

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

In the matter of an Appeal in terms of Section 451(3) of the Code of Criminal Procedure Act No.15 of 1979 as amended by Act No.21 of 1988.

SC.TAB 01A/2014-01F/2014

HC.SPL Case No.7193/2014

1. Andrawas Patabendi Ganendra de Vaas Gunawardena
2. Bamunusinghe Arachchige Lakmina Indika Bamunusinghe
3. Athapaththuge Gamini Sanathchandra
4. Anantha Pathiranage Priyantha Sanjeewa
5. Dissanayake Mudiyanselage Kelum Rangana Dissanayake
6. Andrawas Patabendi Ravindu Sameera de Vass Gunawardena

Presently at Remand Prison, Welikada.

1st -6th Accused-Appellants

-Vs-

The Hon. Attorney-General
Attorney-General's Department,
Colombo 12.

Complainant-Respondent

BEFORE : **MOHAN PIERIS, PC, CJ.**
S.E. WANASUNDERA, PC, J.
B.P. ALUWIHARE, PC, J.
SISIRA J. DE ABREW, J &
SARATH DE ABREW, J.

COUNSEL : Anil Silva PC with Chandika Pieris and Sumithra Waidyasekera for the 1st -3rd Accused-Appellants.

D.P. Kumarasinghe PC with Neville Abeyratne, Mahendra Kumarasinghe and Asitha Vipulanayake for the 4th & 5th Accused-Appellants.

Anuja Premaratne with Chamath Wickramasinghe, Nayana Dissanayake and Iromie Jayarathne for the 6th Accused-Appellant.

Ayesha Jinasena DSG with Varunika Hettige SSC and Nayomi Wickramasekera SC for the Attorney-General.

WRITTEN SUBMISSIONS
TENDERED BY THE 1ST
ACCUSED APPELLANT : 24.10.2014

WRITTEN SUBMISSIONS
TENDERED BY THE
ATTORNEY GENERAL : 23.10.2014

ARGUED &
DECIDED ON : 29.10.2014

By way of their petitions of appeal preferred by the 1st to 6th Accused-Appellants in this case in terms of Section 451 of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 21 of 1988, the Accused-Appellants seek to impugn the

order made by the Trial at Bar on the 25/08/2014, dismissing the objections to the maintainability of the indictment against them.

In these petitions cumulatively taken together, the Accused-Appellants assailed the order of the Trial at Bar dated 25/08/2014 on the following grounds:

- a. The order is contrary to law.
- b. The said Trial at Bar has disregarded the effect of *R.P. Wijesiri v. Attorney-General* (1980) 2 Sri.L.R 317, and thus the Trial at Bar has acted contrary to what was stated in the precedent.
- c. The interpretation placed by the Trial at Bar on Section 5 of the Code of Criminal Procedure Act No. 15 of 1979 is contrary to law.
- d. Section 394 of the Code of Criminal Procedure Act No.15 of 1979 is inapplicable.
- e. It will be an abuse of process on the part of the A-G to forward an indictment for an offence under the provisions of the penal code when the investigation has begun under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. In the circumstances the Accused-Appellants contend that the continuity of the trial consequent to these alleged vitiating factors and the consequent detention of the Accused would impact on the liberty of the Accused, and the Accused-Appellants have prayed for a quashing of the order dated 25/08/2014 and an order that the Trial at Bar cannot continue and proceed with the trial on the information/indictment. The Accused-Appellants further pray that they be acquitted on these grounds.

At this stage, the contention of the respective counsel could be summarised in a nutshell. The counsel for the 1st to 3rd Accused-Appellants submitted that the subject matter of the appeal could be bifurcated into two grounds namely -

- a. The A-G did not have the power to file an indictment under the penal code when the investigations were carried out under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979
- b. In the circumstances the indictment/information is tainted.

The contention of counsel was that the Attorney General had acted ultra vires his powers and there was an abuse of process on the part of the Attorney General.

The counsel for the 4th and 5th Accused appellants D.P Kumarasinghe P.C submitted that investigations and materials elicited under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 cannot be used in a trial under the ordinary law of the country. The counsel for the 6th Accused-appellant contended that the investigation was tainted as a result of adhering to the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 in conducting investigations into the alleged crimes and as such, there is an abuse of process.

The underlying thread of argument running through the contentions of the Accused appellants is premised on one cardinal point, namely, whilst the arrest and detention of the Accused and the investigations into the case had been under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, they had been on the contrary, charged under the Penal Code. This would constitute an abuse of process. This contention alleging abuse of process can be viewed in the light of some of the pronouncements that have been made in regard to abuse of process in overseas jurisdictions. The phrase 'abuse of process' had come up in the context of delay in the case of *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80

Cr.App.R. 164, and the pertinent observation of the divisional court merit a reference as far as the clarification of this phrase is concerned. An abuse of process in the context of a delay was conveniently characterised in the following terms:

*“The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-Accused, or to genuine difficulty in effecting service. . . . The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, for, as Lord Diplock said in *Reg. v. Sang* [1980] A.C. 402, 437: ‘the fairness of a trial . . . is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.’”*

In order to ascertain whether the process of investigation and the ultimate arraignment of the Accused in this case passed the test of the standards that are articulated in the above passage it is convenient to bear in mind the details of events that took place in the case *vis-a-vis* the dates and the statutes that become applicable to these events. These details have been conveniently summarised by the learned Deputy Solicitor General and they throw light on the investigation into the standards that the English cases insist upon, as requirements for an abuse of process to be made out. From the first information into the alleged abduction and

murder of the deceased had come about with the first information being given by Mohammed Fauzdeen to the Bambalapitiya police consequent to which the Bambalapitiya police and filed a report on the 23 May 2013. This step had been taken pursuant to Section 109 of the Code of Criminal Procedure Act No.15 of 1979 and the subsequent B Report filed by the Bambalapitiya police in MC Colombo under Case No. B3729/5/13 has been filed in terms of Section 115 of the Code of Criminal Procedure Act No.15 of 1979. All the subsequent events have been filed under the Code of Criminal Procedure Act No.15 of 1979 and it is pertinent to observe that detention orders had been obtained in respect of Krishantha and Fauzdeen under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

The report by the CID in regard to the detention orders narrate that an aspect of the investigation had given rise to a reasonable suspicion that an offence had been committed under the respective provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. It is on that basis that the arrest of the 2nd to 5th Accused-Appellants and their detention had taken place under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. It has to be noted, though, that the progress of the investigation continued to be reported under Section 120(1) of the Code of Criminal Procedure Act No.15 of 1979. In the course of this investigation, a request had been made under section 127 of the Code of Criminal Procedure Act No.15 of 1979 to have the statements recorded of Krishantha and Fauzdeen. It is in this light that the 1st Accused-Appellant had been arrested on the 10th June 2013 and his detention had been effected under Section 6(1) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. It has to be noted the progress of the investigation had been reported under Section 120(1) of the Code of Criminal Procedure Act No.15 of 1979. It has to be noted that though the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 had been used to effect the arrest of the suspects and to secure their

detention, in view of the grounds that existed for such steps taken in the course of the investigation. The investigative steps have also been taken in accordance with the terms of the Code of Criminal Procedure Act No.15 of 1979. It is quite apparent from the chronology of events that have been tendered to court by way of Volume 3, which contains a compendium of the B reports and the investigatory mechanisms adopted among other things. The investigation in the instant case had been solely conducted in terms of the provisions of the Code of Criminal Procedure Act No.15 of 1979. Volume 3 appended to the materials that are before this court clearly bring out the fact that the investigators had identified the Penal Code offences almost at the beginning of their investigation. The continuous reporting of the facts as regards the process of the investigation had been made in accordance with the provisions of the Code of Criminal Procedure Act No.15 of 1979, and this court observes that the Prevention of Terrorism Act No 48 of 1979 had been applied only in the arrest and detention of the 1st to 5th Accused-Appellants. It is quite apparent that by the time these Accused-Appellants came to be arrested, upon the material collected in the course of the investigation, a reasonable doubt had been created in the mind of the investigators of the probable involvement of the perpetrators relating to offences under Sections 2(1)(h) and 3(a)(b) of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979.

When this court observes the details of the periods of detention of the Accused-Appellants, the accompanying details merit reference in respect of each Accused Appellant. The following table would help the court in its investigation as to whether the investigators abused the process of law by having the 1st to 5th Accused-Appellants on detention orders.

Appellant	Statute	Date of Arrest	Validity of the DO	Produced in MC and Remanded	Total Period on DO
1A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	10/06/13	For 72 hours with effect from 10/06/13	13/06/13	03 days
2A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	05/06/13	72 hours at first [sec 6(1), 7(1)]. DO* from 07/06/13 to 02/09/13	17/07/13	1 month and 12 days
3A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	05/06/13	72 hours at first [sec 6(1), 7(1)]. DO from 07/06/13 to 02/09/13	17/07/13	1 month and 12 days
4A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	05/06/13	72 hours at first [sec 6(1), 7(1)]. DO from 07/06/13 to 02/09/13.	17/07/13	1 month and 12 days
5A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	06/06/13	72 hours at first [sec 6(1), 7(1)]. DO from 07/06/13 to 03/09/13.	17/07/13	1 month and 11 days
6A	Code of Criminal Procedure Act No.15 of 1979	09/08/13	—————	09/08/13	none

* DO = Detention Order

The tabular data above has clearly established that proper procedure had been followed as mandated by statutory provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 15 of 1979, and there had been material for setting in motion these provisions in order to aid the investigation. A notable feature of this investigation is that as soon as the investigators formed the opinion that their investigation had reached a state where the 1st to 5th Accused-Appellants could be committed to judicial custody, the investigators had produced the 1st to 5th Accused-Appellants before court and they were placed in fiscal custody. In the likes of the above, this court does not find any illegality or procedural irregularity in the investigations that have been conducted by the investigators with a view to bringing the Accused's crimes to be resolved in a court of law.

The question arises whether the counsel for the Accused-Appellants can continue to mount the argument that the interposition of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 at one stage of the investigations taints the whole procedure leading up to the information/indictment that had been preferred against the Accused-Appellants. Section 5 of the Code of Criminal Procedure Act No.15 of 1979, which applies to trial of offences under the Penal Code and other laws states as follows:

Section 5. All offences-

- (a) under the Penal Code,*
- (b) under any other law unless otherwise specially provided for in that law or any other law.*

This provision applies to offences not only under the Penal Code, but any other law, and the section mandates all these offences, both statutory and under the penal code must be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure Act No. 15 of 1979. In other words,

even a statutory offence, other than offences under the Penal Code have to be investigated, inquired into, tried and otherwise dealt with unless specifically provides for any other procedure. In fact, the case of *T.N. Fernando, Assistant Commissioner of Excise v. Nelum Gamage, Bribery Commissioner and another* (1994) 3 Sri.L.R 190 specifically adverted to Section 5 of the Code of Criminal Procedure Act and declared that even an offence under the Bribery Act can be investigated in terms of the Code of Criminal Procedure Act No.15 of 1979. In the instant case, much was made of the arrest and detention of the 1st to 5th Accused-Appellants under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979. It needs to be noted that the investigators have always had recourse to the provisions of the Code of Criminal Procedure Act No.15 of 1979 even in regard to these Accused-Appellants.

The Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 does not have provisions to cater to the recording of first information, summoning of witnesses, periodical reporting of facts to court and securing the assistance of the Magistrate to aid the investigators in the investigatory process. These lacunae are conveniently supplemented by recourse to the provisions of the Code of Criminal Procedure Act No.15 of 1979, and Section 5 can be said to authorise such a cause of action rather than negate it. If the investigators in this case have properly followed the statutory mechanisms that are in place as fortified by previous precedents, it defies logic and reasoning to concur with the contention advanced by counsel for the Accused-Appellants that such a procedure taints the investigatory mechanism that has been adopted in the case. This court is of the view that no illegality or irregularity taints the investigation and thus, no abuse of process has been occasioned.

This court is of the view that based on the above reason, the inherent weaknesses that were observed by Ranasinghe J (as he then was) in *R.P Wijesiri v. Attorney General* (1980) 2 Sri.L.R 317 do not infect this case in any way, and the facts in the

instant case are clearly distinguishable from those of *R.P. Wijesiri v. Attorney General*, and two incomparables cannot be compared to bolster an argument of an illegality that does not exist in this case for the reasons set out above.

In the course of the aforementioned argument an application was made for bail pending trial, presumably on the basis of the alleged infirmities leading to the indictment. This court cannot ignore that this case has provoked a public outcry which had the impact of attracting the provisions that led to a Trial at Bar. It is therefore the view of this court that an expeditious conclusion of this matter would meet the ends of justice from the point of both the accused and those who have been aggrieved by this alleged crime. This court has already held that the indictment has been validly presented. We therefore think it apposite that the application for bail be rejected.

In the circumstances, the indictment that has been forwarded against the Accused-Appellants stands devoid of any illegality or vices and this court sees no compelling reason to grant the relief sought by the Accused-Appellants. We also bear in mind that all the Accused-Appellants have pleaded to the charges and thereby submitted to the jurisdiction of the court. We are mindful of Section 39 of the Judicature Act No. 2 of 1978, which estops an accused party who pleads in any action from objecting to the jurisdiction of such court. Before this court parts with this judgment, the court wishes to advert to the distilled wisdom we glean from Lord Diplock in the celebrated case of *Reg. v. Sang* [1980] A.C. 402, 437:

“the fairness of a trial . . . is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.”

For the reasons set out above we see no reason to fault the reasoning adopted by the Judges of the Trial at Bar in their order dates 25/08/2014 and we affirm the order accordingly. We also direct the Learned Judges of the High Court at Bar to have the trial taken up without delay, and proceeded with **day to day** until its conclusion. We further direct that the Trial at Bar shall not be adjourned on account of any interlocutory appeals or applications made hereinafter by the Accused in the course of the trial, unless otherwise directed by this Court.

Subject to the aforementioned this appeal is dismissed.

CHIEF JUSTICE

S.E. WANASUNDERA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

B.P. ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT

SARATH DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT