

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

In the matter of an application under and in
Terms of Article 140 of the Constitution for
Mandates in the nature of Writs of Certiorari.

CA. (Writ) Application

No. 174/2009

Don. Chaminda Padma Kumara Jayasekara
Kulasinghe,
" Kamini", Malliwatta,
Ittapana.

PETITIONER

Vs.

1. Inspector General of Police,
Police Headquarters, Colombo-01.

2. Deputy Inspector General,
Administration,
Police Head Quarters, Colombo-01.

And four (04) others

RESPONDENTS.

BEFORE: Anil Gooneratne J. &
Deepali Wijesundera, J

COUNSEL: Niroshana Igalahewa for Petitioner.
Yuresha Fernando SC for the Respondents

ARGUED ON: 21.05.2013

JUDGMENT

DELIVERED ON: 28.06.2013

Gooneratne, J.

The Petitioner to this application is a person who joined the Sri Lanka Police Force as a reserve force Sub Inspector on or about 1989, and later absorbed into the regular force as a Sub Inspector on 25.06.1997 (vide P2). A writ of certiorari is sought to quash charge sheet P3 of 22.07.2003 and the disciplinary order made against him marked P4 of 02.01.2006. Mandamus is sought to place the petitioner in his due place according to circular P8 and an opportunity to afford the petitioner to sit the promotional examination as per sub para 'e' of the prayer to the petition. In the body of the petition it is pleaded that

he had served the police force for about 19 years and had been serving in various parts of the Island inclusive as officer in charge of crime branch of Police Station Kalutara.

His grievance as described in the petition and as well as in the submission to this Court by learned counsel was that around July 2001 whilst serving as officer in charge of crimes division of Kalutara South Police, on investigating a murder charge had taken into custody suspects and produced before the Kalutara Magistrate, on 16.09.2001, but had been subsequently discharged. One of the suspects W.A.Dhanapala had filed a fundamental rights case (584/01) against the petitioner and some others on the basis that the said Dhanapala was assaulted by the petitioner and other police officers. Supreme Court in the fundamental rights application had held in favour of the above named Dhanapala and ordered the petitioner to pay compensation as pleaded in para 7 of the petition and the corresponding affidavit of the petitioner. (Copy of the judgment of the Supreme Court or any other document not annexed by petitioner) Subsequently based on the order of the Supreme Court three charges were preferred against the petitioner. (Vide para 8 of the petition and charge sheet P3) Para 9 of the petition

states that order was delivered on 02.01.2006 finding the petitioner guilty of charge Nos. 2 and 3 only. (P4)

Petitioners initial complaint of the above inquiry and the charge sheet is as follows (as in para 10 of the petition)

- a) According to Establishments Code Vol 2 chapter 48 13:12 the “ officer conducting the preliminary investigation should also draft the charge sheet and forward it to the relevant authority....”
- b) However the Officer who conducted the Preliminary investigation (Jayantha Kulathilaka) himself has signed the charge sheet and that is in violation of the procedure of Establishments Code Vol 2 chapter 48 13:12 and therefore the charge sheet is irregular and void.

Petitioner avers that no sooner the Supreme Court order was delivered, petitioner was indicted in the High Court (vide indictment P4). Petitioner was interdicted from service on 29.09.2005 (P6). What is emphasized by the petitioner is that he was acquitted by the High Court (vide order P7) and more particularly as in the judgment at P7, the above named Dhanabala who was the petitioner in

the fundamental rights application had lied on oath to the Supreme Court, and that for the reasons contained in para 14 of the petition the High Court Judge acquitted the petitioner. By this the petitioner attempts to demonstrate that he was incorrectly found guilty for an alleged violation of a fundamental rights due to false evidence provided by the said Dhanapala who was the petitioner in the Fundamental Rights application before the Supreme Court. As such the petitioner argues that the root cause in the finding the petitioner guilty in the inquiry held by the Police Department is without a basis and found to be false.

Petitioner supports his entitlement for promotions with reference to circulars P8 and P9. In order to clarify the positions of the petitioner, I would incorporate the following paras in the petition of the petitioner.

- a) The Petitioner further states that while he was in interdiction, by circular number C/RTM 68 several promotions were granted to officers and that inter alia the circular stated that ; SII who possess 8 years of active service in the rank of SII as at 31.12.2005 were to be promoted to the next higher level w.e. f 06.02.2006, and further that if those who have pending cases will be kept in the reserve list and if at the conclusion of the case they are exonerated the promotion will be effected from due date.

- b) The Petitioner further states that although the date for above promotions were 06.02.2006 he is aware that the promotions were given on 01.01.2006.
- c) The Petitioner says therefore that he is entitled to the promotion mentioned in P8 above as the he was acquitted from all charges on 14.11.2008 from the said High Court cased number 375/2004; and further states that he now bears a clean record, and consequently falls to the category of SII's who possessed 8 years of active service in a rank by 31.12.2005 having been appointed to the SII rank in 25.06.1997 (as evidenced from P2)
- d) The Petitioner further states that by circular number (IGP circular number 1999/2007 and official circular number 17/2007) dated 13.06.2007, both I.P.s and SII of Police who have been confirmed before 24.02.2006 and who has completed 10 years of active duty were called for application for the promotion to Assistant Superintendent of Police

The Petitioner also plead that he appealed to the National Police Commission requesting for the promotion and increments by letter P10. However the

outcome of the appeal is not known and or pleaded, in the petition filed of record. The annexure "8" referred to in P10 is not forwarded to this Court.

The learned State Counsel referred to the averments in the affidavit of the 1st respondent the Inspector General of Police and the position of the respondents. It was argued that the petitioner has failed to divulge material facts including the fact that he did not have an uninterrupted period of service. Document R1 is produced and this Court note the following facts, pertaining to the petitioner, as disclosed in the affidavit of the 1st respondent.

- a) Petitioner demobilized from service on 17.09.1990 due to an adverse report against him in relation to Terrorist activities.
- b) reinstated in service on 01.02.1996. Petitioner not in service during 1990-1996.
- c) served the reserve service only for 2 years.
- d) Period of service in the regular force is only 12 years of which 3 ½ years, he was under interdiction.

As such State Counsel argues that the petitioner does not have a record of 19 years uninterrupted service.

At this point of this judgment having considered (a) to (d) above, we are of the view that the petitioner has deliberately or misleadingly or otherwise not disclosed to this Court the correct service record of the petitioner and he was duty bound to give correct details irrespective of the remedy sought from this Court. To this extent there is an obvious willful suppression/misrepresentation of material facts. Irrespective of merits of the application, Court could refuse the remedy sought.... So rigorous is the necessity for a full disclosure of all material facts that the Court will not go into the merits of the application but will dismiss it without further examination. Per Pathirana, J in *Alphonso Appuhamy Vs Hettiarachchi* 1973) 77 NLR 131,136. The words of Pathirana, J cited and followed by Marsoof, J in *Dhahanayake Vs Sri Lanka Insurance Corp* (2005) 1 SLR 67 .

Petitioner must be frank with the Court and must not suppress material facts or practice anything like deception. Per Sansoni, J *Kandy Omnibus Co. Ltd Vs Roberts* 56 NLR 293, 304.

The position of the Respondents is that as per circular P8, (which petitioner does not possess) there is a requirement of 8 years active service and 5 years of unblemished record from the date on which application for the said posts were closed. The findings of the disciplinary inquiry dated 02.01.2006 the petitioner would be disqualified for consideration for promotions. Further the petitioner does not have the basic requirements according to circular P9. i.e 10 years service in the rank of Inspector of Police. 5 years unblemished service as a minimum criteria, and entails satisfactory performance and a written exam and a viva-voce examination. This Court is convinced that the petitioner does not come anywhere close to the requirements in P9. As such the submissions of the respondent in this regard cannot be doubted.

Respondent also urge that the disciplinary order and inquiry (02.01.2006) remains unchallenged. Petitioner has failed to appeal from the said order to the National Police Commission. Although the petitioner has produced P10 as observed above the annexure " 8 " to p10 had not been produced along with the petition. This could have been explained in the counter affidavit of the petitioner. Other than a mere denial of the

Respondents position, no attempt made to draw the attention of this Court to the outcome of an inquiry, if it was infact held by the National Police Commission. As such respondents position in this regard could not be doubted. i.e petitioner has failed to appeal to the Police Commission. Availability of alternative remedy would in certain instances deprive a petitioner for a prerogative writ. Appellate procedure as established by law being the ordinary procedure should be availed of before recourse is had to the extraordinary jurisdiction by way of judicial review as provided by article 140 of the Constitution.

In all the above circumstances we are not inclined to grant any relief to the petitioner. Finally this Court observes that the findings of the High Court does not in any way have the effect of over-riding or vitiating the findings of the Supreme Court (SC /FR 584/01) which is the apex Court. The High Court which has criminal jurisdiction would adopt the proof of facts being proved beyond reasonable doubt. A reasonable doubt would demolish the prosecution case. The Supreme Court which is the final apex Court in the Island would in ' rights' cases proceed on the basis of a just and equitable standard. The High Court criminal standard of proof cannot override the at any costs the just and equitable aspect. In arriving at this decision to refuse

relief to the petitioner, the apparent delay in filing this application would be ignored by this Court giving the benefit to the petitioner by his move to get acquitted in High Court proceedings. Nevertheless the other matters referred to in this judgment would disentitle the Petitioner for the remedy sought by way of prerogative writs. As such we dismiss this application without costs.

Judge of the Court of Appeal

Deepali Wijesundera, J

I agree.

Judge of the Court of Appeal

Kpm/-