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

In the matter of an application for mandates in the nature of Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution.

Piyal Kumarasiri Wadanambi
Flight Sergeant of Sri Lanka Air Force Service
No. 6/55, Kakiriwatta, Galthude, Panadura.

Petitioner

C. A. Writ Application 866/2010

Vs.

1. Air Commodore Wijitha Gunarathna
Commanding Officer
Air Force Headquarters, Colombo 02.

2. Air Commodore A. D. Gamachari
Chief Legal Officer
Air Force Headquarters, Colombo 02.

3. Air Chief Marshal W. D. R. M. J. Goonetilleke
Acting Chief of the Defence Staff and
Commander of the Sri Lanka Air Force
Air Force Headquarters, Colombo 02.

3A. Air Marshal Harsha Duminda Abeywickrama
Commander of the Sri Lanka Air Force
Air Force Headquarters, Colombo 02.

3AA. Air Marshal Kolitha Aravinda Gunathilleke
Commander of the Sri Lanka Air Force
Air Force Headquarters, Colombo 02.

3AAA. Air Marshal G. P. Bulathsinghala
Commander of the Sri Lanka Air Force
Air Force Headquarters, Colombo 02.

4. Air Commodore D. L. S. Dias
Sri Lanka Air Force Camp, Ratmalana.

Respondents

Before: Janak De Silva J.

Counsel:

Saliya Pieris P.C. with Varuna De Saram for the Petitioner

Milinda Gunetilleke SDSG for the Respondents

Written Submissions tendered on:

Petitioner on 20.10.2016 and 14.05.2019

Respondents on 29.05.2017 and 22.05.2019

Argued on: 21.02.2019

Decided on: 28.06.2019

Janak De Silva J.

The Petitioner is seeking a writ of certiorari quashing the decision contained in P4 and a mandate in the nature of a writ of mandamus re-instating the Petitioner to his rank of Flight Sergeant in the Sri Lanka Air Force.

At all times material to this application the Petitioner was a Flight Sergeant of the Sri Lanka Air Force. The Petitioner along with several other forces' personnel were to receive houses in the 'Ranajayapura Housing Scheme' and was called to attend a meeting by the Ministry of Defence at the said housing scheme on 28th June 2010. Certain incidents took place at that meeting and later a Court of Inquiry was held against the Petitioner after which he was summoned before the 1st Respondent and a summary trial conducted.

Upon being found guilty at the said summary trial the Petitioner was detained for a period of 34 days before being taken to the Ratmalana Air Force base on 30th September 2010 where he was served with letter P4 wherein it was stated that he had been sentenced to 90 days imprisonment and dismissal with disgrace by the Air Force.

The Petitioner seeks to impugn P4 on the following grounds:

(a) The Petitioner was not given the option of electing either summary trial or district court martial

(b) The charges against the Petitioner were never read out and no copy of a charge sheet was given to him

(c) The Petitioner was not called upon to plead to the charges against him

(d) The Petitioner was not given an opportunity to cross-examine the witnesses

(e) The Petitioner was denied the right to a fair hearing

(f) The punishment imposed was excessive

I shall examine each of the grounds urged by the Petitioner.

Electing Either to Summary Trial or District Court Martial

Section 40(3) of the Air Force Act No. 21 of 1949 as amended (Act) reads:

> "(3) Where a non-commissioned officer other than a corporal is charged with any offence set out in this Act, his commanding officer shall, if the sentence on the conviction of the accused will involve forfeiture of pay or will not consist only of a minor punishment which a commanding officer is authorized to inflict by regulation made in that behalf, ask the accused whether he desires to be dealt with summarily or to be tried by a court martial, and he shall, if the accused elects to be tried by a court martial, take steps for the trial of the accused by a court martial, or if the accused does not so elect, proceed to deal with the accused summarily."

The learned President's Counsel for the Petitioner submitted that this section gave the Petitioner the option of electing either summary trial or district court martial which was not given and as such the summary trial conducted was ultra vires the provisions of the Act. He relied on the decision in *Koralagamage v. The Commander of the Army* [(2003) 3 Sri.L.R. 169] where it was held that if the impugned act is not done in the genuine exercise of the regulations then they are not done in the exercise of a power conferred by law and are a nullity. The circumstances in *Koralagamage v. The Commander of the Army* (supra) and this case are in my view different.

The Petitioner maintained both in the petition and counter objections that he was never given an opportunity to elect between summary trial or district court martial. However, in the written submissions filed on behalf of the Petitioner this position is contradicted.

The Petitioner was informed after the summary trial that the court has found him guilty of the charge and was given the option to either accept the punishment imposed by the court or opt to be tried by a court martial. The accused opted to accept the punishment meted out by the court [Vide page 4 of Annexure to R6, paragraph 7 of the written submissions of the Petitioner dated 15.05.2019].

Furthermore, having considered the options available to him the Petitioner decided to accept the punishment imposed by the summary trial. He decided as such based on the charges levelled against him and the proceedings at the summary trial [paragraph 8 of the written submissions of the Petitioner dated 15.05.2019]. The Petitioner opted to accept the punishment imposed as he was of the view that it would be prudent to accept the punishment imposed rather than opting for a court martial [paragraph 10 of the written submissions of the Petitioner dated 15.05.2019].

An admission of fact made by counsel is binding on the client [E.R.S.R. Coomaraswamy, *The Law of Evidence*, Vol. I, page 129]. The admissions of fact made in the written submissions by counsel or the registered attorney are binding on the Petitioner.

Hence, I hold that the Petitioner cannot seek to impugn any impropriety in the procedure for a number of reasons.

Firstly, the Petitioner is seeking to approbate and reprobate which cannot be allowed. The Petitioner was given the option to elect albeit after the summary trial but importantly before the punishment was carried out and he chose to accept the punishment meted out at the summary trial. He cannot now be heard to complain. In *Ranasinghe v. Premadharma and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda J. (as he was then) held:

> "In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm"

Secondly, the option to elect was given to the Petitioner at the conclusion of the summary trial but importantly before the punishment was carried out. In these circumstances there has been sufficient compliance with section 40(3) of the Act.

More importantly, the Petitioner is, in that context, guilty of suppression and/or misrepresentation of material facts which is a ground by itself to dismiss this application without going into the merits [*Hulangamuwa v. Siriwardena* [(1986) 1 Sri.L.R.275], *Collettes Ltd.* v. Commissioner of Labour [(1989) 2 Sri.L.R. 6], *Laub v. Attorney General* [(1995) 2 Sri.L.R. 88], *Blanca Diamonds (Pvt) Ltd. v. Wilfred Van Els* [(1997) 1 Sri.L.R. 360], *Jaysinghe v. The National Institute of Fisheries* [(2002) 1 Sri.L.R. 277] and *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene & Others* [(2007) 1 Sri.L.R. 24].

No Charge Sheet/Not Called to Plead/No Opportunity to Cross-Examine/Denial of a Fair Hearing

The Petitioner alleges that no charge sheet was read out nor was he given a charge sheet. He relies on the decision in *Lalith Deshapriya v. Captain Weerakoon and Others* [(2004) 2 Sri.L.R. 314] where it was held that the failure to serve a charge sheet was one ground which lead to the entire proceedings been a nullity. He further pleaded that he was not called upon to plead to the charges against him [*Abdul Sameem v. The Bribery Commissioner* (1991) 1 Sri.L.R. 76] and that he was not given an opportunity to cross-examine the witnesses and as a result the Petitioner was denied the right to a fair hearing.

I am not inclined to accept this assertion of the Petitioner. Furthermore, the facts of this case are different to *Lalith Deshapriya v. Captain Weerakoon and Others* (supra).

Having considered the options available to him the Petitioner decided to accept the punishment imposed by the summary trial. He decided as such based on the ***charges levelled against him*** and the proceedings at the summary trial [paragraph 8 of the written submissions of the Petitioner dated 15.05.2019]. The proceedings of the court martial indicate that the charge was read out to the Petitioner as well as that he was given an opportunity to cross-examine the witnesses(R6).

In any event, the Petitioner chose to accept the punishment of the court martial and as such he cannot be allowed to approbate and reprobate.

Proportionality

The Petitioner contends that the punishment meted out violates the principle of proportionality inasmuch the Petitioner was discharged with disgrace from the Sri Lanka Air Force after being imposed a punishment of three months rigorous imprisonment.

Regulation 120(1) of the Air Force Regulations (R9) specifies the causes of discharge from the regular Air Force, and the officer competent to affect such discharge in Table B of the 5th schedule to the said Regulations. Item (ix) of Table B provides that the Air Force Commander may

discharge an airman from the Air Force for misconduct if the nature of the misconduct justifies the discharge.

The Petitioner in this case was found guilty of participating in a protest against the authorities. The evidence indicates that he directly contributed towards formation of an unlawful protest against the defence establishments/government. Such action on the part of a military person is unacceptable and is a direct threat to the very foundation of military discipline. Accordingly, I see no merit in the argument that the punishment meted out to the Petitioner is disproportionate merely because he was also subjected to 90 days imprisonment in addition to dismissal with disgrace. In fact, the dismissal with disgrace was a separate decision taken by the Commander of the Air Force in terms of the powers vested by the regulations made under section 155 of the Act.

For all the foregoing reasons, I dismiss this application with costs.

Judge of the Court of Appeal