

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

Hewa Alankararage Monti
Wasantha Kumara,
No. 34, Ambalangodawatta,
Dakunukanumuldeniya,
Walasmulla.
Petitioner

CASE NO: CA/WRIT/171/2015

Vs.

1. Air Martial Kolitha Gunathilake,
Commander of Air Force,
Sri Lanka Air Force,
Colombo 02.
2. Wing Commander B.A.M.P.
Balasuriya,
Commanding Officer,
Sri Lanka Air Force,
Katukurunda Camp.
3. Air Vice Martial C.P. Welikala,
Director of Administration,
Sri Lanka Air Force,
Colombo 02.

4. Sq. Leader A.K.W. Lakshman,
Acting Commanding Officer,
Sri Lanka Air Force,
Colombo 2.
Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Jagath Abeynayaka with Pradeepa
Abeyrathna for the Petitioner.
Milinda Gunathileka, S.D.S.G., for the
Respondents.

Argued on: 12.06.2020

Decided on: 01.07.2020

Mahinda Samayawardhena, J.

By this application the Petitioner, who had been serving as a Flight Sergeant of the Sri Lanka Air Force, seeks a mandate in the nature of a writ of certiorari quashing the decision of the 1st Respondent, the Commander of the Air Force, to discharge the Petitioner under the clause “Service No Longer Required” referred to in P2 and P6. The Petitioner submits the said decision is *inter alia* illegal, *ultra vires*, perverse, against the principles of natural justice, and in violation of the doctrine of double jeopardy and the principle of proportionality.

The position taken by the Respondents in their statement of objections is the said decision was made “considering the entirety of the past record of offences of the Petitioner and specifically the final letter of warning issued to the Petitioner”. The Respondents have, in the statement of objections, listed out four offences committed by the Petitioner and the punishments meted out to the Petitioner thereon.

The first offence is the Petitioner having lost his service identity card due to negligence, thereby committing an offence under section 115(1)(b) of the Air Force Act, No. 41 of 1949, as amended. For this offence, as seen from 1R3, he had been admonished with an “admin recovery of Rs.5000 from his salary.”

The second offence, according to paragraph 11(ii) of the statement of objections, is as follows:

Upon conclusion of a Court of Inquiry into a claymore mine attack at Kappalturai on 15 April 2006 it was found that the petitioner neglected his primary duty as the male nurse at the Kappalturai detachment to provide first aid to 28838 LAC Jayasekara, who was critically injured due to the incident.

As the punishment for the above offence, the Petitioner was served with a letter of warning marked 1R5, which cautioned that commission of another offence could *inter alia* result in discharge from the Air Force.

The third and fourth offences are connected. The third offence, “Conduct Prejudicial to Air Force Discipline”, as stated in paragraph 6 of the statement of objections, is:

[the Petitioner] at SLAF Station Katukurunda being the Senior Non Commissioned Officer in charge of the Medical Centre during the period from 01 May 2013 to 31 May 2014 did order VAW/01889 Air woman Priyadarshani PA the stock holder of drug stores to remove the expired drugs from the drug stocks without prior authority of the Director of Health Services of SLAF or any other authority, pretending that the removed drugs were issued to patients, thereby committing an offence under section 129(1) of the Air Force Act read in conjunction with section 43 of the said Act.

The fourth offence, “Neglect to obey general or other orders”, is:

[the Petitioner] at SLAF Station Katukurunda being Senior Non Commissioned Officer in charge of the Medical Centre during the period from 01 May 2013 to 31 May 2014 did fail to maintain the stock of drugs contravening Para 2 of Order No.2 issued to SNCO I/C medical section thereby committing an offence punishable under section 102(1) of the Air Force Act read in conjunction with section 43 of the said Act.

After a summary trial on the above third and fourth offences, the Petitioner was severely reprimanded for the former and sentenced to seven days confinement to camp for the latter.

In my view, the whole process involving all four offences is tainted with illegality, *ultra vires* and procedural impropriety. Let me explain.

For the first offence of losing his service identity card, the Petitioner was charged only under section 115(1)(b) of the Air Force Act, as seen from 1R3. No other section is mentioned in the charge sheet. If the Respondents opted to charge the Petitioner only under the said section, then according to that section the Petitioner should have been tried by Court Martial. This was not done. Hence the said decision and punishment are *ultra vires*.

The letter of warning 1R5, which the Respondents heavily rely on, was served on the Petitioner as the punishment for the second offence. This punishment was admittedly given upon conclusion of a Court of Inquiry and not after a summary trial or Court Martial.

According to the Air Force (Courts of Inquiry) Regulations, promulgated under section 155 of the Air Force Act, found in Chapter 359 in Vol. VI of the Subsidiary Legislation (1956), a Court of Inquiry is not a body empowered to decide a matter. Its task is to investigate and report to the convening authority, for the convening authority to decide on the future course of action. Upon the findings of a Court of Inquiry, punishment cannot be imposed. For punishment to be imposed, the accused shall be convicted on a charge sheet. But there is neither an accused nor a charge sheet at a Court of Inquiry. It is a fact-finding mission. This is amply clear by Regulation 2 of the Air Force

(Courts of Inquiry) Regulations, which states “*The Commander of the Air Force or the officer in command of any unit or station may by order in writing convene a court of inquiry for the purpose of investigating into any matter which may be referred to it by him.*”

In *Boniface Perera v. Lt. General Sarath Fonseka* [2009] BLR 44 at 46, this Court held:

Proceedings before a Court of Inquiry in terms of the Army Act is a preliminary step prior to a proper trial, which is more or less a fact finding inquiry to collect and record evidence and to submit a report. On receipt of such Court of Inquiry proceedings or report, the Commander of the Army could decide whether to initiate formal disciplinary proceedings by a Court Martial or Summary Trial in terms of provisions of the Army Act. A Court of Inquiry proceeds on the basis of the terms of reference issued regarding the allegation against the officer concerned. There are no formal charges framed. Therefore based on the Court of Inquiry proceedings it would not be within the purview of the 1st Respondent to impose any punishment as in the case in hand. It is essential that the person concerned should be tried on formal charges and no punishment could be imposed prior to framing formal charges at a legally constituted Court Martial or Summary Trial. As such any decision to punish based on the Court of Inquiry proceedings would be illegal and ultra vires the provisions of the Army Act.

In *Lokuhennadige v. Lt. General Sarath Fonseka* [2010] 2 Sri LR 85 at 93-94, this Court held:

Any punishment on the Petitioner can only be imposed after such disciplinary inquiry. In a disciplinary inquiry a charge sheet will be served and the person accused will have an opportunity to answer the charges and defend himself in contrast to a Court of Inquiry where there is no accused and no charge sheet all those who appear before the Court of Inquiry are witnesses as it is a fact finding inquiry. Only in instances where the inquiry affects the character or military reputation of an officer or a soldier the officer or a soldier was afforded an opportunity of being present throughout the inquiry and allowed to cross-examine any witness, make statements and adduce evidence on his own behalf. But this opportunity given to an officer or soldier will not change the character of the Court of Inquiry into a disciplinary inquiry.

The same conclusion was reached in *Colonel Fernando v. Lt. General Fonseka* [2010] 2 Sri LR 101.

Therefore, serving a letter of warning on the Petitioner as the punishment upon the findings of the Court of Inquiry is *ultra vires*. The 1st Respondent cannot make use of the said letter to discharge the Petitioner from service.

The third and fourth offences referred to earlier are offences respectively punishable under sections 129(1) and 102(1) of the Air Force Act.

Section 129(1), which deals with “Conduct prejudicial to air-force discipline”, reads as follows:

Subject to the provisions of subsection (2) of this section, every person subject to this Act who, by any act, conduct, disorder, or neglect, prejudices good order and air-force discipline, shall be guilty of an air-force offence and shall, on conviction by a court martial, be liable, if he is an officer, to be cashiered or to suffer any less severe punishment in the scale set out in section 133, and, if he is an airman, to suffer simple or rigorous imprisonment for a term not exceeding three years or any less severe punishment in the scale set out in section 133.

Section 102(1), which deals with “Neglect to obey general or other orders”, reads as follows:

Every person subject to this Act who neglects to obey any general, local or other order shall be guilty of an air-force offence and shall, on conviction by a court martial, be liable, if he is an officer, to be cashiered or to suffer any less severe punishment in the scale set out in section 133, and, if he is an airman, to suffer simple or rigorous imprisonment for a term not exceeding three years.

As the above sections stipulate, charges under both offences are triable by Court Martial. However, the charges against the Petitioner under sections 129(1) and 102(1) were framed to be read with section 43 of the Act, and a summary trial instead of a Court Martial was conducted. If a summary trial is held, upon

conviction, the accused cannot be cashiered and only less severe punishment can be meted out. Section 43 runs as follows:

Where a commanding officer deals summarily with a case in which an airman (not being a warrant officer) under his command is charged with the commission of any offence, he shall, after hearing the evidence, acquit the accused if he finds the accused not guilty, or convict the accused if he finds the accused guilty, and after conviction of the accused may

(a) (i) if the commanding officer is of the rank of Wing Commander or of higher rank, order the accused to be placed under detention, or imprisonment, for a period not exceeding ninety days, and such order of imprisonment shall not take effect until it is ratified by the Commander of the Air Force;

(ii) if the commanding officer is of a rank subordinate to Wing Commander, order the accused to be placed under detention for a period not exceeding twenty-eight days; or

(b) if the offence is drunkenness, order him to pay a fine not exceeding twenty rupees, either in addition to or without any other punishment; or

(c) in addition to or without any other punishment, order him to suffer any such deduction from his pay

as is authorized by this Act to be made by the commanding officer; or

(d) where he is not a non-commissioned officer and the offence has been committed by him while on active service, subject him to field punishment for a period not exceeding twenty-eight days in accordance with such regulations relating to field punishment as may be made, and, in addition to or without any other punishment, order him to forfeit all pay for a period commencing on the day of the order and not exceeding twenty-eight days; or

(e) in addition to or without any other punishment, subject him to such minor punishment as the commanding officer is authorized to inflict by regulations made in that behalf, so however that a minor punishment shall not be inflicted for any offence for which detention exceeding seven days is ordered.

Hence, on the strength of the convictions for the third and fourth offences, the Petitioner could not have been discharged on the ground "Service No Longer Required".

Let me quote paragraph 18 of the corresponding affidavit of the Commander of the Air Force to understand the basis upon which the impugned decision to discharge the Petitioner was made.

In particular, answering the averments in sub paragraph (d) of paragraph 14 of the petition, the respondents state that the administrative action of discharging the petitioner from service on 'Service No Longer Required' was made in terms of section 126 of the Air Force (Regular and Regular Reserve) Regulations of 1951 considering the entirety of the past record of offences of the petitioner and not merely on the incident highlighted in paragraphs 4, 5, 6 and 7 of the petition, which evidently does not amount to an excessive punishment disproportionate to the offence.

It is clear from the above, without any shadow of doubt, the Petitioner was discharged from the Air Force on the said "convictions". The decision is *ultra vires* and therefore a nullity. I quash the decision by certiorari.

In view of the above averment in the affidavit of the Commander of the Air Force, there is no necessity in this case to consider whether the Commander has standalone authority (despite any defects in the convictions for the offences) to discharge an Airman under (xiii) of Table B of the Fifth Schedule read with Regulation 126(1) published in the Gazette marked 1R6.

There is also no necessity to consider the other arguments mounted by learned Counsel for the Petitioner on the doctrine of double jeopardy and proportionality of punishment.

For the aforesaid reasons, I grant the relief prayed for in paragraph (b) of the prayer to the petition. The application of the Petitioner is allowed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal