful, rational and reached by a fair and due process. The public authority is normally the primary decision maker with a duty to apprehend the facts underlying the decision by a fair procedure which takes properly into account all relevant facts and circumstances. If the public authority does this, the court will not normally examine the merits of the factual determination. Accordingly, a court hearing a judicial review application normally receives evidence in writing only, and does not set about determining questions of disputed fact.*

In this case, the petitioner does not accept the evidence led or findings made by the Commission of Inquiry based on such evidence, which were relied upon by the Attorney General. The petitioner does not accept that he instructed the representatives of the three state banks to bid only within specified yield rates at the treasury bond auctions and assured them that only bids within that range would be accepted by the Central Bank. The main items of material evidence against the petitioner were elicited from the testimony of officials from the three main state banks. This forms the core foundation of the case against the petitioner.

Given the above items of evidence presented before the Commission, how can the Court of Appeal, in the exercise of writ jurisdiction, quash the indictment on the ground that there was not "adequate material and evidence particularly against the petitioner"? The question whether the evidence led through these witnesses is reliable and adequate should be left for the Trial Court to determine.

The petitioner's alleged involvement as revealed in the final report

The Court of Appeal has referred to certain observations, findings, and recommendations contained in the final report of the Commission of Inquiry that are adverse to the petitioner and remain undisturbed. These are reproduced at pages 19–20 of the judgment of the Court of Appeal. The

Court of Appeal *inter alia* has quoted the following paragraph from the final report:

> *We would reasonably expect that, since the then Minister of Finance had instructed the National Savings Bank, Peoples' Bank and Bank of Ceylon to place Bids at these Yield Rates, which were considerably lower than the Yield Rates which the Market expected to obtain at these Auctions, these three State Banks are likely to have faced a degree of restriction when they placed at the Treasury Bond Auction held on 29th March 2016 since Bids at these specified Yield Rates, which would, almost inevitably, be accepted, will not represent the most profitable investments possible in the prevailing Market. The witnesses from the National Savings Bank, Peoples' Bank and Bank of Ceylon who gave evidence before us confirmed that, these three State Banks were of that view.*

Chapter 24 of the final report of the Commission of Inquiry addresses certain aspects of the petitioner's involvement in the events under scrutiny. It states:

> *We are of the view that evidence before us suggests that, Hon. Ravi Karunanayake, while he was Minister of Finance, derived a substantial benefit from the lease payments made by Walt and Row Associates (Pvt) Ltd, which is an associate company of Perpetual Treasuries Ltd and which is owned and controlled by the same persons who own and control Perpetual Treasuries Ltd.*

The Commission of Inquiry further states that, at meetings held at the Ministry of Finance on 28.03.2016 and 30.03.2016, the petitioner, in his capacity as Minister of Finance, instructed the representatives of the three state banks to bid at specified low yield rates at the Treasury bond auctions held on 29.03.2016 and 31.03.2016. It also notes that these instructions

were not communicated to the Central Bank, and that Perpetual Treasuries Ltd., having received such "inside information", was able to gain a significant advantage at the said bond auctions. The Commission of Inquiry has also made reference to blatant falsehoods uttered by the petitioner, under oath, in an attempt to conceal the truth.

The Commission of Inquiry states:

> *Perpetual Treasuries Ltd obtained a License to operate as a Primary Dealer on the 01st October 2013.*
>
> *Perpetual Treasuries Ltd commenced Business in early 2014 and during the remaining few months of the financial Year ended 31st March 2014, Perpetual Treasuries Ltd made a Net Loss of Rs. 3.7 Million.*
>
> *During the next Financial Year from 01st April 2014 to 31st March 2015, Perpetual Treasuries Ltd made a Net Profit of Rs. 959.5 million.*
>
> *In the next Financial Year from 01st April 2015 to 31st March 2016, which falls within the period of our Mandate, the Net Profit made by Perpetual Treasuries Ltd rose remarkably sharply to Rs. 5.124 Billion.*
>
> *In the following Financial Year commencing from the 01st April 2016 and ending on 31st March 2017, the Net Profit made by Perpetual Treasuries Ltd increased further to Rs. 6.365 Billion.*
>
> *Although the Financial Year is chronologically outside the period of our Mandate, the profits made by Perpetual Treasuries Ltd during that period are relevant to us and can be properly considered as falling within the ambit of our Mandate, for the reason that, the evidence shows that a major part of this profit was realised by the disposal of Treasury Bonds acquired by Perpetual Treasuries Ltd during the period of our Mandate.*

In reference to the meetings held with the officials of the state banks, the Commission of Inquiry states:

> *We note that, these meetings were held at the Ministry of Finance and Hon. Ravi Karunanayake gave these instructions, soon after he moved into the Apartment for which Walt and Row Associates (Pvt) Ltd paid the Lease Rental.*

Further evidence presented before the Commission of Inquiry revealed that, after meetings with these state bank officials, the petitioner moved into an apartment (penthouse) where the rent was paid by the owners of Perpetual Treasuries Ltd., the primary dealer. This apartment was subsequently purchased by a company named Global Transportation and Logistics (Pvt) Ltd., which is owned and controlled by members of the petitioner's family. The owner of the apartment, Anika Wijesuriya, gave evidence regarding this matter.

The approach of the Court of Appeal

I do not intend, for the purposes of this appeal, to scrutinise in detail all the evidence (direct and circumstantial) led before the Commission of Inquiry, or the observations, assertions, findings, or recommendations made by the Commission against the petitioner. However, in view of the material elicited thus far, the approach adopted by the Court of Appeal in this matter is untenable. The Court of Appeal states:

> *It is abundantly clear that the Commission of Inquiry has not made an expressed recommendation or direction against the Petitioner under the said Chapters 32 and 33, although, the Commission of Inquiry has expressed an opinion that the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) should examine as mentioned above whether appropriate actions should be taken against the Petitioner under the Bribery Act. The other opinion expressed by the Commission*

of Inquiry referring to the truthfulness of evidence given by the Petitioner is also based on alleged telephonic communication between the Petitioner and Mr. Arjun Aloysius. As observed above, the CIABOC has already instituted proceedings against the Petitioner.

Hence, I take the view that the assertions or observations or recommendations made by the Commission of Inquiry in reference to the meetings on 28.03.2016 and 30.03.2016 and the purported allegations levelled against the Petitioner by the 1st Respondent on instructions given to the State Banks are merely in the nature of assertions or observations of the Commission of Inquiry and not expressed determinations.

The Court of Appeal states that the aforesaid findings "*are merely in the nature of assertions or observations of the Commission of Inquiry and not expressed determinations*". I regret that I am unable to agree. I must observe that even the petitioner does not take this position. As I stated previously, in the petition filed before the Court of Appeal, the petitioner characterises them as "decisions" made by the Commission of Inquiry. But even assuming without conceding that they are merely assertions or observations and not determinations in the strict sense, it does not follow that they are devoid of evidentiary value. The Attorney General may take such assertions, together with other material lawfully gathered, into account in deciding to indict the petitioner on specific charges under the Penal Code and other relevant statutes, in terms of the powers vested in the Attorney General by the Code of Criminal Procedure Act.

The Court of Appeal proceeds to state that the Commission of Inquiry had merely recommended the institution of proceedings against the petitioner under the Bribery Act, if deemed appropriate, and since such proceedings have already been instituted by the Commission to Investigate Allegations of Bribery or Corruption, there was, in its view, no adequate basis to initiate

criminal proceedings under section 24 of the Commissions of Inquiry Act. With respect, I am unable to agree with this reasoning.

Firstly, no copy of the proceedings, if any, instituted by the Commission to Investigate Allegations of Bribery or Corruption has been tendered to this Court, thereby precluding this Court from ascertaining whether such proceedings have in fact been initiated, and if so, on what charges. Secondly, notwithstanding the possibility that proceedings may have been instituted under the Bribery Act in relation to the apartment issue, the Attorney General is not precluded from relying on the same items of evidence, together with other material, to support the proof of distinct and separate charges in the indictment filed before the Trial-at-Bar.

It must be emphasised that the charges framed against the petitioner in the indictment are not based on the apartment transaction, but arise from other incidents involving alleged criminal misconduct, which are entirely separate and independent of the matter referred to the Commission to Investigate Allegations of Bribery or Corruption. It is also relevant to note that the petitioner did not allege that the principle of double jeopardy had been violated by the Attorney General.

The Court of Appeal has referred to several legal principles such as “due process” and the “no evidence rule” in support of its conclusion. However, I find it difficult to understand how those principles are meaningfully connected to the facts of this case. This is the concluding part of the judgment of the Court of Appeal.

> *For the reasons set out above, I take the view that the Attorney General should be satisfied by following due process that adequate evidence and material are available to prosecute an accused against whom no express recommendation or a determination has been made by the COI, before commencing criminal proceedings against such accused*

under section 24 of the COI Act. The 1st respondent is unsuccessful in establishing before this Court the fact that the 1st respondent has followed such due process for him to be satisfied upon the availability of adequate material and evidence particularly against the Petitioner. This requirement will be certainly different if the COI has made clear and express pronouncements in respect of persons who are implicated in the matter under inquiry or any other appropriate persons under section 16 of the COI Act. I am highly influenced in this regard by the admissions of the 1st Respondent in his Statement of Objections supported by an affidavit that the information was exhibited by the 1st Respondent on the charges that were contemplated against the petitioner on the basis of the material gathered at the COI.

The information exhibited by the 1st Respondent in respect of the offences to be tried against the Petitioner before the High Court-at-Bar appears to be directly based on alleged facts and circumstances reflected on the Report of the COI. I need to reiterate that the assertions or observations or recommendations made by the COI in reference to the meetings on 28.03.2016 and 30.03.2016 and the purported allegations levelled against the Petitioner by the 1st Respondent on the instructions given to the State Banks are merely in the nature of assertions or observations of the COI and such assertions or observations cannot be considered 'material' as intended by the legislature in the said Section 24 of the COI Act.

In view of my above findings and based on special circumstances of this case, I am of the opinion that the mere leading of evidence for the Prosecution against the Petitioner in the Trial Court cannot establish the ingredients of the charges due to the restrictions of a written law. Additionally, the decision to indict the Petitioner cannot be assumed as

a decision taken following the process and with adequate evidence in terms of the 'No evidence rule'.

Hence, I proceed to issue a writ of Certiorari quashing the decision made by the 1st Respondent to charge the Petitioner by way of an indictment and/or information on the charges bearing Nos. 1, 3, 14, 15 and 16 contained in the document marked 'P10' in relation to case No HC(TAB)2445/2021. The judgement should not impede or obstruct any investigations to be conducted against the Petitioner nor shall this judgement impede or obstruct the 1st Respondent from maintaining the Indictment bearing Case No. HC (TAB) 2445/2021 against the 1st, 3rd to 11th Accused, before the High Court-at-Bar.

As already discussed, the reasoning set out in the concluding part of the judgment of the Court of Appeal cannot be justified.

The Court of Appeal states that "*the mere leading of evidence for the prosecution against the Petitioner in the trial court cannot establish the ingredients of the charges due to the restrictions of a written law*" and "*the decision to indict the Petitioner cannot be assumed as a decision taken following due process and with adequate evidence in terms of the No evidence rule*".

It is not entirely clear what the Court of Appeal intended by these expressions or findings. When it refers to "*the restrictions of a written law*", neither the specific written law in contemplation nor the nature of the purported restrictions has been clearly identified. Those expressions appear to conflate two distinct concepts: "due process" and "no evidence rule". Those are broad legal concepts.

Due process largely refers to the fairness and legality of the procedure adopted in the decision-making process, whereas the no evidence rule refers to patent lack of evidence to support a conviction.

It appears that the Court of Appeal thought that due process was not followed as there is no adequate evidence to indict the petitioner in terms of the no evidence rule. As I have already made it clear, there is no basis for applying the "no evidence rule" to the facts and circumstances of this case.

Administrative Law by Sir William Wade and Christopher Forsyth (op. cit.), clearly encapsulates the current position of the development of the "no evidence rule" at page 227 as follows:

> *Findings of fact are traditionally the domain where a deciding authority or tribunal is master in its own house. Provided only that it stays within its jurisdiction, its findings are in general exempt from review by the courts, which will in any case respect the decision of the body that saw and heard the witnesses or took evidence directly. Just as the courts look jealously on decisions by other bodies on matters of law, so they look indulgently on their decisions on matters of fact.*
>
> *But the limit of this indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing to altogether make insupportable finding. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.*
>
> *'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires. It also has some affinity with the substantial evidence rule of*

> *Americanlaw, which requires that findings be supported by substantial evidence on the record as a whole.*

It is to be noted that the no evidence rule has only opened up a very narrow path for the Courts to review non-jurisdictional errors of fact. The onset of this development marked by the statement of Lord Denning in *Ashbridge Investments Ltd v. Minister of Housing and Local Government* [1965] 1 WLR 1320 at 1326 reflects the threshold of glaring indefensibility or irrationality of the decision required for the application of the no evidence rule:

> *[T]he Court can interfere with the Minister's decision if he has acted on no evidence, or if he has come to a decision to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position when the Court has power to interfere with the decision of a lower tribunal which has erred in point of law.*

Accordingly, P.P. Craig, *Administrative Law*, 4th Edition, cautions against judicial review of factual findings at page 495 as follows:

> *[T]he general test should be whether there was some reasonable or sufficient evidence to justify the action. To require more runs the risk of the courts substituting their view for that of the authority.*
>
> *…decision-makers tend to reach decisions on the basis of bounded rationality. They do not have and cannot have all the possibly relevant materials and evidence before them. No decisions would ever be made if this were to be demanded. While this may provide some justifications for ensuring that the decision-maker indicates what was the factual basis for his action, we should be wary of developing review of facts upon the premise that all such material could or should be considered.*

It is worth reproducing Lady Carr's statement in *Director of Public Prosecutions (Appellant) v. Chris Durham and Two Others (Trinidad and Tobago)* (supra) at para 41 that:

> *It is not the prosecutor's function to decide whether a person is guilty of a criminal offence, but rather to make an assessment as to whether it is appropriate to present charges for the criminal court to consider.*

I must add that, as a Divisional Bench of this Court held in *Attorney General v. Inspector General of Police* (SC/TAB/3/2023, SC Minutes of 05.11.2024), known as Easter Sunday Trial-at-Bar case, even the acquittal of an accused after closing the prosecution case without calling for the defence on the basis of no case to answer, under section 200(1) of the Code of Criminal Procedure Act, is not a decision to be taken lightly. While in full agreement with the principal judgment delivered by Justice Surasena by which the acquittal entered after the closure of the prosecution case on the ground of no case to answer was quashed directing the Trial-at-Bar to call for the defence, I further analysed the applicability of section 200(1) to conclude that "*At the stage of the close of the prosecution case, the proper question for the Court to consider is whether the prosecution has made out a prima facie case to call upon the accused for his defence, not whether the prosecution has proved the case beyond reasonable doubt. The decision whether the accused is guilty of the charge beyond reasonable doubt should be reserved until the conclusion of the entire trial*."

It is also pertinent to note that, by the inclusion of section 200(1) in the Code of Criminal Procedure Act, the legislature has made provision to address situations where insufficient evidence is adduced at trial. Thus, the legislature has recognised that the question of whether sufficient evidence has been led to establish the ingredients of an offence is a matter for the trial Judge to determine either upon the close of the prosecution case or after calling for the defence. In the circumstances of this case, and having

regard to the facts set out above, the finding of the Court of Appeal that no evidence existed to prove the charges against the petitioner was premature.

Let me assume, *arguendo*, that the material found during the Presidential Commission of Inquiry was inadequate to indict the petitioner.

The error committed by the Court of Appeal in quashing the indictment against the petitioner was its focus on the fact that the Attorney General's decision to indict was based solely on the final report of the Commission of Inquiry. The Court of Appeal judgment places repeated emphasis on this matter.

However, as I previously noted, the Attorney General's decision to indict the petitioner was not based solely on the final report of the Commission of Inquiry or the material gathered during its investigation and inquiry. The Attorney General depended on the material collected during the investigation carried out by the Criminal Investigation Department, which was initiated following a written complaint made by the Governor of the Central Bank, Dr. Coomaraswamy. This was explicitly stated by the Attorney General in the information presented to the High Court in terms of section 450(4) of the Code of Criminal Procedure Act. Without an investigation conducted by the Criminal Investigation Department with the guidance of the Attorney General, it would not have been practically possible for the members of the Commission alone to carry out its mandate.

Had the Court of Appeal taken this fact into serious account, I am certain, it would have arrived at a different conclusion. The Court of Appeal paid no attention to this aspect. As I previously mentioned the Court of Appeal acknowledged "*that the Attorney General is not essentially bound to divulge evidence before a Review Court to justify his reasons to forward an indictment*."

Connected to the above, another error committed by the Court of Appeal was its failure to give due consideration to the *non obstante* clause at the beginning of section 24 of the Commissions of Inquiry Act, which reads: "*Notwithstanding anything to the contrary in the Code of Criminal Procedure Act, No. 15 of 1979, or any other law…*" In my view, the Court of Appeal did not properly appreciate the significance of this clause. Far from limiting the Attorney General's discretion, this part of section 24 reinforces and expands it. The discretionary power conferred on the Attorney General under the Code of Criminal Procedure Act or any other law remains unaffected by the latter part of section 24. That latter part merely provides an additional tool in the Attorney General's prosecutorial arsenal. However, the Court of Appeal appears to have focused solely on this additional tool, disregarding the broader discretionary framework preserved by the *non obstante* clause.

At page 17 of the impugned judgment, the Court of Appeal acknowledges that the principal argument of the petitioner revolved around paragraph 9 of the statement of objections filed by the Attorney General, which stated that the information was exhibited and charges were framed against the petitioner on the basis of material gathered at the Commission of Inquiry. The Court of Appeal placed complete reliance on this averment and shut out all other material that may have been collected through independent investigations by other agencies.

By perusing the journal entries of the Court of Appeal docket, it is evident that after the conclusion of the main argument, the parties were permitted to file further written submissions and to make additional oral submissions at several stages for the purpose of further clarifications. Along with the further written submissions filed by the Attorney General dated 09.01.2023, the Attorney General tendered a document marked 'X', which is a copy of a letter addressed by the Attorney General to the Inspector General of Police dated 03.03.2020 in relation to Fort Magistrate's Court Case No.

B/8266/2018, with copies to the Fort Magistrate, the DIG/CID, and the Director/CID.

The Court of Appeal in the impugned judgment notes that the said document was produced by the Attorney General to underscore that the decision to indict the petitioner was not based solely on the material collected during the course of the Commission of Inquiry, but also on other material independently obtained. This position is clearly reflected in the first two paragraphs of the document marked 'X', which runs into 20 pages. The first two paragraphs read as follows:

මගේ අංකය: CF/31/2016

2020.03.03

සී.ඩී. වික්‍රමරත්න මහතා,
වැඩ බලන පොලිස්පති,
පොලිස් මූලස්ථානය
කොළඹ 01

<u>කොටුව මහේස්ත්‍රාත් අධිකරණ නීති කෘත්‍යය අංක 8266/2018</u>

(01) (අ) 2015.02.01 වන දින සිට 2016.03.31 වන දින අතර කාලය තුළදී පවත්වන ලද භාණ්ඩාගාර බැඳුම්කර නිකුතුවන් සහ ඊට අදාළ ගනුදෙනු පිළිබඳව විමර්ශනය කොට විභාග කිරීම සඳහා පත් කරන ලද කොමිෂන් සභාව විසින් පවත්වන ලද පරීක්ෂණ සහ විභාග සැසිවාරවල දී එකතු කරගන්නා ලද විමර්ශන ද්‍රව්‍ය සහ සාක්ෂි,

(ආ) 2016.11.25 දාතමෙන් ශ්‍රී ලංකා මහා බැංකුව එවකට සිටි අධිපති ආචාර්ය ඉන්ද්‍රජිත් කුමාරස්වාමි මහතා විසින් කරන ලද පැමිණිල්ලට අනුරූපව අපරාධ පරීක්ෂණ දෙපාර්තමේන්තුව විසින් පවත්වන ලද අපරාධ විමර්ශන සටහන් විමර්ශනයේදී එකතු කරගන්නා ලද ලේඛන සහ

(ඇ) ඔබ දෙපාර්තමේන්තුවේ විමර්ශන නිලධාරීන් සහ ශ්‍රී ලංකා මහ බැංකුවේ විමර්ශන නිලධාරීන් සමඟ පවත්වන ලද සම්මුඛ සාකච්ඡා කෙරෙහි අවධානය යොමු කරන ලදී.

(02) ඉහත පළවන ඡේදයේ සඳහන් දෑ සැලකිල්ලට ලක් කිරීමෙන් අනතුරුව පිළිවෙලින් 2016.03.29 වන දින සහ 2016.03.31 යන දිනයන්හි දී පවත්වන ලද බැදුම්කර වෙන්දේසි වලදී සිදුකරන ලද අපරාධමය වැරදිවලට අදාළ පහත විස්තර කර ඇති චෝදනා සම්බන්ධයෙන් මින් මතුවට නම් කරනු ලබන සැකකරුවන්ට එරෙහිව ප්‍රමාණවත් කරුණු සාධාරණ සැකයක් (reasonable suspicion) ඉදිරිපත් වී ඇති බවට මෙයින් උපදෙස් දෙමි.

There is no allegation that document 'X' is a forgery or one manufactured for the purpose of the proceedings before the Court of Appeal. Nevertheless, the Court of Appeal rejected the document on the basis that "*the learned President's Counsel for the petitioner vehemently objected to tendering a document along with the written submissions and moved that the said document be rejected*." In a matter of this complexity and national importance, the Court of Appeal ought not to have adopted such a narrow and technical approach.

There was an opportunity for the petitioner to counter that document, as it was filed before the case was taken up for further clarifications in open Court. It is also pertinent to note that the first paragraph of 'X' quoted above is reflected in the information exhibited in terms of section 450(4) of the Criminal Procedure Code. Thus, the position revealed in document 'X' is not a new position.

It is well to remember that a writ is a discretionary remedy, not one granted as of right. The exercise of such discretion must be guided by well-settled principles of judicial restraint. The greater the complexity and contest over facts, the higher the degree of caution that is warranted.

Conclusion

I answer the question of law on which special leave appeal was granted, i.e. "*Did the Court of Appeal err in failing to appreciate in its judgment, the presence of section 24 of the Commission of Inquiry Act as amended from its*

correct perspective?", in the affirmative. The judgment of the Court of Appeal dated 28.02.2023 is set aside and the appeal is allowed with costs. The writ application filed by the petitioner in the Court of Appeal shall stand dismissed.

As agreed, the parties in SC/APPEAL/103/2024 will abide by this judgment.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

Janak De Silva, J.
I agree.

Judge of the Supreme Court