

**(1) KARAVITA AND OTHERS
AND
(2) WELIKANNA
v.
INSPECTOR-GENERAL OF POLICE AND OTHERS**

COURT OF APPEAL
AMARATUNGA, J.
CA NO. 736/2000
CA NO. 907/2000
JUNE 27, 2001
FEBRUARY 21, 2002

Writ of Mandamus – Public Service Commission – Promotion of Police Officers – Selection process – Performance of public duty – Public authorities – Constitution Articles 55 (1) and 140 – Pleasure principle – Applicability – Courts competence to issue a Writ of Mandamus compelling the appointment of a person to a particular post or office.

The petitioners seek writs of *Mandamus* directing the PSC, to promote the petitioners to the rank of ASP and also to direct the IGP and Secretary Defence to give effect to such appointments.

Held:

- (1) The PSC is a body established by the Constitution. In making appointments to the rank of ASP the PSC is under a legal duty to make such appointments on the basis of selections made in accordance with the laid down selection process. When the PSC makes appointments to the rank of ASP it is under a duty to make such appointments on a basis which is reasonable.
- (2) Within the field of Public Law, the scope of *Madamus* is still wide and the Court may use it freely to prevent breach of duty and injustice.

Per Amaratunga, J.

“The absence of precedent does not deter me when I am convinced that the only effective remedy to remedy the injustice caused to the petitioners is an order of *Mandamus*.”

APPLICATION for Writs of *Mandamus*.

Cases referred to :

1. *Migultenne v. Attorney-General* – (1996) 1 Sri LR 408.
2. *Jayawardena v. Dharani Wijetilake and Others* – (2001) 1 Sri LR 132 at 159.
3. *R. v. Hanley Revising Barrister* – (1912) 3 KB 518 at 529.
4. *Chief Constable of North Wales Police v. Evans* – (1982) 2 All ER 141.

Faiz Musthapha, PC with Abdul Najeem for the petitioners in both applications.

Y. J. W. Wijetilake, DSG for the respondents in both applications.

Cur. adv. vult.

April 30, 2002

GAMINI AMARATUNGA, J.

These two applications are applications for Mandates in the nature of Writs of *Mandamus* directing the Chairman, Public Service Commission and six other members of the Commission (9th to 10th respondents) to promote the petitioners to the rank of Assistant Superintendent of Police and also to direct the Inspector-General of Police (1st respondent) and the Secretary to the Ministry of Defence (2nd respondent) to give effect to such appointments. Since both applications relate to the same matter and since respondents to both applications are the same, both applications were consolidated and heard together and parties agreed to abide by one judgment pronounced in respect of both cases.

These two applications were heard by me and His Lordships Justice J. A. N. de Silva before his Lordship's elevation to the Supreme Court and the parties thereafter agreed that this matter could be decided by me sitting alone on the submissions already made.

Petitioners No. 4, 5, 6, 10 and 11 in application No. 736/2000 are holders of the rank of Chief Inspectors of Police in the Police Department. Others hold the rank of Inspectors of Police. The petitioner in application No. 907/2000 is an Inspector of Police.

The scheme of recruitment and promotions of Senior Gazetted 20 Officers of the Department has been approved by the Cabinet of Ministers on 05. 08. 1998. (P1) In terms of this scheme appointments to the post of Assistant Superintendent of Police are made in three ways. What is relevant to the present petitioners is the 2nd category according to which "25% of the vacancies will be filled on the results of a limited competitive examination from among Chief Inspectors of Police and Inspectors of Police with 10 years' service".

Upon the directions of the Public Service Commission, the Inspector-General of Police by circular dated 03. 09. 1998 (P2) invited applications from Chief Inspectors and Inspectors who were eligible for promotion 30 to the rank of Assistant Superintendent of Police (ASP) through a limited competitive examination. The petitioners who possessed the requisite qualifications applied and sat for the limited competitive examination conducted by the 3rd respondent, the Commissioner-General of Examinations. The examination was conducted in respect of the following subjects :

1.	Language Ability (essay and precis)	150	marks	
2.	General Knowledge and Intelligence	150	"	
3.	Social, Political and Economic Development of Sri Lanka	100	"	40
4.	Practical Police Methods	100	"	
5.	Police Administration	100	"	

According to the scheme of recruitment and promotion, the prospective candidates had to face an interview in addition to the written examination. For the written examination 75% of the marks were allocated and the balance 25% for the interview. To qualify for the interview a candidate had to get a minimum of 40% marks at the written examination.

Thereafter, in March, 1999, 72 candidates including the petitioners were called for interviews. The results of the examination and the interview were given in the marks sheet produced by the petitioners marked P5. On 25. 06. 1999 the Public Service Commission (PSC) has ordered the appointments of the first 14 candidates whose names and marks appear in P5 to the rank of ASP. Then the 3rd, 5th, 6th, 10th and 11th petitioners in CA Application No. 736/2000 and the petitioner in application No. 907/2000 made application Nos. 607/99 and No. 608/99 to the Supreme Court for alleged infringement of their fundamental rights. Those applications were consolidated and heard together by the Supreme Court. It appears that the complaint of those who filed applications in the Supreme Court was that 32 persons who had scored less than 40% of the marks at the limited competitive examination had been called for the interview and the appointments of 14th to 24th respondents to the Supreme Court applications (11 officers among the first 14 candidates promoted to the rank of ASP) has resulted in the infringement of their fundamental rights.

The first two papers of the limited competitive examination were to be given marks out of 150 and others out of 100. However, it appeared from the affidavit filed by the Commissioner-General of Examinations, who was the 3rd respondent to those applications, that although the aforesaid two papers were marked out of 150 the said marks were converted to a percentage in accordance with the prevailing practice in the Department of Examinations and that the practice had been adopted in respect of all candidates and accordingly none of the candidates who had secured less than 40% of the marks had been called for the interview. Therefore, the Supreme Court held that :

“The practice adopted by Commissioner of Examinations to convert the marks obtained by the candidates out of 150 for the first two subjects to percentage to ensure uniformity has not caused any prejudice to any of the candidates and cannot be faulted as

that was the practice that prevailed in the Department of Examinations". (*emphasis added*).

The petitioners heavily relied on the above finding of the Supreme Court that the practice adopted by the Commissioner-General of Examinations to convert marks obtained out of 150 to percentage to ensure uniformity has not caused any prejudice to any of the candidates. For this reason and for the other reasons (which are not relevant to the present purpose) set out in the judgment, the Supreme Court dismissed the fundamental rights applications on 12. 01. 2000 ⁹⁰ (SC Minutes of 12. 01. 2000).

The petitioners have stated in their applications that whilst the fundamental rights applications were pending in the Supreme Court, another officer who sat for the same examination and faced the interview for promotion to the rank of ASP filed application in the Court of Appeal (CA Application No. 1164/99) seeking mandates in the nature of Writs of *Certiorari* and *Mandamus* on the basis that the said practice of pro-rating of marks was arbitrary and in excess of the powers of the 3rd respondent Commissioner-General of Examinations. The Officer who filed Application No. 1164/99, H. K. D. W. M. P. B. ¹⁰⁰ Ratnatilake who has obtained a total of 320.6 marks was placed in the 20th position in the marks list marked P5. Whilst the Writ application of Ratnatilake was pending in the Court of Appeal the PSC by its letter dated 25. 04. 2000 ordered the appointment of three other candidates to the rank of ASP. The particulars relevant to them, as they appear in the marks sheet P5 are as follows :

<u>Serial No.</u>	<u>Name</u>	<u>Total Marks</u>	
20	H. K. D. W. M. P. B. Ratnatilake	320.6	
29	B. D. Chandrasiri	315.8	
39	N. Moses	310.2	110

The petitioners in Application No. 736/2000 in the order their names appear in the caption of the application have secured the following places in the marks sheet P5 in order of merit.

<u>Name</u>	<u>Serial No.</u>	<u>Total Marks</u>	
Karavita	15	328	
Jamaldeen	16	324.4	
Ranaweera	17	323	
Lal Kumara	18	321.8	
Baddewela	19	321.2	
Samarasekara	22	319	120
Karunanayake	25	317.2	
Palitha Fernando	26	316.8	
Mahagedara	31	315.6	
Dayananda	34	314.2	
Ellepola	36	312.8	
Gajasinghe	37	310.8	

This shows that Rantatileke was below the first five petitioners. Chandrasiri was below the first eight petitioners. Moses was below all 12 petitioners. Petitioner in Application No. 907/2000 Welikanna who is in the 24th position having obtained 317.4 marks is above Chandrasiri and Moses. The promotions of Rantatileke, Chandrasiri and Moses were given on 25. 04. 2000, three months after the Supreme Court delivered its judgment in the fundamental rights case.

It appears from what has been set out above that Rantatileke and Chandrasiri have been promoted over some of the petitioners who have scored more marks than them and Moses has been promoted above all petitioners in application Nos. 736 and 907 who have scored higher marks than him.

The 4th respondent, the Chairman of the PSC, by his affidavit seeks to explain the basis on which Rantatileke was promoted. The 4th

respondent in paragraph 6 of this affidavit has stated that "I state that the finding of the Supreme Court in the said applications (SC Nos. 607/99 and 608/99) was that the petitioners in the said application has not been prejudiced by the practice followed by the Department of Examinations". This averment does not correctly set out the finding of the Supreme Court, this is what the Supreme court has held.

"In my view this practice adopted by the Commissioner of Examinations to convert the marks obtained by the candidates out 150 of 150 for the first two subjects to a percentage to ensure uniformity has not caused prejudice to any of the candidates and cannot be faulted as that was the practice that had prevailed in the Department of Examinations." (per Gunasekara, J.) (emphasis added).

The above passage from the judgment of the Supreme Court clearly shows that the finding of the Supreme Court was not confined to the petitioners of the applications that were before the Supreme Court. The finding of the Supreme Court was that the conversion of the marks has not caused prejudice to any of the candidates. This includes the petitioners as well as those candidates who sat for 160 the same limited competitive examination. The Chairman and the members of the Public Service Commission were respondents to the aforesaid fundamental rights applications and the PSC as a body is bound by the ruling of the Supreme Court and as such they cannot in law act on the basis that notwithstanding the definite finding of the Supreme Court they are free to review cases of individual candidates and decide for themselves whether a particular candidate has been prejudiced by the conversion. It appears from the rest of the averments of the 4th respondent's affidavit that this exactly was what the PSC 170 has done.

The 4th respondent in paragraph 8 of his affidavit admits that the order to promote 14 officers to the rank of ASP was given according to the marks sheet prepared by the Commissioner-General of

Examinations marked P5. It was presented to the Supreme Court as the correct marks sheet and the Supreme Court having taken into consideration the affidavit of the Commissioner-General of Examinations held that by the conversion set out in it no candidate has been prejudiced. The 4th respondent's affidavit goes on to say that the said marks sheet P5 was altered by the amended marks sheet 'referred by the Commissioner-General of Examinations'. The amended marks sheet has been produced marked 4R1. It is dated 16. 02. 2000, which date is subsequent to the judgment of the Supreme Court in the fundamental rights cases. Several questions arise in view of the aforesaid averment. What was the necessity to amend the marks sheet tendered to the Supreme Court? Were there mistakes in P5 and if so what were those mistakes and how did such mistakes occur? Who detected those mistakes and who requested or authorized the preparation of an amended marks sheet? I cannot find answers to any of the above questions in the affidavit of the 4th respondent. The Commissioner-General of Examinations is a respondent to these applications but he has not filed an affidavit setting out the reasons for and the basis on which he prepared the amended marks sheet R41. In the absence of any explanation from the Commissioner-General of Examinations, Chairman of the Public Service Commission or from the Inspector-General of Police the reason for the preparation of the amended marks sheet remains a mystery as far as this Court and these applications are concerned.

It appears from P8 submitted by petitioner Samarasekara with his counter affidavit that the promotions of Ratantileke, Chandrasiri and Moses were ordered on the basis of the amended marks sheet marked 4R1. Ratantileke who was No. 20 in P5 has become No. 14 in amended marks sheet. Chandrasiri who was No. 29 in P5 has become No. 16 in the amended list. Moses who was No. 39 in P5 has become No. 15 in the amended marks sheet. With their positions their total number of marks has also changed upwards. No one has explained to this Court how and on what basis those changes have been made. It is also to be noted that the first 14 officers promoted

in June, 1999, on the basis of their positions in the original marks sheet P5 remain even in P41 within the first 17 officers promoted to the rank of ASP.

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However, the positions of most of the petitioners have substantially changed in the amended marks sheet. The following table shows how their positions were changed :

	<u>Name</u>	<u>Position under P5</u>	<u>Position under 4R1</u>
1.	Karavita	15	25
2.	Jamaldeen	16	31
3.	Ranaweera	17	27
4.	Lal Kumar	18	28
5.	Baddewela	19	32
6.	Samarasekara	22	18
7.	Karunanayake	25	20
8.	Palitha Fernando	26	29
9.	Mahagedara	31	19
10.	Dayananda	34	48
11.	Ellepola	36	47
12.	Gajasinghe	37	35
13.	Welikanna (907/2000)	24	23

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This table shows that except 6th, 7th, 9th and 12th petitioners and the petitioner in No. 907/2000 the others were reduced to positions lower than the positions they had under the original marks sheet P5. The respondents have not explained the basis on which those changes have been made.

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The 4th respondent in his affidavit (paragraph 9) has stated that consequent to the filing of the Writ application No. 1164/99 it was evident that prejudice has been caused to the petitioner resulting in the steps taken as suggested by this Court to afford administrative relief. However, the 4th respondent has not stated in what way

prejudice has been caused to the petitioner in CA Application No. 1164/99. In paragraph 10 of the 4th respondent's affidavit it is stated that the practice adopted by the Examinations Department on which the petitioners rely for promotion was incorrect and cannot be legally or fairly given effect to. I cannot see how the 4th respondent can say this when the Supreme Court has accepted that practice as the prevailing practice followed by the Department of Examinations. The members of the Public Service Commission who were respondents to the Supreme Court applications are bound as a body by the ruling of the Supreme Court and if they act contrary to the finding of the Supreme Court such act is an arbitrary act without any legal basis. The 4th respondent has also failed to explain the reason why the PSC ordered the appointments of Chandrasiri and Moses to the supernumerary cadre.

The respondents have failed to establish the validity of the amended marks sheet 4R1 as against the original marks sheet accepted by the Supreme Court as correct marks sheet (and also by the PSC by appointing 14 ASPP on the basis of P5) and as such the respondent members of the PSC are under a duty to order promotions on the basis of the results reflected in P5. By promoting a person who has obtained less marks than all petitioners in these two applications they have failed to perform their duty according to law and have failed to adhere to the results reflected in P5.

In the written submissions filed on behalf of the respondents a question has been raised as to whether public servants have a right to receive promotions. The petitioners responded to a circular issued by the 1st respondent calling for applications from eligible officers to be promoted to the rank of ASP in accordance with the approved scheme. They obtained the necessary marks at the written examination to qualify for the interview. They faced the interview and obtained marks which were taken into account in deciding the total marks to be awarded to them. After the completion of the selection process if the authorities decided not to promote anyone, the petitioners or

others whose names are set out in the marks sheet P5 did not ordinarily have a right to demand that they should be promoted.

However, in this case on the results of the selection process 14 officers were promoted to the rank of ASP. Thereafter, another person who has obtained less marks than all 13 petitioners was promoted on the basis of an amended marks sheet the validity of which the respondents have failed to prove. With this appointment, the petitioners who have higher marks than the last appointee acquired a right to be promoted on the same results on which 14 others promoted earlier.

The respondents cannot also invoke the pleasure principle embodied ²⁸⁰ in Article 55 (1) of the Constitution as an answer to the petitioners' plea for a Writ of *Mandamus*. As was pointed out by his Lordship Justice Fernando in *Migultenne v. The Attorney-General*⁽¹⁾ the pleasure principle does not give an absolute discretion to the executive. It is subject to the other provisions of the Constitution such as the fundamental rights and the Writ jurisdiction of the Court of Appeal under Article 140 of the Constitution. It cannot be used to shield an act which has no basis in – law or in fact.

Now, I turn to the relief sought by the petitioners. They have sought a Writ of *Mandamus* directing the 4th to 10th respondents to promote ²⁹⁰ and appoint them to the rank of ASP in the Police Department and to direct the 1st and 2nd respondents to give effect to such appointments.

The first question to be decided to whether this Court has the power in law to issue Writ of *Mandamus* compelling the PSC to appoint or promote a particular person to a particular office or post. The Writ of *Mandamus* is the normal means of enforcing the performance of public duties by public authorities. "It is normally granted on the application of a private litigant" and "the commonest employment of *Mandamus* is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him." Wade, *Administrative* ³⁰⁰ *Law*, 8th edition, p 604. Is there a failure by a public authority do its duty by the petitioners?

Public Service Commission is a body established by the Constitution. In terms of Article 55 (3) of the Constitution it exercises powers of appointment, transfer, dismissal and disciplinary control of public servants delegated to it by the Cabinet of Ministers. The schemes of recruitment and promotions of senior *Gazetted* officers of the Police Department have been approved by the Cabinet. Under this scheme there is a selection process to select officers for appointments to the rank of ASP, in the Police Department. In making appointments to the rank³¹⁰ of ASP the PSC is under a legal duty to make such appointments on the basis of selections made in accordance with the laid down selection process. The power of appointment conferred on the PSC does not empower it to make appointments without any regard to the selections made after following the proper selection process. "It is accepted today that power of appointment and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice" *per* Fernando, J. In *Jayawardena v. Dharani Wijetilake and Others*⁽²⁾ at 159. When³²⁰ the PSC makes appointments to the rank of ASP it is under a duty to make such appointments on a basis which is reasonable. In fact, when the PSC appointed 14 Assistant Superintendents of Police in accordance with the order of merit set out in the marks sheet P5 it has acted on a reasonable basis. But, can the same be said with regard to the other three appointments made subsequently? As I have already pointed out the reason for preparing the marks list 4R1 remains a mystery. The respondents have not established its correctness. They have not explained the basis on which the candidate who was in the 39th position in the order of merit in P5 came to be placed in the 15th position in 4R1. "Respect for the rule of law³³⁰ requires the observance of minimum standards of openness, fairness and accountability in administration; and this means – in relation to appointments to and removal from, offices involving powers, functions and duties which are public in nature – that the process of making a decision should not be shrouded in secrecy . . ." *per* Fernando, J. *Jayawardana by Dharani Wijetilake and Others (supra)*.

By making three appointments on the basis of 4R1 the PSC has failed in its public duty by the petitioners.

Even after petitioner Samarasekara by his counter affidavit ³⁴⁰ challenged the correctness of 4R1, the PSC has not taken any steps at least to examine the correctness of his challenge. This is quite in contrast to the manner in which the PSC has acted when Ratnatilleke filed his application No. 1164/99. In my view, the failure of the PSC to respond to the complaint of injustice contained in the applications of the petitioners constitutes a refusal to perform the duty owed by it to the petitioners. The above failure and the refusal of the PSC constituted a denial of the rights of the petitioners to be considered for promotions on the order of merit decided upon in the selection process and reflected in P5. In such a situation what is the remedy ³⁵⁰ available to the petitioners?

Wade in *Administrative Law* makes the following observation which is relevant here. "Within the field of public law the scope of *Mandamus* is still wide and the Court may use it freely to prevent breach of duty and injustice." He has quoted Darling, J. in support : "Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable" *per* Darling, J. in *R. v Hanley Revising Barrister*⁽²⁾ at 529. See Wade *Administrative Law*, 8th edition ³⁶⁰ pp 607-608.

In the case of *Chief Constable of North Wales Police v. Evans*⁽³⁾ a probationary police constable was forced to resign under threat of dismissal held out by the Chief Constable who believed that the rumours he had heard about Evans' private life (which were largely unfounded) to be true that he should resign. Evans was not given a hearing before he was asked to resign. The House of Lords categorically stated that an order of *Mandamus* to reinstate the respondent was the only satisfactory remedy and that the House of

Lords had the power to make such an order. However, a Writ of *Mandamus* was not issued by the House for practical reasons. Evans was still a probationer and he had some more time to complete his period of training. Under the regulations applicable to probationers, the chief constable had the power to review, at the end of the training period, the suitability of the probationer and to dismiss him with one month's notice. In view of this residuary power available to the chief constable the House was of the view that an order of *Mandamus* in practice might be an usurpation of the powers of Chief Constable under the regulations. In view of this, the House, without granting an order of *Mandamus*, granted a declaration. The decision of the House of Lords is clear authority confirming a Court's competence to issue a Writ of *Mandamus* compelling the appointment of a person to a particular post or office. ³⁸⁰

In the present case the PSC does not have powers akin to the residuary powers possessed by the Chief Constable in Evans' case. Since the appointment of officer Moses who was placed after all petitioners in order of merit cannot be reversed, the only way to remedy the injustice caused to the petitioners is to issue a writ of *Mandamus* directing the 4th to 10th respondents to promote and appoint the petitioners to the rank of ASP on the same terms applicable to Moses. The absence of precedent does not deter me when I am convinced that the only effective remedy to remedy the injustice caused to the petitioners is an order of *Mandamus*. ³⁹⁰

A comparison of the Fundamental Rights applications (Nos. 607/99 and 608/99) with the present application indicates that at the time the fundamental rights applications were filed the members of PSC were not the same members named as respondents in the present applications. There is no material to indicate whether the appointment of officer Moses was made by the present members of the PSC or their predecessors. If it had been made by the former members of the PSC, and when they have been replaced by successors, the latter ⁴⁰⁰

may be ordered to make good their predecessors' default. *R. v. Hanley Revising Barrister (supra)*.

The respondents' in their written submissions have stated that if the relief prayed for by the petitioners is granted, it would prejudice the rights of others who are placed in between the several petitioners in order of merit who have not filed similar applications before this Court. However, the inaction of the other candidates is not a ground to deny relief to the petitioners who relentlessly pursued these applications to protect their rights.

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The Inspector-General of Police (1st respondent) and the Secretary, Ministry of Defence (2nd respondent) have not filed objections to the petitioners' applications. The 1st respondent has not placed before this Court any material to indicate that there would be administrative difficulties, such as the non availability of cadre vacancies, in implementing an order to promote the petitioners to the rank of ASP made in consequence of a Writ of *Mandamus* issued by this Court. It must be noted here that when the PSC earlier ordered the promotions of Chandrasiri and Moses they were appointed to the Supernumerary cadre when cadre vacancies did not exist.

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For the reasons set out above I allow the applications of the petitioners in CA Application Nos. 736/2000 and 907/2000 and issue a Writ of *Mandamus* directing the 4th to 10th respondents to promote and appoint the petitioners in the above-mentioned applications to the rank of Assistant Superintendent of Police based on the marks sheet P5 prepared by the 3rd respondent and also directing the 1st and 2nd respondents to give effect to such appointments. In view of the important question of law involved in this case I make no order for costs.

Application allowed.