

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

*In the matter of an application in terms
of Article 126 read with Article 17 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.*

S C (F R) Application No. 81/ 2010

1. M S K Wickramanayake,
Balapatthawa,
Avisawella Road,
Galigamuwa,
Kegalle.

2. D C P Kumarasinghe,
Perakuma Mawatha,
Medalandawatta,
Kurunegala.

PETITIONERS

-Vs-

1. Mahinda Balasooriya,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

1(a). N K Illangakoon,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

1(b). Pujitha Jayasundera,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

2. Secretary,
Ministry of Defence Public Security,
Law and Order,

No 15/5,
Baladaksha Mawatha,
Colombo 03.

3. Vaas Gunawardena,
Senior Superintendent of Police,
Office of Senior Superintendent of
Police,
Kurunegala.

4. Ajith Wansanatha,
Headquarters Inspector,
Kurunegala Police Station,
Kurunegala.
Presently:
Assistant Superintendent of Police,
Office of the Assistant
Superintendent of Police,
Galgamuwa.

4. (a)(i) Prof. Siri Hettige - Chairman,
National Police Commission.
4. (a)(ii) P H Manatunga - member
4. (a)(iii) Mrs Savithri Wijesekara -
Member.
4. (a)(iv) Y L M Zawahir - Member.
4. (a)(v) Anton Jeyanandan - Member.
4. (a)(vi) Thilak Collure - Member.
4. (a)(vii) Frank de Silva - Member.
4. (a)(viii) N A Cooray - Secretary.

4(a)(i) to 4(a)(viii)

all of them respectively the
Chairman, members and the
Secretary of the National Police
Commission

Block No 3,

BMICH Premises,

Buddhaloka Mawatha,

Colombo 07.

5. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Prasanna Jayawardena PC J

Vijith K. Malalgoda PC J

P. Padman Surasena J

Counsel:

J C Weliamuna PC with Pulasthi Hewamanna and Thilini
Vidanagamage for the Petitioners.

Viveka Siriwardena DSG for the Attorney General.

Argued on : 14-03-2019

Decided on : 27-08-2019

P Padman Surasena J

The 1st and 2nd Petitioners at the time of the incident relevant to this case were serving in the Kurunegala Police Station respectively as the Headquarters Inspector (hereinafter sometimes referred to as the HQI) and the officer in charge of the administration branch of Kurunegala police station.

It is common ground between the parties

- i. that the 3rd Respondent was the Senior Superintendent of Police (hereinafter sometimes referred to as the SSP) in charge of Kurunegala Police division at the relevant time, and
- ii. that His Excellency the President of the Republic, by proclamation published in the gazette had declared that the presidential election was to be held on 26th January 2010.

The incident relevant to this application had occurred on the 23rd January 2010 which was just two days prior to the said scheduled date (i.e. 26th January 2010) for the presidential election.

It would be useful at the outset to encapsulate the facts salient to this case. It is as follows.

- i. On the 23rd January 2010 the 1st Petitioner being the HQI of Kurunegala police station had attended a meeting held at the office of the Deputy Inspector General (hereinafter sometimes referred to as the DIG) in charge of Kurunegala Police Division to discuss about the security arrangements etc. in the area in view of the impending presidential election scheduled for 26th January 2010. The DIG – Kurunegala (Mahesh Samaradivakara), DIG - in charge of Elections (Anura Senanayake), the SSP - Kurunegala (3rd Respondent) had been present at the said meeting.
- ii. The DIG in charge of Kurunegala Police Division had received around 3.30 PM on 23rd January 2010, a telephone call from a senior lawyer namely Mr. Felician Perera Attorney-at-law informing him that a lorry belonging to Sri Lanka Navy bearing registration No. කා. භ. 6284 Was heading towards Kurunegala from Polgahawela carrying counterfeit ballot papers.
- iii. Few minutes later, the 1st Petitioner who was the HQI of Kurunegala police station also has received the same information through a telephone call.

- iv. Acting on the instructions of the DIG in charge of Kurunegala Police Division, the 1st Petitioner had taken steps to deploy a team of police officers led by the 2nd Petitioner (who was the Officer in charge of administration of Kurunegala police station) to set up a road block near the office of the SSP in Kurunegala. The said team of police officers had commenced checking on the passing by vehicles.
- v. As the meeting had ended around 4.15 PM, the 1st Petitioner had left the DIG's office and had taken steps to give necessary instructions to the 2nd Petitioner regarding the apprehension of persons in the suspected vehicle.
- vi. Consequently, around 5.10 PM, the team of police officers led by the 2nd Petitioner has taken the above numbered lorry (along with three Navy personnel who had been travelling in the lorry) into custody at a location close to a place called Wehara Junction. Shortly thereafter, the 1st Petitioner also had arrived at that location.
- vii. Thereafter, acting on the instructions of the 3rd Respondent, the apprehended suspects and the lorry had been brought to Kurunegala Police Station. At that time, Superintendent of Police Nagahamulla and the 3rd Respondent also had come to the Police Station.

- viii. Soon thereafter Mr. Jayawickrama Perera, a member of the opposition of then parliament along with a group of his supporters including Mr. Felician Perera Attorney-at-law (who provided the information) had arrived at the Police Station.
- ix. An intense argument had then ensued between the 3rd respondent and the group of people led by the Member of Parliament who had insisted that the apprehended lorry should be inspected. Pursuant to this argument, the 3rd Respondent had reluctantly permitted the inspection of the lorry.
- x. Although counterfeit ballot papers (referred to in the information received) had not been found, the police had found the following items stacked inside the lorry;
- i) A stock of liquor stored in crates and boxes,
 - ii) 24 bundles of handbills titled “හඳුනාගත්තොත් ඔබ මා”
(produced marked **P 6**) and
“කවිද මේ ...?
කවිද මේ ...?
කවිද මේ ...?” (Produced marked **P 7**).

These items had been covered with several empty metal barrels. A collection of photographs of these items including the lorry has been produced marked **P 1**. A compact disk (CD) containing the images of the said items in a video has also been produced marked **P 2**. The contents of the handbills found in the lorry had been printed in both Sinhala and Tamil languages. The said handbills had not disclosed any information leading to the identification of their author or publisher.

- xi. At about 6 PM, Mr. Jayarathne Herath a Minister serving in the then government along with a group of his supporters had rushed to the scene. An altercation had then ensued between the said Minister and the aforesaid Member of Parliament. At that stage, the DIG-Kurunegala and DIG-Elections also had arrived at that place.
- xii. The politicians who had gathered there had left the police station upon an undertaking given by the DIG-Elections to deal with the defamatory publications according to law. The politicians had left the scene leaving behind a person who was found busy making telephone calls to various persons.

- xiii. Around 8 PM, the 3rd Respondent had directed the 1st Petitioner to record statements from three Navy personnel, take into custody the previously mentioned defamatory publications and then release the lorry. Copies of the statements given by the Navy personnel have been produced marked **P 3**. The DIG-Elections (Anura Senanayake), had also made an entry regarding the said incident in the Officers Visiting Book maintained at the Kurunegala Police station, a copy of which has been produced marked **P 4**.
- xiv. After the superior officers left the scene the 3rd respondent having had several telephone conversations with several people, to the surprise of the petitioners, had directed the 1st Petitioner to release the stock of liquor and defamatory publications along with the lorry.
- xv. The Petitioners had reminded the 3rd Respondent that they would be subjected to disciplinary action if they release the defamatory publications after which the 3rd Respondent himself had taken the key of the lorry and thrown it towards the Navy personnel.
- xvi. The said Navy personnel drove away in the lorry with the said defamatory publications after they were re-loaded on to the lorry under the personal supervision of the 3rd Respondent.

- xvii. Around 9 PM, the person by the name of Prabath who was left behind by the above mentioned Minister, had abused the Petitioners in filth and threatened them that they would be dealt with after the conclusion of the presidential election.
- xviii. The entries made in the Officers' Visiting Book maintained at the Kurunegala police station by Superintendent of Police Nagahamulla and the 3rd Respondent have been produced marked **P 9(a)** and **P 9(b)** respectively.
- xix. About 1 week after the conclusion of the presidential election, by the fax dated 6th February 2010, 110 police officers including the 1st Petitioner had been transferred with immediate effect. (Fax dated 6th February 2010 has been produced marked **P 10**). According to **P 10**, the 1st Petitioner has been transferred to a supernumerary position at the Sri Lanka Police College in Kalutara based on exigencies of the service. The Ministry of Defence and Public Security and Law and Order had approved the said transfer.
- xx. Upon an order of the Inspector General of Police bearing No. D/MD /ADM/73/2010 dated 6th February 2010; the 2nd Petitioner has been

transferred to Trincomalee. This communication has been produced marked **P 11**.

The Petitioners complain that the above transfers effected immediately after the conclusion of the presidential election 2010 are arbitrary, mala fide and executed for collateral purposes. It is on this basis that they complain that the fundamental rights guaranteed to them under Articles 12(1) and or 12 (2) of the Constitution have been infringed.

Although, the Petitioners in the prayers of their petition have prayed for a declaration by this Court that their fundamental rights guaranteed under Articles 12(1) and 12(2) of the Constitution have been violated, this Court when this application was supported on 01-03-2010, having heard the submissions of the learned counsel for the Petitioners and the submissions of the learned State Counsel who appeared for the Respondents, had decided to grant leave to proceed only under Article 12(1) of the Constitution. Thus, the task of this Court at this moment must be restricted only to ascertain whether anyone or more of the Respondents have infringed the fundamental rights of the petitioners guaranteed under Article 12(1) of the Constitution.

It would be opportune at this juncture to consider the position taken up by the respondents. Both Mr. Mahinda Balasuriya then Inspector General of Police who is the 1st Respondent and Mr. Vaas Gunawardena then SSP - Kurunegala (3rd Respondent) have filed affidavits. They in the said affidavits have admitted the following facts;

- i. There was a meeting held on the 23rd January 2010 with the presence of the 1st Petitioner and the 3rd Respondent along with other senior officers to discuss about the security arrangements etc. in the area in view of the impending presidential election scheduled.
- ii. While the said meeting was going on around 3.30 PM, the Deputy Inspector General in charge of Northwestern Province - East had received a telephone call from a person identified as Felician Perera Attorney-at-law informing him that a vehicle bearing registration No. කා. භ. 6284 was being used to transport counterfeit ballot papers.
- iii. Thereafter, the Deputy Inspector General in charge of Northwestern Province - East had instructed the 1st Petitioner to take the said vehicle into custody.

- iv. The 2nd Petitioner had consequently taken the above numbered lorry into custody and had brought the said lorry to Kurunegala Police Station.
- v. At the time, the said lorry was brought to Kurunegala Police Station, a crowd had gathered there and among them were Mr. Gamini Jayawickrema Perera a Member of Parliament and Mr. Jayaratne Herath a Minister in the then government along with their supporters.
- vi. The unrest which prevailed at that time had been solved by DIG (Northwestern Province - East) and DIG (crimes). The 3rd Respondent had also been present there at that time. The respondents have produced the relevant part of the notes made by the 3rd Respondent marked **1R1**.
- vii. Upon the inspection of the said lorry, they had not found any counterfeit ballot papers. However, they had found 24 bundles of handbills criticizing the presidential election candidate Mr. Sarath Fonseka and some goods meant for the welfare of Navy officers in the lorry.

- viii. At this instance the DIG (Northwestern Province - East) had instructed the 3rd Respondent to release the lorry and the Navy personnel after retaining few handbills as samples and after recording statements of the said Navy personnel. Relevant notes made by the DIG has been produced marked **1R2**.
- ix. The 3rd Respondent had accordingly instructed the 1st and 2nd Petitioners to follow the instructions of the DIG.
- x. The 1st Petitioner had refused to follow the said instructions, and had entered into an argument with a person amongst the gathering, and had left the scene without obeying the instructions given by the 3rd Respondent. Relevant notes made by the 3rd Respondent has been produced marked **1R3**.
- xi. The 1st and 2nd Petitioners were subsequently issued with charge sheets, which have been produced marked **1R4** and **1R5**.

The position taken up by then Inspector General of Police Mr. Mahinda Balasuriya regarding the transfers of the Petitioners are set out in paragraph 8(x) of his affidavit. It is as follows.

“considering the fact that the 1st Petitioner as the HQI and the 2nd Petitioner being the OIC of the Kurunegala Police Station had a

misunderstanding with the 3rd Respondent, over insubordination moreover explained as above, the 1st and 2nd Petitioners were transferred out of the Division of the 3rd Respondent, on exigency of services, namely for the smooth functioning of the Police service within the SSP's Division."

It was the position of the then IGP that it was for administrative convenience that the names of the Petitioners were included in a common list of officers to be transferred.

It would be appropriate at this juncture to briefly outline the counter arguments advanced by the learned Deputy Solicitor General (who will hereinafter sometimes be referred to as DSG) who appeared for the Respondents. It was the submission of the learned DSG that the Respondents have effected the transfers of the Petitioners based on exigencies of service. Learned DSG further submitted that the conduct of the Petitioners showing disobedience and insubordination in refusing to carry out orders given by the superior officers was the primary fact, which precipitated the Respondents to have the Petitioners transferred out of Kurunegala Police Division on the given basis. Moreover, it was the submission of the learned DSG that the transfer of the Petitioners out of

Kurunegala Police Division became necessary to maintain the proper working atmosphere and the chain of command in the police service.

At the very outset of the process of evaluation of the arguments placed by the parties before this Court, it would be relevant to bear in mind that the Respondents do not deny that the Petitioners had taken into custody, copies of some publications defamatory to one of the candidates for the presidential election scheduled to be held on 26th January 2010.

Admittedly, this detection had been made on the 23rd January 2010 which was just two days prior to the said scheduled date (i.e. 26th January 2010) of the said election.

In view of the submission made by the learned DSG that the primary fact, which precipitated the Respondents to transfer the Petitioners was the disobedience and insubordination of the Petitioners in refusing to carry out orders given by the superior officers to release the items seized, it would be necessary to first consider whether the Petitioners were obliged in law to carry out the said instructions. Since what is in issue is an election related incident, I would commence this discussion by referring to some of the relevant provisions of the Presidential Elections Act.

According to section 72 of the Presidential Elections Act No. 15 of 1981, *'every person who, not being a candidate, prints, publishes, distributes or posts up, or causes to be printed, published, distributed or posted up, any advertisement, handbill, placard or poster which refers to an election and which does not bear upon its face the names and addresses of its printer and publisher, shall be guilty of an offence.'*

It would be relevant to recall at this stage that the 24 bundles of printed handbills produced marked **P 6** and **P 7** referred to a candidate of the presidential election, which was to be held in two days' time, and the said handbills did not bear upon its face, the names and addresses of their printer and publisher. Thus, whoever had caused the said handbills printed, published or distributed is guilty of an offence under section 72 of the Act.

Further, section 68 of the said Act has prohibited doing certain acts on a polling day. The part relevant would be section 68. (1) which is as follows.

"no person shall, on any date on which a poll is taken at a polling station, do any of the following acts within the precincts, or a distance of a half a kilometer of the entrance, of that polling station:

(a) Canvassing for votes;

(b) soliciting the vote of any elector;

(c) persuading any elector not to vote for any particular candidate;

(d) persuading any elector not to vote at the election;

(e) distributing or exhibiting any handbill placard, poster, photograph or drawing or notice relating to the election (other than any official handbill, placard, poster, photograph or drawing or notice) or any symbol allotted under section 20 to any candidate."

I must also take into account the general provisions in section 71 of the Act relating to some offences including an offence under section 68. According to that section [S. 71. (1)] every person who attempts to commit an offence specified in section 68 shall also be liable to the punishment prescribed for that offence.

It is also relevant to note that section 71 (2) of the Act has made every offence under section 68 or section 69 a cognizable offence within the meaning of the Code of Criminal Procedure Act, No. 15 of 1979.

Section 32 of the Code of Criminal Procedure Act No. 15 of 1979 states that it is lawful for any peace officer to arrest without an order from a Magistrate and without a warrant any person who has been concerned in any cognizable

offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.

It must also be noted that according to section 56 of the Police Ordinance No. 16 of 1865 as amended, every police officer is under a duty to use his best endeavors and ability to prevent all crimes and offences, and to detect, apprehend and bring all offenders to justice.

Taking into consideration the above factual and legal material, I am of the view that in the given instance there was sufficient material and justifiable grounds for the Petitioners to arrest the three Navy personnel who had been concerned in a cognizable offence. Thus, the Petitioners had performed their duty well within law. Their actions are nothing but what the law of the country had expected of them.

However, the 3rd Respondent had admittedly directed the Petitioners to release the said offenders. The 3rd Respondent has not assigned any acceptable reason for this blatant violation of the prevailing provisions of the law. In the light of the above material it is not difficult for this Court to hold that the orders, the 3rd Respondent has given to the Petitioners, are clearly illegal. The 3rd Respondent had not heeded even the reluctance or

the protest of the Petitioners to carry out his illegal orders. The 3rd Respondent upon the said reluctance of the Petitioners to carry out his illegal orders had forcibly taken the key of the lorry from the Petitioners and given it to the offenders enabling the offenders to drive away with impunity. Not being contented with that, the 3rd Respondent had thereafter taken steps to charge the Petitioners for insubordination. Alas! The only alleged offence committed by the Petitioners is enforcement of the provisions in the prevailing law of the land as law enforcement officers and refusing to carry out illegal orders of a superior officer.

Moreover, it was submitted to this Court by the learned President's Counsel for the Petitioners that the inquiring officer, subsequent to the disciplinary inquiry held against the Petitioners, has exonerated the Petitioners from all the charges framed against them. This is despite the admission by both parties of the issuance of the relevant order by the 3rd Respondent and the refusal to carry it out by the Petitioners.

It would be opportune at this juncture to refer to an interesting judicial precedent on a similar question.

The question whether a soldier is bound to obey illegal order given by his superior came to the fore in the case of A. Wijesuriya and another Vs The State.¹

The first appellant in that case Lieutenant Wijesuriya, a member of the volunteer force of the Army was the commander of the platoon sent to Kataragama on 16-04-1971, few days after that area was overrun and held by the insurgents for few days. The second Appellant was the second in command of the said platoon.

Both those appellants were indicted on two separate counts for having committed the offences of attempted murder of Premawathie Manamperi by shooting her with Sterling sub-machine guns and causing serious injuries to her on 17-04-1971. Both appellants were unanimously convicted by the jury. The defense raised by the appellants at the trial was a defence under section 69 of the Penal Code on the premise that they acted under the orders of their superior officers. The first appellant being the commander of the said platoon took up the position that he had received orders to "bump off" the deceased, from his superior officer Colonel

¹ 77 NLR 25.

Nugawela who was the Co-coordinating Officer for Hambantota district at the relevant time.

The 2nd appellant in that case sought to draw a difference with regard to his culpability on the basis that he only (unlike the 1st appellant who received the order to shoot the deceased on the previous day) received the order to shoot the deceased at the very time of the shooting took place, from the first Appellant who was his immediate superior (commander of his platoon) and was therefore compelled to act on that spur of the moment.

The Court of Criminal Appeal² held that under section 100 of the Army Act (Chapter 357) every person subject to Military Law³ is only bound to obey the lawful commands given personally by his superior officers.

On this basis the Court of Criminal Appeal held that the order to shoot the deceased who was indeed arrested by Police, and was kept in custody, being manifestly and obviously an unlawful command, the

² Chief Justice of the island of Ceylon and Puisne Justices of the Supreme Court were the judges of that Court (vide section 2 of the Court of Criminal Appeal Ordinance).

³ Vide section 34 of the Army Act.

appellants were not entitled to succeed with their defense even under the Military law.

The Court of Criminal Appeal on the above basis affirmed the conviction of both the appellants in that case.

Moreover, this Court, in the case of Deshapriya Vs Rukmani, Divisional Secretary, Dodangoda and others,⁴ also has echoed similar views. The 3rd Respondent in that case who was the Deputy Speaker and a Member of then Parliament, had summoned the Petitioner of that case, a Samurdhi Niyamaka, along with all the other Samurdhi Niyamakas of Dodangoda Divisional Secretary's Division to attend a meeting presided over by him. In the said meeting the said 3rd Respondent (the Deputy Speaker and Member of Parliament) had instructed the Petitioner and the other Samurdhi Niyamakas to canvass amongst the people whom they work with, for support for the People's Alliance candidates for the then impending election. The said Petitioner had declined to follow the said instructions given by the said 3rd Respondent. The 3rd Respondent (Deputy Speaker) had then complained to then Minister of Samurdhi, Youth Affairs and Sports that the said Petitioner had espoused his political opinion in a public

⁴ 1999 (2) Sri L R 412.

meeting presided over by him. Upon that complaint, then Minister of Samurdhi, Youth Affairs and Sports had instructed the Commissioner General of Samurdhi (2nd Respondent in that case) to suspend the services of the Petitioner in that case with immediate effect. The Commissioner General of Samurdhi then suspended the services of the said Petitioner with immediate effect. The sole reason for the said suspension was the fact that the said Petitioner had spoken against the instructions given by the said Deputy Speaker.

This Court having considered the material adduced in that case has stated in its judgment as follows.

“ As far as the 2nd and 3rd Respondents were concerned, it was not just a case of a suspension for which there was no reason, but one which they knew full well was for a wholly bad reason. That reason was, unashamedly, stated in the letter “A”, and it was obvious to them that a suspension for that reason was both unlawful and a gross abuse of power. The 2nd Respondent may have acted - as he says in his affidavit - only because he was ordered to do so by the Minister of Samurdhi, but he should have known that that was an unlawful order which it was his duty to refuse to obey”. ”

In the instant case, the 3rd Respondent has admitted that he had given directions to the Petitioners to release the handbills, lorry and Navy personnel on the instructions of his (3rd Respondent's) superiors.

It is the position of the 3rd Respondent that his superiors having consulted the Hon. Attorney General had decided that no offence had been constituted at the given instance. This Court notes that Hon. Attorney General has been named as the 5th Respondent in the instant case and that no such position has ever been taken up by him at any stage of this case. The learned DSG who appeared for the Hon. Attorney General at no stage informed this Court that Hon. Attorney General was indeed consulted in this instance or that he took such view.

What the 3rd Respondent in his notes (**P 9(b)**) has stated is that DIG Anura Senanyaka had telephoned him and informed him that Hon. Attorney General, upon a query (whether the facts in this instance had constituted an offence) made by the 1st Respondent (IGP), had informed him that no offence had been constituted. According to the 3rd Respondent, it was on that basis that the 1st Respondent had instructed him to release the items and persons in custody.

However, to the surprise of this Court, the 1st Respondent (IGP) in the affidavit filed by him in this case has not adverted to any such position either directly or indirectly. This means that the 3rd Respondent's position, which is only reflected in his notes as mere hearsay material, has not even been supported by the 1st Respondent (IGP) who is said to have given the questionable directions.

In any case, the Hon. Attorney General who was before this Court did not support such factual or legal position. Moreover, in any case the Attorney General in all probability could not have had in his hand any material by that time to study and assess the evidence available or the circumstances leading to this detection in its correct perspective before forming any such opinion. Thus, this Court is of the view that the Respondents have not established by any degree of proof, the fact that the Attorney General was consulted or that he provided the purported advice in this regard. Further, while it is not the position of the 1st Respondent (IGP) that he gave such instructions, there is also no other support forthcoming from any quarter, for the 3rd Respondent's position. This has left the 3rd Respondent to stand or fall with his own version.

In these circumstances, this Court refuses to accept the position that any of the senior Police officers had consulted the Hon. Attorney General before giving questionable directions or that Hon. Attorney General in fact gave such opinion.

Furthermore, if the 3rd Respondent had indeed received such instructions from his superiors, this Court notes with regret that the 3rd Respondent had chosen (unlike the Petitioners) to unhesitatingly and promptly carry out such illegal instructions. Such a situation is pathetic especially in the face of the ability to understand the illegal nature of these instructions by the Petitioners who are the subordinates of the 3rd Respondent.

Further, this Court is of the view that the case at hand and the given set of facts and law applicable to this instance is not complex to the extent that it would have required the prompt attention and advice of Hon. Attorney General.

Moreover, as has been held in the case of Deshapriya Vs Rukmani, Divisional Secretary, Dodangoda and others,⁵ (Samurdhi Niyamaka's case) use of the resources of the state including human resources for the benefit

⁵ Supra.

of one political party or group is considered unequal treatment because such an unauthorized use would confer an unlawful advantage to one political party or group when a similar facility is denied to its rivals. In the instant case, the state vehicle had been used to transport handbills of the kind prohibited by election laws of the country.

It is to be noted that during the time relevant to the incident pertaining to this case the 17th Amendment to the Constitution was in operation. Article 104 B (4) therein had empowered the Election Commission to prohibit during the period of an election, the use of any movable or immovable property belonging to the State or any public corporation -

- i. For the purpose of promoting or preventing the election of any candidate or any political party or independent group contesting at such election;
- ii. by any candidate or any political party or any independent group contesting at such election.

This could have been done by a direction in writing by the Chairman of the Commission or of the Commissioner General of Elections on the instruction of the Commission. Once such a direction is made, every person or officer

in whose custody or under whose control such property is for the time being, was duty bound⁶ to comply with and give effect to such direction.

The Petitioners have drawn the attention of this Court to such notification (marked **P 14**,) issued by the Election Commissioner. It is clear even as per the said directive the respondents could not have lawfully decided to release the lorry, which is a state property as it had been used for purposes, referred to in that directive (**P 14**,).

Considering the above material, it is the view of this Court that this was not an instance where the respondents should have released at that time itself, the suspects or the handbills in their custody. This is particularly so when the presidential election was just two days away. Releasing the suspects along with those handbills at that time could only have paved the way for their distribution as may have been planned by those who were behind it in the eve of the Election Day.

Be that as it may, even if one were to assume that the 3rd Respondent had received such instructions, it would suffice for this Court to state here that the 3rd Respondent has not had any semblance of the forthrightness his subordinate officers had displayed at this instance when they refused to

⁶ Article 104 B (4) (b).

carry out such manifestly illegal instructions. If the 3rd Respondent had, in fact received such illegal instructions from his superiors, he was entitled and should have refused to carry out such illegal instructions in the same way his subordinate officers had rightly done.

Since the position taken up by the respondents is that the Petitioners were transferred on the exigencies of the service, reproducing a passage from the judgment of this Court in the case of Tennakoon, Assistant Superintendent of Police Vs T. P. F. De Silva, Inspector General of Police and Others⁷ would be relevant. That is also a case, which dealt with the term 'exigency of service'. The said passage is as follows.

".....Thus the issue for decision becomes narrowed down to this: is this Court bound, or even entitled, to accept the 1st Respondent's subjective assertion as to the lack of a satisfactory working relationship - especially where that is only the unverified and unsupported conclusion of his subordinate? In my opinion, however wide the 1st Respondent's discretion, he cannot simply say that he ordered a transfer "because of the exigencies of service", or "for disciplinary reasons", or "in the interests of the service", or "because of the lack of a harmonious working relationship", and expect

⁷ 1997 (1) Sri L R 16.

this Court blindly to accept that assertion. While it is true that Article 126 does not authorize this Court to usurp the 1st Respondent's discretion in regard to transfers, yet it does not allow this Court to accept a mere assertion of that sort - for that would be to abdicate its duty to examine whether the 1st Respondent's conduct fell short of the norms mandated by the fundamental rights, and thus indirectly to invent a new official immunity Senanayake v. Mahindasoma⁸. Let me add that, of course, different considerations would apply where national security is involved. ...”

Fernando J in the above case, went on to state thus, ‘If a police officer may, with impunity, be transferred on that ground (without any need to consider the reasons for it) what signals would that give, firstly, to the transferred officer as to how he should perform his duties in his new station, and secondly, to his replacement? To act according to law in the public interest or to avoid an unsatisfactory working relationship at all costs? As, for instance, by giving in to an unlawful request either to stifle an investigation into or a prosecution for an offence, or to pursue a frivolous and vexatious charge? The power to transfer exists in order to ensure an efficient service to the public, but without imposing an unfair

⁸ SC 41/96, SC Minutes of 14-10-1996.

burden on individual public officers. Transfer on the ground of unsatisfactory working relationship will not only be unfair to the individual but will promote inefficiency and injustice.....'

Article 12(1) of the Constitution reads as follows;

"All persons are equal before the law and are entitled to the equal protection of the law".

As has been set out above, the Petitioners were entitled in law to refuse to carry out the illegal instructions they had received to release the handbills, lorry and the Navy Personnel they had taken into custody. It necessarily follows that Respondents are not entitled in law to allege insubordination and subsequently to charge the Petitioners for insubordination on that account. According to the Respondents, it is this so-called insubordination, which had precipitated the Respondents to transfer the Petitioners.

In these circumstances, this Court is of the view that there had been no exigency of the kind alleged by the Respondents. Therefore, the submission of the Respondents that the Petitioners had to be transferred on the exigency of the service must fail.

Further, the above facts disclose clearly that the transfers effected soon after the presidential election on the guise of exigencies of service have been effected arbitrarily, illegally and for collateral purposes. It is therefore the view of this Court that the transfers of the Petitioners, subsequent preferring of charge sheets against them and conducting disciplinary proceedings against the Petitioners are all ab initio void and hence are hereby declared null and void.

Considering all the above material in its totality, this Court is of the view that the 1st Respondent and the 3rd Respondent in the given situation had acted arbitrarily, outside the law and had violated, the fundamental rights guaranteed to the Petitioners under Article 12(1) of the Constitution.

In these circumstances, and for the foregoing reasons, this Court decides that the Petitioners are entitled to a declaration by this Court that their fundamental rights guaranteed under Article 12(1) of the Constitution have been infringed.

Hence, this Court decides to

- I. declare that the 1st and 3rd Respondents have violated the fundamental rights of the Petitioners guaranteed under Article 12(1) of the Constitution;
- II. declare that the aforesaid purported transfers of the Petitioners reflected in **P 10** and **P 11** are illegal and hence null and void;

This Court thinks this is a fit occasion to commend the forthrightness displayed by the Petitioners even in the face of the aforementioned adversary circumstances. There is no doubt that they had undergone a difficult time for mere upholding the rule of law in the country. Therefore, this Court decides to award a compensation in a sum of Rs. 1,000,000/= to each of the Petitioners payable by the 1st Respondent and the 3rd Respondent in equal shares.

Further, this Court directs that the Petitioners must be deemed for all purposes to have continued to be in service in the ranks they were respectively holding at the time of this incident without a break in service. They will be entitled to all the arrears of their salaries and allowances as well as benefits, which their colleagues would have received during that period in terms of salary, increments, promotions etc.

This Court also directs the Inspector General of Police and the Police Commission to take necessary suitable steps to redress any disadvantage, which may have accrued to the Petitioners regarding their promotions due to their being unlawfully subjected to disciplinary proceedings relating to this incident.

Petitioners are entitled to the costs of this application.

Application is allowed with costs.

JUDGE OF THE SUPREME COURT

Prasanna Jayawardena PC J

I agree,

JUDGE OF THE SUPREME COURT

Vijith. K. Malalgoda PC J

I agree,

JUDGE OF THE SUPREME COURT