NANDADASA

v.

M.S. JAYASINGHE, SECRETARY, MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS AND OTHERS

SUPREME COURT
FERNANDO, J.
WEERASEKERA, J. AND
ISMAIL, J.
SC (FR) APPLICATION NO. 674/97
24TH OCTOBER, 2000

Fundamental rights - Prosecution of a public officer for bribery - Disciplinary action upon acquittal - Order by the disciplinary authority - Natural justice - Chapter XLVIII of the Establishments Code - Decision of the Public Service Commission in appeal - Articles 58(2) and 12(1) of the Constitution.

The petitioner was a public officer coming within the disciplinary control of the 1st respondent (the Secretary, Ministry of Justice) The petitioner was prosecuted in the Magistrate's Court on two charges, (1) for soliciting and (2) for accepting a bribe on 22. 07. 1991 for performing an official act namely, serving an injunction in his capacity of a process server attached to the District Court of Matugama. Pending the prosecution the 1st respondent interdicted the petitioner on 02. 11. 1993, without pay. On 25. 08. 1994 the Magistrate found the petitioner guilty on the first charge and acquitted him in the second. On 15. 09. 1995 the High Court acquitted him on the first charge well.

After the conclusion of the criminal case, the 1st respondent caused a disciplinary inquiry to be held against the petitioner under Chapter XLVIII of the Establishments Code on the same charges of bribery and on two other charges namely, acting without integrity expected of a public officer and bringing the public service into disrepute.

The 3rd respondent (the inquiring officer) exonerated the petitioner on all the charges, but on 27. 05. 1997 the 1st respondent found him guilty of all the charges on the basis that the charges had been established before the Magistrate, the High Court and the disciplinary inquiry and subjected him to two "punishments" (1) non-payment of salary withheld during interdiction (ii) a warning. Sections 5.5 and 14.21 of Chapter XLVIII of the Establishments Code require the Tribunal to submit a

report containing findings and reasons. Those reasons and findings were not disclosed to the petitioner. Nor did the 1st respondent disclose to the petitioner his own findings and reasons for reversing the inquiring officer's findings.

Initially, the petitioner filed his application challenging the 3rd respondent's findings and for salary withheld during interdiction in the belief that the 3rd respondent had found him guilty of the charges. After leave to proceed was granted it was agreed that the petitioner may appeal to the Public Service Commission. Nearly one year later the 15th respondent (the Secretary to the Commission) by letter dated 08. 09. 1999 informed the petitioner that the Commission had confirmed the 1st respondent's decision to withhold his salary for the period of interdiction and substituted a reduction of two increments of salary in lieu of the warning. The Commission relied on the statements of Bribery Department officers which had not been led at the disciplinary inquiry. It did not furnish to the petitioner or to the court its own finding, reasons or order. Whereupon the petitioner added the members of the Commission.

Held :

1. The 1st respondent violated the petitioner's fundamental right under Article 12(1), read with Article 58(2) of the Constitution.

Per Fernando, J.

> ". . . Article 58(2) of the Constitution . . . allows every public officer a right of appeal to the Public Service Commission against any disciplinary order made under delegated authority. That is one of the "protections" which the law affords to a public officer, which must not be arbitrarily denied or impaired, by law, regulations or executive action".

Per Fernando, J.

> ". . . not only was there a grave violation of the principles of natural justice, but the petitioner was kept in the dark as to the case against him and the irregularities which had occurred, and thereby the exercise of his right of appeal to the Commission was seriously impaired"

2. The Commission too violated the petitioner's fundamental right under Article 12(1), by denying him due exercise of his right of appeal under Article 58(2) in conformity with the requirements of natural justice.

APPLICATION for relief for infringement of fundamental rights.

Ms. Priyanthi Guneratne for petitioner.

U. Egalahewa, State Counsel, for respondents.

Cur. adv. vult.

November 21, 2000.

FERNANDO, J.

The Petitioner is a public officer coming within the disciplinary control of the Secretary, Ministry of Justice. He claims that the adverse orders made against him, after a disciplinary inquiry held by the 3rd Respondent (Inquiring Officer, Ministry of Justice), were in violation of his fundamental right under Article 12(1).

The Petitioner was transferred to the District Court of Matugama as a process server with effect from 01. 12. 1989. In an action filed by one H.J.A. Siripala, that Court issued an injunction restraining one of the defendants from proceeding with the construction of a house. The Petitioner was instructed, in the course of his duties, to serve a notice of injunction on that defendant, which he did on 22. 07. 91. In early October he gave evidence in that case about the service of that notice as well as the state of construction of the house at that time.

According to the Petitioner, shortly thereafter Siripala accosted him at the Matugama bus stand, accused him of having given false evidence, and threatened to lodge a complaint that he had taken a bribe of Rs. 200/- in order to carry out his official duties.

At no stage did Siripala make a complaint to the Court, the Police or the Bribery Commissioner. It was only three months later, by a letter dated 16. 01. 92, that he complained to the Presidential Mobile Service that the Petitioner had taken a bribe of Rs. 200/-. Having made inquiries, the Bribery Commissioner instituted proceedings against the Petitioner in

the Magistrate's Court of Colombo on two charges: of accepting a bribe on 22. 07. 91 for performing an official act, and of accepting a sum of Rs. 200/- from Siripala, while being a public servant - offences punishable under sections 19B and 19C, respectively, of the Bribery Act.

Thereupon, by letter dated 08. 11. 93, the then Secretary to the Ministry of Justice informed the Petitioner that he was interdicted without pay with immediate effect, in terms of section 18:5 of Chapter XLVIII of the Establishments Code ("the Code"). Despite the subsequent lapse of well over three months, he did not exercise the discretion (which he had in terms of section 21:5(iii) of the Code) to order the payment of at least a part of the Petitioner's salary.

On 25. 08. 94, the Magistrate's Court found the Petitioner guilty of the first charge, and acquitted him of the second. On 15. 09. 95 the High Court, on appeal, acquitted him of the first charge as well. The prosecution made no attempt to have that order set aside on appeal or in revision.

On 10. 10. 95 the Petitioner requested reinstatement. The then Secretary replied on 24. 11. 95 that he was reinstated subject to a disciplinary inquiry, and that a decision as to the payment of salary withheld during interdiction would be taken after that inquiry. It is not disputed that the Code permits a disciplinary inquiry even after an acquittal by the Courts.

A charge sheet dated 19. 03. 96 was issued. It contained four charges, alleged to fall under Schedule A to Chapter XLVIII of the Code: that he had solicited a bribe of Rs. 250/- from Siripala; taken a bribe of Rs. 200/- from Siripala; acted without the integrity expected of a public officer; and brought the public service into disrepute.

Although I do not intend to review the findings of the two Courts and of the disciplinary inquiry, it is necessary to state the nature of the case that was presented against the

Petitioner, because that was the context in which the orders now impugned were made. In the Magistrate's Court, Siripala's allegation of bribery was denied by the Petitioner, on whose behalf it was stressed that the complaint was extremely belated, and that Siripala was actuated by malice because the evidence which the Petitioner gave in October 1991 was unfavourable to him. Siripala's allegation was supported by the evidence of one Amerasinghe, the proprietor of a hotel, who said that Siripala borrowed Rs. 200/- from him at that hotel, and gave it to the Petitioner in his presence; however, he did not know for what reason it was given. The Petitioner claimed that Amerasinghe had a grievance against him. Police Constable Udayakantha, of the Bribery Commissioner's Department, testified that on 27. 04. 92, after recording Siripala's statement, it was agreed that Siripala would engage in conversation with the Petitioner, and make reference to the bribe of Rs. 200/- in Udayakantha's hearing; and that such a conversation did take place that same day. The Petitioner relied on certain contradictions between Udayakantha and Siripala; and in addition claimed that he did not hear Siripala make any reference to a bribe - and a doctor gave evidence that he had a hearing disability.

Thus in the criminal proceedings, if Amerasinghe and Udayakantha were believed, there was corroboration of Siripala's evidence from two different sources. Nevertheless, the High Court acquitted the Petitioner - and whether that decision was right or wrong was not within the purview of a disciplinary inquiry held under the Code.

Among the witnesses listed in the charge sheet dated 19. 03. 96 were Amerasinghe and Udayakantha. The documents listed did not include the proceedings and judgments of the Magistrate's Court and the High Court.

The disciplinary inquiry was held by the 3rd Respondent. It commenced on 30. 11. 96. Neither Amerasinghe nor Udayakantha gave evidence. The proceedings and judgements

of the Magistrate's Court and the High Court were not produced in the course of that inquiry.

By letter dated 27. 05. 97 the 1st Respondent informed the Petitioner that upon the facts disclosed **at the disciplinary inquiry** held pursuant to the charge sheet dated 19. 03. 96, he found the Petitioner guilty of all the charges, and imposed two "punishments": the non-payment of salary withheld during the period of interdiction, and a warning. The 1st Respondent did not specify the facts disclosed at the disciplinary inquiry or state what the 3rd Respondent's findings were, nor did he furnish a copy of his order or even state the reasons for his findings.

Acting in the belief (to which the 1st Respondent's letter contributed) that it was the 3rd Respondent who had found him guilty of the charges, the Petitioner filed this application, pleading that on the evidence led at the inquiry the 3rd Respondent could not reasonably have found him guilty of the charges, and asked this Court to quash those findings and to direct the payment of arrears of salary and other benefits withheld. After leave to proceed under Article 12(1) had been granted, it was agreed that the Petitioner may file an appeal to the Public Service Commission ("the Commission"). Mr. Egalahewa very fairly stated that the Commission would entertain the appeal notwithstanding the lapse of time. The Petitioner accordingly submitted an appeal dated 26. 08. 98, addressed to the Commission through the Magistrate and the Secretary, Ministry of Justice, briefly stating the facts and requesting a variation of the punishment as well as the payment of arrears.

The former Secretary to the Commission replied on 15. 10. 98, raising several technical objections: that the appeal was undated; that it did not disclose what the charges were, what injustice the Petitioner alleged, and what relief he sought; that it did not state whether he was in service; and that if he was in service, the appeal should be forwarded through the Head of his department. All were entirely devoid of merit.

It was nearly one year later that, by letter dated 08. 09. 99, the 15th Respondent (the present Secretary to the Commission) informed the Petitioner that the Commission had confirmed the 1st Respondent's decision to withhold his salary for the period of interdiction and had further decided to substitute a reduction of two increments in lieu of the warning imposed by him. No reasons were stated.

The petitioner then filed an amended petition, adding the members of the Commission as respondents, and challenging their decision as well. The 1st and the 15th Respondents filed affidavits in reply. It was only then that the Petitioner was made aware of certain crucially important facts. The 1st Respondent's affidavit disclosed that the 3rd Respondent had found the Petitioner not guilty of all the charges; however, even then he did not produce the 3rd Respondent's report. While the substance of those findings is not in issue in this case, it is not at all surprising that without the evidence of Amerasinghe and Udayakantha the 3rd Respondent exonerated the Petitioner.

The 1st Respondent only produced the minute which he himself had made when refusing to accept the 3rd Respondent's findings exonerating the Petitioner. His main conclusion was that **in the proceedings before the Magistrate, as well as in the High Court** and in the disciplinary inquiry, it was established that the Petitioner had received Rs. 200/- from Siripala; and that there was no evidence that that sum had not been received at Amerasinghe's hotel or that it had been received for some other purpose.

The 15th Respondent's affidavit did not state the basis of the Commission's decision. The **only** relevant averment was that "the Commission also took into consideration the fact that officials of the Bribery Department who gave evidence at the Magistrate's Court were not present to testify at the disciplinary inquiry which finally led to his exoneration". She did not produce the Commission's decision, or even a minute thereof.

PROVISIONS OF THE ESTABLISHMENTS CODE

It is necessary to refer to some relevant provisions of Chapter XLVIII of the Code, in regard to (a) the different types of offences and punishments, (b) interdiction and withholding of salary during interdiction, (c) the need for a Tribunal to inquire into, and report on, serious offences, and (d) the imposition of punishments by the disciplinary authority and the refund of salary withheld during interdiction.

(a) Section 16 of that Chapter distinguishes between "minor" punishments, which are "appropriate for offences of the type similar to those in Schedule B", and "major" punishments for offences similar to those in Schedule A. Section 16:2 provides that "minor" punishments include:

> ". . . reprimand, severe reprimand or censure. (**A "warning" is not a punishment**). Suspension, stoppage for a period not exceeding one year of increment. A disciplinary transfer at the officer's expense. A fine not exceeding one week's pay. Any other form of Departmentally recognised punishment not more severe than those listed above." [Emphasis added]

Under section 16:3, "major" punishments include:

> ". . . Dismissal. Termination of service (after disciplinary inquiry). Retirement for general inefficiency. Retirement for inefficiency as a merciful alternative to dismissal. Reduction in seniority (i.e. by a specified number of places in the grade to which the officer belongs). Reduction in rank . . . Reduction of salary/deferment of increment. Deferment of promotion for a specified period. Disqualification from sitting any promotional examination for a specified period. Any other form of punishment of greater severity then those described in section 16:2."

Appendix I to that Chapter contains a "schedule of offences", which, however, is not comprehensive. Offences are

categorized under six heads: inefficiency, incompetence, negligence, improper conduct (whether connected with an officer's official duties or not), indiscipline, and "lack of integrity", which is defined as relating to:

> ". . . acts or omissions arising from motives of improper personal gain, fraud, cheating, theft, forgery, dishonesty, concealment of the truth or portions of the truth in writing reports, suppression of documents or facts, bribery, the use of his official position or the exercise of his official functions for own private advantage or the advantage of his friends or relatives . . ."

Schedules A and B do not describe the offences which merit "major" and "minor" punishments. Schedule B merely refers in general to:

> "Offences of a type which are not serious enough to warrant compulsory retirement, dismissal or a major punishment."

Likewise, Schedule A refers (insofar as is relevant to this case) only to:

> ". . . 2. Offences of the type that are serious enough to warrant dismissal or a major punishment.
>
> 3. Repeated offences of a type which considered singly are not serious enough to warrant dismissal or a major punishment, but where repetition justifies dismissal or a major punishment."

(b) Section 21:1 of that Chapter authorizes interdiction where criminal proceedings are pending "on charges which if established are sufficiently serious to warrant dismissal"; and where there is a *prima facie* case of bribery, section 21:5(ii) provides that no emoluments shall be paid. Although section 21:5(iii) does give the Secretary the discretion to authorize a

payment (not exceeding half salary) if disciplinary proceedings are not completed within three months, in this case it cannot be said that the Secretary acted improperly in not exercising that discretion.

(c) Where the offence falls under Schedule A, section 5:3:1 requires the disciplinary authority to appoint a Tribunal to inquire into the charge. Section 5:4, read with section 14:21, requires the Tribunal to submit a report containing specific findings on each charge, together with "the reasons and arguments on which the Tribunal has arrived at these findings". Section 14:23 stipulates that the Tribunal should base its findings **solely** on the evidence led **before it**. Section 5:5, read with sections 15:1 and 15:5, empowers the disciplinary authority to accept, reject or revise any or all the findings of the Tribunal, and to order such punishment as he deems fit. Section 15:2 empowers him to refer a matter back to the Tribunal for further inquiry, or even to quash the proceedings and to order a fresh inquiry.

(d) Section 21:5(vi) provides that if the punishment is dismissal, the officer will not be paid any further emoluments. In other cases, section 15:6 applies:

> "If **punishment less than dismissal** is imposed . . . the disciplinary order will include an order as to whether the whole of the emoluments withheld from him, or a specified proportion thereof should be paid, or whether the whole of the emoluments withheld should not be paid. In deciding on such an order, consideration should be given to the length of the period of interdiction, to the extent to which it cannot be directly attributed to the accused officer." [Emphasis added]

Section 21:5(vii) makes similar provision. Where the accused officer is exonerated, section 21:5(viii) entitles him to be paid the emoluments withheld.

NON-PAYMENT OF SALARY WITHHELD

Ms. Guneratne submitted that the 1st Respondent should have exercised his discretion (under section 15:6) in favour of the Petitioner who, she urged, was not responsible for the delay. Indeed, it would seem that the 1st Respondent did not take into consideration, as required by section 15:6, the length of the period of interdiction. However, there appears to be a more fundamental flaw.

The initial withholding of salary during interdiction is not a punishment. It cannot be a punishment, because it is an order made **before** there is any finding of guilt. Is a subsequent order for the non-payment of salary thus withheld a punishment? It is not among the punishments listed in section 16. But section 16 does not set out comprehensive definitions. If section 16 is interpreted in isolation, such an order might be regarded as being (in terms of section 16:3) "any other form of punishment of greater severity than those described in section 16:2."

But section 16 must be considered in the context of other provisions of the same Chapter. Section 15:6 proceeds on the basis that such an order is not itself a punishment, but is merely a consequence of punishment. If - and only if - a **punishment** is imposed, then section 15:6 requires that an order be made in respect of salary withheld. In this case, the 1st Respondent only warned the Petitioner; and section 16:2 expressly states that a warning is not a punishment. Accordingly, he could not have ordered non-payment of the salary withheld.

In the absence of an order under section 15.6, would the Petitioner be automatically entitled to the refund of the salary withheld? Had he been exonerated, section 21:5(viii) would have entitled him to a refund. However, the Code makes no provision for the situation in which an officer is neither exonerated nor punished (although found guilty). The fact that

the disciplinary authority does not impose a punishment on an officer found guilty, suggests that he considered the offence to be so trifling that no punishment was warranted. I incline to the view that in such circumstances the Code should be interpreted, *contra proferentem* and in favour of public officers, to mean that the officer would be entitled to receive the salary withheld, but it is unnecessary to decide that question in view of my decision that the findings of guilt must be quashed.

1ST RESPONDENT'S FINDINGS AND ORDER

The Petitioner had been charged with a serious offence under Schedule A, i.e. one warranting dismissal or a major punishment. The very fact that the 1st Respondent did not impose a major punishment - and, indeed, imposed no punishment at all - gives rise to serious questions as to his findings.

Bribery, and indeed any form of corruption and lack of integrity, on the part of officers entrusted with duties connected with the administration of justice - even if they are not directly performing judicial functions - undermines the judiciary, diminishes its ability to administer justice, and erodes public confidence. It is a matter of common knowledge that various forms of bribery and corruption are rampant. Accordingly everyone, and certainly officers of the Ministry of Justice, must endeavour to eradicate bribery and corruption, by every means: prevention, investigation, prosecution and punishment. It is very easy to make allegations of bribery and corruption against Judges and other officers engaged in the administration of justice, but it is very difficult to substantiate them. If the 1st Respondent had honestly considered that the Petitioner was guilty of bribery as charged, was a warning and the deprivation of salary during interdiction appropriate or adequate? The leniency of the "punishment" which the 1st Respondent imposed shows that he either did not appreciate the need to eradicate bribery and corruption or did not really believe that the offences had been duly proved.

I must now turn to the 1st Respondent's findings and order. These must be considered in the context of Article 58(2) of the Constitution, which allows every public officer a right of appeal to the Public Service Commission against any disciplinary order made under delegated authority. That is one of the "protections" which the law affords to a public officer, which must not be arbitrarily or unreasonably denied or impaired, by law, regulations or executive action. A public officer will not be able, effectively, to exercise that right of appeal unless he is informed of the findings against him (whether of fact or law) and the reasons therefor, and I hold that that is a necessary implication of Article 58(2). Consistently with that, sections 5:5 and 14:21 of the Code require the Tribunal to submit a report containing findings and reasons. Although the Code does not expressly so provide, those findings and reasons must be disclosed to the officer. If not, how can he effectively present an appeal, stating which findings and reasons are wrong, and why they are wrong? It follows, further, that if the disciplinary authority reverses those findings, he too must disclose his findings and reasons, for otherwise an appeal will be nugatory.

In this case, when communicating his decision to the Petitioner the 1st Respondent did not, straightforwardly, disclose to the Petitioner that the 3rd Respondent had exonerated him and the reasons therefor. Further, he stated that his findings were based on the facts disclosed **at the disciplinary inquiry** - deliberately concealing the fact that he had acted on material disclosed in the criminal proceedings, which formed no part of the evidence led against the Petitioner at the disciplinary inquiry. It was not permissible for the disciplinary authority to consider evidence not led at the disciplinary inquiry. If he was of the view that such evidence should be considered, he should have referred the matter back to the 3rd Respondent or ordered a fresh inquiry (under section 15:2). Whatever procedure was adopted, natural justice demanded that before any finding was made on the basis of new evidence, the Petitioner should have been given an

opportunity of being heard. The fact that section 14.23 expressly requires the Tribunal to base its findings **solely** on the evidence led before it, and makes no reference to the disciplinary authority, makes no difference: that merely re-states one requirement of natural justice, and that requirement would have applied even without section 14:23.

In the result, not only was there a grave violation of the principles of natural justice, but the Petitioner was kept in the dark as to the case against him and the irregularities which had occurred, and thereby the exercise of his right of appeal to the Commission was seriously impaired.

I therefore hold that the 1st Respondent violated the Petitioner's fundamental right under Article 12(1), read with Article 58(2), and that the nature and extent of that violation was such that he should pay the Petitioner's costs.

PUBLIC SERVICE COMMISSION ORDER

The Commission took nearly an year to decide. The 15th Respondent's affidavit mentions only one matter which the Commission took into account: that the prosecution did not lead the evidence of Bribery Department officials at the disciplinary inquiry. It is clear that this was considered **adversely** to the Petitioner, either as confirming guilt or as justifying enhanced punishment. That was unreasonable.

The flaws which vitiated the 1st Respondent's findings and order would have been manifest to the Commission from the Petitioner's personal file. Nevertheless, the Commission neither informed the Petitioner of what had actually taken place nor gave him an opportunity of challenging the 1st Respondent's findings, reasons, and order. Neither the 15th Respondent's affidavit nor the documents produced suggest that the Commission even considered the several flaws in the 1st Respondent's order before confirming that order; and accordingly its own order is vitiated by those flaws. That

affidavit also stated that the Commission "examines . . . the observations of the . . . Secretary on the averments in the appeal". It appears that the Petitioner was not informed even of those observations. Finally, the Commission did not furnish this Court or the Petitioner with its own findings, reasons and order.

I hold that the Commission too violated the Petitioner's fundamental right under Article 12(1), by denying him the due exercise of his right of appeal under Article 58(2) in conformity with the requirements of natural justice.

ORDER

I hold that the Petitioner's fundamental right under Article 12(1) has been violated by the 1st Respondent as well as the Public Service Commission, and quash the orders communicated to the Petitioner by letters dated 27. 05. 97 and 08. 09. 99. The Petitioner will be entitled to (a) the salary withheld during the period of interdiction, together with simple interest at 15% p.a. from 27. 05. 97 up to date of payment; (b) compensation in a sum of Rs. 100,000 payable by the State; and (c) costs in a sum of Rs. 10,000 payable personally by the 1st Respondent.

WEERASEKERA, J. - I agree.

ISMAIL, J. - I agree.

Relief granted.