

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

In the matter of an application under and in terms  
of Articles 17 and 126 of the Constitution

**Wickramage Stanley Perera,**

**No. 111/7, Kurawalana,**

**Kahataovita**

**Petitioner**

**SC /FR/ Application No. 403/2016**

**Vs,**

1. P. H. Manatunga  
The Chairman,
- 1A. K. W. E. Karalliyadda  
The Chairman,
2. S. T. Hettige,  
Member,
- 2A. Gamini Nawarathne  
Member
3. Savithri D. Wijesekera,  
Member,
4. B. A. Jayanathan  
Member,
- 4A. Ashoka Wijethilaka  
Member
5. Y. L. M. Zawahir,  
Member,
6. Tilak Collure,  
Member,

7. Frank de Silva,  
Member,

7A. G. Jayakumar  
Member

8. N. Ariyadasa Cooray,  
Secretary,

8A. Nishantha A. Weerasinghe  
Secretary

All of the  
National Police Commission  
Block No. 09, BMICH Premises,  
Buddhaloka Mawatha,  
Colombo 07.

9. Pujith Jayasundara  
The Inspector General of Police  
Police Headquarters  
Colombo 01

9A. C. D. Wickramaratne  
The Inspector General of Police (Acting)  
Police Headquarters  
Colombo 01

10. L. K. W. Kamal Silva  
Deputy Inspector General of Police  
Crimes and Traffic Division  
Police Headquarters  
Colombo 01  
[Formerly, Senior Superintendent of Police  
Director, Police Narcotics Bureau  
3<sup>rd</sup> Floor, New Secretariat Building  
Colombo 01

10A. M. R. Manjula Senarath  
Senior Superintendent of Police  
Director, Police Narcotics Bureau  
3<sup>rd</sup> Floor, New Secretariat Building  
Colombo 01

11. D. K. C. Siyambalapitiya,  
Assistant Superintendent of Police  
Police Narcotics Bureau  
3<sup>rd</sup> Floor, New Secretariat Building  
Colombo 01
  
- 11A. K. W. R. J. Rohana  
Assistant Superintendent of Police  
Administration  
Police Narcotics Bureau  
3<sup>rd</sup> Floor, New Secretariat Building  
Colombo 01
  
12. T. Ludwaik  
Chief Inspector  
Officer in Charge  
Police Narcotics Bureau  
3<sup>rd</sup> Floor, New Secretariat Building  
Colombo 01
  
- 12A. H. N. P. Ekanayaka  
Inspector, Officer in Charge (Acting)  
Police Narcotics Bureau  
3<sup>rd</sup> Floor, New Secretariat Building  
Colombo 01
  
13. K. W. R. J. Rohana  
Assistant Superintendent of Police  
Operations  
Police Narcotics Bureau  
3<sup>rd</sup> Floor, New Secretariat Building  
Colombo 01
  
14. Priyantha Liyanage  
Superintendent of Police  
Director, Organized Crimes Prevention Unit  
No. 09, Mihindu Mawatha  
Colombo 12.
  
15. Hon. Attorney General  
Attorney General's Department,  
Colombo 12.

**Respondents**

**Before:** Chief Justice Jayantha Jayasuriya PC  
Justice Vijith K. Malalgoda PC  
Justice E. A. G. R. Amarasekera

**Counsel:** Senany Dayaratne with Ms. Eshanthi Mendis for the Petitioner  
Ms. Yuresha de Silva, SSC for Attorney General

Argued on: 30.08.2019, 18.02.2020

**Judgment on: 18.01.2021**

### **Vijith K. Malalgoda PC J**

Petitioner who was an Inspector of Police, who initially came before the Supreme Court alleging the continued harassment and unjustified transfers in violation of his Fundamental Rights, had later amended the pleadings with the permission of Court when he was served with a vacation of Post Notice with effect from 21<sup>st</sup> April 2017 by his employer. The said amended petition was tendered before this Court on 23<sup>rd</sup> June 2017 and it was further amended on 1<sup>st</sup> August 2017.

During the arguments before us, the learned Counsel who represented the Petitioner, focused his submissions with regard to the service of vacation of post on the Petitioner and restricted his case mainly on the violation of Article 12 (1) of the Constitution, but made extensive submissions with regard to the harassment faced by him for several months prior to him being served with the said vacation of Post Notice.

Even though it is not directly linked to the final relief the Petitioner had prayed for, the continued harassment the Petitioner had complained of for a considerable period, which made him to initially come before this court, has some relevance for the final outcome of the instant application.

As revealed before us, the Petitioner who was enlisted as a reserve Sub-Inspector of Police on 11.08.1990 was absorbed in to the permanent cadre on 09.02.2006, and was promoted to the rank of Inspector with effect from 25.09.2007.

During his long career for nearly 26 years as a reserve Sub-Inspector, Sub-Inspector and Inspector of Police, he had served in several Police Stations Island wide and also served at the Criminal Investigation

Department, Police Narcotic Bureau and Organized Crimes Division before he was served with the said Vacation of Post Notice.

The Petitioner has received many commendations and appreciations including those from the Inspector General of Police in 2007 and 2010 [P3(a) and P3(b)] and more than 321 good entries with several cash rewards. The Petitioner proudly states that he never had a single bad entry during his carrier in the Police Service. The exemplary service the Petitioner had rendered to the Police Department was never challenged by any of the Respondents before us.

However, as submitted by the Petitioner the bad days of his exemplary carrier started when he was serving in the Police Narcotic Bureau. As revealed before us the Petitioner was transferred to the Police Narcotic Bureau on 16.10.2012 and whilst serving in the Police Narcotic Bureau he was successful in conducting a raid and apprehension of 59 kilograms of heroin from a place in Katugastota where he was recommended an award of Rs. 500,000/- which was later increased by the Deputy Inspector General of Police to 800,000/-. He was also successful in the recovery and confiscation of property alleged to be proceeds from drug trafficking worth of Rs. 185,000,000/- and was awarded Rs. 400,000/-. With all this commendable service he discharged in his carrier as an Inspector of Police attached to Police Narcotic Bureau, the Petitioner realized that he is singled out and treated differently by his seniors for several reasons he had complained of. Some of his complains are as follows;

- a) The Petitioner has produced several documents before court as confidential documents for the perusal of Court and those documents show the reward monies entitled by the informants in raids conducted by various Police Units including the Police Narcotic Bureau.

In this regard the Petitioner took up the position that the reward granted to his informant when he successfully recovered 59 kilograms of heroin (one of the biggest quantities recovered at that time) was much less than the rewards awarded to the other informants who passed information on much lessor quantities of heroin. The said reward was recommended in April 2016 with regard to the raid he conducted on 15.08.2014 and he had agitated against the amount rewarded to his informant with his superiors.

- b) During the same period in March 2016 the Petitioner played a very active role in detaining two foreign nationals (an Iranian and a Singaporean) and recovery of 110 kilograms of heroin, but the Petitioner observed hostility towards him by some of his superior officers against his good work.

- c) The Petitioner was all of a sudden transferred to the Narcotic Division of the Bandaranayake International Air Port with effect from 02.05.2016 without any prior notice or valid reason.
- d) On 03.05.2016 a circular was issued under the hand of the 10<sup>th</sup> Respondent to the Officer-in-Charge of the Katunayake Unit of the Police Narcotic Bureau, directing him to have a close supervision on his subordinates' work, including the Petitioner and to record progress made by them. A fax copy of which was strangely kept on his table by somebody as against the general practice of pasting a copy of the message in the telephone register.
- e) The Petitioner continued to work diligently and was able to arrest a Pakistani National for smuggling drugs on 25.06.2016 with his team and sized 5 kilos of heroin.
- f) The Petitioner was not allowed to continue with his work even at the Bandaranayake International Air Port for three months. On 28.07.2016 he was transferred back to the Police Narcotic Bureau.
- g) Whilst serving in the Police Narcotic Bureau, the Petitioner was summoned to report to the Orderly Room on 04.10. 2016 assigned to address minor disciplinary issues.

In discussion with the 12<sup>th</sup> Respondent, the Officer-in-Charge of the Police Narcotic Bureau who advised the Petitioner to plead guilty, regardless of the charge to avoid undue delay, the Petitioner pleaded guilty, placed his signature on a document and was found guilty by the 11<sup>th</sup> Respondent.

However, Petitioner continued to make inquiries as to what made him to be placed before the Orderly Room and discovered that he was charged under sections A (7), 4(a), 4(b) and 4(f) of the Department Orders for neglecting to carryout duties assigned to him, namely "neglecting to correct the entries pointed out by the 10<sup>th</sup> Respondent at the bi-annual inspection, conducted on 29.10.2015 and submitting the same to Inspector of Police Keerthi Perera, a Junior Police Officer, but further discovered that the 10<sup>th</sup> Respondent had in fact not come for an inspection on the day specified in the charge.

On 10.10.2016 the Petitioner informed the 13<sup>th</sup> Respondent of the disparity referred to above. Even though the 13<sup>th</sup> Respondent had agreed with the Petitioner, when he submitted the above before the 13<sup>th</sup> Respondent, the Petitioner was unaware of any steps taken by the 13<sup>th</sup> Respondent thereafter.

- h) On 10.10.2016, the 12<sup>th</sup> Respondent came to the Petitioner with Form 51 which is for the purpose of nomination for transfer and requested the Petitioner to place his signature on the Form.

When the Petitioner refused to sign the Form, the 12<sup>th</sup> Respondent left, leaving the form on the Petitioner's desk. On perusal, the Petitioner observed that the said document had already being recommended by 12<sup>th</sup>, 11<sup>th</sup> and 10<sup>th</sup> Respondents and had placed their signatures on the document. Both the 12<sup>th</sup> and the 11<sup>th</sup> Respondents in their comments with regard to the work and conduct, stated that the Petitioner's work and conduct was unsatisfactory. In addition to the above recommendation, the 11<sup>th</sup> Respondent under column 4 had said that the nomination for transfer had been informed to the officer which is not correct. However, the reasons given by the 10<sup>th</sup> Respondent for the recommendation is different to the reasons given by his two subordinates 12<sup>th</sup> and 11<sup>th</sup> Respondents, and according to 10<sup>th</sup> Respondent the Petitioner's transfer was recommended due to excessive leave and incapability in handling work (P-16)

- i) On the same day i.e. 10.10.2016 the Petitioner was served with a letter issued by the 10<sup>th</sup> Respondent informing that a transfer had been recommended due to excessive leave taken by him during his service at the Police Narcotic Bureau (P-17)

Whilst disputing the above position taken by the 10<sup>th</sup> Respondent in letter produced marked P-17, the Petitioner came before the Supreme Court challenging

- a) The finding of guilt at the Orderly Room of a charge related to a bi-annual inspection,
- b) Imposing of no pay leave on the Petitioner,
- c) Recommendation of the transfer to the Petitioner out of Police Narcotic Bureau on 10<sup>th</sup> October 2016

As further revealed before this court, the instant application had come up before this court for the first time on 01.12.2016, and the learned Senior Deputy Solicitor General who represented the Respondents before this court had moved out the case since, he was held up before another division of this court.

The learned Counsel for the Petitioner, though agreed to put off the case, had submitted that, "there is likelihood of the Petitioner being transferred from his present station and also there is a move to have his personal weapon withdrawn, which will have an impact on his personal safety."

At that stage, the learned Senior Deputy Solicitor General who represented the state had given the following undertaking before the court;

“that the Petitioner will not be transferred out from his present station or that the personal weapon issued to him will not be withdrawn.”

This matter had once again come up before the Chief Justice on 15.02.2017 but the matter could not be taken up since some of the Respondents have seized to hold office. On that day this court had made the following order,

“Learned Counsel for the Petitioner brings to the notice of court the undertaking given by the learned Deputy Solicitor General on 01.12.2016 that the Petitioner would not be transferred out from his present station and that his personal weapon issued to him would not be withdrawn. Counsel states that he had got instructions from Petitioner that the Petitioner’s weapon in fact being withdrawn from him.

The Court directs the learned Deputy Solicitor General to convey this order to the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents and to ensure that the personal weapon issued to him is restored to the Petitioner” and extended the undertaking until the next date i.e. 16<sup>th</sup> March 2017.

The above undertaking was once again extended till 05<sup>th</sup> May 2017 on 16<sup>th</sup> March 2017. When this matter was once again called on 05.05.2017, this court had observed as follows;

“Senior Deputy Solicitor General Mr. Parinda Ranasinghe agrees with this court when court pointed out to him that in spite of the court order given after the undertaking was given by the state to grant the Petitioner his weapon, when he was under many threats on his life and even then it was not complied with by the Respondents.

However, since Mr. Dayarathne move to file another Fundamental Rights Petition with regard to the Vacation of Post being served on him this court postpone this matter to be supported on the next date.”

Whilst making submissions before this court the Counsel for the Petitioner relied on an affidavit tendered by the Petitioner along with a motion dated 11.04.2017. According to the Counsel, the



Petitioner had explained the circumstances, under which he was compelled not to report to work since 16.03.2017 in the said affidavit.

In his affidavit the Petitioner had stated that notwithstanding the repeated undertaking given by the Hon. Attorney General, he was transferred to the Organized Crime Prevention Division with effect from 17.10.2016 and also the weapon has been removed from his possession.

However, he reported to work in the new branch and continued to work with the officers. On 12.03.2017 he raided a house and a restaurant belonging to an underworld leader and on return he received a call from the said person who threatened the Petitioner that he had received a contract from the police itself to fix him for something. Since then he did not pick the said number, but made an entry in his return notes. The Petitioner was surprised as to how the said under world leader got his telephone number. During the same period, he received some reliable information that a close associate of the 10<sup>th</sup> Respondent is collecting information with regard to the movements of the Petitioner. In the said circumstance, the Petitioner felt unsafe, specially for the reason that the permission to retain his weapon outside office hours had been withdrawn and his weapon had been taken over.

In those circumstances, he did not report to work since 16.03.2017 but further submitted that he had every intention of returning to duty if his safety is assured.

When considering the material placed before this court, it is necessary to consider whether the Petitioner had any intention of abandoning his job for the Respondents to serve him with a Vacation of Post Notice or on the other hand the Respondents or any one of them had acted in a manner for the Petitioner to keep away from his work, which would finally result in a Vacation of Post Notice being served on him.

Three Respondents namely, the 9<sup>th</sup>, the 12<sup>th</sup> and the 14<sup>th</sup> Respondents have submitted affidavits challenging some of the positions taken up by the Petitioner before this court. The 12<sup>th</sup> and the 9<sup>th</sup> Respondents namely the Officer-in-Charge of the Police Narcotic Bureau and the Inspector General of Police whilst denying any act of *mala-fides*, had taken up the position that the Petitioner's transfer recommend by the 10<sup>th</sup> Respondent was necessitated due to the own conduct of the Petitioner, namely his poor attendance to work and failure to obtain leave as per the relevant and applicable procedure. However, both the above Respondents including the 9<sup>th</sup> Respondent, the Inspector General of Police

were silent on the question, whether they were aware of any undertaking given before this court by the State not to transfer the Petitioner until the Application before the Supreme Court is supported.

In this regard it is also important to note that, at the time the Petitioner came before this Court, i.e. on 07<sup>th</sup> November 2016 a transfer order had already being issued on him and was attached to the Organized Crimes Prevention Division since 17.10.2016 but this position was not placed before court by the Deputy Solicitor General who repeatedly gave the undertaking that the Petitioner would not either be transferred out from the Police Narcotic Bureau or the official weapon issued to the Petitioner would not be withdrawn from him until the case was supported before court.

The 14<sup>th</sup> Respondent, Director of the Organized Crimes Prevention Unit and the 9<sup>th</sup> Respondent the Inspector General of Police had explained how the Petitioner was sent on Vacation of Post for his failure to report to work since 17.03.2016. According to them, the Notice of Vacation of Post (X-2) was issued on 21.04.2017 and prior to 21<sup>st</sup>, four police messages were sent to the Petitioner on 18.03.2017, 19.03.2017, 20.03.2017 and 20.04.2017 and a letter dated 28.03.2017 informing him to report to work or to submit a valid medical certificate and that the failure to do so would result in the issuance of a Notice of Vacation of Post. In the absence of any request, medical certificate or Petitioner's failure to report to work, had finally resulted in the issuance of Notice of Vacation of Post, dated 21.04.2017.

However, both the above Respondents are silent on the withdrawal of the permission granted to the Petitioner to retain his personal weapon out of office hours, but had taken up the positions that if there was a threat to his life, that should have been brought to the notice of the authorities by way of a complaint to the relevant police station.

The 14<sup>th</sup> Respondent was not a party before this Court when the Petitioner came before this Court on 7<sup>th</sup> November 2016 but was made a Respondent by the Petitioner when he filed the amended Petition on 23<sup>rd</sup> June 2017. Even though the Petitioner by his affidavit dated 11<sup>th</sup> April 2017 which was filed along with a motion dated the same had given reasons as to why he kept away from his work since 16<sup>th</sup> March 2016, the 14<sup>th</sup> Respondent was not a party before this court by that date and therefore he cannot be made responsible for any failure from his part to look into the complaints made by the Petitioner in the said affidavit and the subsequent amended petition filed before this Court on 23<sup>rd</sup> June 2017.

In this regard I further observe, that the Petitioner when making the Director, Organized Crime Prevention Unit as the 14<sup>th</sup> Respondent, had not made any allegation against him for his failure to respond to his return entry dated 16.03.2017 as referred to in the affidavit dated 11.04.2017

However, the 9<sup>th</sup> Respondent who was a party to the instant application from its inception was well aware of the complaints made by the Petitioner in his affidavit dated 11.04.2014 and the undertaking given before the Supreme Court, but failed to explain any steps taken by him prior to the vacation of Post Notice being served on the Petitioner.

Both the Respondents are once again silent as to whether they were aware of a pending application before this Court and the undertaking given by the state in the said application not to withdraw the permission granted to the Petitioner to retain the weapon issued to him until the application was supported before court.

When considering the position taken by the Respondents with regard to the permission granted to retain the weapon, it is important to consider as to how and why the above permission was granted to the Petitioner.

Along with his counter objection filed before this court the Petitioner, had tendered documents marked P19(a) to P19(f), the recommendations he received and the final approval granted to retain the weapon issued to him, out of office hours. Among the recommendations he produced, P19(d) is the recommendation of the 10<sup>th</sup> Respondent and in that, whilst referring to some of his important detections had finally recommended to the Deputy Inspector General CID/PNB that,

- 05. මෙම නිලධාරියාගේ රාජකාරි කාලය තුළ විෂමාවාර ක්‍රියාවන් සිදුකර නොමැති අතර නිලධාරියා මනා කැපකිරීමකින් ඕනෑම අවධානම් රාජකාරියක් වගකීමකින් සිදුකරන අවංක නිලධාරියෙක් බැවින් නිලධාරියාගේ ජීවිතයට හානියක් සිදුවීමට ඉඩ ඇති බැවින්ද, නිලධාරියා විසින් ඔහුට දෙපාර්තමේන්තුව මගින් නිකුත්කර ඇති අංක E9459/2507-9MM දරණ සේවා අවියදු පත්‍රමි ගැබ් 02 හා එම උන්ඩ 50 නිලධාරියාගේ පුද්ගලික භාරයේ තබා ගැනීමට ඉල්ලා ඉදිරිපත්කර ඇති ලිපිය නිර්දේශ කර කාරුණිකව ඉදිරිපත්කරමි.

If the above position taken by the 10<sup>th</sup> Respondent in September 2014 is correct, the threat to the life and the danger the Petitioner faced to his life by attending to his official work will not suddenly disappear, unless there is proof that, after a proper assessment of the threat to the life of the Petitioner

had revealed that there was no such threat to his life. In the absence of any such material before us this court cannot simply accept the argument placed on behalf of the above Respondents.

When considering the matters already referred by me in this Judgment, it is clear that the Petitioner had a genuine fear for his life when he was suddenly transferred out of the Police Narcotic Bureau and with the implementation of the said transfer, he was compelled to return his weapon.

The Petitioner's Counsel who appeared before this court on 01.12.2016 had informed this to court and the Petitioner by his affidavit dated 11<sup>th</sup> April 2017, 10 days prior to him being served with the Notice of Vacation of Post, had informed this court that due to the reasons he averred in the said affidavit, that he feel compelled not to report for duty, is not a disinclination from discharging his duty, but due to the belief that there is an imminent threat to his life

When considering the legal issues arising in the instant case, I observe that there are two distinct areas to be considered in this case. Firstly, it is the duty of this court to consider whether the Notice of Vacation of Post said to have been served on the Petitioner will have the same effect as stated in Rule 172 of Chapter XV of the PSC Rules and whether the said act was in violation of the legitimate expectation of the Petitioner. Secondly there is a duty cast upon this court to ascertain whether any of the Respondent before this court had acted in violation of the Fundamental Right guaranteed under Article 12 (1) of the Constitution when allegedly serving the said notice of Vacation of Post on the Petitioner.

#### **Service of Vacation of Post Notice on the Petitioner**

It was the position taken by the Respondents before this court, that even after giving several opportunities to the Petitioner by sending reminders either by way of Police messages (14R1) or by way of a letter (14R2) the Petitioner failed to report to work or submit any acceptable explanation to the authorities until 20.04.2017 and thereafter acting under Rule 172 of Chapter XV of the PSC Rules, the Petitioner was served with the Vacation of Post Notice (14R3 as well as P-17).

The Respondents further took up the position that the Petitioner is not entitled to any relief by invoking the fundamental rights jurisdiction of the Supreme Court since he had failed to comply with administrative procedures and exhaust appeal procedures available within the administrative mechanism.

In this regard the Respondents have drawn our attention to Rule 171 and 172 of Chapter XV of PSC Rule and paragraph 6 of the Vacation of Post Notice served on the Petitioner (X2 and 9R11) which reads as follows;

**Rule 171;** A public officer who finds it difficult to report for duty is required to inform his/her Head of the Institution of such absence and get his leave duly approved so that the Head of the Institution will be able to take measures to get the respective work done. The public officer is required to inform the Head of the Institution within 24 hours of commencement of his/her duties on that particular day.

**Rule 172;** A public officer who absents himself from duty without informing his Head of the Institution is considered to have vacated his post on his own accord.

“ඔබගේ විනය බලධාරියා ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පති අපරාධ හා රථවාහන දිසාව තුමා වන අතර කාර්ය පටිපාටික රීති පරිච්ඡේද 15 වගන්තිය 174 ආයතන සංග්‍රහයේ XLVIII පරිච්ඡේදයේ 37 පරිදි සේවය අතහැරයාමේ නියෝගයට විරුද්ධව සේවය අතහැරයාමේ නියෝගය නිකුත් කර මාස 03ක් ගතවීමට පෙර විනය බලධාරියා වෙත අභියාචනයක් ඉදිරිපත් කිරීමේ හැකියාව ඇත.”

In addition to the above, the Respondents further relied on the decision of this court in the case of *Building Materials Corporation Vs. Jathika Sevaka Sangamaya (on behalf of D.N.T. Warnakulasuriya) [1993] 2 Sri LR 316* where it was decided that,

“Absence from work of an employee on the ground of illness or other reason beyond his control is inconsistent with the intention to abandon his employment provided that there are no other circumstances from which an inference to the contrary could be drawn.

Where an employee endeavours to keep away from work or refuses or fails to report to work or duty without an acceptable excuse for a reasonably a long period of time such conduct would necessarily be a ground which justifies the employer to consider the employee as having vacated service.”

However, as already referred to by me in this Judgment, the 9<sup>th</sup> and 12<sup>th</sup> Respondents in their affidavits tendered before this court (it is also important to note that the 10<sup>th</sup> Respondent, against whom several allegations were made by the Petitioner had preferred not to tender an affidavit before this court) were

silent on their knowledge that the Petitioner had already filed a Fundamental Rights application challenging

- a) The finding of guilt at the orderly room of a charge related to a bi-annual inspection,
- b) Imposing of no pay leave on the Petitioner,
- c) Recommendation of the transfer to the Petitioner out of Police Narcotic Bureau

and that, “the state” on several occasions (as referred to in this Judgment) had given undertaking that,

- a) the Petitioner would not be transferred from the Police Narcotic Bureau
- b) the permission granted to the Petitioner to retain the service weapon issued to him out of office hours will continue until the instant application is supported before the Supreme Court.

As further observed by me, the Petitioner who had an unblemished service record with 321 good entries including two Inspector General’s commendations, was subject to harassment specially during the last six months of his service. As I referred to in this Judgement, transferring him to Katunayake Unit of the Police Narcotic Bureau and getting him down within 3 months when the Respondents observe that even after his transfer, he continued to discharge his duties at his best; within two months thereafter summoning him before the Orderly Room on a charge, the Respondents themselves admitted before this court as incorrect (9R4(a)); thereafter making a failed attempt by the 10<sup>th</sup> to the 12<sup>th</sup> Respondents to obtain the signature of the Petitioner to “Form 51” on 10<sup>th</sup> October 2016 and failing which the 10<sup>th</sup> Respondent issuing P-17, recommending the transfer of the Petitioner out of Police Narcotic Bureau on the same day, knowing very well that it will badly effect the Petitioner with regard to his own recommendation in P19 (d), include the instances of such harassment.

The Petitioner in his affidavit tendered before this court on 11<sup>th</sup> April 2017 had explained the above incidents which compelled him to keep away from his work in paragraph 13-15 as follows;

13. I respectfully state that, due to the incidents of the recent past, the continued harassment and attempts to provoke me, inquiries about my whereabouts, removing my weapon from my possession, calls from suspicious persons as aforesaid I felt compelled to not report for duty from 16. 03.2017, due to grave apprehension of any security.
14. I respectfully state that the reason that I feel compelled not to report for duty is not a disclination from discharging my duty, but due to the belief that there is an imminent threat to my life.

15. I specifically state that I have every intention of returning to duty, if my safety is assured

When considering the matters already discussed in my Judgment, I see no reason to reject the above statements of the Petitioner.

The Court of Appeal in the case of ***Nelson de Silva Vs. Sri Lanka State Engineering Corporation [1996] 2 Sri LR 342*** discussed the importance of the mental element in a case of Vacation of Post as follows;

“The concept of vacation of post involves two aspects. One is the mental element, that is the intention to desert and abandon the employment and second is the failure to report at the work place of the employee. To constitute the first element, it must be established that the applicant is not reporting at the workplace, was actuated by an intention to voluntarily vacate his employment. The physical absence and the mental element should co-exist for there to be a vacation of post in law....”

In the case of ***V. I. D. J. Perera Vs. University of Colombo and Others SC Appeal 46/2011*** SC minutes dated 07.10.2015 this court observed that,

“The conduct on the part of the Respondent clearly demonstrate that he had no intention of abandoning his post and he had the *animus revertendi*. Thus, I am of the view that the Court of Appeal has not erred, with regard to the issue as well.”

In these circumstances, I take the view that the Petitioner could not be said to have vacated his post by his failure to report to work since 17.03.2017.

The next question that is to be considered by me is whether the service of the alleged Notice of Vacation of Post was in violation of the legitimate expectation of the Petitioner, and does any one of the Respondent is responsible for such violation.

In the case of ***Siriwardena Vs. Senevirathne and Others SC FR 589/2009 SC minute dated 10.03.2011 and 2011 (2) BLR 336*** *Shirani Bandaranayake J* (as she then was) considered the alleged violation of Fundamental Rights guaranteed in terms of Article 12 (1) on the basis of legitimate expectation and held that,

- a) A careful consideration of the doctrine of legitimate expectation, clearly shows that whether an expectation is legitimate or not is a question of fact. This has to be decided not only on the basis of the application made by the aggrieved party before Court, but also taking into consideration whether there had been any arbitrary exercise of power by the administrative authority in question.
- b) .....
- c) The applicability of the doctrine of legitimate expectation imposes in essence a duty to act fairly

It was also held by *Shirani Bandaranayake J* (as she then was) in the case of ***Perera Vs. National Police Commission and 24 Others SC FR 290/2006 and 2007 BLR 14*** that,

“A promise or a regular procedure could give rise to a legitimate expectation that could be enforced by Court.”

As discussed by me at length in this judgment the conduct of the 9<sup>th</sup> to the 12<sup>th</sup> Respondents were arbitrary and in violation of the regular procedure, and therefore in violation of the legitimate expectation of the Petitioner.

Whilst relying on the contention that the Petitioner’s services had been correctly terminated and therefore the Petitioner is not entitled to complain of any violation of equal protection guaranteed under Article 12(1) of the Constitution, the Respondents, further relied on the decisions of this court in ***Rev. Watinapaha Somananda Thero Vs. Akila Viraj Kariyawasam and Others*** SC FR 361/2015 SC minute dated 14.12.2017 and ***W.K. Samarakoon and Others Vs. National Water Supply and Drainage Board and Others*** SC FR 284/2013 SC minute dated 23.09.2016.

As observed by this court in both these cases there is reference to a land mark decision by Sharvananda CJ in ***C.W Mackie Co. Ltd. Vs. Hugh Molagoda, Commissioner General of Inland Revenue and Others [1986] 1 SLR 300*** where Sharvananda CJ had observed the violation by an illegal act, when considering the alleged violation of equal treatment guaranteed by Article 12 in the following words;

“The equal treatment guaranteed by Article 12, is equal treatment in the performance of a lawful act; via; Article 12, one cannot seek the execution of an illegal act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law.”



However, this court had already concluded that, even though the Petitioner was served with a notice of Vacation of Post, it does not have the same effect as stated in Rule 172 of the Chapter XV of the PSC Rules since the Petitioner did not intend to abandon his post.

In the said circumstances, the alleged violation before this court is not with regard to an illegal act., as found in the case of *C. W. Mackie & Co. Ltd Vs. Hugh Molagoda Commissioner General of Inland Revenue and Others [1986] 1 SLR 300* and therefore I reject the argument of the Respondents based on the above two Judgments.

**Has anyone of the Respondent acted in violation of the fundamental rights guaranteed under Article 12 (1) of the Constitution**

In the case of *Farook Vs. Dharmarathne Chairman, Provincial Public Service Commission Uva and others [2005] 1 Sri LR 133* Her Ladyship Shirani Bandaranayake J (as she then was) held,

“When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of violation of his Fundamental Rights on the basis of unequal treatment? If the answer to this question is in the affirmative, it would mean that Article 12 (1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of the Article 12 (1) of the Constitution cannot be used for such situation as it provides to an aggrieved person **only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines.** Article 12 (1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12 (1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed, the Petitioner must be in a position to place material before this court that there has been unequal treatment within the framework of a lawful act” **(emphasis added)**

In the case of *Horathalage Thilak Lalith Kumara Vs. S.S. Hewapathirana Secretary Ministry of Youth Affairs and Skills Development and Others SC FR 451/2011* SC minute dated 17.09.2015 Anil Goonarathne J had observed,

“I have to observe at this point that Article 12 of the Constitution forbids hostile discrimination but does not forbid reasonable classification. Equality before the law does not mean that the same set of laws should apply to all persons under every circumstance, ignoring differences and disparities. Reasonable classification is inherent in the concept of ‘equality’ because all persons **are not similarly situate**” (emphasis by his Lordship)

As already discussed by me in this Judgment the conduct of 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Respondents specially between 04.10.2016 and 10.10.2016 summoning the Petitioner before the Orderly Room on a charge, which the Respondents themselves admitted before this court as incorrect, and thereafter making an unsuccessful attempt by the said Respondents to obtain the signature of the Petitioner to “Form 51” on 10<sup>th</sup> October 2016 and the 10<sup>th</sup> Respondent to issue P-17 on the same day recommending the transfer of the Petitioner out of Police Narcotic Bureau clearly shows that the said Respondents had acted incorrectly ignoring the applicable provisions of law. As revealed before this court in “Form 51 the 10<sup>th</sup> to the 12<sup>th</sup> Respondents have taken contradictory positions when recommending the transfer of the Petitioner, had made a failed attempt by them to obtain the signature of the Petitioner to “Form 51,” is clearly in violation of the accepted legal principles.

In these circumstances, I am of the view that the above conduct of the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Respondents are in clear violation of the equal protection guaranteed under Article 12 (1) of the Constitution of the Petitioner.

The 9<sup>th</sup> Respondent, Inspector General of Police, on behalf of whom the state had continued to appear on several days prior to the main application was supported before court, had given an undertaking that,

- a) the Petitioner would not be transferred from the Police Narcotic Bureau
- b) the permission granted to the Petitioner to retain the service weapon issued to him out of office hours will continue until the instant application is supported before the Supreme Court.

was silent in his affidavit as to why the undertaking was not adhered to, but allowed 10<sup>th</sup> to the 12<sup>th</sup> or the 14<sup>th</sup> Respondent or any one of them to withdraw the facility granted by him to retain the official weapon after working hours, which finally compelled the Petitioner not to report for duty since 16<sup>th</sup> March 2017. The 9<sup>th</sup> Respondent, Inspector General of Police was well aware of the

imminent danger to the life of the Petitioner when he permitted the retention of the official weapon after working hours. In the said circumstances the above conduct of the 9<sup>th</sup> Respondent is in clear violation of the equal protection of the Petitioner guaranteed under Article 12 (1) of the Constitution.

Hence, I declare that the 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Respondents have acted in violation of the legitimate expectation of the Petitioner and therefore violated the Fundamental Rights of the Petitioner guaranteed under Article 12 (1) of the Constitution. In the said circumstances, I further declare that the Petitioner could not to be said to have vacated his post by his failure to report to work since 17.03.2017.

I therefore direct 1<sup>st</sup> to 14<sup>th</sup> Respondents including 1A, 2A, 4A, 7A, 8A, 9A, 10A, 11A and 12A Respondents to re-instate the Petitioner with effect from 17.03.2017 with all back wages, and increments. The Petitioner is entitled to all the promotions due to him as he was considered as in active service since 17.03.2017.

The 9A Respondent is further directed to consider granting permission to retain the official weapon issued to the Petitioner in consideration of proper assessment, if a request is made through proper channels.

The 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Respondents are directed to pay Rs.25,000/- each to the Petitioner from their personal funds.

Application allowed with cost fixed at Rs.50,000/-

**Judge of the Supreme Court**

**Justice Jayantha Jayasuriya PC**

I agree,

**Chief Justice**

**Justice E. A. G. R. Amarasekera**

I agree,

**Judge of the Supreme Court**