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

In the matter of an Appeal to the Supreme Court under and in terms of Article 128 of the Constitution.

C.K.N. Rohan Fernando
No.64 C.P. De Silva Mawatha
Moratuwa.

Petitioner -Appellant

Vs.

S.C.Appeal No.100/2006
C.A.(Writ) Application No.930/2001

01. K. Viknarajah
(Chairman)
02. Dr. N. Samarasekera (Member)
03. M.M. Munsoor (Member)
04. Dr. D. Nesiah (Member)
05. H.D.L. Goonawardena (Secretary)
06. S.D. Wijitha Padmaseeli,
All of the Public Service Commission,
BMICH, Baudhaloka Mawatha,
Colombo 07.
07. Secretary, Ministry of Defence,

Balakshe Mawatha,
Colombo 03.

08. Inspector General of Police,
Police Head Quarters,
Colombo 01.

09. Hon. Attorney General,
The Attorney General's Department,
Colombo 12.

Respondent-Respondents

10. Justice P.R.P. Perera,
(The Chairman)
Public Service Commission,
(Now Changed)

10A. Dr. Dayasiri Fernando
Chirman-Public Service Commission
(Now Changed)

10B. Justice Sathya Hettige P.C.,
(Chairman)
(Now Changed)

10C. Mr. Dharmasena Dissanayake,
(Chairman)
Public Service Commission

11. Prof. Dayasiri Fernando,
(A member- Public Service
Commission) (Now changed)

11A. Mr. Palitha M. Kumarasinghe P.C.
(A member- Public Service
Commission) (Now changed)

11B. Dr. J.M. Zoysa Gunasekera,
(Member- Public Service
Commission) (Now changed)

11C. Prof. Hussain Iamail,
(Member- Public Service
Commission)

12. Mr. W.P.S. Jayawardane
(A member- Public Service
Commission) (Now changed)

12A. Mrs. Sirimavo A. Wijerathne,
(Member- Public Service
Commission) (Now changed)

12B. Mr. Sunil Sirisena,
(Member- Public Service
Commission) (Now changed)

12C. Ms. Shirantha Wijayathilake,
(Member- Public Service
Commission).

13. Mr. Palitha M. Kumarasinghe
(A member- Public Service
Commission) (Now changed)

13A. Mr. S.C. Mannapperuma,
(Member- Public Service
Commission) (Now changed)

13B. Dr. Prathap Ramanujam,
(Member- Public Service
Commission).

14. Prof. M.S. Mookiah

(A member- Public Service Commission) (Now changed)

14A. Mr. Ananda Senevirathne, (Member- Public Service Commission) (Now changed)

14B. Mrs. V. Jegarajasingham, (Member- Public Service Commission).

15. Prof. Mendis Rohanadeera (A member- Public Service Commission) (Now changed).

15A. Mr. N. H. Pathirana, (Member- Public Service Commission) (Now changed)

15B. Mr. Santi Nihal Senevirathne, (Member- Public Service Commission).

16. Dr. Bernard Soyza, (A member- Public Service Commission) (Now changed)

16A. Mr. S. Thillanadarajah, (Member- Public Service Commission) (Now changed)

16B. S. Ranuge, (Member- Public Service Commission).

17. Mr. Gunapala Wickremarathne, (A member- Public Service Commission) (Now changed)

17A. Mr. M.D.W. Ariyawansa,
(Member- Public Service
Commission) (Now changed)

17B. Mrs. Kanthi Wijethunga,
(Member- Public Service
Commission) (Now changed)

17C. Mr. D. L. Mendis,
(Member- Public Service
Commission).

18. Mrs. Sirimavo Attigalla Wijerathne,
(A member- Public Service
Commission) (Now changed)

18B. Mr. Sarath Jayathilake,
(Member- Public Service
Commission).

10th to 18B Respondents are at No. 177, Nawala Road, Narahenpita, Colombo 05.

19. The Secretary,
The Ministry of Law and Order,
13th Floor, Stage II, Sethsiripaya,
Battaramulla.
Respondents

BEFORE : **S. THURAIRAJA, PC, J.**
ACHALA WENGAPPULI, J.
MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Rasika Dissanayake with Chandrasiri Wanigapura for the Petitioner-Appellant
Ms. V. Hettige D.S.G. for the Respondent-Respondents.

ARGUED ON : 20th July, 2021

DECIDED ON : 18th December, 2025

ACHALA WENGAPPULI, J.

The Petitioner-Petitioner-Appellant (hereinafter referred to as "the Appellant"), joined the Police Department as a reserve Sub-Inspector of Police on 05.09.1993.

He was promoted to the rank of Assistant Superintendent of Police w.e.f. 05.11.1993 from his rank of Chief Inspector of Police and he was serving as an Assistant Superintendent of Police until the Public Service Commission decided to demote him back to the rank of Chief Inspector of Police. This demotion was carried out as a punishment subsequent to a disciplinary inquiry conducted against the Appellant. The Appellant thereupon sought to quash the said decision by invoking jurisdiction of the Court of Appeal conferred under Article 140 of the Constitution and with the issuance of Writ of *Certiorari*. The Appellant cited all the members of the Public Service Commission as the 1st to 6th Respondent-Respondent-Respondents (hereinafter referred to as the "1st to 6th Respondents") in the caption of his said application.

The Court of Appeal, having inquired into the Appellant's application, refused to grant any form of relief and proceeded to dismiss the same by its order dated 27.09.2006. Thereafter, the Appellant, sought Special Leave to Appeal against the said order of dismissal.

This Court, after affording a hearing to the parties, decided to grant Special Leave to Appeal on the following questions of law on 05.12.2006, as

formulated by the Appellant in sub-paragraphs (a) to (g) of paragraph 18 of his petition dated 06.11.2006, which are reproduced below;

(a) whether the Court of Appeal has erred in law by holding that the 1st to 6th Respondents have not reviewed an order made under the provisions of the 1981 Establishments Code, but were exercising the powers under the 1999 Establishments Code?

(b) whether the Court of Appeal has failed to take into consideration the fact that the purported decision of the 1st to 6th Respondents is based not on the documents placed at the inquiry and the report of the Inquiring Officer, but on the documents, those were not produced and not considered by the Inquiring Officer?

(c) whether the Court of Appeal has failed to take into consideration the fact that the 1st Respondent's decision is based on the provisions of both 1981 Establishments Code and 1999 Establishments Code?

(d) whether their Lordships of the Court of Appeal has failed to consider the finding of the judgment of Your Lordship's Court in SC (F/R) 607/99 and 608/99?

(e) whether the judgment of the Court of Appeal is a nullity and/or invalid for the reason that the said application was not argued before his Lordship Justice *Sriskandaraja* although he has agreed and signed the judgment?

(f) whether the Court of Appeal has erred in law justifying the 1st Respondent's findings in respect of the Supreme Court judgment in SC (F/R) 20/90, SC (F/R) 22/90 and SC (F/R) 31/90 which were not produced at the inquiry held against the Appellant?

(g) whether the Court of Appeal has failed to consider the fact that the 1st to 6th Respondents' decision is based on the Judgments of the Supreme Court in SC (F/R) 20/90, SC (F/R) 22/90 and SC (F/R) 31/90 which were not produced at the inquiry held against the Appellant?

At the hearing of the instant appeal, learned Counsel for the Appellant submitted that the Court of Appeal had fallen into serious error in law when it held that the 1st to 6th Respondents decided to review the findings of the Inquiring Officer, they were exercising powers conferred on that Commission under the Establishments Code of 1999, and not under powers conferred under the provisions of the previous one, i.e., Establishments Code of 1981. This is because the Appellant was issued a Charge Sheet and consequently the inquiry against him commenced and proceeded under the provisions of Establishments Code of 1981. The Appellant contended that therefore it is the provisions of Establishments Code of 1981 that are applicable to the review of the disciplinary proceedings against him and not the revised provisions of Establishments Code of 1999, which in fact came into effect only after his inquiry was concluded.

Before I consider the Appellant's contention, it is helpful if a brief reference is made at this stage to the circumstances under which the Public Service Commission decided to initiate disciplinary proceedings against him.

The Petitioners of the SC Application Nos. 22 of 1990, 23 of 1990, and 31 of 1990, have invoked the jurisdiction of this Court conferred under Articles 17 and 126(1) of the Constitution by collectively alleging that the

Appellant had infringed their fundamental rights, whilst functioning as the Officer-in-Charge of *Homagama* Police Station. The Appellant was cited in all three applications as one of the respondents against whom the Petitioners sought certain reliefs.

This Court, in delivering its consolidated judgment dated 03.03.1994 in respect of the said applications, declared that the Appellant had infringed the fundamental rights of the all three petitioners, guaranteed to them by Articles 11, 13(1) and 13(2). The Appellant was therefore ordered to pay each of the petitioners a sum of Rs. 10,000.00 from his personal funds.

On 22.09.1995, the Public Service Commission served a Charge Sheet on the Appellant containing three charges. The first charge is in relation to an allegation of torture and identical to the allegations made in the three applications that were decided by this Court. The inquiry against the Appellant proceeded before an Inquiring Officer, who, at its conclusion, found that the three charges against the Appellant were not established by the prosecution.

The findings of the inquiry were conveyed to the Public Service Commission by letter dated 19.10.1999.

Thereupon, the Public Service Commission, having re-examined the material presented before the Inquiring Officer, found the Appellant guilty to the three charges and decided to demote him. The Public Service Commission, by its letter dated 18.06.2001, directed the 8th Respondent-Respondent-Respondent (the Inspector General of Police) to take appropriate steps to activate the said punishment, imposed by the Commission.

It is against this factual backdrop that I shall now proceed to consider the submissions of the learned Counsel for the Appellant made before this Court, in relation to the questions of law on which Special Leave to Appeal was granted. In relation to his submissions, it is important to make a brief reference to the manner in which the inquiry against the Appellant was conducted by the Inquiry Officer on behalf of the Public Service Commission and the series of subsequent events that unfolded therefrom.

The Appellant was served with a Charge Sheet by the Public Service Commission on 22.09.1995. The inquiry on that Charge Sheet commenced on 05.01.1999 and concluded on 15.04.1999.

Meanwhile, the Establishments Code of 1981, which came into force on 07.09.1974, under which the inquiry against the Appellant was commenced and proceeded on, was replaced by a new version, which came into force only on 01.11.1999. By then, the inquiry against the Appellant was already concluded and the Inquiring Officer too had released his findings, exonerating him from the allegations contained in the Charge Sheet. Hence, the Appellant's contention that the Public Service Commission should have applied the provisions of the Establishments Code of 1981 and not 1999. He further contends that since the Establishments Code of 1999, contained provisions which expanded the scope of the powers conferred on the Commission particularly, in relation to reviewing of the findings reached by an Inquiring Officer, which the Code of 1981 did not contain, the Court of Appeal should have adopted a restrictive approach in the application of the relevant procedure.

The Public Service Commission, having disagreed with the findings made by the Inquiring Officer, proceeded to review the said inquiry findings on 26.01.2001.

The findings of the Inquiring Officer, that the three charges against the Appellant were not established, were set aside by the Public Service Commission on the footing that it was satisfied that the evidence presented before the said inquirer clearly established the charges, particularly the one relating to act of the Appellant that he had subjected the three persons to degrading and inhumane treatment and torture, by extracting their teeth, using a pair of pliers. The Commission further decided as such, it would be a travesty of justice to allow the findings of the Inquiring Officer to remain as a valid finding made on the available material.

It is to be noted that the Appellant's complaint before this Court against the conclusion reached by the Commission was made, not with a view to challenge the validity of the decision taken by the Public Service Commission to set aside the said findings of the inquiry but, made with a view to challenge its decision to impose a punishment on him by acting in terms of Section 4:18 of Chapter XLVIII of the Establishments Code of 1999, without remitting it for re-inquiry under the provisions of the Establishments Code of 1981.

It is only in the revised Code that such a power was conferred on that Commission, which it did not possess under the earlier Code of 1981. Under the Code of 1981, all what the Commission, when faced with such a situation, could do was to remit it back for re-inquiry. The Appellant accordingly submits that, if the Public Service Commission was not

agreeable with the findings made by the Inquiring Officer, it had acted illegally when it proceeded to act under Section 4:18 of Chapter XLVIII of the Establishments Code of 1999, instead of remitting the matter back to an Inquiring Officer with a direction to conduct a fresh inquiry, as required by Section 15.2 of Chapter XLVIII of the Establishments Code of 1981.

The Court of Appeal, after having dealt with this particular contention of the Appellant, decided to reject the same. The Court stated "*[W]hen the disciplinary authority exercises its powers of discipline; it is obliged to exercise such powers in terms of the provisions of the Code in operation as at the date of such exercise. The Establishment Code of 1999 operative on 26.01.2001 does not provide for any such reservation of or limitation of powers with regard to matters that commenced under the obsolete Code; nor does the Counsel refer this Court to any such rules*".

It is clear from this pronouncement that the Court of Appeal was of the view that the applicable provision of the Establishments Code in this instance is Section 4:18 of Chapter XLVIII of the Establishments Code of 1999 and not Section 15.2 of Chapter XLVIII of the Establishments Code of 1981. This is confirmed with the pronouncement made by the Court of Appeal that the Public Service Commission "… *is obliged to exercise such powers in terms of the provisions of the Code in operation as at the date of such exercise.*" The Court of Appeal also noted that there were no transitional provisions contained in the Establishments Code of 1999 allowing the continued operation of the provisions contained in its earlier version.

Bindra, in the authoritative text on ***Interpretation of Statutes*** (9th Ed, at p. 899) states in relation to substantive law and procedural law that the "*[L]aw defines the rights it will aid and the way in which it will aid and specifies*

the way in which it will aid. So far as it defines, thereby creating, it is 'Substantive Law'. So far as it provides a method of aiding and protecting, it is 'Adjective Law'. The adjective law is also termed as 'procedure' which is a term used to express the mode of proceeding by which a legal right is enforced …". He then adds what it means to be the procedural law as "… *the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right which, by means of the proceedings, the Court is to administer."*

The text of *Bindra* also deals with the contention of the Appellant, referred to in the preceding paragraph, by offering a clarification to same. It is stated therein (at p. 904) " *[W]here a suit, in its initial stages, was pending in the trial Court and a change was affected by amendment of the procedure to be followed in the trial or the suit, the changed procedure should be followed, because no right of any person would be affected at that stage*" unless of course " … *by the enforcement of the amendment, the validity of a judicial order validly passed is affected".*

In this context, in order to determine the applicable Establishments Code at the time the Commission made its decision to find the Appellant guilty to the charges and impose a punishment, what must be examined first is whether the provisions contained in Chapter XLVIII of the Establishments Code of 1981 as well as of 1999, should be termed as provisions of a substantive law or the provisions of a procedural law.

The statement of the Secretary to the Ministry of Public Administration carried in page 2 of the Volume II of the Establishments Code of 1999 indicates that the "… *provisions of this volume have been approved by the Cabinet of Ministers in terms of Article 55(4) of the Constitution of the Democratic Socialist Republic of Sri Lanka."* The Article 55(4) of the

Constitution (before the amendment made by the Seventeenth Amendment to the Constitution) reads as follows:

> "*Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to public officers, including the formulation of schemes of recruitment and codes of conduct for public officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers.*"

The reference made in the said Article to the nature of the provisions contained in it, particularly "*the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers*" makes it clear that the Chapter XLVIII of Volume II of the Establishments Code of 1999, is indeed contains such procedures that are established under the said Article for that very purpose. Moreover, Chapter XLVIII is titled "*RULES OF DISCIPLINARY PROCEDURE*". Thus, in my view the Section 4:18 of Chapter XLVIII of the Establishments Code of 1999 sets out the procedure applicable to situations in which the Public Service Commission disagrees with the findings of an inquirer made on a disciplinary inquiry, and as such, the Commission "… *is obliged to exercise such powers in terms of the provisions of the Code in operation as at the date of such exercise*" as the Court of Appeal had rightly held.

In forming that view, I was strongly persuaded by the observations made by this Court from time to time in relation to the nature of the provisions contained in the Chapter XLVIII of Volume II of the Establishments Code of 1999.

In the judgment of ***Elmore Perera v Montegue Jayawickrema, Minister of Public Administration and Others*** (1985) 1 Sri L.R. 285, this Court observed (at p.328) that *"[T]he standard procedures are contained in the Establishments Code, which compilation as its name indicates is the basic enactment on these matters. The relevant Chapter is XLVIII of Volume 11 of this Code, which contains the rules of Disciplinary Procedure."*

In the said judgment, although expressing the minority view on the outcome of the application, *Wanasundara* J further noted that (*ibid*, at p.335) *"[T]he Establishments Code is the basic document relating to procedures of disciplinary action against public officers. It has been formulated by the Cabinet of Ministers under Article 55(4) of the Constitution in whom such a power is reposed. This formulation has the characteristics of a policy decision as it deals with the broad principles and procedures governing disciplinary action against officers of practically the entire public service in this country."*

In relation to Chapter V of the Establishments Code too, a similar view was expressed by this Court. During the course of the judgment of ***Dr. Perera v Justice Perera and Others*** (2011) 1 Sri L.R. 43, this Court stated that (at p.52), *"[T]he Establishments Code refers to the procedure, which governs the release of a public officer and chapter V of the Establishments Code deals with such release, reversion and termination of employment".*

Section 4:18 of Chapter XLVIII of the Establishments Code of 1999 laid down the procedure when the relevant Disciplinary Authority does not agree with the findings of the inquiring tribunal and confers power on such authority by stating that he may make a disciplinary order contrary to the findings of that tribunal in accordance with his own findings, independently reached by him, based on the record of the proceedings and other documents. However, the said provision also demands that, in

issuing such contrary disciplinary order, the Disciplinary Authority should clearly and specifically state, in the disciplinary file all the reasons that led that authority to make such an order before it is issued."

Section 22.5 of Chapter XLVIII of the Establishments Code of 1999 reads thus:

> "*[A] Disciplinary Authority may, after careful study of the report of a formal disciplinary inquiry forwarded to him by the Tribunal, arrive at the following decisions;*
>
> *22:5:1* *convict the officer of one or some or all of the charges*
>
> *22:5:2* *acquit the accused officer on one or some or all of the charges*
>
> *22:5:3* *quash the proceedings of the formal disciplinary inquiry and order a fresh disciplinary inquiry*".

Thus, when the Public Service Commission decided to set aside the findings of the Inquiring Officer and to substitute same with their own finding, the applicable procedure was the procedure set out in Section 4:18 of Chapter XLVIII of the Establishments Code of 1999 and not 1981. Therefore, the Public Service Commission had the authority to set aside the findings made by the Inquiring Officer and to substitute them with its own.

In this situation, the Public Service Commission acted in terms of Section 22:5:1 instead of acting under 22:5:3 of the earlier version. The said course of action of the Commission could not be faulted. The Appellant's contention that, in doing so, it had acted without authority therefore cannot be accepted as a valid one. Indeed, the said course of action adopted by the Commission and the decision reached are acts, which

could clearly be termed as acts of the Commission done intra *vires* of its powers.

The Appellant presented another contention claiming that the Public Service Commission, acted in violation of the established procedure when it acted on documents that were not presented against him during the inquiry. It is to be noted that the Appellant, in support of this contention, had relied on certain references made by the Public Service Commission to the medical reports of the petitioners.

A careful examination of the reasons adduced by the Public Service Commission to make such an order reveals that the Commission has found fault with the Inquiring Officer and the prosecution for the failure to produce relevant medical reports of the three Petitioners who were subjected to several acts of torture. The Commission, having observed that it would be a travesty of justice to allow the findings of the inquirer to remain unaltered, thereupon concluded that the available evidence clearly established the Appellant's culpability to the charge which alleged that he had subjected three persons to degrading and inhumane treatment and torture.

In arriving at this conclusion, the Commission reproduced a part of the judgment of this Court in SC (F/R) Application No. 31/1990, in which this Court made a detailed reference to the injuries, as observed by the Judicial Medical Officer, upon conducting a physical examination of the petitioner of that particular application.

It is interesting to note that the Charge Sheet that had been served on the Appellant also contained a list of documents, which the prosecution intended to rely on, in order to prove the charges contained therein. These

documents included JMO's reports, the petition of the petitioner in SC (F/R) Application No. 31/1990 and the judgment of this Court on that application. The Commission was justifiably concerned over the failure of the prosecution and the Inquiring Officer to produce or to call for those items of documentary evidence. The Commission was of the view that the manner in which the prosecution presented its evidence led to the irresistible conclusion *that "… the prosecution was conducting a sham prosecution".*

The Public Service Commission did not adopt any "*evidence*" that had not been presented before the inquiry by the prosecution, although it found the prosecution against the Appellant is a sham. The contention raised by the Appellant appears to be a one that concerns admissibility of fresh evidence by the Public Service Commission and therefore acted illegally.

The Courts established by law are bound to adhere to statutory provisions contained in the Evidence Ordinance in conducting judicial proceedings. However, Section 21:25 of the Establishments Code permits a tribunal to make reference to a document, although not produced during the inquiry, if it assists in arriving at a decision. The said Section states that a tribunal "… *may refer to any document even though it has not been produced in evidence, which assists it in arriving at a decision. Nevertheless, such a document should not be properly be regarded as evidence.*"

In coming to the conclusion against the Appellant, the Commission, in its reasoning, did make a few references to the medical reports which indicated the nature of injuries spoken to by the lay witnesses, whilst giving evidence before the Inquiring Officer. The references to these

medico legal reports were made by the Commission only after reproducing relevant sections from the judgment of this Court. The Commission neither did receive any fresh evidence on the injuries nor treated the judgment of this Court, although a public document, as an item of evidence. The Commission, whilst making a comparison between the allegations made against the Appellant in that application with the almost identical accusation made against him in the Charge Sheet, proceeded to comment on the two contrasting findings that were arrived at, first by this Court and thereafter by the Inquiring Officer. It is very evident that the said references were made by the Commission with a view to justify its own finding that the prosecution against the Appellant was in deed a sham.

Connected to this contention, the Appellant also submitted that the Court of Appeal failed to consider the reasoning of the judgments of this Court in SC (F/R) Application Nos. 607/1999 and 608/1999. The complaint of the Appellant in this regard is that the finding of this Court that the Appellant had infringed rights conferred on the prosecution witnesses by Article 11, cannot be taken as a 'conviction' entered against him by a Court of law. The Appellant relied on a *dictum* of *Perera* J, who delivered the said judgments, which are indicative of the position that a finding made by this Court of an infringement of Article 11 of the Constitution could not be equated to a conviction entered by a Court of law.

The Appellant's said complaint is apparently founded on the perception that the Public Service Commission's decision to find him guilty to the torture charge contained in the Charge Sheet was solely based

on the fact that this Court had already found him to have infringed Article 11. The Appellant misled himself into this belief as he strongly relied on an observation made by the Commission on the conduct of the 8th Respondent-Respondent-Respondent (the Inspector General of Police) where by the Commission indicated its view that he (the IGP) should have "*… [w]ithout resorting to a new formal inquiry, the accused should have been appropriately punished on the finding of the Supreme Court*."

The Commission, before making this observation, had already reached the conclusion that the evidence presented before the Inquiring Officer "*… establishes without any manner of doubt that the accused had subjected these three persons to degrading and inhumane treatment and torture*" and therefore decided to set aside the findings of the Inquiring Officer, who decided to exonerate the Appellant of all the charges. It is at that stage only the Commission noted that the three civil persons who had filed fundamental rights cases in the Supreme Court, bearing Nos. 22/90, 20/90 and 31/90, prior to the institution of the disciplinary inquiry and therefore the IGP should have given effect to the order of this Court made in the judgment of SC (F/R) Application No. 22/1990. In the said judgment, this Court ordered the IGP to "*take suitable action as he may deem to be appropriate with regard to the conduct of the 1st [The Appellant], 2nd, 3rd, 4th and 5th Respondents*". The Commission was of the view that the IGP could have imposed a punishment on the Appellant without initiating a disciplinary inquiry into the identical allegation once more.

After undertaking a careful examination of the many reasons given by the Public Service Commission, in justifying its decision to find the Appellant guilty to the charges, I am convinced that the said Commission

had arrived at that decision only upon perusal of the material presented before the inquiry and that too, quite independent to the adverse finding already made by this Court against the Appellant.

Last point taken up by the Appellant was that the judgment of the Court of Appeal is a *nullity* as it was delivered by a division of that Court, which had no opportunity to hear the submissions of the parties.

The judgment of the Court of Appeal was delivered by *Wijayaratne* J, in open Court on 27.09.2006, with the concurrence of *Sriskandarajah* J. The hearing of the application of the Appellant commenced on 05.10.2004 before a division of that Court, that constituted *Wijayaratne* J and *Sri Pavan* J (as he then was). Although the journal entry of that date indicated that the arguments were concluded, the judgment was not reserved by Court following the usual practice. It appears from the relevant journal, that the Court, thereby provided the parties of an opportunity to arrive at a mutually acceptable administrative arrangement. The matter was therefore mentioned before a division of the Court of Appeal on 28.03.2005, constituting of *Wijayaratne* J and *Sriskandarajah* J. It was on that day the judgment was reserved by *Wijayaratne* J.

It appears that, when the matter came up before the Court of Appeal on that day, and since the parties have failed to reach an administrative arrangement, the matter had to be proceeded with and had to be concluded with a pronouncement of an order of Court. In between these two dates, the matter was mentioned three times before *Sriskandarajah* J for the purpose of filing written submissions of the parties. Only on 28.03.2005, the judgment was reserved by the Court. Thus, before reserving the judgment, the relevant division of the Court of Appeal

would probably have had the benefit of the respective arguments of the parties once more, particularly to appraise *Sriskandarajah* J who now part of that division of Court, of their respective positions. Perusal of the journal entries indicated that the pronouncement of the judgment of the Court of Appeal was re-scheduled on account of *Sriskandarajah* J was overseas. If what the Appellant contends now is in fact the situation that prevailed at that point of time, it is reasonable to expect him to seize that opportunity to bring that matter to the attention of Court. His silence in this regard is indicative of the fact that the matter was in fact considered for its merits by the very bench that delivered the judgment. Thus, it appears that the said contention of the Appellant was presented to this Court for a co-lateral purpose.

In view of these considerations that are enumerated in this judgment, I proceed to answer all seven questions of law in the negative.

The appeal of the Appellant is accordingly dismissed and the judgment of the Court of Appeal is hereby affirmed.

I impose Rs. 25,000.00 on the Appellant as State costs, payable to the Registrar of this Court within three months from today.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT

S. THURAIRAJA, PC, J

I had the benefit of reading in draft the judgment proposed to be delivered by my brother Wengappuli, J.

While I unreservedly agree with the reasoning therein as well as the conclusion reached by my brother, I thought something more ought to be said with respect to the question of law set out in sub-paragraphs (d), (f) and (g) of paragraph 18 of the Petition[1], for this matter arises from one of those rare instances where an errant officer of the Sri Lanka Police had in fact been held accountable.

In this regard, I am in total agreement with the finding of my brother that the Public Services Commission had arrived at its decision independently, based entirely on the material before it, without being prejudiced by the finding of this Court in SC (F/R) Application bearing Nos. 20/90, 22/90 and 31/90.

However, I wish to place further emphasis on the judgments of this Court in SC (F/R) Application Nos. 607/1999 and 608/1999, and the extent to which the findings of this Court in a fundamental rights action may be considered in instituting disciplinary action.

The instant case involves an officer [the Appellant] who was demoted by the Public Service Commission as a consequence of being found to have violated Article 11 of the Constitution for torturing three arrestees, along

[1] Dated 06th November 2006

with several of his subordinate officers, in SC (F/R) Nos. 20/90, 22/90 and 31/90.

In these cases, the Appellant was alleged to have committed some extremely gruesome acts of torture: hand-cuffing some persons to a bed, tying one end of a rope to a person's hand and the other to a beam on the ceiling to leave them dangling mid-air as he personally assaulted them with a club on their knees and toes, extracting their teeth with a plier, burning their bleeding gums with a match-stick, putting chillie powder into a pot of smoldering coconut shells and forcing the persons to inhale

the noxious fumes after tying a gunny gab around their heads, burning them with cigarette buds, stamping their mouth with his foot and beating them with club on the chin until they bled, among other things.

This Court has very clearly found the Appellant to be liable for such acts, even going so far as to order payments of compensation to the victims out of the Appellant's personal funds. Subsequent to the decision of this Court, the Appellant was demoted by the Public Services Commission as a punishment for these violations.

The Appellant had sought to invoke the writ jurisdiction of the Court of Appeal, seeking that the decision of the Public Service Commission to demote him be quashed.

I am reminded of the observations of this Court, speaking through Aluwihare, PC, J, in ***Mohammed Rashid Fathima Sharmila v. K.W.G. Nishantha,***[2]

[2] SC FR Application No. 398/2008, SC Minutes of 03rd February 2023

> *"…Sri Lanka Police established in 1806, has a history of over two centuries and one would expect it to develop into a body that comprises of professional law enforcement personnel. I am at a loss to understand, in the present day and time as to why such an established law enforcement entity is incapable of affording due protection to a citizen who is in their custody. Unfortunately, it is not rare to hear instances of suspects dying in the hands of the police. It only highlights the utterly unprofessional approach to duty by the personnel who man it and as a consequence, people are increasingly losing trust in the police. It had lost the credibility it ought to enjoy as a law enforcement agency. The incident relevant to this application had taken place in 2008, however, this court observes that instances of death of suspects in police custody are continuing to happen, even today. It appears that the hierarchy of the administration had paid scant attention to arrest this trend which does not augur well for the law enforcement and the rule of law."*

This Court has now come to unequivocally recognise that superior officers can be held liable for acts of their subordinates even in the absence of any positive acts on the part of such superior officers.[3] Simply put, where a duty coincides with a gross failure to act in accordance with this duty, such omission on its own can make one complicit. This includes situations where senior officers deliberately endeavour to protect errant officials and to prevent, hinder or sabotage any efforts to hold such errant officials accountable for their wrongdoings.

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[3] *Weheragedara Ranjith Sumangala v. Bandara, Police Officer and Others,* SC (FR) Application No. 107/2011, SC Minutes of 14th December 2023; *Janath S. Vidanage v. Pujitha Jayasundara and Others (Easter Sunday Cases)* SC/FR Nos. 163/2019, SC Minutes of 12th January 2023.

However, in the aforementioned matters, viz. SC (F/R) Application Nos. 20/90, 22/90 and 31/90, the Appellant was found by this Court to be directly liable as a principal offender, for he had personally carried out many of the torturous acts.

The reliance placed on SC (F/R) Application Nos. 607/1999 and 608/1999[4] by the Appellant was to establish that a judgment of this Court in a fundamental rights application before it does not amount to a 'conviction by a court of law', properly so called. It is indeed accurate that this judgment is authoritative to the effect that a decision in a fundamental rights application cannot be equated to a conviction. While this is indeed a sound legal position, and taking cognisance of the same leads to no error in this matter, it should not be stretched to such extreme and illogical ends to effectively reduce a decision of the apex court of the land to a mere piece of paper.

Even though the assertion that a fundamental rights decision does not amount to a conviction is correct, this does not mean that disciplinary or like action cannot be based on such a judgment. No witnesses are ordinarily led before this Court in fundamental rights proceedings, as done in criminal matters, and it cannot be denied that vastly contrasting evidentiary rules, standards and procedures apply in such matters. While this may be so, this Court does not take allegations of fundamental rights infringements lightly. This Court consistently insists upon the requirement to meet a high evidentiary threshold before a fundamental rights

[4] *S.A.D.M.P. Gunasekera and Others v. A.K. Samarasekera and Others*, S.C. Applications No. 607/99 & 608/99, SC Minutes of 12th January 2000

infringement can be found—this is especially so when Article 11 of the Constitution is concerned.[5]

The Public Services Commission, in giving reasons for its decision, has indeed taken notice of the SC (F/R) Application Nos. 20/90, 22/90 and 31/90. After discussing the nature of the prosecution at the disciplinary inquiry, which the Commission referred to as a "sham", the Commission has also made the following observation:

> "*In those applications, the Supreme Court had found the accused Fernando and the other Police Officers guilty of the identical charges with which the accused were charged at formal inquiry. The Supreme Court had after pronouncing the judgment, directed the Registrar of the Court to forward to IGP the copies of these judgements for the IGP to deal with the accused appropriately. Without resorting to a new formal inquiry, the accused should have been appropriately punished on the findings of the Supreme Court.*
>
> *In the formal inquiry the prosecution appears to have stultified the judicial process of this country. On the findings of the Supreme Court the IGP should have recommended a suitable punishment instead of resorting to a formal inquiry."*

[5] See *Goonewardene v. Perera* [1983] 1 Sri L.R. 305, at p. 313*; Kapugeekiyana v. Hettiarachchi and Others* [1984] 2 Sri L.R. 153, at p. 165*; Hettiarachchige Gemunu Tissa v. W. Lionel Jayaratne, Sub Inspector of Police,* SC (FR) Application No: 417/2016, SC Minutes of 28th May 2024, at pp. 11-13; *W.B. Inoka Nadishani and Another v. K.D. Somapala and Others*, SC FR 155/2009, SC Minutes of 04th April 2025

I do not see anything objectionable in the said observation. It is, in fact, a very prudent observation. Police officers of whatever rank, including the Inspector-General of Police (IGP), like any public official, hold their office and authority in trust for the benefit of the people. When the Supreme Court has conclusively found any officer to have abused their power, especially in such an abhorrent and heinous manner as in this case, the public trust demands that such errant officers be duly held accountable. When the IGP, National Police Commission or any other official in a supervising capacity fails or refuses to heed this demand, they violate the doctrine of public trust. Moreover, when this Court has specifically directed that disciplinary action be taken, failure to do so amounts to contempt of court.

In the instant case, the IGP had made a decision to direct a disciplinary inquiry to be held. However, as the Public Service Commission has observed, the IGP could have taken disciplinary action solely based on the Supreme Court Judgments, even in the absence of a formal inquiry. While a finding of guilt by a judgment of this Court in a fundamental rights application cannot be equated to a criminal conviction, it is a conclusive determination that the relevant officer is guilty of violating a provision of the fundamental rights chapter. Violating the fundamental rights chapter or any provision of the Constitution is a grave misconduct on its own, and that *per se* warrants serious disciplinary action. When a decision of the Supreme Court, being the highest and final court of record in the Republic and the sole and exclusive authority relating to questions of fundamental

rights,[6] has found a person guilty of such misconduct, I do not see why another formal inquiry is necessary, unless any other related misconduct requires further investigation.

To read the judgment in SC (F/R) Application Nos. 607/1999 and 608/1999[7] as preventing disciplinary action solely based on a fundamental rights judgment of this Court would, in my view, amount to a gross misinterpretation of the ratio in the said judgment. As such, without prejudice to my brother's judgment and my own observations hereinabove, it is my considered view that, even if the Public Service Commission were to base its decision to demote the Appellant solely on the judgments of this Court, that would not amount to a fatal error on the part of the Commission.

The punishment imposed on the Appellant, by demoting him by a single rank, is but a slap on the wrist, considering the serious nature of the violations he has committed. In view of just how lenient this punishment is, the decision of the Public Services Commission can hardly be deemed unreasonable. As my brother has exhaustively discussed the legality of this decision, I see no need to say any more of the same.

Moreover, it is trite law that a court of law ought to consider the probable consequences of issuing a prerogative writ before granting the same.[8] As

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[6] Article 126(1) of the Constitution

[7] *S.A.D.M.P. Gunasekera and Others v. A.K. Samarasekera and Others*, S.C. Applications No. 607/99 & 608/99, SC Minutes of 12th January 2000

[8] *P.S. Bus Company Ltd. v. Members and Secretary of Ceylon Transport Board* 61 NLR 491; *Wanninayake Mudiyanselage Dhanapala v. Commissioner of Buddhist Affairs,* CA (Writ) Application No: 243/2017, CA Minutes of 07th November 2017, at p. 6-7; *Attanayake Mudiyanselage Wickramasinghe Dayasiri v. A.H.K. Jagath Chandrasiri,* CA/18/2016/Writ, CA Minutes of 16th

the Respondent contended, to this extent, public policy considerations are to be taken into account,[9] and it would most certainly be antithetical to the public interest as well as public policy if a court of law were to interfere with the process of holding officers accountable for violations of such enormity, as this case involves, by the issuance of a prerogative writ.

The refusal by the Court of Appeal to grant the relief sought by the Appellant is well founded and the instant Appeal must accordingly be dismissed.

The Attorney-General on behalf of the Respondents highlighted in the written submissions that, in the three fundamental rights decision where the Appellant was found guilty for violating Article 11 of the Constitution, this Court ordered the State to pay Rs. 112,000/- as costs and compensation to the Petitioners, causing the taxpayer to foot the bill for the Appellant's transgressions. Need I remind, the said amounts were ordered in early 1990s, which clearly indicates the gravity of the Appellant's violations.

Considering the aforementioned and how long the instant case itself had taken, I am of the view that imposing a significant amount as State costs is warranted.

July 2018, at p. 3; *Annalingam Annarasa and Others v. S.J. Kahawatta and Others* CA/Writ/21/2022, CA Minutes of 13th February 2023, at p. 9

[9] *Heather Mundy v. Central Environmental Authority,* SC Appeal 58/2003, SC Minutes of 20th January 2004

Appeal dismissed and the Appellant is ordered to pay one million rupees as State costs.

JUDGE OF THE SUPREME COURT