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

In the matter of an application for orders in the nature of Writs of Certiorari and Mandamus under Article 154 (P)(4)(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Case No. CA (PHC) 187/2013

H.C. Badulla Case No.

PHC/UVA (Writ) Application No: 72/2013

M.D.Jothipala
Udawela,Pathanawatte,
Kandegedara.

Petitioner-Appellant

Vs.

01. Nanda Mathew
The Governor of the Uva Province,
Office of the Governor,
King Street,Badulla.

1A. M.P.Jayasinghe
The Governor of the Uva Province,
Office of the Governor,
King Street,Badulla.

02. D.K.M.Keerthisena Dassanayake
The Chairman

2A. Mohan R.A.Ratwatte
The Chairmen

03. Rajarathnam Gnanasekeram
Member.

04. Mohan R.A.Ratwatte

Member

4A. Mr.M.M.Vijitha Peiris

Member

05. A.A.Salam

Member

5A.Mr.Danushka Weligama

Member

06. D.C.Dahanayake

Member

6A. Mr.S.W.Edirisinghe

Member

6B. Mr.M.S.M.Farooq

Member

07. R.M.T.D. Hathiyaldeniya

Secretary.

The 2nd to 7th Respondents all of:

The Uva Provincial Public Services Commission

14/4, Peelipothagama Road,

Pinarawa,Badulle.

08. H.M.Somathilake,

Secretary to the Governor

Office of the Governor,

King Street, Badulla.

09. Anil Wijesinghe

The Secretary to the Ministry of Education of the

Uva Provincial Council,

Uva Provincial Council,

Badulla.

9A.G.A.M.S.P.Abanwala

The Secretary to the Ministry of Education of the

Uva Provincial Council,

Uva Provincial Council,

Badulla.

10. W.M. Wimaladasa

Inquiry Officer

No.131/A,

Mahiyanganaya Road,

Badulla.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Shantha Jayawardena with Chamara Nanayakkarawasan, Neranjan Arulpragasam and H. Damunupola for the Petitioner-Appellant

Udeshi Senasinghe State Counsel for 1st to 9A Respondents-Respondents

Written Submissions tendered on:

Petitioner-Appellant on 16.07.2018

Argued on: 06.05.2018

Decided on: 03.09.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Uva Province holden in Badulla dated 25th November 2013 refusing to issue notice on the Respondents-Respondents (Respondents) in the above styled application filed by the Petitioner-Appellant (Appellant).

The Appellant was a graduate teacher in the Provincial Public Service of the Uva Province. He was taken into custody by the Police on 09.06.1999 and produced in the Magistrates Court of Badulla on a complaint made by a student, who will be referred to as "X" in these proceedings, alleging that she was raped by the Appellant on three occasions.

Thereafter, the Appellant was interdicted by letter dated 11.08.1999 (P11). While the above criminal proceedings were pending, the Appellant was issued a charge sheet under the Establishments Code (E-Code) and after a formal disciplinary inquiry he was found guilty of all charges and dismissed from service by letter dated 17.06.2002 (P21). The Appellant appealed to the Provincial Public Service of the Uva Province which was rejected by letter dated 13.01.2003 (P24). He then preferred an appeal to the Governor which was also rejected by letter dated 15.10.2003 (P26).

The Appellant was indicted in the High Court of Badulla in Case No. 36/2002 on the charge of rape of "X" and after a trial which spanned six years, he was acquitted and discharged as the prosecution had failed to prove the charge against the Appellant beyond reasonable doubt (P30). The Appellant then appealed to the Governor requesting that he be reinstated in view of his acquittal by the High Court (P31). The Governor rejected his appeal by letter dated 12.06.2013 (P35).

The Appellant then filed the above styled application before the Provincial High Court of the Uva Province holden in Badulla and sought inter alia:

(a) A writ of certiorari quashing the said decision of the Governor contained in P35;
(b) A writ of mandamus directing the 1st to 6th Respondents to reinstate him as prayed for in the prayer to the petition.

The learned High Court Judge refused to issue notice on the Respondents and hence this appeal by the Appellant.

The learned counsel for the Appellant urged two grounds in appeal. They are:

(a) The charges of the disciplinary inquiry were based on the alleged commission of the criminal offence and therefore the acquittal of the Appellant by the High Court necessitates revisiting the disciplinary order;

(b) The disciplinary inquiry was ultra vires and a nullity and the Appellant could not have been tried for a criminal offense in a disciplinary inquiry

Acquittal Necessitates Revisiting the Disciplinary Order

The disciplinary proceedings against the Appellant began when the E-Code provisions was applicable to the Provincial Public Service of the Uva Province. The charge sheet issued to the Appellant (P13) specified charges falling under the First Schedule of chapter XLVIII of Vol. II of the E-Code. Altogether there were three charges. The first was improper conduct not inconformity with the teacher service, second was attempting to outrage the modesty of student "X" and third was bringing disrepute to the office of the Appellant and the public service in general by the aforesaid conduct. As far as the criminal proceedings were concerned the charge was rape.

Clearly the charges in the criminal case and the disciplinary proceedings were different. Accordingly, submission of the learned counsel for the Appellant that the charges of the disciplinary inquiry were based on the alleged commission of the criminal offence and therefore the acquittal of the Appellant by the High Court necessitates revisiting the disciplinary order is misconceived in law and in fact.

In any event, 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.

Furthermore, chapter XLVIII: sections 27:11 of the 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 still being 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 Code. Therefore, the provisions of the Establishments 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.

Section 28:7 of the E-Code states that an officer who has been punished under the E-Code for any offence, other than a punishment in terms of sub-section 28:3 therein, may not claim remission of such punishment on the ground that he has subsequently been acquitted or discharged by a court of law in respect of that same offence or that the order of a Court has been set aside in appeal.

By the time the Appellant preferred an appeal to the Governor based on his acquittal by the High Court, the Governor of the Uva Province had promulgated a new Disciplinary Procedure for the Uva Provincial Public Service (Uva Disciplinary Procedure) containing similar provisions to the E-Code provisions. Sections 28.6 and 28.7 are the same as the corresponding provisions in the E-Code. Furthermore, section 27.15 of the Uva Disciplinary Procedure is the same as clause 27.15 of the E-Code and it is this provision that the Governor refers to in rejecting the appeal of the Appellant by P35.

The Supreme Court in *D.M. Anura Mangala v. The Inspector General of Police and others* [(S.C.F.R. Application No. 273/2014, S.C.M. 04.06.2015] was called upon to consider a similar issue as in the instant case and Gooneratne J. (at page 7) held that the High Court case filed against the Petitioner in that case would have no bearing on the disciplinary order made against the Petitioner in that case although the Petitioner was acquitted in the High Court. The learned counsel for the Appellant submitted that in *D.M. Anura Mangala's* case (supra) the charges amounted to an offence under the E-Code whereas in this case molesting a girl is not an offence under the E-Code.

This submission must be addressed although I must say it was quite surprising that such a submission was ever made. The three charges against the Appellant in the disciplinary proceedings were improper conduct not inconformity with the teacher service, attempting to outrage the modesty of student "X" and bringing disrepute to the office of the Appellant and the public service in general by the aforesaid conduct. The student "X" was a student of the school the Appellant was a teacher. Clearly these charges fall under the First schedule to the E-Code read with the meaning given to "improper conduct" in Appendix 1 of Vol. I of E-Code.

The same issue as in the instant case also came up before me in *Jayalath Pedige Prema Jayantha v. Secretary Chief Ministry, Sabaragamuwa Provincial Council* [C.A. (PHC) 182/2008, C.A.M. 29.06.2018] where the court came to a similar conclusion.

For the foregoing reasons, the Governor acted within jurisdiction in rejecting the appeal of the Appellant and the learned High Court Judge was correct in concluding that there were no prima facie reasons to interfere with the decision of the Governor.

Disciplinary Inquiry Ultra Vires and a Nullity

The learned counsel for the Appellant submitted that the charges on which the disciplinary proceedings against the Appellant were held are criminal in nature and therefore the disciplinary authority must await the outcome of the criminal proceedings and further disciplinary action can be taken only where there is a conviction by in the criminal proceedings.

I have no hesitation in rejecting this submission. As I have pointed out above, the three charges against the Appellant was not based on the criminal charge in the High Court. The E-Code clearly permits disciplinary proceedings to be taken independent of the criminal proceedings. In fact, section 28:7 of the E-Code states that an officer who has been punished under the E-Code for any offence, other than a punishment in terms of sub-section 28:3 therein, may not claim remission of such punishment on the ground that he has subsequently been acquitted or discharged by a court of law in respect of that same offence or that the order of a Court has been set aside in appeal.

There is also a procedural defect in the application of the Appellant. There is already an order by the Governor rejecting the appeal made by the Appellant against the finding of guilt in the disciplinary proceedings (P26). That has not been challenged by the Appellant. But he seeks to strike down the order made by the Governor rejecting his appeal after his acquittal by the High Court (P35). Even if it is assumed that P35 can be quashed by a writ of certiorari, there is an existing decision by the Governor rejecting the appeal made by the Appellant against the disciplinary order.

The learned counsel for the Appellant contends that the disciplinary inquiry itself was ultra vires and a nullity. It is not for the reasons set out earlier. In any event, there must be a formal quashing of the decision even if it is ultra vires and a nullity. *It was occasionally suggested in the past that a quashing order should not be used to quash nullities on the grounds that if a decision is a nullity it cannot produce legal effects, and so does not need to be quashed. This line of reasoning is misplaced. The purpose of granting a quashing order is to establish invalidity and, once established, to make it clear that the decision is devoid of legal effect* [Lewis, *Judicial Remedies in Public Law*, 5th Ed., page 209].

In these circumstances, there can be no public or statutory duty requiring the reinstatement of the Appellant and therefore a writ of mandamus will not lie.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the Uva Province holden in Badulla dated 25th November 2013.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal