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

In the matter of an appeal under and in terms of Article 138 of the Constitution read with Section 11 of the High Court of the Provinces (Special Provisions) Act No:19 of 1990

Jayakodi Arachchige Don Wifred Asoka Jayakody,

No:22,"Kumara Sevana",

Case No: CA (PHC) 83/2013

Muddhagaya Mawatha,

H.C. Anuradhapura Case No. 26/2012 (Writ)

Anuradhapura.

Petitioner-Appellant

Vs.

01. Ananda Kalurathna,

Chief Secretary,

Chief Ministry,

North Central Province,

Anuradhapura.

02. S.M.Galagoda,

Chairman,

Provincial Public Service

Commission of the North

Central Province,

District Secretary's Office

03. S.M.S.Thennakoon,

Secretary,

Provincial Public Service

Commission of the North

Central Province,

District Secretary's Office

Anuradhapura.

04. H.M.H.B.Rathnayaka

Member,

Provincial Public Service

Commission of the North

Central Province,

District Secretary's Office

Anuradhapura.

05. H.M.S.Thennakoon,

Secretary,

Provincial Public Service

Commission of the North

Central Province,

District Secretary's Office

Anuradhapura.

5A. Wanigasingha Mudiyanselage Samarasinghe

Member,

Provincial Public Service

Commission of the North

Central Province,

District Secretary's Office

Anuradhapura.

06. Karunarathna Divulgane

Hon.Governor,

Governor's Office

Anuradhapura.

07. Chandra Karunarathne

Secretary to the Hon:Governor

Office of the Secretary to the

Hon. Governor

Governor's Office

Anuradhapura.

Respondents-Respondents

1A. H.M.R.B.Herath

Chief Secretary,

Chief Ministry,

North Central Province,

Anuradhapura.

1B. K.A.Tilakarathna

Chief Secretary,

Chief Ministry,

North Central Province,

Anuradhapura.

The Chairman,

Provincial Public Service

Commission of the North

Central Province,

District Secretary's Office

Anuradhapura.

2B. S.G.M.C.K.Senavirathne

The Chairman,

Provincial Public Service

Commission of the North

Central Province,

District Secretary's Office

Anuradhapura.

3A. R.M.Wanninayake

Secretary,

Provincial Public Service

Commission of the North

Central Province,

District Secretary's Office

Anuradhapura.

5B. H.M.K.Herath,

Member,

Provincial Public Service

Commission of the North

Central Province,

District Secretary's Office

Anuradhapura.

6A. A.P.B.Dissanayake

Hon.Governor's

Governor's Office

Anuradhapura.

7A. S.M.S.Thennakoon,

Secretary to the Hon:Governor

Office of the Secretary to the

Hon:Governor

Goyernor's Office

Anuradhapura.

Added -Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Saliya Pieris P.C. with Thanuka Nandasiri for the Petitioner-Appellant

Udeshi Senasinghe State Counsel for the Respondents-Respondents

Written Submissions tendered on:

Respondents-Respondents on 22.06.2018

Argued on: 18.05.2018

Decided on: 07.08.2018

Janak De Silva J.

This is an appeal against the judgement of the learned High Court Judge of the North Central Province holden in Anuradhapura dated 28.05.2013.

The Petitioner-Appellant (Appellant) was at all material times a western music teacher at St. Josephs College, Anuradhapura. Upon a complaint made by a student, who will be referred to as "student X" in this judgement, and his mother that the Appellant subjected student X to child abuse, criminal proceedings were begun against the Appellant. Thereafter the Hon. Attorney General indicted the Appellant before the High Court of Anuradhapura under section 365B(2)(a) of the Penal Code with an alternative count under section 365A of the Penal Code.

During the pendency of the criminal case, disciplinary proceedings were begun against the Appellant in terms of the Establishments Code (E-Code) which resulted in a charge sheet dated 11.07.2001 been served on the Appellant.

The Appellant was convicted by the High Court of Anuradhapura on 02.10.2007. He appealed to the Court of Appeal which on 02.12.2009 set aside the conviction and sentence and acquitted the Appellant on the basis that the Court is unable to accept the prosecution story as a true story and therefore the prosecution has not established the charge beyond reasonable doubt.

The disciplinary proceedings against the Appellant concluded on 16.08.2002 and by letter dated 31.03.2003 he was informed that he had been found guilty of the 1st, 2nd, 5th and 7th charges and was therefore dismissed from service. The Appellant appealed to the Provincial Public Service Commission on 02.05.2003 and after nearly seven and half years the Provincial Public Service Commission by letter dated 04.11.2010 rejected the appeal.

The Appellant appealed to the Hon. Governor of the North Central Province. The Appellant was informed by letter dated 15.12.2010 that the Hon. Governor had rejected his appeal.

The Appellant then filed the above action in the High Court of the North Central Province holden in Anuradhapura and sought, inter alia, the following relief:

(a) A writ of certiorari quashing the decision of the Hon. Governor;
(b) A writ of certiorari quashing the decision of the Provincial Public Service Commission
(c) A writ of mandamus directing the 1st and/or 2nd to 5th and/or 6th Respondent to reinstate the Appellant with back wages and other benefits entitled to him.

The learned High Court Judge dismissed the application and hence this appeal by the Appellant.

The learned High Court Judge dismissed the application on the following grounds:

(a) The High Court did not have jurisdiction in view of Article 61A of the Constitution
(b) The E-Code allowed for disciplinary proceedings to be held and concluded despite criminal proceedings pending before a court of law
(c) Since there was a right of appeal to the Hon. Governor the decisions by the Provincial Public Service Commission marked P. 2 and P. 9 cannot be quashed in the first instance by writs of certiorari

I am doubtful whether the ouster in Article 61A of the Constitution applies to decision of a Provincial Public Service Commission. However, I wish to reserve my opinion on that issue to be determined in a fit and proper case in the future after having the benefit of a full and comprehensive argument on that issue.

Even if the learned High Court Judge was wrong in his conclusions on this issue, Article 138 of the Constitution states that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. The learned High Court Judge refused relief to the Appellant after considering the whole case and this Court must therefore see whether the Appellant is entitled to the relief claimed upon a consideration of the merits of case.

The Appellant appears to take the position that since he was acquitted of the criminal charges by the Court of Appeal, the findings of the disciplinary inquiry cannot be sustained. I am unable to agree with this position for several reasons.

The burden of proof in the two proceedings are different as the charges under the Penal Code in the High Court has to be proved beyond reasonable doubt whereas the charges in the disciplinary proceedings must be proved on a balance of probability.

Chapter XLVIII: sections 27:11 of the Establishments Code (E-Code) indicates that there is no barrier to a departmental inquiry being conducted against a public officer whilst criminal proceedings are in progress against that public officer for an offence which falls under the E-Code. The section states that the Disciplinary Authority **should hold a disciplinary inquiry independent of the court proceedings in progress** and should only suspend or postpone the inquiry for compelling reasons and unavoidable obstacles.

The fact that both proceedings can be done in parallel is further supported by section 27:6 of the E-Code. This section requires the Head of Department or a staff officer to retain certified copies of any documents that are handed over to relevant authorities for legal proceedings, if those documents may become necessary for a disciplinary inquiry against the accused public officer. The retention of certified copies for the disciplinary inquiry is thus mandated because the original documents will be in the custody of courts in a parallel court proceeding.

Further, section 27:12 of the E-Code states that court proceedings in progress will not inhibit a disciplinary order being made at the end of the disciplinary inquiry. Section 27:13 of the E-Code states that a court order being made against the public officer should not inhibit the disciplinary inquiry if it is still in progress and that it should be concluded and an appropriate disciplinary order made unless there are unavoidable obstacles to the continuation of the disciplinary inquiry. These sections reinforce the proposition that both proceedings can be conducted in parallel.

The question whether parallel proceedings could be conducted when both proceedings *deal with the same charges/offences* is also answered in the affirmative by the E-Code. Section 27:11 of the E-Code requires the relevant disciplinary authority to hold an independent disciplinary inquiry even where court proceedings **for an offence which falls within the Code** are in progress. Therefore, it can be reasonably concluded that the disciplinary authority can normally inquire into the offence that is already before court in addition to other relevant offences. This conclusion is strengthened when one considers section 27:15 of the E-Code. The section envisages departmental inquiries and court proceedings being held **'with regard to a charge or a series of charges' and states that the fact that the officer is acquitted in the Court proceedings should in no way affect the implementing of the disciplinary order made on the matters revealed in the departmental disciplinary inquiry.**

Similarly, section 27:14 of the E-Code states that a public officer who has been acquitted of a charge or series of charges at a departmental inquiry but found guilty **of the same charges** at a Court of Law, could still be dealt with in terms of the E-Code. Therefore, the provisions of the E-Code make it very clear that parallel proceedings can be conducted against a public officer even in relation to the same charge/offence.

Section 28:6 of the E-Code unequivocally states that the fact that an officer has been acquitted or discharged or found not guilty by a Court of Law is no reasons at all why he should not be dealt with under the E-Code, if there is sufficient material on which disciplinary proceedings can be taken against him.

Accordingly, I am of the view that the acquittal of the Appellant in the criminal case does not in any way prevent the disciplinary order been implemented. I came to a similar conclusion in *Jayalath Pedige Prema Jayantha v. Secretary, Sabaragamuwa Provincial Council and others* [CA(PHC) 182/2008; C.A.M. 29.06.2018].

The Appellant contended that the Provincial Public Service Commission and the Hon. Governor have failed to give reasons for rejecting the appeals of the Appellant and that was a ground for the issuing of writs of certiorari as prayed for by the Appellant. *In Hapuarachchi and others v. Commissioner of Elections and another* [(2009) 1 Sri.L.R. 1 at page 11] Dr. Shirani Bandaranayake J. (as she was then) held:

> "Accordingly, an analysis of the attitude of the Courts since the beginning of the 20th century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness. Reasons for an administrative decision are essential to correct any errors and thereby to ensure that a person, who had suffered due to an unfair decision, is treated according to the standard of fairness. In such a situation without a statement from the person, who gave the impugned decision or the order, the decision process would be flawed and the decision would create doubts in the minds of the aggrieved person as well of the others, who would try to assess the validity of the decision. Considering the present process in procedural fairness vis-a-vis, right of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement."

The Provincial Public Service Commission and the Hon. Governor have in ඔ. 9 and ඔ..10 stated that the appeals are rejected as the Appellant has failed to adduce acceptable grounds to cancel it. This in my view is sufficient compliance with the duty to give reasons.

In any event, the disciplinary inquiry findings against the Appellant point to grave misconduct on the part of the Appellant which is unbecoming of a teacher. A child is entrusted to the custody of a teacher with the full confidence that he will be well cared for and looked after. The Appellant has breached fundamental norms governing the conduct of a teacher. That itself is a ground to deny him any relief.

In *Selvamani v. Dr. Kumaravelupillai and others* [(2005) 2 Sri.L.R. 99] Sisira De Abrew J. held:

> "A person who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct, delay, laches, waiver submission to jurisdiction are all valid impediments, which stand against the grant of relief."

For the foregoing reasons, I see no reason to interfere with the judgement of the learned High Court Judge of the North Central Province holden in Anuradhapura dated 28.05.2013.

The appeal is dismissed with costs.

The parties agreed to be bound by the judgement given in this case in the revision application bearing Case No. CA(PHC)APN 91/2013.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal