

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

**In the matter of an Application for mandate in the
nature of Writ of *Mandamus* under and in terms of
Article 140 of the Constitution of The Democratic
Socialist Republic of Sri Lanka**

Nidhu Manohar David,
711, Station Road,
Wattala

Petitioner

CA/ WRIT/265/2014

Vs,

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
2. N.K. Illangakoon,
Inspector General of Police,
Police Head Quarters,
Colombo 01.
3. Mr. Hemal Prasantha,
Officer in Charge,
Police station,
Matara.

And ten others

Respondents

Before : Vijith K. Malalgoda PC J (P/CA)

**Counsel : J.C. Weliamuna for the Petitioner
Priyantha Nawana DSG for the Respondents**

Argued On: 26.02.2016

Written Submissions On: 01.04.2016

Order On: **23.09.2016**

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioner to the present application has come before this court seeking inter alia,

- b) Grant a mandate in the nature of a writ of *Mandamus* compelling any one or more of the Respondents to direct and/or conduct the investigations and institute criminal prosecutions against any individual, forthwith regarding the matter complained here—in particular in respect of the complaints reflected in the lists produced marked P-14(a) and P-14 (b)

The petitioner who claimed to be a ‘Jehovah’s witness’ and a member of the ‘Appointed Elders (Religions Ministers)’ had complained in his petition, the failure by any one or more of the Respondents to initiate and/or continue with effective and meaningful investigations and commence criminal proceedings against the individuals, who were complicit in several illegal activities, particularly such attacks on the followers of Jehovah’s witnesses and the failure of any one or more Respondents to take meaningful and effective steps to effectively investigate such illegal activities, whilst seeking writ of *Mandamus* compelling as referred to above.

The petitioner has brought before this court series of events took place in several parts in the country which leads to making complaints and counter complaint, when followers of Jehovah’s witnesses were engaged in preaching and declaring the gods news of the Kingdom of God by Public Ministry/ house to house teaching.

Even though the Petitioner was not a victim in any of the said incidents he had filed the present application in public interest and had referred to 11 such incident resulting in various forms of attacks and/or harassments faced by Jehovah's witnesses.

The Petitioner under paragraph 7, subheading 7.1- 7.11 referred to those incidents in detail and in paragraph 8 of his petition summarized them under two categories and explains as follows,

“Paragraph 8 for propose of clarity the Petitioner sets out below several lists prepared by him regarding the incident set out in the preceding sub paragraph;

- a) A list prepared by the Petitioner setting out several complaints lodged by the victims, with the police. The Petitioner states that no effective investigations being conducted or arrests and/or prosecutions flowing there from and states that the police are refusing to make any disclosure of the progress of any such investigations;
(Annexed here with marked 14 (a) a document prepared by the Petitioner setting out such information and such is pleaded and part and parcel of this application)
- b) A list prepared by the Petitioner setting out the several instances of malicious prosecutions instituted against the victims who attempted to seek redress and protection from the police, where in the police should have acted under the law and in particular the Police Ordinance and section 56 thereof;
(Annexed herewith marked P-14 (b) is a document prepared by the Petitioner setting out such information and such is pleaded as part and parcel of this application)

As observed by this court, out of the two lists referred to above, list 14 (a) referred to incidents where no effective investigations being carried out and list 14 (b) referred instances where prosecutions are being launched against 'Jehovah's witnesses', maliciously.

Since the Petitioner had refers to several incidents took place in various parts of the country, it is important to consider as to how the complained incidents have initially commenced. The

Petitioner in paragraph 5 and 6 of his petition explains the background to Jehovah's witnesses as follows;

“Jehovah's witnesses are recognized traditional religion, followed by a considerable number of Sri Lankans, and they engage, in public, as well as private, to manifest their religion and observe, practice and teach such religion, similar of other main religions in Sri Lanka”

“As a follower of his religious faith, one aspect of worship of Jehovah's witnesses is preaching and declaring the gods news of the Kingdom of God as reflected in the Bible..., the Petitioner states that Jehovah's witnesses where ever in the world, engage in such public ministry/house to house teaching and provide the opportunity to any individual to learn more about the Bible massage. The Petitioner further state that Jehovah's witnesses habitually carry several publications/ literature when engaging such preaching/house to house teaching.”

Therefore it is an admitted fact that the followers of the Jehovah's witnesses were engaged in house to house teaching of religion. They further admit that the said followers when engaged in public ministry/house to house teaching that they distribute publications/ Literature religious material. During the arguments before us, the Respondents took up the position that there were villagers who disliked the said conduct of the Jehovah's witnesses, which amount to propagation of religions and was resisted by the said villagers.

In this regard this court is mindful of the interpretation given to the term “propagation” by the Supreme Court in the determination 19/2003 in the following manner,

“As referred to earlier, the Constitution does not recognize a fundamental right to propagate a religion. The expression ‘propagate’ has a number of meanings, but according to the shorter Oxford Dictionary it means ‘to spread from person, or from place

to place to disseminate, diffuse (a statement, belief, practice etc) in the Supreme Court Determination No. 2/2001 it was stated that,

“In Sri Lanka the Constitution does not guarantee a fundamental right to ‘propagate’ religion as in article 25 (1) of the Indian Constitution. What is guaranteed here to every citizen is the fundamental right by article 14 (1) (e) to manifest, worship, observe and practice that citizen’s religion or teaching”

As observed by this court majority of the said incidents were reported in areas where the majority of the populations were non catholic.

In majority of such incidents have ended up in police station where the villagers have brought the followers of Jehovah’s witnesses into police station and making complaints. The Respondents have further submitted that when complaints were made by the public, there was a duty cast upon the police to take prompt steps to maintain the peace in the said areas and to investigate such complaints and if necessary, report the facts before Court. However the Respondents admitted before this Court that when the said followers of Jehovah’s witnesses were brought before police stations and when their statements were recorded, in some instances the said followers had complained incident of sexual harassment, etc and in such instances police had taken steps to investigate those complaints too.

As observed by this court the Respondents have admitted taking following steps with regard to the complaints reported to police. It is also important to note at this stage, that the police investigations referred to above have been commenced not by the complaints made by the followers of Jehovah’s witnesses but by the complaints made by the general public of the area against the conduct of the Jehovah’s witnesses.

- i. ‘2R-1’: A report filed in court under the Criminal Procedure Code upon receipt of a complaint against propagation of religion by Athurugiriya Police Station

producing three suspects. This relates to the alleged incident at Athurugiriya Police area in List 'P-14 (a)' and referred to in paragraph 7.1 of the petition.

ii. (a) '2R-2': Weliveriya Police Station investigated into complaints against propagation of religion and statements were recorded where the followers of 'Jehovah's Witness' admitted such propagation, as borne-out by '2R-2' in relation to the allegation in paragraph 7.2 of the petition.

(b) '2R-4': Report on an inquiry into a complaint lodged at the police Headquarters, where it was concluded that the incident had arisen as a result of propagation of a religion. The report concluded that the parties had agreed that they had not wanted to proceed further. This relates to the alleged complaint made at the Police Headquarters and referred to in List 'P-14 (b)'.

iii. (a) '2R-4) A report filed in court producing three suspects under the Criminal Procedure Code by Matara Police Station upon receipt of a complaint against propagation of religion. This relates to the alleged incident in Matara Police area in List 'P14 (a)' and referred to in paragraph 7.3 of the petition.

(b) '2R-5': A complaint received from 'Jehovah's witness' Chathusandika by the Matara Police Station on an alleged sexual assault in the course of her house-to-house propagation of religion; and, the notes of the investigation ensued thereon. '2R-5 (a)' is a report filed in Matara Magistrate's Court presenting facts to court on alleged sexual assault.

iv. '2R-6' and '2R-6 (a)': Katunayake Police Station, upon receipt of the complaint, investigated and the matter was referred for mediation as borne-out by '2R-6'. On

receiving a Certificate of Non-settlement, a report was filed in court for prosecution as supported by '2R-6 (a)'.

- v. Complaints received by Galagedara and Mawathagama Police Stations while the followers of 'Jehovah's witnesses' were propagating religion were inquired into by police. As the matters were amicably settled among the disputant parties, there was no need for criminal prosecution as affirmed to by the 2nd Respondent in terms of paragraph 11 of his affidavit.

Whilst submitting the steps taken by the Respondents with regard to the complaints received by the respective police stations, Respondents have argued that the Court of Appeal cannot grant a *Writ of Mandamus* in these instances when public functionary has already taken steps acting within the powers vested on them by the respective statutes.

As observed by this court, the relief the petitioner is seeking from this court is limited to "any one or more Respondent to direct and/or conduct the investigations and institute criminal prosecutions against any individual forthwith regarding the matters complained here in particular in respect of the complaints reflected in the lists produced marked 14 (a) and 14 (b)."

However as revealed above, the 1st complaint with regard to the matters referred to in the lists 14 (a) and 14 (b) have not been received by the follower of the Jehovah's witnesses but from the General Public of the areas and the officers of the respective police stations after considering the material revealed during their investigation has taken steps to initiate action against the persons responsible for the said complaints.

In this regard we observe, that out of the two lists produced by the petitioner, the instances the Petitioner has referred to in list 14 (b) where he alleges that the Respondents have maliciously filed complaints in the Magistrate's Court, are also connected to paragraphs 7.1 and 7.3 of his Petition having corresponding entries in the list 14 (a).

It is also observed by this court that some of the matters (referred to in paragraph 7.2, 7.4 and 7.9) have been settled between the parties. In these circumstances it is clear from the material placed before us by both parties that the police, having received the complaints against the followers of the Jehovah's witnesses with regard to their conduct and after having conducted investigation, where ever it appeared to them in their judgment reached decisions, either to file prosecutions or to mediate or settle the matters between the parties. The said actions have taken by the police where ever it appeared to them in their judgment as the best course of action in the discharge of their discretion.

In the said circumstances it is observed by this court,

- a) That the functions of the officers of the respective police stations are not ministerial in its nature
- b) The decisions referred to above have been taken by the said officers, wherever it appeared to them in their judgment as the best course of action

Availability of a mandate in the nature of Writ of *Mandamus* in the said circumstances were discussed by M.R. Mallick and B.P Benerjee as follows;

“Generally *Mandamus* will lie to compel performance of duties, purely ministerial in nature and so clear and specific that no element of discretion is left in their performance, but *Mandamus* will not lie to all acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or authority [*Shiv Shankar Dal Mills V. State of Haryana AIR 1980 SC1037*]. However in case where the authority has to exercise its discretion the court cannot command it to perform the duty, but *Mandamus* will set it in motion and command it to act by using its discretion **but a writ court will not interfere in any manner with the exercise of such discretion or control or dictate**

the judgment or decision which shall be reached. (Emphasis added) Writs Law and Practice M.R. Mallick 2nd Edition at page 492.

“But most important principle to be observed in the exercise of the jurisdiction by *Mandamus* and which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy is that which fixes the distinction between the duties of mandatory nature and those which are discretionary in character involving the **exercise of some degree of judgment on the part of the office or body against whom *Mandamus* is sought.** Generally, *Mandamus* will lie to compel performance of duties purely ministerial in their nature and so clear and specific and no element of discretion is left in their performance but *Mandamus* will not lie to all acts or duties necessary calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required. **In other words when authorities are vested with discretionary power as to the performance of any duty required to be done by them, or when performing an official action they are required to use some degree or judgment and/or discretion.**” (Emphasis added) Writ Remedies B.P. Benerjee 4th Edition at page 172

It is further observed by this court that in his prayer the Petitioner has averred, to grant a Writ of *Mandamus*.....investigate and institute criminal prosecutions.....reflected in the list produced marked 14 (a) and 14 (b).

According to the Petitioner, the list referred to as 14 (b) consist of incidents of malicious prosecutions filed by the Respondents.

In the said circumstances I observed that in the absence of a proper mandate to quash the decision to prosecute the said Jehovah’s witnesses, this court will not be able to grant such relief to the Petitioner.

In the said circumstances this court is not in favour of granting any relief to the Petitioner in the nature of Writ of *Mandamus* as prayed by the petitioner since the Petitioner has failed to discharge his burden of satisfying this court.

Application is accordingly dismissed. However this court will not make order with regard to cost.

President of the Court of Appeal