

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

In the matter of an application under Article 126 of the constitution of the Democratic Socialist Republic of Sri Lanka

Ekanayake Udaya Kumara Ekanayake,

“Sriyani”, Diyambalapitiya,

Kotugoda.

Petitioner

SC /FR/ Application No 556/2010

Vs,

1. Mahinda Balasooriya,
Inspector General of Police,
Inspector General’s Office,
Police Headquarters,
Colombo 01.
2. Officer in Charge,
Personal Administration, Police Headquarters,
Colombo 01.
3. Deputy Inspector General, Discipline and Conduct
Division, Police Headquarters,
Colombo 01.
4. Director Legal,
Police Legal Division,
Police Headquarters,
Colombo 01.
5. The Secretary, Police Commission, National Police
Commission, 3rd Floor,
Rotunda Towers,
No.109, Galle Road,
Colombo 03.
6. The Secretary, Public Service Commission.
Carlwill Place,
Colombo 03.
7. The Secretary, Ministry of Defence,
Law and Order, 15/5, Baladaksha Mw,
Colombo 03.

8. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
9. N.K. Illangakoon,
Inspector General of Police,
Police Headquarters,
Colombo 01.
10. Nanda Mallawarachchi,
The Secretary,
Ministry of Law and Order,
Janadhipathi Mw,
Colombo 01.
11. Sathya Hettige,
Chairman,
Public Service Commission,
No.177, Nawala Road,
Narahenpita.
12. Kanthi Wijetunga,
Member
13. Sunil A. Sirisena,
Member
14. I.N. Soyza,
Member
All of the Public Service Commission,
No 177,
No.177, Nawala Road,
Narahenpita.

Respondents

Before: B.P. Aluwihare PC J

 Anil Goonaratne J

 Vijith K. Malalgoda PC J

Counsel: Saliya Peiris PC with Lasitha Sachindra for the Petitioner
Viraj Dayaratne Senior Deputy Solicitor General for the Respondents

Argued on: 21.06.2017

Judgment on: 06.10.2017

Vijith K. Malalgoda PC J

The Petitioner to the present application Ekanayake Udaya Kumara Ekanayake had joined the Reserve Police Service as a Reserve Police Constable on 01.05.1986.

He has applied for the post of Sub-Inspector in the Police Reserve Service, based on his qualifications and was appointed as a Sub-Inspector of the Police Reserve Service on 05.08.1889. According to the Petitioner, ha had served in Wattala, Kandana, Katunayake, Minuwangoda Police Stations and Batticaloa and Negombo Divisions since his appointment as a Sub-Inspector, until his services were suspended on 06.03.1999 on an incident of shooting, where the Petitioner alleged, that he was falsely implicated to the said incident.

However as submitted by the Petitioner, he was acquitted of the charge of attempted murder by the Learned High Court Judge on 23.06.2008 and thereafter he preferred an appeal to the predecessor to the 1st Respondent and to the National Police Commission on 01.07.2008 seeking inter alia that he be re-instated considering the acquittal by the High Court, and to absorb him to the regular cadre based on a Cabinet decision dated 01.02.2006. In this regard he further submitted that, while he was on suspension, other officers of the Police Reserve Service were absorbed to the Regular Service and therefore he too was entitled to be promoted.

On 25.04.2009 the Petitioner had received a letter from the 3rd Respondent, said to have signed by the 2nd Respondent, informing the Petitioner that he has been demobilized and his name had been struck off from the enrollment list with effect from 24.03.2009 on the orders of the then Inspector General of Police.

Being aggrieved by the said decision Petitioner had come before the Supreme Court for alleged violations of his fundamental rights under Article 12(1) and 14(1) (G) of the Constitution, in SC FR application bearing No 412/2009.

As submitted by the Petitioner before us, the said application was withdrawn by the Petitioner on 1st October 2009 before the said application was supported, after considering the fact that the Hon. Attorney General has advised that, an inquiry should be held before disciplinary action is taken against the Petitioner.

However in the absence of any positive reply coming from the Respondents, the Petitioner had filed a motion in the said application, and moved to support the said motion before this court on 27.06.2010. At that stage it was revealed that a decision had been taken not to re- instate the Petitioner after an inquiry. When this position was conveyed to the Petitioner, he moved to withdraw the motion already submitted before court and the said motion too was disallowed by the Supreme Court on 28.09.2010.

The present application was filed before this court on 08.10.2010 alleging violations under Articles 12 (1) and 14 (1) (G) of the Constitution and this court after considering the material placed before court had decided to grant leave on alleged violations under Article 12 (1) of the Constitution on 10.02.2011.

During the argument before this court, the Petitioner heavily relied on three reports, out of which one was prepared by Senior Superintendent of Police Negombo on 30.12.2009. The other two reports were prepared on 19th February and 23rd February 2010 by Superintendent of Police, Negombo II and Senior Superintendent of Police Negombo.

From his petition filed before this court the Petitioner had requested this court to call for the said reports and in fact this court had called for the said reports and they are available before court for our consideration.

As observed by me, all three reports referred to above have been prepared subsequent to the Attorney General's advice to the 1st Respondent in SC FR 412/2009 to conduct an inquiry before action is taken against the Petitioner.

Before considering the said three reports, I would now proceed to consider the position taken up by the Respondents before this court.

The Petitioner who had first joined the Police Reserve as a Reserve Police Constable on 01.05.1986 had left the service and was employed at a private establishment. Upon an appeal submitted by him, he was permitted to re join the Police Reserve in the same capacity with effect from 23.03.1987. Thereafter he was recruited as a Reserve Sub-Inspector with effect from 1989.

During the period between 5th August 1989 and 6th March 1999 the Petitioner was once interdicted by letter dated 24.07.1990 considering the bad reports received against him and was dismissed from the service with effect from 19.09.1990. (1R4)

Even though the Respondents have failed to submit any documentation for his reinstatement thereafter, the Petitioner was once again interdicted on 23rd August 1993 on an allegation of Bribery (1R6) but the Respondents have once again failed to submit any documentation with regard to the reinstatement of the Petitioner but as submitted by the Petitioner he was in service at the time he was interdicted on an allegation of attempted murder on 06.03.1999.

Whilst referring to the said period of interdiction/dismissal, the Learned Deputy Solicitor General who represented the Respondents before this court had submitted that the total period of service of the Petitioner is not more than 4 years and six months when he was interdicted on 06.03.1999. As observed by me, the circular issued by the then Inspector General of Police, on absorption of Reserve Police Officers to the Regular Cadre (P-11) subsequent to the Cabinet decision dated 09.02.2006 (P-10) required the reservist to have 5 years unblemished record and the period under suspension or demobilization will not be considered when considering active service.

In the said circumstances it is observed that the Petitioner has failed to fulfill both the requirements referred to above, to be absorbed to the regular service.

As further observed by me, the Petitioner is silent on his previous conduct between the period of 5th August 1989 and 06.03.1999 and failed to give any explanation with regard to his conduct revealed from the documents produced by the Respondents marked 1R4-1R6 even in his counter objection filed before this court on 30.11.2011. In this regard I am further mindful of the fact that the Petitioner is not a member of the Regular service and is only a reservist.

In all three reports the Petitioner had relied before this court, the authors of the said reports had considered the allegation against the Petitioner.

As discussed by SSP Negombo in his report dated 30.12.2009 addressed to DIG (Western Province-North), SP II Negombo in his report dated 19.02.2010 addressed to SSP Negombo and by SSP Negombo in his report dated 23.02.2010 addressed to Director Legal Division, they have not considered the previous conduct of the Petitioner referred to above but only considered the circumstances under which the Petitioner's name was strike off from the list of reservist on 24.03.2009.

As revealed by the said reports, the Petitioner was produced before the Magistrate Court of Gampaha on a charge of attempted murder by shooting, on Vithanage Sujith Lalinda along with 4 other suspects but it was only the Petitioner who was indicted by the Attorney General for the said offence before the High Court of Gampaha.

However prior to the said case was taken up for trial, the complainant had died and the trial proceeded without the virtual complainant.

At the trial, the evidence given by the deceased virtual complainant at the Non Summary Inquiry was led under the provisions of the Evidence Ordinance and evidence of several other witnesses including some witness who were present at the wedding where the shooting took place and the police officers who conducted the investigation were led before the Learned High Court Judge. At the conclusion of the said trial, the Learned Trial Judge had acquitted the Petitioner of the charge of attempted murder.

As observed by me, the Learned Trial Judge had considered the testimony of eye witnesses who gave evidence before him and the evidence given by the deceased, complainant Vithanage Sujith Lalinda at the Non Summary Inquiry when arriving the said decision to acquit the Petitioner.

During the inquiry conducted by the Superintendent of Police Negombo (Report dated 19.02.2010) evidence of the following witnesses, namely,

1. Gammada Liyanage Sanath Ranjan Liyange
2. Vithanage Johan Benadict

3. Arangallage Sunil Premasighe, who had given evidence at the High Court Trial, had been recorded and according to their statements, none of them had seen the Petitioner at the scene of crime when they rushed to the scene after hearing the gunfire but only seen the injured with injuries.

After considering the said material and the outcome of the High Court Trial, Superintendent of Police Negombo had concluded that the material revealed during his inquiry does not warrant forwarding charges against the Petitioner.

However whilst referring to the reports referred to above the first Respondent had taken up the position that, at the time the said reports were prepared, most of the official documents maintained at the relevant police stations were destroyed and therefore the Senior Officers who prepared those reports were deprived of important evidence. Even though the 1st Respondent had taken up the above position with regard to certain documents which were not available when inquiries were conducted, the officers who conducted subsequent inquiries in 2009 and 2010 had not referred to this difficulty in their reports. As referred to above in this judgment, Superintendent Negombo had proceeded to record the evidence of the eye witnesses at his inquiry before submitting his recommendation.

Beside of the three reports referred to above the 1st Respondent had heavily relied on 1R7 a document produced by the 1st Respondent with his objections where the then Senior Superintendent of Police Negombo (not the same officer who prepared subsequent Report in 2010) had submitted his recommendation on an appeal submitted by the Petitioner, on 04 .11.2008 to the effect that steps should not be taken to re-instate the petitioner considering his involvement to the alleged incident whilst in service.

It is further observed by me, that the above document (1R7) was available at the time when the Attorney General instructed the authorities to hold an inquiry before taking any decision against the Petitioner, and in the said circumstances any decision to discontinue the service of the Petitioner will have to be taken, having considered the subsequent reports submitted by the relevant officials who conducted inquiries with regard to the conduct of the Petitioner.

The only document before this court with regard to the decision to demobilize and strike off the name of the Petitioner from the reservist list is P-13 and as revealed before this court the said

decision was taken on 24.04.2009, prior to SC FR 412/2009 was filed before this court. As referred to above, when the said application was filed, the Hon. Attorney General had advised the 1st Respondent to hold a fresh inquiry before taking any decision against the Petitioner. The Respondents have failed to submit any material to show that a fresh inquiry was carried out before any decision is taken as submitted in the said case. This position is further confirmed from the fact that the 1st Respondent had once again heavily relied on a document prepared by Senior Superintendent of Police Negombo much prior to the advice given by the Attorney General.

In the said circumstances it is clear that the 1st to 4th Respondents have failed to follow the rules of Natural Justice and granting a fair opportunity to the Petitioner by holding a fresh inquiry before taking an administrative decision to demobilize and to strike off the name from the reservist list.

Failure by the said Respondents to hold a fresh inquiry is further confirmed from all three reports before me. In all three reports, the authors of those reports have strongly recommended not to commence disciplinary proceedings against the Petitioner in the absence of any grounds to have such proceedings.

Failure to follow the rules of Natural Justice was discussed in the case of ***Captain Nawarathne V. Major General Sarath Fonseka and 6 others 2009 1 Sri LR 190*** by the Supreme Court as follows;

“Where the Petitioner denies that rules of Natural Justice have not been complied with and the Respondents assert the contrary, a Petitioner can do no more than deny the compliance with the rules of Natural Justice and the burden is on the Respondents to establish that rules of Natural Justice have been complied by producing an acceptable record of proceedings. In the absence of production of a such a record proceedings the court would not have any option other than to accept the Petitioner’s version that there has been procedural impropriety leading to a denial of the rules of Natural Justice.”

From the material I have already discussed it is clear, that the 1st to 4th Respondents have failed to establish that they hold a fresh inquiry before taking a decision to demobilize and strike off the name of the Petitioner from the reservist list, which leads to a procedural impropriety as discussed in the above case.

In the said circumstances it clear that the above conduct of the 1st to 4th Respondents had been in violation of the Petitioner’s fundamental right guaranteed under Article 12-1 of the Constitution

of the Democratic Socialist Republic of Sri Lanka by their failure to hold an inquiry before taking a decision to demobilize and strike off the name of the Petitioner from the reservist list of the Police Reserve Service.

As discussed above in this judgment, the Petitioner has failed to give any explanation with regard to his conduct revealed in the documents 1R4-1R6 produced by the 1st Respondent before this court. The position taken up by the 1st Respondent that the Petitioner does not possess 5 years unblemished record in order to consider under the provisions of the circular P-11 was not disputed before this court by the Petitioner. In the said circumstances I am not inclined to make any order directing the Respondents to absorb the Petitioner to the regular cadre of Sri Lanka Police.

Whilst declaring that the fundamental rights of the Petitioner guaranteed under Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka had been violated by the conduct of the 1st to 4th Respondents. I make order directing the 1st to 4th Respondents to reinstate the Petitioner with effect from 24.03.2009 but make no order with regard to the payment of cost or compensation.

Application allowed.

Judge of the Supreme Court

B.P. Aluwihare PC J

I agree,

Judge of the Supreme Court

Anil Goonaratne J

I agree,

Judge of the Supreme Court