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 Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Commander(S) R.G.A.A. Weerasinghe
NRS 0452
No. 101/4, Kalalgoda Road,
Pannipitiya.

C.A. (Writ) Application No: 538/2011

Petitioner

Vs.

1. Commodore K.R. Senadheera
   President,
   Naval Head Quarters, Colombo 01.

2. Captain M.A. Ananda
   Member,
   Naval Head Quarters, Colombo 01.

3. Captain P.M. Wickremasinghe
   Member,
   Naval Head Quarters, Colombo 01.

4. Rear Admiral W.J.S. Fernando
   Judge Advocate,
   Naval Head Quarters, Colombo 01.

5. Commander of Sri Lanka Navy
   Naval Head Quarters, Colombo 01.

Respondents

Before	:	Dhammika Ganepola, J.
Counsel	:	Rienzie Arseculeratne, PC with Thilina Punchihewa, Himasha Silva and Erandi Pathiranga for the Petitioner. Vickum de Abrew, ASG, PC with Shemanthi Dunuwila, SC for the Respondents.
Argued on	:	18.07.2024, 01.08.2024
Written Submissions tendered on	:	Petitioner : 28.10.2024 Respondents : 06.01.2025
Decided on	:	20.03.2025

Dhammika Ganepola, J.

Factual matrix of the application

In the instant application, the Petitioner *inter alia* challenges the decision of the Court Martial to convict him for certain charges and to impose a sentence of "dismissal without disgrace" from the Sri Lanka Navy. The Petitioner joined the Sri Lanka Navy on 31.05.1983 to the rank of Sub Lieutenant and had an unblemished record of service of 27 years. While the Petitioner was holding the rank of Commander and serving as the

“Area Stores Officer and Area Victualing and Clothing Officer -West”, he had been served with a charge sheet connected to an incident of selling of kerosene belonging to Sri Lanka Navy to a civil party consequent to a recommendation made by a Board of Inquiry. At the Board of Inquiry, statements from Stores Assistant M.K.E. Padmakumara, S.S.44808, N. Rathnasiri(Browser Cleaner), and K.S.N. Whella(Browser Driver) had been recorded. The Petitioner states that he was not permitted to be present throughout the proceedings of the Board of Inquiry. It is claimed that the above proceedings had been conducted in contravention of Regulation 13 of the Navy (Board of Inquiry) Regulation of 1975 and the rules of natural justice.

After the conclusion of the Board of Inquiry, on 12.11.2009 the Summary of Evidence of the number of witnesses was recorded. The Petitioner's statement had been recorded on 30.11.2009. Yet again, on 11.12.2010 Summary of Evidence from R.S.K. Rupasinghe, M.K.E. Padmakumara for the second time and three other new witnesses, namely Commander S.B. Kaluarachchi NRS 403, Lieutenant Commander B.G.C.S. Lakmal NRS 1171 and Lieutenant M.H. Kosala NRR 1348 had been recorded.

Based on the aforesaid Summary of Evidence, the 5th Respondent had issued the Charge Sheet dated 03.05.2010 containing three charges against the Petitioner Subsequently, a Court Martial had been appointed to inquire into the matter. It is stated that after issuing the aforesaid Charge Sheet and appointment of Court Martial on 12.05.2010 for the third occasion, a Summary of Evidence of three more witnesses namely, Sub Lieutenant W.S. Shantha NRR 2564, Stores Assistant R.M.A. Rajapaksha SS 17339 and J.A.J. Henry (Civilian) had also been recorded. The Petitioner states that the recording of evidence in the summary of evidence for the third occasion, after the issuance of the Charge Sheet and the appointment of the Court Martial, is illegal and violates the rules of natural justice.

At the Court Martial, the following witnesses had given evidence on behalf of the prosecution.

i. Captain S.M.S.K. Silva

ii. Leading Transport Assistant H.A.D.P. Niroshan

iii. Stores Assistant M.K.E. Padmakumara

iv. I.M.A. Ilangakoon-Investigating Officer -CPC

v. W.N. Rathnasiri – Bowser Cleaner

vi. Sub Lieutenant W.S. Shantha

vii. Stores Assistant R.M.A. Rajapaksha

viii. J.A.J. Henry - Civilian

ix. Commodore N.K.D. Nanayakkara

x. Provost Sailor R.A.P.N. Jayawardena

xi. Lieutenant Commander M.H. Kosala

After closing the case for the prosecution, the Petitioner made a dock statement while one Commander Ariyarathna and one Lieutenant Commander Chandralal gave evidence on behalf of the Petitioner. Thereafter, the prosecution had called the evidence of Commander N.K.D. Nanayakkara in rebuttal. The verdict of the Court Martial was delivered on 05.01.2011, finding that the Petitioner was guilty of all three charges and had imposed a punishment of "dismissal without disgrace" from the Sri Lanka Navy. The Petitioner states that the said decision of the Court Martial is;

a. *ultra vires*
b. *contrary to the Provisions of law*
c. *made without jurisdiction*
d. *violate the rules of natural justice*
e. *contravene the no evidence rule*
f. *contrary to the evidence*
g. *unfair, unreasonable and irrational*
h. *perverse*
i. *fails to take into consideration relevant matters*
j. *fails to properly evaluate the defence of alibi*
k. *1st to 4th Respondents unlawfully and illegally permitted the prosecution to lead evidence in rebuttal*
l. *Improperly reject the Petitioner's defence of alibi.*

Further, the Petitioner pleads that the summation by the 4th Respondent judge Advocate;

a. *contains mis -directions of fact and law,*
b. *fails to evaluate the evidence according to law*
c. *Fails to sum up the defence of the alibi in a manner required by law, and*
d. *the recommendations of the Board of Inquiry and proceedings of the summary of evidence were held contrary to law.*

Accordingly, the Petitioner seeks, inter alia, Writs of Certiorari quashing the

(a) proceedings of the Court Martial (P15),
(b) decision of the Court Martial dated 05.01.2011,
(c) decision to impose a punishment of dismissal without disgrace from the Sri Lanka Navy, and
(d) decision contained in the message dated 06.01.2011(P20) communicating the decision of the Court Martial to impose a punishment.

Factual Background Leading to the Court Martial Against the Petitioner

The matters that had led towards the conducting of a Court Martial against the Petitioner are as follows. It is stated that the witness Padmakumara had left the Navy Camp Welisara and had gone to the Ceylon Petroleum Corporation, Kolonnawa to purchase 6600 Liters of Kerosene as ordered by the Sri Lanka Navy on 08.04.2009. After loading the said consignment of Kerosene, said Padmakumara had called the Stores Assistant R.M.A. Rajapaksha and had informed him that he was on his way to the Camp. Said Rajapaksha had informed Padmakumara that there are no Navy personnel and Barrels to unload Kerosene at the Camp, and therefore to sell the Kerosene. Thereafter, Rajapaksha had spoken to the Bowser Driver Wehella and had inquired about selling the consignment of kerosene. Wehella had called Padmakumara back and had informed him that he knows of a place to sell kerosene and had asked Rajapaksha to call him. Then said Padmakumar had called said Rajapaksha and had handed over the phone to Wehella to speak to Rajapaksha directly. Afterwards, Bowser driven by Wehella had left Kollonnawa along with said Padmakumara and one Rathnasiri. The bowser had gone to a certain location identified by Wehella and had reached a petrol station. At the Petrol Station, Wehella and Rathnasiri had stepped out of the Bowser and had spoken to a motorcyclist who was there. Thereafter, said

Rathnasiri had returned to the bowser and had informed the driver to follow the motorcyclist. Then they had followed the motorcyclist to a house and Kerosene had been unloaded to another bowser which was parked near the house. Thereafter, said Rajapaksa had informed Padmakumar that he was coming to the location in the Petitioner's car. Subsequently, the Petitioner had arrived at the location along with Rajapaksha in his official car driven by the transport assistant Niroshan. Thereafter, certain other people had also arrived at the said place in a white car and had given Padmakumar cash wrapped in a bag. It had been handed over to the Petitioner. Thereafter, the Petitioner, Rajapaksha and Padmakumar had returned in the Petitioner's car. It is said that Padmakumara was given Rs.10,000 by the Petitioner before he was dropped off near the camp. Wehella, in his statement made to the Navy during the investigations, states that he received Rs. 20,000 and gave Rs. 10,000 to Rathnasiri out of that sum.

Procedural Violations Alleged by the Petitioner

The Petitioner states that he was not permitted to be present throughout the proceedings of the Board of Inquiry [P1] and was denied of the opportunity to cross-examine the witnesses M.K.E. Padmakumara, N. Rathnasiri and K.S.N. Wehella, *who were admittedly accomplices violating Regulation 13 of the Navy (Board of Inquiry) Regulations 1975 marked P2. Said Regulation No. 13 of P2 is as follows.*

> *"Whenever any inquiry affects the character of professional reputation of a person subject to Naval Law, full opportunity shall be afforded to that person of being present throughout the inquiry, and of making any statement and of giving any evidence he may wish to make or give, and of cross-examination any witness whose evidence in this opinion affects his character or professional reputation and of producing any witnesses in defence of his character or professional reputation."*

The Respondents aver that the document marked P1 contains the proceedings of the Board of Investigation appointed by the Commander Western Naval Area to conduct an inquiry into the impugned incident. It is observed that as specified in Regulation 2 of P2, a Board of Inquiry may be assembled by an order in writing by the Commander of the Navy. Since the Commander of the Navy had not appointed the above Board of Investigation [P1], it is submitted that the Board of Investigation in issue cannot be considered as a Board of Inquiry. Hence, the Respondents

submit that the said regulations contained in P2 have no application to the Board of Investigation, and it only applies to the Board of Inquiry appointed by the Commander of the Navy. The Petitioner has failed to encounter the above submission which is averted in the statements of objections of the Respondents. In any event, no material or evidentiary proof has been placed before this Court by either party for this Court to arrive at a proper conclusion as to whether the instant inquiry was a board of investigation or a board of inquiry. Owing to the condition that the Petitioner has failed to deny the stance put forward by the Respondent that the instant is a Board of Investigation and not a Board of Inquiry and terminology referred to in P1 and P2, I am inclined to conclude that Regulation 13 of P2 has no application to the recording of evidence specified in P1 by the Board of Investigation.

Nevertheless, it is observed that the Petitioner has been given an opportunity to make a statement and give evidence by the aforesaid Board. It is further observed that as per the said Regulation 13, an opportunity as referred therein could be given to any person if he so wishes and if he thinks that the inquiry affects his character or professional reputation only. There is no material before this Court to conclude that the Petitioner had made such requests as such to the Board. Hence, the argument advanced by the Petitioner that he was denied of the opportunity to be present throughout the inquiry and cross-examine the witnesses at the proceedings as contained in P1 (alleged denial of the right to a fair hearing) as per the above Regulation No.13 cannot sustain.

The Respondents submit that the appointment of a Board of Inquiry by the Commander of the Navy under the Regulations contained P2 is not a mandatory requirement to be fulfilled prior to the commencement of Court Martial proceedings. It is on common ground that the Court Martial was convened based on the evidence recorded in the Summary of Evidence which is an essential pre-condition to be satisfied prior to summoning a Court Martial as per the Sri Lanka Navy Order No. 0512 marked P4. It is observed that Section 2 of Order P4 stipulates that one of the objects of a Summary of Evidence is to inform the convening Authority of the nature of the case and to enable him to decide whether the case should be tried by the Court Martial. The evidence of the above-mentioned three witnesses, namely M.K.E. Padmakumara, N.Rathnasiri

and K.S.N. Whella, whose statements were recorded during the proceedings before the Board of Investigation P1 too, were yet again recorded in the Summary of Evidence marked P5 as well. The said witnesses have been subjected to cross-examination by the Petitioner. Accordingly, it could be observed that a fair hearing had been given to the Petitioner.

The Petitioner avers that after the relevant Charge Sheet was issued and the Court Martial was appointed, a Summary of Evidence from three additional witnesses had been recorded for the third time. The Petitioner had been served with an additional list of witnesses and documents. The Petitioner further asserts that he was not provided with a copy of the Summary of Evidence concerning Lieutenant Commander A.M.D.M. Abeysinghe and that the same violates regulations 10 and 30 of the Sri Lanka Navy Orders 0512 [P4]. It is asserted that the failure to adhere to the said procedural steps violates principles of natural justice rendering the final order a nullity.

As per the document marked P5, the Summary of Evidence had commenced on 12.11.2009. Documents P6 and P7 show that the aforesaid Charge Sheet was served on the Petitioner on 03.05.2010. The Petitioner complains that the recording of the Summary of Evidence for the third time from the witnesses namely S.B. Kaluarachchi, B.G.C.S. Lakmal and M.H. Kosala is contrary to the due procedure of recording the Summary of Evidence as stipulated in Sri Lanka Navy Orders 0512 [P4]. Nevertheless, the proceedings of the Court Martial commenced on 23.06.2010. The third Summary of Evidence of the above three witnesses was recorded from 11.02.2010 to 25.02.2010 before the commencement of the Court Martial. In terms of Section 31 of the P4, if it appears to the Commanding Officer or Convening Authority that additional evidence is required, additional evidence may be obtained by recording an additional Summary of Evidence. Furthermore, it is observed that the Charge Sheet [P7] was not amended subsequent to the third Summary of Evidence.

Although the Petitioner states that he was not provided with a copy of the said Summary of Evidence containing the evidence of Lieutenant Commander A.M.D.M. Abeysinghe, as per the document marked P5/R2 it is evident that a copy of the above Summary of Evidence of A.M.D.M.

Abeysinghe had been served on the Petitioner and the same has been formally accepted by the Petitioner placing his signature.

Under such circumstances, the Petitioner's assertion that the Respondents have failed to adhere to the due procedural steps as stipulated in P2 and P4 cannot be accepted. As such, I am of the view that no prejudice or miscarriage of justice had been caused to the Petitioner.

The Admissibility of the Testimony of Prosecution Witnesses

Credibility of witness

The Petitioner challenges the evidence placed before the Court Martial in various aspects. The Petitioner states that the prosecution witnesses Padmakumar and Rajapaksa are admitted accomplices and criminals unworthy of any credit. Therefore, it is claimed that said witnesses were not independent witnesses and had to testify on behalf of the prosecution to satisfy the Naval Authorities to safeguard their respective positions in the Navy. It is claimed that the Naval Authorities allowed the said witnesses to remain in their positions and handle stores despite, their own admissions of theft, in order to elicit the required evidence from them to implicate the Petitioner by inducing them.

Nevertheless, by the times of the Court Martial, the said witnesses had not been tried for the alleged offences they had committed. However, by that time, Sri Lanka Navy had lodged a complaint with the Criminal Investigation Department regarding an alleged large-scale fraud involving lubricating oil and kerosene against said Rajapaksha and the Petitioner. Accordingly, the said witness Rajapaksa had been arrested by the Criminal Investigation Department. The Respondents submit that witness Pathmakumara was summarily tried by his Commanding Officer for the offence he had committed. Furthermore, the Petitioner has failed to convincingly show how the alleged criminal backgrounds of the witnesses had negatively affected his case or the credibility of witnesses. Therefore, the argument that these witnesses were not independent cannot be accepted merely on a simple assertion.

Further, the petitioner asserts that Niroshan was an accomplice along with witnesses Rajapaksha, Padmakumara, Wehella and Rathnasiri. Accordingly, he is an unreliable witness. Who is an accomplice? *"An accomplice is one who is a guilty associate in a crime or who sustains such*

relation to the criminal act that he could be charged jointly with the accused. It is admittedly, not every participation in crime which makes a party an accomplice in it so as to require a testimony to be confirmed." [see *Peris v. Dole (1948) 49 NLR 12*].

"*An accomplice is a person who knowingly, voluntarily and with common intent with the principal offender unites the commission of a crime. The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who has even an admitted participation in a related but distinct office. To constitute one an accomplice, he must perform some part in the commission of the crime or owe some duty to the person in danger that makes it incumbent on him to prevent its commission*." [see The King V. Piyasena *49 NLR 389*].

In *LT.CDR.Samantha Pushpa Kumara Pathirage v. Vice Admiral Jayantha Perera and Others - CA (Writ) Application No. 689/2011, decided on: 14th February 2019* *on similar circumstances* *His Lordship Justice Arjuna Obeyesekere observed that:*

> *"The question that arises from the second argument of the learned Counsel for the Petitioner is whether an accomplice is a competent witness. In terms of Section 133 of the Evidence Ordinance, 'an accomplice shall be a competent witness against an accused person, and the conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.' Section 133 should be considered with Section 114 illustration (b) of the Evidence Ordinance, which reads as follows: "The Court" may presume an accomplice is unworthy of credit unless he is corroborated in material particulars."*
>
> *If Section 114 illustration (b) presupposes the unreliability of the accomplice's evidence, why does the prosecution depend on the evidence of an accomplice? One explanation is that there may be instances where it is difficult and sometimes impossible to detect offences which have been secretly planned and executed without obtaining the evidence of a partner in crime. Unless their evidence is led, those responsible cannot be held accountable for the crimes that they have committed, thereby making the evidence of accomplices essential for the prosecution.*
>
> *This Court observes that the Petitioner, as a senior Commissioned Officer of the Sri Lanka Navy was required to act with utmost honesty and adhere to high standards of discipline required of a Commissioned Officer. Any breach thereof has to be taken serious note of. Thus, in order to establish its case and ensure that any breach of discipline is dealt with, this Court is of the view that the prosecution was entitled to lead the evidence of the three storekeepers and*

leave the decision as to whether their evidence is truthful and reliable to the members of the Court Martial.

The combined effect of sections 133 and 114 illustration (b) is that it is not illegal to convict on uncorroborated evidence of an accomplice, even though it may be dangerous and unsafe to do so."

In *P. Sivasambu, Inspector of Police vs Nugawela 41 NLR 363 at 368, it* was held that *"under section 133 of the Evidence Ordinance, a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But, it is necessary that the Magistrate should have clearly before his mind the fact that he is dealing with the evidence of an accomplice, and he must give clear and satisfactory reasons for convicting in the absence of corroboration."*

However, in the instant application the witnesses, Rajapaksha and Padhmakumara, called by the Prosecution, have identified the Petitioner, who was present at the scene, and well known to them. Alleged accomplice Niroshan's testimony had been corroborated by the evidence of the above witnesses.

The Petitioner states that according to the Summary of Evidence of Lieutenant Rupasinghe, he had seen Niroshan conversing with Rajapaksha and Padhmakumara, who were seated at a table in the Kerosene stores and Niroshan himself admitted in evidence before the Court Martial that he used to speak to Rajapaksha and Padhmakumara at the stores. Hence, Niroshan was a close friend of Rajapaksha and Padhmakumara. Consequently, the Petitioner contends that Niroshan has intentionally altered his evidence and provided false testimony to align with the narrative given by his friends. Anyhow, the Summary of Evidence is not evidence before the Court Martial. Furthermore, merely because witnesses sit in such a manner or speak with each other does not necessarily mean that they were close friends, and it does not seem as a reason for Niroshan to give evidence in agreement with the testimony given by the other two. As such, I view that there is no rationale behind such an allegation.

The Petitioner states that the witness Niroshan, who was the driver of the Petitioner's official car, has uttered deliberate falsehood before the Court Martial and it was refuted by the testimony of Commander Ariyaratne and Commander Chandralal called as witnesses by the Petitioner at the

Court Martial. Nevertheless, the evidence given by Commander Ariyaratne and Commander Chandralal are not consistent. In his evidence-in-chief, Ariyaratna said that there had been another private party after the conclusion of the official farewell party held on behalf of Commander Sandanayake who was the retiree, and the Petitioner did not attend the said event. In the cross-examination, Ariyarathne said that he dropped off Commander Sandanayake after the private party at his home in Meerigama and came back.

ප්‍ර: *දළ වශයෙන් කතාබහ ඉවර වුන වෙලාව මතක ද*

පි: *රාත්‍රී 11.15ත් 11.30ත් අතර වගේ තමා ඔය සිද්ධිය සිදුවුණේ*

ප්‍ර: *රාත්‍රී 11.30 න් පස්සේ තමන්ලා විසිර ගියැයි කියලාද තමන් කියන්නේ*

පි: *11.30 වෙනකොට ජ්‍යෙෂ්ඨ නිළධාරීන් විසිර ගියා. කදවුරේ ගොඩාක් ජ්‍යෙෂ්ඨ නිළධාරීන් හිටියා. නාවික හමුදාවෙන් ගිය නිළධාරියා මගෙත් එක්ක සහ අනෙක් නිළධාරි එක්ක හුගාක් හිතවත් වෙලා හිටියා. ඒක නිසා එතුමා කිව්වා යන්න ඉස්සෙල්ලා එයාට තව අපිත් එක්ක එකතුවෙලා Drink එකක් ගන්න ඕන කියලා. ඒ නිසා ඒක සාදයට සම්බන්ධයක් නැතුව එතනම Drink එකක් ගන්න පටන් ගත්තා.*

ප්‍ර: *ඒ සාදය අවසන් වෙලා නිළධාරියා කරපු සුභද ඇසුරට මේ චුදිත නිළධරියා සම්බන්ධ වුනාද?*

පි: *නැහැ සම්බන්ධ වුනේ නැහැ.*

(evidence of chief of Ariyaratna at pages 471, 472 of P15)

ප්‍ර: *එතනට ආපු කට්ටිය කවුද?*

පි: *බහින්බස් වීමකට නෙවෙයි ඇවිල්ලා තිබුනේ ඒගොල්ලො හමුදාවට ඒ දවස් වල යුද්ධෙ එහෙම හින්දා ප්‍රතිචාර දක්වලා තියෙන්නේ නමුත් බීමත්ව සිටි නිසා අපේ අයත් එක්ක බහින්බස් වීමක් සිදුවෙලා මම කතා කරලා ඒක සමථයකට පත් කලා ඊට අමතරව කොමාණ්ඩර් සන්දනායකව ගෙදරට ගිහිල්ලා ඇරලලා ආවා එතුමාට යන්න වාහනයක් තිබුනෙ නැහැ මගේ පෞද්ගලික වාහනයක් තිබ්බා මම රෑ මීහිරිගමට ගිහින් එතුමාව ගෙදරට බස්සවලා ආවේ මම එනකොට 05ට විතර ඇති ඒ නිසා ඒ දවස මට හොඳට මතකයි.*

ප්‍ර: *තමන්ගෙ නිල රථයෙන්ද ගියේ?*

පි: *නැහැ මගේ පෞද්ගලික රථයෙන්*

(cross-examination of Ariyaratna at page 483 and 484 of P15)

ප්‍ර: *ඒ කොමාණ්ඩර් සන්දනායක එක්ක අර නිළ සාදය පවත්වලා තවත් පොඩි සාදයක් පැවැත්වුවා.*

පි: *ඔබ හරි.*

ප්‍ර: *පුද්ගලික සාදයට පස්සේ තමන් ගිහින් එයාව මීරිගමට ඇරලලා ආවා.*

පි: ඔබ හරි තුමනි එතුමාගේ ගෙදරට ගිහින් ඇරරලා ආවා.

(cross-examination of Ariyaratna at page 503 of P15)

Evidence of the witness Chandralal is contrary to the evidence given by the witness Ariyaratna. The witness Chandralal stated that both Ariyaratna and the Petitioner sent Commander Sandanayake off and had a drink thereafter.

ප්‍ර: කොමාණ්ඩර් වීරසිංහ ස්තුති කරනකොට වේලාව කීයද මතකයක් නැහැ

පි: කොමාණ්ඩර් සන්දනායක ගියාට පස්සේ ඒ කට්ටිය ඇවිල්ලා වෙනම බිව්වා එතන.

ප්‍ර: පළවෙනි පාටිය ඉවර වුනාට පස්සේ කොමාණ්ඩර් සන්දනායක දැන ඇදුනම් පිට තවත් බිබ්වා .

පි: කොමාණ්ඩර් සන්දනායක දැක්කේ නැහැ මම කියන්නේ කොමාණ්ඩර් ආරියරත්නයි කොමාණ්ඩර් වීරසිංහයි සන්දනායක සර් යවලා අයෙත් තව Officers ලා කිහිප දෙනෙක් හිටියා මම එතකොට Wine ගණන් කර කර හිටියේ එතනට ඇවිල්ලා කොමාණ්ඩර් වීරසිංහ ස්තුති කරලා වෙනමම Drink එකක් ඉල්ලා ගත්තා එතන කොමාණ්ඩර් ආරියරත්න හිටියා තක්ෂලා XO හිටියා මහසෙන් XO හිටියා.

(cross-examination of Chandralal at page 522 of P15)

ප්‍ර: කොමාණ්ඩර් වීරසිංහ දෙවැනියට පාටිය තිබූ තැන මත්පැන් පානය කරමින් සිටියා.

පි: මත්පැන් පානය කලාද දන්නේ නැහැ එතනට ඇවිල්ලා මට ස්තුති කලා බිව්වාද කියලා දන්නේ නැහැ.

ප්‍ර: තමන්ට දෙවන අවස්ථාවේ මතක නැහැ කොමාණ්ඩර් සන්දනායක මත්පැන් පානය කරනකොට හිටියා කියලා.

පි: මතක නැහැ.

ප්‍ර: සමහර කාරනා මතකයි කොමාණ්ඩර් සන්දනායකට දීපු පාටිය වශයෙන් පාටියේ කොමාණ්ඩර් සන්දනායක දෙවන වතාවට මත්පැන් පානය කලා මතක නැහැ.

පි: ඒ ගොල්ලෝ ඇවිල්ලා Drinks Order කරනකොට හිටියේ නැහැ.

ප්‍ර: කොමාණ්ඩර් සන්දනායක කොමාණ්ඩර් ආරියරත්න එකට බිව්වාද

පි: මට මතක විදිහට කොමාණ්ඩර් ආරියරත්නයි කොමාණ්ඩර් වීරසිංහයි හිටියා.

(cross-examination of Chandralal at page 523 of P15)

Accordingly, the credibility of the above witnesses Ariyaratna and Chandralal is in dispute and the credibility of the evidence of witness Niroshan cannot be refuted by such evidence.

Witness Niroshan had been involved in the incident in issue as a naval driver of the Petitioner during the transaction material to the incident. There is no evidence to support that Niroshan received any financial

benefit or inducement from the said transaction. Furthermore, the evidence does not show that Niroshan even stepped out of the vehicle during the time relevant to the incident. Hence, although Niroshan was seen speaking with witnesses Rajapaksha and Padhmakumara in the store, this does not necessarily prove his involvement in the offence. The circumstances and legal principles outlined above do not support the Petitioner's claim that Niroshan is an accomplice.

The Petitioner further states that witness Niroshan is a person with a criminal background. However, it is observed that at the time the Petitioner was convicted, the Niroshan had not been a convicted criminal. Hence the credibility of Niroshan could not be impeached in the instant application based on his alleged criminal liability subsequent to the Court Martial. The Petitioner contends that failure to maintain and submit a running chart for April 2009 shows that Niroshan had knowingly used the official vehicle for an unauthorized purpose and deliberately concealed such use from the Petitioner and the Supplies Department. Nevertheless, Niroshan's explanation in his testimony was that he was unable to submit the running charts for April 2009 before the month's end due to being taken to Navy Headquarters is acceptable.

Failure of the Prosecution to Call Wehella as a Prosecution Witness

The Petitioner submits that although the Bowser Driver Wehella was a material witness listed by the Prosecution at the Court Martial, the prosecution failed to call him as a prosecution witness. The Petitioner relies on the presumption under Section 114(f) of the Evidence Ordinance which provides that evidence which could have been produced and is not produced, if produced, be unfavourable to the person who withholds it. It is submitted by the Respondents that the Prosecution had decided not to call said Wehella as a witness since the prosecution was of the opinion that the evidence placed before the Court Martial was sufficient to substantiate the charges against the accused (Petitioner). Section 134 of the Evidence Ordinance provides that no number of witnesses shall in any case be required for the proof of an act.

There may be multiple reasons as to why a certain party may decide not to call a certain witness. One such reason would be the fact that the witness in question if called to submit evidence, would give evidence that is adverse to the party in question. However, that is not the sole reason

for a party not to call a particular witness to stand. There may also be circumstances where a party may, in their opinion, determine that sufficient evidence has been adduced to prove a certain fact and decide not to call any more witnesses. Therefore, in the instant matter, it is not prudent to make the presumption that the reason for the Prosecution to not call this particular witness was that the Prosecution feared that the evidence adduced by such witness would be adverse. There may have been several other compelling reasons that triggered the decision not to call the witness in question.

Further, it is observed that although the Petitioner claimed the benefit of the presumption in Section 114(f) of the Evidence Ordinance he has failed to substantiate any importance to the case in calling the above witness.

In *Walimunige John and Another v. The State 76 NLR 488*, it was held,

> *"that the prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross-examination. Further, it is not incumbent on the trial Judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114 (f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all.*
>
> *The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the ' prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such a witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance."*

Nevertheless, it appears from the proceedings before the Court Martial that the Court Martial had summoned Wehella as a defence witness on a request made by the defence (Petitioner). However, the defence had also decided not to call Wehella as a witness at their right. Under such circumstances, it cannot be assumed that the Prosecution decided not to call Wehella as a witness since the Prosecution considered that said

Wehella's evidence would be unfavourable to the Prosecution case if he was called.

Judge Advocate's Direction in Respect of Accomplice Evidence

It is also submitted that the Judge Advocate failed to sum up that the corroboration of accomplices must be derived from unimpeachable or independent evidence. In the instant application, Judge Advocate in his summation to the members of the Court Martial had been adequately warned of the perils of acting on the evidence of an accomplice and advised that they must be satisfied with the truthfulness and reliability of the said witnesses, prior to acting upon such testimony. [See pages 570,571,574,576,577,578,599 and 600 of the document marked P15].

This Court is of the view that the directions given to the Judge Advocate were adequate to the members of the Court Martial to duly consider the evidence presented by the Prosecution Witnesses. Moreover, the Judge Advocate in his summing up has given proper directions in respect of the identification of the Petitioner assessing the evidence of the above witnesses.

> *දැන් මේ පැමිණිල්ලෙම සාක්ෂි ඒ කිසිම සාක්ෂියක් ඒ සාක්ෂි 3ම ගත්තත් විත්තිකරු කියන ආකාරයට 11.20 වෙනකල් සාදයේ රැදි සිටියා නම් ඔහුට ඉන්පසු කඩුවෙල ගිහිල්ලා ඔය කියන ආකාරයට එන්න හැකියාවක් නැහැ විත්තිකරු වෙනුවෙන් සාක්ෂි දුන්න නිලධාරීන් දෙදෙනා එහෙනම් ආරියරත්න සහ චන්ද්‍රලාල් කියන විධියට එවැනි වෙලාවක් වෙනකල් හිටියත් ඔහුට පැමිණිල්ලෙන් කියන විධියට මේ දේට සහභාගි වෙන්න ඒ වෙලාවේ කඩුවෙල ඉන්න හැකියාවක් නැහැ.*
>
> *එම නිසා විත්තිකරුගේ හෝ චන්ද්‍රලාල්ගේ හෝ ආරියරත්නගේ හෝ ඒ 3 දෙනාගේම සාක්ෂි ඔබතුමන්ලා පිළිගන්නවා නම් විත්තිකරු පැමිණිල්ලේ කියන ආකාරයට එවැනි කඩුවෙල වැනි ස්ථානයක එම කාල පරාසය තුළ සිටීමට හැකියාවක් නැහැ.*
>
> *(*at page 592 of P15, summing up*)*

> *දැන් මෙතනදි තමුන්නාන්සේලා මේ දේ තීරණය කිරීමේදී මතක තබාගත යුතු කාරණයක් තමා රාජපක්ෂ නිරෝෂන් සහ පද්මකුමාර විත්තිකරුව අඳුනා ගැනීම පිළිබඳව ප්‍රශ්නයක් නැහැ ඔවුන් 03 දෙනාම විත්තිකරුව දන්නවා එනකොට තමුන්නාන්සේලා එතනදි තීරණය කරන්න ඕන ඔවුන්ගේ සාක්ෂි සත්‍යයද නැද්ද කියන එක විතරයි දැන් රත්නසිරිව ගත්තම රත්නසිරිගේ සාක්ෂිය තමුන්නාසේලා සත්‍ය ලෙස පිළිගත්තත් එහිදි විත්තිකරු කියලා ඔහු මෙහිදි අඳුනා ගත්තත් ඒ අඳුනා ගැනීම සාධාරණ සැකයෙන් තොරව පිළිගත හැකි හඳුනාගැනීමක්ද කියන එකත් තමුන්නාන්සේලා තීරණය කරන්න ඕන තමුන්නාසේලා තීරණය කරනවා නම් ඒ අවස්ථාවේදී කවුද ආවෙ කියන එක්කෙනා හරියට ඒ වෙලාවේ අඳුන ගන්න හැකියාවක් තිබුනෙ නැහැ .විශේෂයෙන් ඔහු 1 වෙනි වනාවට විත්තිකරුව දැක්කෙ කියලා එසේ නම් ඒ සැකයේ වාසිය විත්තිකරුට දීලා රත්නසිරිගේ සාක්ෂිය ප්‍රතික්ෂේප කරන්න පුළුවන්.*
>
> (at pages 586 and 587 of P15, summing up)

The decision of the Court Martial had been arrived at only after having considered the said direction. This Court is therefore of the view that the

members of the Court Martial have arrived at their decision, after having been correctly assessed of the law and after having been satisfied of the truthfulness and reliability of the evidence of the witnesses.

Defence of Alibi Advanced by the Petitioner

The Petitioner has taken up the defence of alibi in his dock statement before the Court Martial. It is stated that on 08.04.2009 between 5.45 p.m./6.00 p.m. to 11.30 p.m. to 11.45 p.m. the Petitioner was at a party at the Wardroom of the Welisara Navy Camp. Hence, the Petitioner claims that he was not present at the place of crime at Kaduwela.

> *"මෙම සාදයට සහභාගි වීමට එදින මා හවස 5.30 පමණ සිට නිලධාරී නිවාසයේ රැඳී සාදය හමාර කොට රාත්‍රී 11.30 පසුවී නිවසට යාමට පිටත් වූ බව ස්ථිරවම ප්‍රකාශ කරමි."*
>
> (at page 466 in P15 - dock statement)

On the said day, there had been a farewell party for retired Commander Sandanayake. According to the evidence given by the witness, Ariyarathna, who was summoned to give evidence by the defence, the party commenced at 8.45 p.m./9.00 p.m. The Petitioner had attended in the above. At 11.30 p.m., senior officers had left the party. However, the retired officer Sandanayake, with about 10 officers, had had a drink after the main function. However, from the following evidence, it appears that the Petitioner had not attended in the said party.

> *ප්‍ර:* *දළ වශයෙන් රාත්‍රී අටයි හතළිස් පහ නවයට පමණ සාදය පටන් ගත්තා*
>
> *පි:* *ඔව්.*
>
> (evidence of Ariyarathna at Page 469 of P15)

> *ප්‍ර:* *රාත්‍රී 11.30 න් පස්සේ තමන්ලා විසිර ගියැයි කියලාද තමන් කියන්නේ*
>
> *පි:* *11.30 වෙනකොට ජ්‍යෙෂ්ඨ නිළධාරීන් විසිර ගියා. කදවුරේ ගොඩාක් ජ්‍යෙෂ්ඨ නිළධාරීන් හිටියා. නාවික හමුදාවෙන් ගිය නිළධාරියා මගෙන් එක්ක සහ අනෙක් නිළධාරි එක්ක හුගාක් හිතවත් වෙලා හිටියා. ඒක නිසා එතුමා කිව්වා යන්න ඉස්සෙල්ලා එයාට තව අපිත් එක්ක එකතුවෙලා Drink එකක් ගන්න ඕන කියලා. ඒ නිසා ඒක සාදයට සම්බන්ධයක් නැතුව එතනම Drink එකක් ගන්න පටන් ගත්තා.*
>
> *ප්‍ර:* *ඒ සාදය අවසන් වෙලා නිළධාරියා කරපු සුභද ඇසුරට මේ චුදිත නිළධරියා සම්බන්ධ වුනාද?*
>
> *පි:* *නැහැ. සම්බන්ධ වුනේ නැහැ .*
>
> *ප්‍ර:* *තමන් 11.30 වෙනකල් ඒ කාර්ය කරලා ඉවර වුනා*

පි: *ඔව්. තව නිළධාරීන් 10ක් විතර හිටියා.*

(evidence of Ariyarathna at Page 472 of P 15)

The stance of the Petitioner is that the evidence of witness Ariyarathna is not inconsistent with the evidence of the witness Chandralal, who was also called by the defence. In this context, it is essential to evaluate the evidence presented by the witness mentioned above. In his cross-examination, said witness Ariyarathne had said that he dropped off Commander Sandanayake at his home in Meerigama and came back to the party.

ප්‍ර: *ඒ කොමාණ්ඩර් සන්දනායක එක්ක අර නිළ සාදය පවත්වලා තවත් පොඩි සාදයක් පැවැත්වුවා.*

පි: *ඔබ හරි.*

ප්‍ර: *පුද්ගලික සාදයට පස්සේ තමන් ගිහින් එයාව මීරිගමට ඇරලලා ආවා*

පි: *ඔබ හරි තුමනි එතුමාගේ ගෙදරට ගිහින් ඇරරලා ආවා.*

(cross-examination of Ariyaratna- at Page 503 of P15)

Witness Chandimal had also given evidence that the farewell party lasted until 11.00 p.m.-11.30 p.m. Although the witness Ariyarathna said that the Petitioner left the place after the main function, Chandimal stated that even after sending the Sandanayake off, Ariyarathna and the Petitioner had drinks.

ප්‍ර: *කොමාණ්ඩර් වීරසිංහ ස්තුති කරනකොට වේලාව කීයද මතකයක් නැහැ.*

පි: *කොමාණ්ඩර් සන්දනායක ගියාට පස්සේ ඒ කට්ටිය ඇවිල්ලා වෙනම බිව්වා එතන.*

ප්‍ර: *පළවෙනි පාටිය ඉවර වුනාට පස්සේ කොමාණ්ඩර් සන්දනායක දැන ඇඳුනම් පිට තවත් බිව්වා.*

පි: *කොමාණ්ඩර් සන්දනායක දැක්කේ නැහැ මම කියන්නේ කොමාණ්ඩර් ආරියරත්නයි කොමාණ්ඩර් වීරසිංහයි සන්දනායක සර් යවලා අයෙත් තව Officers ලා කිහිප දෙනෙක් හිටියා මම එතකොට Wine ගණන් කර කර හිටියේ එතනට ඇවිල්ලා කොමාණ්ඩර් වීරසිංහ ස්තුති කරලා වෙනමම Drink එකක් ඉල්ලා ගත්තා එතන කොමාණ්ඩර් ආරියරත්න හිටියා තක්ෂලා XO හිටියා මහසෙන් XO හිටියා.*

.....

ප්‍ර: *කොමාණ්ඩර් වීරසිංහ දෙවැනියට පාටිය තිබූ තැන මත්පැන් පානය කරමින් සිටියා*

පි: *මත්පැන් පානය කලාද දන්නේ නැහැ එතනට ඇවිල්ලා මට ස්තුති කලා බිව්වාද කියලා දන්නේ නැහැ*

ප්‍ර: *තමන්ට දෙවන අවස්ථාවේ මතක නැහැ කොමාණ්ඩර් සන්දනායක මත්පැන් පානය කරනකොට හිටියා කියලා*

පී: මතක නැහැ

ප්‍ර: සමහර කාරනා මතකයි කොමාණ්ඩර් සන්දනායකට දීපු පාටිය වශයෙන් පාටියේ කමාණ්ඩර් සන්දනායක දෙවන වතාවට මත්පැන් පානය කලා මතක නැහැ

පී: ඒ ගොල්ලෝ ඇවිත් Drinks Order කරනකොට හිටියේ නැහැ

ප්‍ර: කමාණ්ඩර් සන්දනායක කමාණ්ඩර් ආරියරත්න එකට බීච්චාද

පී: මට මතක විදිහට කොමාණ්ඩර් ආරියරත්නයි කමාණ්ඩර් වීරසිංහයි හිටියා

(cross-examinations of Chandralal at Pages 522 – 523 of P15)

Hence, the above piece of evidence shows that there is an inconsistency in evidence given by the witnesses Ariyarathna and Sandanayake concerning the time of the Petitioner leaving the premises after the function. Accordingly, the credibility of the defence witnesses is in dispute. Therefore, I view that the credibility of prosecution witness Niroshan's evidence cannot be undermined by the evidence of Ariyarathna and Chandimal in favour of the defence of alibi claimed by the Petitioner.

Evidence in Rebuttal

The Petitioner submitted that the Court Martial acted *ultra vires* by allowing the Prosecution to call evidence in rebuttal. After closing the defence case, the Respondent had been allowed to call evidence in rebuttal. Consequently, the Prosecution had called the evidence of Commodore Nanayakkara in rebuttal. The Petitioner claims that the evidence in rebuttal could be allowed only when the Prosecution is taken aback by surprise. Section 134 of the Navy Act (as amended) provides that, *subject to other provisions of this part, the rules of evidence to be adopted in proceedings before a court martial shall be the same as those followed in the civil courts in Sri Lanka*. Hence, it is viewed that the Evidence Ordinance applies to a Court Martial. The Petitioner relies on the Law of Evidence by E.R.S.R.Coomaraswamy and the Supreme Court decision in K.S. Sediris v. The Queen 74 NLR 224.

"Evidence in rebuttal should not be permitted except in a case where matter has arisen ex improviso, or the evidence was not admissible before the prosecution case was closed" (Law of Evidence by E.R.S.R. Coomaraswamy, Volume 2, Stamford Lake Publication,2013, at Page 845).

In K.S. Sediris v The Queen 74 NLR 224 at Page 227 the Court observed as follows;

> *"Evidence in rebuttal is permitted to be led at discretion of the trial Judge under Section 237(1) of the Criminal Procedure Code. It is permitted in the interests of justice when the prosecution has been taken by surprise by evidence being led on behalf of the defence which the Prosecution could not reasonably anticipate. In such a case the prosecution, if it has evidence which runs counter to the defence case, is permitted to lead evidence in rebuttal…"*

It is the submission of the Petitioner that in the instant application, the Prosecution was not taken by surprise as during the recording of the Summary of Evidence itself, the prosecution knew that,

(a) about the Petitioner attending the aforesaid party and that alcohol was served at the said party;
(b) the Petitioner attended the said party; and that
(c) when the Petitioner was asked about the commission of the crime in Kaduwela, the Petitioner replied, stating he remembers drinking at a party at Welisara.

The Petitioner refers to a certain portion of the evidence recorded in the Board of Inquiry.

ප්‍ර: *ඔබ එසේ යන විට ඔබ අඩුම ගානේ මත්පැන් පානය කර සිටී බවටත් මතකයේ තිබේද?*

පි: *සාදයේදී බීමත්ව සිටියා* ***(පරීක්ෂණ මණ්ඩලය සාදයක් තිබුනා කියා පැවසුවායින් පසුව)***

(at Page 4 of the document marked P1)

ප්‍ර: *2008 අප්‍රේල් මස 08 දින රාත්‍රී කාලයේ ඔබ නිල රථයෙන් ඔබ සහ ග/ස රාජපක්ෂ යන අය කඩුවෙල හේවගම යන ප්‍රදේශයට ගමන් කොට එහි පාර අයිනේ නවතා තිබූ බවුසරයේ අසල සිටී ග/ස පත්මකුමාරන් කොලොන්නාවට පිටත් වූ බවුසරයේ (CPC) රියදුරු මහතා සහ එහි ගෝලයන් හමුවූ බවට ඔබට විරුද්ධව චෝදනා එල්ල වී ඇත. නවද මේ අවස්ථාවේදී ඔබත් ග/ස රාජපක්ෂත් මත්පැන් පානය කර තිබූ බවට සාක්ෂි ලැබී ඇත. මේ කරුණු දෙක සම්බන්ධයෙන් ඔබට කීමට ඇත්තේ කුමක්ද?*

පි: *මා හට මතකයේ හැටියට වැලිසර නිලධරි නිවාසයේ පැවති සාදයක දී මත්පැන් පානය කල බවට මතක යි. මට සිතෙන පරිදි එදින 2009 අප්‍රේල් 08 වෙන දින විය හැකියි. ඊට වැඩිය යමක් කීමට මට මතක නෑ.*

(at Page 5 of the document marked P1)

It is also important to observe from the above proceedings before the Board of Inquiry that even the Petitioner had no recollection of a party held at the officer's mess until the Board of Inquiry disclosed such.

However, after being reminded by the Board of Inquiry only the Petitioner had answered that he was drunk there. It shows that even the Petitioner had no idea of the defence of alibi at the commencement of the proceedings, and it is only an afterthought of the Petitioner. In fact, the Petitioner has not clearly averred the said defence during the summary of evidence.

12. *ප්‍ර:* *මෙදින නිලධාරි නිවාසයේ සාදයක් පැවතුනේද?*

පි: *මතක නැත.*

(at Page 3 of the document marked P1)

However, the Petitioner claims that the evidence from the Board of Inquiry disclosed that the Petitioner attended a party at Welisara. Hence, it is claimed that the Prosecution would have known that the Petitioner was at the said party at the time of the crime in Kaduwela. It appears that the Petitioner expected the prosecution and Court to predict his plea of an alibi which is misconceived in law. However, I am of the view that the mere knowledge of the Prosecution of a party and the Petitioner's attendance there does not effectively serve the possible defence of an alibi.

It is also observed that since the party was in Welisara and the place where the relevant offence was committed is Kaduwela, the Petitioner's attendance at the party at Welisara does not necessarily exclude the possibility of the Petitioner being physically present at Kaduwela at the scene of the crime, subsequently. At least the Petitioner should have been certain and consistent with his position as to where he was at the time of the commission of the crime. In *Damayanu v. The Queen 73 NLR 62, H.N.G. Fernando C.J.* observed: "*The defence becomes one of alibi only when there is direct evidence that the accused person was at a different place on or about the relevant time of the commission of the act*."

Hence, the effect of the alibi is less. The evidence indicated that the Petitioner left the party and drove to Kaduwela in his official vehicle. No questions were put to the witnesses who were called by the Prosecution in their cross-examination by the Petitioner in Court Martial based on the defence of alibi. The first time at which the Petitioner took up the defence of alibi was during his dock statement before the Court Martial. In

Jayatissa v. Hon Attorney General [2010] 1 SRI L.R.279, it was held that when the defence set up an alibi, the Prosecution is entitled to lead evidence in rebuttal. Hence, in the instant application, since the Petitioner has taken up his physical impossibility of being present at the scene of the crime at the relevant time as a defence (alibi) for the first time in the dock statement, taken by surprise, the Prosecution was entitled to call evidence in rebuttal. Hence, I am not inclined to accept the submission of the Petitioner that the Prosecution was not taken by surprise of the defence of alibi taken up by the Petitioner at the dock statement made in the Court Martial. Accordingly, I am of the view that the Court Martial has not acted *ultra vires* in allowing the evidence in rebuttal.

Further, when the Prosecution informed the Court Martial of the intention of calling evidence in rebuttal and on the day of calling witness Commodore Nanayakkara to give evidence in rebuttal, the defence (Petitioner) failed to object to such. Accordingly, the Petitioner is estopped from challenging the decision of the Court Martial at this juncture on such basis.

Alleged Defective Summing up of Evidence in Respect of the Defence of Alibi

It is stated that the summation of evidence by the Judge Advocate contains material misdirections and non-directions. The Petitioner brought the notice of this Court to the following citations in the summation of the Judge Advocate.

> *".....දැන් මෙතනදී විත්තිකරු ඇතුළු 03 දෙනෙක් කියනවා 11 පැන්නා කියලා විත්තිකරු එම ස්ථානයෙන් පිටවෙද්දි rebuttal evidence වශයෙන් ගෙනාපු කොමදෝරු නානායක්කාර කියා සිටින්නේ 09.45-10.00 වෙද්දි පාටිය ඉවරවුනා කියලා. කොමදෝරු නානායක්කාර කියන ස්ථීර පදනම තමා මගේ පාටි පැයකට එකහමාරකට වඩා යන්නෙ නැහැ. එදා 08.00ට පටන්ගන්න තිබ්බ පාටිය ඒ පාටිය විශේෂ අමුත්තා එන්න ප්‍රමාද වුන නිසා මිනිත්තු 15ක් විතර පරක්කු වෙලා පටන් ගත්තේ. එම නිසා 09.45 වෙද්දි අනිවාර්යයෙන් පාටිය ඉවර වෙන්න ඕන."*
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> (vide Document marked P15 at Pages 592-593)

Although Commodore Nanayakkara, in evidence in rebuttal, stated that the party was officially over at 9.45 p.m. the witnesses Ariyarathna and Chandralal stated that the party went on from 8.45 p.m. to 11.15/11.30 p.m. Accordingly, the party had lasted even after 11.30 p.m. Therefore, the officers could have remained even after the party as the bar hours were going on until 10.30 p.m. It is submitted that based on such circumstances when the Judge Advocate says "එම නිසා 09.45 වෙද්දි

අනිවාර්යයෙන් පාටිය ඉවර වෙන්න ඕන" it should be considered as a misdirection of the evidence and creates a serious doubt in the minds of the members of the Court Martial.

Upon close perusal and complete reading of the summation, it appears that the relevant portion "එම නිසා 09.45 වෙද්දි අනිවාර්යයෙන් පාටිය ඉවර වෙන්න ඕන" is not a direction given by the Judge Advocate, but a reference made by him to the evidence given by Commodore Nanayakkara in the evidence in chief (See page 537 of document marked P15- evidence in chief of Nanayakkara). Continuation of the summation clarify the said position.

> *කොමදෝරු නානායක්කාර කියන ස්ථීර පදනම තමා මගේ පාටි පැයකට එකහමාරකට වඩා යන්නෙ නැහැ. එදා 08.00ට පටන්ගන්න තිබ්බ පාටිය ඒ පාටිය විශේෂ අමුත්තා එන්න ප්‍රමාද වුන නිසා මිනිත්තු 15ක් විතර පරක්කු වෙලා පටන් ගත්තේ. එම නිසා 09.45 වෙද්දි අනිවාර්යයෙන් පාටිය ඉවර වෙන්න ඕන."*
>
> *දැන් ඒ වෙලාවට පාටිය ඉවර වුනා නම් පැමිණිල්ලේ සාක්ෂි අනුව තමුන්නාන්සේලා සළකා බලන්න ඕන ඒ අනුව පැමිණිල්ලේ සාක්ෂිකරුවන් කියන ආකාරයට විත්තිකරුට කඩුවෙල ගිහිල්ලා ඔය සියළු දේ කරලා එන්න පුළුවන්ද බැරිද කියලා විත්තිකරුගේ හෝ විත්තියේ ඇලිබායි සාක්ෂි 2ක ගත්තම කොමදෝරු නානායක්කාරගේ සාක්ෂිය එක පැත්තකිනුත් අනිත් සාක්ෂිකරුවන් ආරියරත්න වන්දුලාල් සහ විත්තිකරු අනිත් පැත්තෙන් ගත්තම වැඩි බර සාක්ෂි අනුව තමන් ඒ ඇලිබායි එක පිළිගන්නවාද නැද්ද කියන එක තීරණය කිරීම තමුන්නාන්සේලා සතු වගකීමක්"*
>
> (at Page 593 of the document marked P15)

Without prejudice to the above, even in an instance where this Court considers it as a misdirection, whether the party continued until 9:45 p.m. or even beyond 11:30 p.m. is a matter of fact. The preliminary and main duty of the Judge Advocate is to direct the members of the Court Martial on matters of law. Such directions on the law are final and are not capable of being questioned. In matters concerning the questions of facts of the case, the members of the Court Martial shall be the judges. This means that if the Judge Advocate expresses or indicates any opinions or views regarding questions of facts, the members will evaluate those opinions or views in the same way they consider the arguments presented by both the prosecution and the defence. The members will only rely on the Judge Advocate's views and opinions about the facts if they find them agreeable. If, after careful and honest consideration, the members find that they do not agree with any views or opinions expressed by the Judge Advocate, they are completely free to reject those opinions and act according to their own. Upon careful perusal of the Judge Advocate's summation, it is observed that the Judge Advocate has

correctly addressed the members of the Court Martial on the aforementioned principles. Accordingly, I hold that no prejudice would have been caused to the Petitioner owing to the *summing up of evidence in respect of the defence of alibi*.

The Petitioner states in his written submission that Commodore Nanayakkara was senior in rank to Commander Ariyarathna and Lt. Commander Chandralal, and in the military, rank always matters. Therefore, the suggestion of contradictions between officers of senior rank and junior rank would generally lead to belief in the officer of the senior rank over an officer in junior rank. Accordingly, it is further submitted that the summation of the Judge Advocate would have undoubtedly led the members of the Court Martial to believe Commodore Nanayakkara over Commander Ariyarathna and Lt. Commander Chandralal on the incorrect premises that they were contradictory as incorrectly portrayed by the Judge Advocate in his summation. Anyhow, the Judge Advocate in his summation addressed this point. He summed up that just because Commodore Nanayakka is a senior officer, his evidence could not be accepted above the others.

> *"දැන් මෙතෙන්දි අර පැත්තට 3 දෙනෙක් දුන්නා මේ පැත්තට එක්කෙනයි දුන්නෙ කියන එක නෙවෙයි වැඩිබර සාක්ෂි වන්නේ ඒ අයගෙන් කොයි සාක්ෂියද තමුන්නාන්සේලා පිළිගන්නේ දැන් මෙතනදි තව එකක් මතක් කරන්න ඕන කොමදෝරු නානායක්කාර ජ්‍යෙෂ්ඨ නිලධාරියෙක් හින්දා ඔහුගේ සාක්ෂිය පිළිගන්න පුළුවන් අනිත් අයට වඩා කියලා තීරණයකට එන්නත් ඔබතුමන්ලාට බෑ තමුන්නාන්සේලා තීරණයකට එන්න ඕන මේ සාක්ෂි අපි අහගෙන හිටියා මේ සාක්ෂි අපි පිළිගන්නවද ප්‍රතික්ෂේප කරනවද කියන එක අපි අර අනිත් සාක්ෂිකරුවන්ගේ සාක්ෂි විශ්ලේෂණය කල ආකාරයටම විශ්ලේෂණය කරලා අපි නිගමනයකට එනවා වැඩි බර සාක්ෂි අනුව ඇලිබායි එක අපි පිළිගන්නවද ප්‍රතික්ෂේප කරනවද ඇලිබායි එක පිළිගත්තොත් අනිවාර්යයෙන්ම විත්තිකරු නිදහස් කරන්න ඕන පැමිණිලේ සාක්ෂි පිළිඅරගෙන තියෙනවා නම් සාධාරණ සැකයෙන් ඔබ්බට විත්තිකරුගේ විත්තිවාචකය එනම් ඇලිබායි එකත් සම්පූර්ණයෙන්ම ප්‍රතික්ෂේප කරනවා නම් ඇලිබායි එක ප්‍රතික්ෂේප කරනවායි යන නිගමනය මත එහෙම නම් තමුන්ට විත්තිකරු වරදකරු කරන්න පුළුවන්."*
>
> (at page 593 of the document marked P15)

Hence, the submission that the summation led the members of the Court Martial to believe Commodore Nanayakkara over Commander Ariyarathna and Lt. Commander Chandralal cannot be accepted.

Burden of Proof of Alibi

It is stated that in his summation the Judge Advocate summed up that when an accused takes up the defence of alibi, the burden of proving the

alibi shifts to the accused to prove the same on the preponderance of evidence.

> *"දැන් පැමිණිල්ල මම තමුන්නාන්සේලාට කිව්වා මුල ඉඳලා අග දක්වා ඔප්පු කිරීමේ භාරය තියෙන්නේ පැමිණිල්ල වෙත නමුත් මේ alibi එකක් වෙනත් තැනක සිටියායයි කියන කරුණක් වගේ කරුණක් විත්තියට තමන්ගේ නිර්දෝෂීභාවය ඔප්පු කිරීමේ කිසිම භාරයක් නැති වුනත් එවැනි ඇලිබායි වැනි තත්වයක් ගෙනාවොත් එහිදී to prove that fact the burden shifts to the accused ඇලිබායි එක ඔප්පු කිරීමේ භාරය පැමිණිල්ලෙන් විත්තිය වෙතට එනවා නමුත් පැමිණිල්ලේ භාරය සාධාරණ සැකයෙන් ඔබ්බට වුනාට විත්තිකරුට ඇලිබායි එක ඔප්පු කිරීම සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කිරීමේ භාරයක් රඳා පවතින්නේ නැහැ එය වැඩිබර සාක්ෂි මත පිළිගන්න වෙනවා."*
>
> (vide; document marked P15 at Page 592)

However, as per the settled law, no burden whatsoever falls on an accused just because he raises a plea of alibi. In a criminal case, the burden is always on the Prosecution to establish its case beyond reasonable doubt that the accused was present at the time of the commission of the criminal offence. In other words, the Prosecution must establish that it was the accused, who is present in Court, who committed the alleged criminal acts or omission at the crime scene.

In ***Banda v. Attorney General [1999] 3 SLR 168*** it was held that there is no burden whatsoever on an accused who put forward a plea of alibi and the burden is always on the Prosecution to establish beyond reasonable doubt that the accused was not elsewhere but present at the time of the commission of the criminal offence. This principle was laid down in the decisions of ***King v. Marshal 51 NLR 157 and H. S. R. Fernando 48 NLR 251 also.***

The Supreme Court in ***Beminabennadige Krishantha Ranmal Pieris v. O.I.C. Wallawatta [SC Appeal No. 82/2019 (SC minutes 27.02.2024)*** *reaffirms the above Principle, which was laid down by the superior Courts in multiple judicial pronouncements as follows.*

> *"The principles of law that are applicable in an instance where an accused takes up an alibi had been laid down by the superior Courts in multiple judicial pronouncements. Suffice to quote one such instance, where a divisional bench of this Court in* ***Mannar Mannan v Republic of Sri Lanka (1990) 1 Sri L.R. 280, held (at p. 285)*** *that "… it was sufficient for the appellant to have raised a reasonable doubt as to the truth of the case for the prosecution, namely that it was the appellant who shot and caused the death of the deceased; that there was no burden whatsoever on the appellant to prove his denial or to prove that he was elsewhere at the time of the shooting".*

Accordingly, without a doubt, it is apparent that the above directions made by the Judge Advocate are contrary to the settled law.

However, it appears that sufficient evidence has been placed before the Court Martial to substantiate the position that the Petitioner was present at the place of the crime in Kaduwela. The official driver of the Petitioner Niroshan has given evidence stating that he accompanied the Petitioner to the Kaduwela in the official vehicle leaving the wardroom at Welisara by 9.00 p.m. It is observed that the Petitioner had failed to suggest to any of the Prosecution witnesses that he remained in the wardroom at Welisara camp during the time he was said to have seen in Kaduwela, the place of the crime. Alibi being the main defence of the Petitioner, witnesses of the Prosecution before the Court Martial should have at least been suggested by the defence that the Petitioner had remained somewhere else during the relevant time but not at the site of the crime. Hence the consistency of the defence of the alibi has been called into serious question. In *Jayatissa v. Hon Attorney General [2010] 1 SRI L.R.279,* the Supreme Court observed, that;

> '*if the alibi was set up at the time the accusation was first made and was constantly maintained, the credibility of alibi will be enhanced. If it is taken up belatedly, the effect will be less*.'

In Vishawanadan and Others v. Attorney General [2021]1 SLR 14, it was held that if the accused takes up a plea of alibi, he shall put it to the witnesses of the prosecution during cross - examination. If the Plea of alibi is made for the first time in the dock statement, the court can reject it as false.

Further, the inconsistency of the evidence of the witnesses Ariyarathna and Sandanayake who were called by the Petitioner before the Court Martial to prove the time the Petitioner left the wardroom after the function as I discussed earlier, also supports such view. The Petitioner has taken up the defence of alibi for the first time before the Court Martial which amounts to an afterthought not tenable in law.

Accordingly, in the given circumstances, I am of the view that even if the members of the Court Martial had been properly directed by the Judge Advocate as to the law, that there was no burden whatsoever on the accused and that the burden is always on the Prosecution to establish beyond reasonable doubt that the accused was present at the time of the

commission of the offence, no different decision could have been reached by the members of the Court of Martial with the overwhelming evidence against the Petitioner. Accordingly, even though the point raised by the Petitioner might be decided in favour of the Petitioner no prejudice or miscarriage of justice has actually caused. In this connection, I would like to refer to the following decisions in our jurisdiction.

M.H.M.Lafeer v. The Queen 74 NLR246 at p248, "*There was thus both misdirection and non-direction on matters concern in the standard of proof. Nevertheless, we are of the opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."*

In *Lurdu Nelson Fernando and Others v. The Attorney General (1998)2 Sri LR 329* it was held, that *even though the points raised on behalf of the appellants might be decided in their favour, yet no miscarriage of justice has actually occurred; hence the appeal should be dismissed.*

Lenient Sentence Imposed by the Court Martial

Additionally, it is submitted that despite the serious nature of the charges raised against the Petitioner, the Court Martial imposed a lenient sentence of "dismissal without disgrace" without providing justifiable reasons. The Petitioner contends that the fair assumption which could be arrived at as a reason for sentencing the Petitioner with lenient punishment was that the Court Martial had doubts regarding the guilt of the Petitioner. Thus, despite these doubts, rather than acquitting the Petitioner, the Court Martial opted to impose a lighter sentence. However, I am unable to agree with the above submission made by the Petitioner as the Court Martial has justified its decision by giving reasons. It is observed that the Court Martial has given due consideration to the Petitioner's satisfactory past service records and the previous character of the officer before the sentence was imposed on the Petitioner.

Considering the circumstances and reasons outlined above, I am of the view that there are no compelling cogent reasons, such as illegality, irrationality, or procedural impropriety, for this Court to interfere with the decision of the Court Martial.

Suppression of Material Facts

The instant application has been filed on 04.08.2011. The Petitioner has submitted an appeal dated 14.01.2011 to His Excellency the President against the conviction and sentence imposed on him by the Court Martial. It is stated in the Petition that the Petitioner has not received any response thereon. However, the Respondents submitted that His Excellency the President has ratified the recommendation made by the Commander of the Army in respect of the sentence passed on the Petitioner by letter dated 08.03.2011 marked R8 and turned down the appeal submitted by the Petitioner by letter dated 23.03.2011 marked R9. The Respondent contends that the Petitioner has failed to disclose the purported decisions of His Excellency the President, and such deliberate or convenient ignorance of material facts amounts to the suppression of material facts.

The Petitioner argues that because of the letters labelled R8 and R9 were not addressed to him or copied to him, he could not have included the same in the Petition. However, it is noted that the Petitioner has not claimed ignorance of the decision of His Excellency the President. Furthermore, the document dated March 23, 2011, marked R12, indicates that the Petitioner was informed of this decision.

The Petitioner further asserts that the rejection of the appeal is not a material fact to the application. However, it is the duty of the Petitioner to place all the relevant facts before the Court to enable the Court to reach a fair conclusion. It is for the Court to decide the materiality of the facts produced before it. In ***Fonseka v. Lt.General Jagath Jayasuriya and Five Others [2011] 2 SRI L.R. 373*** it was held that a Petitioner who seeks relief by way of writ which is an extraordinary remedy must in fairness to the Court, bear every material fact so that the discretion of the Court is not wrongly invoked or exercised…..If there is anything like deception, the Court ought not to go into the merits, but simply say "*We will not listen to your application because of what you have done*." Further, Abdus Salam J. observed that:

> *"Material facts are those which are material for the Judge to know in dealing with the application as made, materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.*

Whether the facts not disclosed are of sufficient materiality to justify or require the immediate discharge of the order without consideration of the merits, depends on the importance of the facts to the issues, which are to be decided by the Court"

Further, in *Athula Rathnayake v. Jayasinghe (1975) 78 NLR 35 at 39-40* the exacting standards of disclosure were laid down by Sirimanne J. who when referring to the Petition filed by the Petitioner held as follows:

"His petition though it refers to documents (A) to (J) filed with the petition makes no reference whatever to the summing up also being filed. If any documents are filed with the petition they must be referred to in the petition itself as this Court would be led by the contents of the petition and affidavit. On reading the papers filed I myself was under the impression that the summing up had not been supplied to the petitioner at all. This type of non-disclosure in the petition and the filing of the document without it being referred to in the petition tends to create in the mind of the Court a wrong impression and at the same time affords the petitioner, when his bona fides are questioned, to point out as an excuse that the document was in fact filed with the petition… This type of action must be viewed with strong disapproval and one hopes that it would not be followed in future."

Accordingly, I am of the view that the Petitioner has not acted with uberrima fides and is guilty of suppression of material facts.

Futility

As per the documents marked R8 and R9 the recommendations of the Court Martial have been ratified by, His Excellency the President. The decision of His Excellency the President is not amenable to writ jurisdiction. In *Major P. P. G. Siriwardena v. Cyril Herath* and Others *CA/Writ/Application No. 754/2005, decided on 11.10.2010* it was held that,

"The petitioner in this application has sought a wit of Certiorari to quash the decision of Her Excellency and the Order published in the Gazette. This decision was made by Her Excellency. The President in her capacity as President and as the commander in chief of the Armed forces in terms of Article 30(1) of the Constitution read with Section 10 of the Army Act. In view of the provisions in section 35(1) of the Constitution, the decision of the Excellency the President is not amenable to the jurisdiction."

In *Selvamani vs Dr. Kumaravelupillai and Others (2005) 1SLR 99* at p 103, the Court declined to grant relief on the basis of futility and opined as follows:

> *"Even if this application of the Petitioner is granted, he is not entitled to resume his earlier office in view of the Order of vacation of post. Therefore, issuing a writ of Mandamus would be futile. A writ of Mandamus will not be issued if it will be futile to do so and no purpose will be served."*

Similarly, in the instant application even if the Petitioner were to succeed on the above grounds urged on his behalf, issuing the Writs prayed for would be futile owing to the confirmation of the decision of the Court Martial by His Excellency the President. It is the settled law that the Writ of Certiorari will not be issued where the end result will be futility, frustration, injustice and illegality.

Further, it has been consistently held in a series of cases such as *P.S. Bus Company Ltd., v Members and Secretary of Ceylon Transport Board [61 NLR 491]; Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (Pvt) Limited [2005 (1) Sri LR 89] and recently by the Supreme Court in Samastha Lanka Nidahas Grama Niladhari Sangamaya vs Dissanayake, SC Appeal No. 158/2010, SC Minutes of 14th June 2013* that no court will issue a mandate in the nature of Writ of Certiorari or Mandamus where to do so would be vexatious or futile.

For the reasons given above, the facts and circumstances of the instant application do not warrant this Court to interfere with the decision of the Court Martial. Accordingly, I am not inclined to grant any of the reliefs prayed for in the prayer of the Petition. I order no cost.

Application is dismissed.

Judge of the Court of Appeal