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

In the matter of an application for a mandate in the nature of a Writ of Certiorari under and in terms of Article 140 of the Constitution

Muthuhetti Arachchige Asanka Mangala Weerasinghe,

No. 89 Rideegama, Kurunegala.

Petitioner

Case No. C.A. (Writ) 183/2017

Vs.

1. Group Captain Rajapaksa Appuhamilage Udeni priyadarshana Rajapaksa,
   President, District Court Martial,
   Air Force Headquarters, Chittampalam A. Gardner Mawatha,
   Colombo 2.
2. Group Captain Deepal Munasinghe Waiting President, District Court Martial, Air Force Headquarters, Chittampalam A. Gardner Mawatha,
   Colombo 2.
3. Wing Commander Duwage Chinthaka Dananaya Bandara Alwis, member,
   District Court Martial,
   Air Force Headquarters, Chittampalam A. Gardner Mawatha,
   Colombo 2.

4. Squadron Leader Chamil Prabudda Hettiarachchi, Member, District Court Martial, Air Force Headquarters, Chittampalam A. Gardner Mawatha,
   Colombo 2.
5. Wing Commander Nadun Asiri Gallage,
   Waiting Member, District Court Martial,
   Air Force Headquarters, Chittampalam A. Gardner Mawatha,
   Colombo 2.
6. Squadron Leader Wanduramba Mudiyanselage Mahesh Suranga Chandrasekera,
   Waiting Member, District Court Martial,
   Air Force Headquarters, Chittampalam A. Gardner Mawatha,
   Colombo 2.
7. Mr. Shanaka Wijesinghe,
   Deputy Solicitor General,
   Judge Advocate,
   Air Force Headquarters, Chittampalam A. Gardner Mawatha,
   Colombo 2.
8. Wing Commander S.N.S.N. Dias,
   Director Legal,
   Air Force Headquarters, Chittampalam A. Gardner Mawatha,
   Colombo 2.

9. Air Vice Marshall H.A. Pathirana,
   Commanding Officer,
   Air Force base,
   Ratmalana.
10. Air Marshall Kapila Jayampathi,
    Commander of the Sri Lanka Air Force,
    Air Force Headquarters, Chittampalam A. Gardner Mawatha,
    Colombo 2.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Asthika Devendra with M. Sarathchandra for the Petitioner

Nayomi Kahawita SSC for the Respondents

Argued On: 20.11.2019

Written Submissions Filed On:

Petitioner on 25.01.2019 and 09.07.2019

Respondents on 05.07.2019 and 17.01.2020

Decided On: 26.05.2020

Janak De Silva J.

Parties agreed on 20.11.2019 that this matter can be disposed by way of written submissions. Both parties have filed written submissions and replied thereto.

At all times material to this application the Petitioner was a Temporary Sergeant of the Sri Lanka Air Force and received a severe reprimand as a result of a Court Martial of which the 1st to 4th Respondent were members.

A Summary Trial was commenced around 16.08.2013 against the Petitioner and a charge sheet issued containing a charge under section 129(1) of the Air Force Act No. 41 of 1949 as amended (Air Force Act). The main charge was that the Petitioner during the period 01.02.2011 to 31.07.2013 being the manager of the Judo team of the Air Force harassed certain identified Air Women. Although the Petitioner pleaded not guilty, at the end of the Summary Trial he was convicted and sentenced to serve 48 days detention and removal from the Air Force on the grounds that service is no longer required.

The Petitioner refused to accept this verdict and sought a Court Martial to hear and determine the charges against him. Thereafter a District Court Martial was appointed and the Petitioner was found guilty of the charges levied against him and imposed a punishment of "Severe Reprimand".

The Petitioner is seeking a Writ of Certiorari quashing the decision of the District Court Martial and a Writ of Certiorari quashing the punishment imposed on the Petitioner. The Petitioner seeks to assail the decisions on the grounds that the summing up of the Judge Advocate contains misdirection and non-directions.

In this context it is important at the outset to ascertain the scope of judicial review in respect of a conviction or sentence entered by a Court Martial.

In *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene & Others* [(2007) 1 Sri.L.R. 24 at 33] Sisira De Abrew J. held that:

> "*In an application for a writ of certiorari in respect of a conviction or sentence entered by a Court Martial* the defense of review is not the same as in an appeal from a conviction of a Criminal Court – *judicial review will lie by way of certiorari only in respect of the legality of the conviction or sentence. The merit of the finding will not be subject to review by Certiorari."* (Emphasis added)

I am in respectful agreement with the principle enunciated.

Nature of a Court Martial

It is observed that all legislation in Sri Lanka relating to the three armed forces have provided for Court Martial. I would like to begin considering the case presented by the Petitioner after examining the nature of a Court Martial.

Sections 204 to 238 of the Code of Criminal Procedure regulate the conduct of a Trial by Jury. Sections 230 and 231 specify duties of the judge. Section 229 deals with summing up the evidence.

Upon a careful consideration of the provisions in Part IX of the Air Force Act dealing with Court Martial and in particular the provisions of section 54 therein dealing with the powers and duties of a Judge-Advocate including the need to summing up, it appears to me that Trial by Jury and Court Martial are similar in nature.

The role of the Judge in Trial by Jury is taken by the Judge Advocate in a Court Martial. Both Trial by Jury and Court Martial provide for a prosecution counsel and a defense counsel. The place of the jury in a Trial by Jury is taken by the members of the Court Martial. The Code of Criminal Procedure does not require the jury to give reasons for its decision. Nor does the Navy Act require a Court Martial to give reasons for its findings and sentence.

In fact, in *Jayanetti v. Martinus and others* (71 N.L.R. 41 at 49-50) the Supreme Court after examining the corresponding provisions in the Navy Act held as follows:

> "Section 39 of the Navy Act prescribes the powers and duties of the Judge-Advocate in court martial proceedings. They are inter alia, to give advice on questions of law or procedure during the proceedings of a court martial, to give advice on any matter before the court, to ensure that the accused does not suffer any disadvantage at his trial, and at the conclusion of the case to sum up the evidence and advise the court upon the law relating to the case. The reason why such powers and duties are vested and imposed on the Judge-Advocate is almost obvious. A court martial, although it has

the power to try and punish offences, which if committed by civilians would be tried by the ordinary courts, is not ordinarily composed of officers with legal knowledge or judicial experience. In fact the court in the present case was composed of two supply officers and one surgeon officer. *It is because of this lack of legal or judicial training and experience that the function of advising courts martial is committed by law to the Judge-Advocate. Indeed, his functions are comparable to those of a Judge of Assize in cases tried by Jury.* Although it is the function of the Jury to decide all questions of fact, the law requires that before the Jury deliberates on the facts, the Judge must sum up to them the evidence. Section 39 (d) imposes a similar requirement in the case of a trial by court martial:-

> " (d) At the conclusion of the case he shall, unless both he and the court martial consider it unnecessary, sum up the evidence and advise the court martial upon the law relating to the case before the court martial proceeds to deliberate upon its finding."" (Emphasis added)

The Supreme Court quashed the finding of the Court Martial and the order of punishment on the basis that the failure of the Judge-Advocate to perform the statutory duty, explicitly imposed by section 39 (d) of the Navy Act, to sum up on the evidence before the court deliberates on its finding is a fatal illegality.

This may well be the reason for the learned counsel for the Petitioner to place heavy reliance on the summing up of the Judge Advocate and the alleged misdirection and non-direction therein to assail the decision of the Court Martial and the punishment imposed on him.

The grounds advanced by the learned counsel for the Petitioner are that the Judge Advocate has failed to sum up to the Court Martial about the maintainability of the charge against the Petitioner, since the initial charge sheet issued contained a different charge to that of the charge before the Court Martial, that the Court Martial lacked jurisdiction to try the Petitioner without the provisions of section 40 of the Air Force Act being followed after the charge had been amended/changed.

Firstly, I agree with the submission made by the learned Senior State Counsel that there was in fact no change in the substance of the charges framed against the Petitioner though two different sections in the Air Force Act has been referred to. The essence of the offence of which the Petitioner was charged is harassment by means of his words and action against two female Air Force women in the Judo team. The offence could have been framed either under section 129(1) or 126(1) (a) of the Air Force Act, both of which were triable by a Court Martial and therefore no material change was made.

In any event, it is observed that the Petitioner did not object to the procedure adopted and in particular did not object to the Court Martial proceedings. In *Kumaresan v. Pannawela and Others* [(1990) 2 Sri.L.R. 181] the petitioner and two others of the Air Force were arraigned before a Court Martial on two counts that by ill treating and harassing Flying Officer Samarasinghe they did behave in a manner prejudicial to good order and Air Force discipline in terms of section 129(1) of the Air Force Act as in this case. A preliminary objection was taken that the charges were bad for duplicity and failure to comply with Regulation 21 of the Regulations under the Air Force Act. The Court Martial on a ruling by the Judge Advocate stated that the objections would be ruled upon at the conclusion but this was not done. Court held (at page 184) that had the petitioner not taken this objection at the outset he could not be heard to complain later against those charges.

A similar approach was taken in *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene & Others* [(2007) 1 Sri.L.R. 24 at 31] where Sisira De Abrew J. held that:

> "In any event *the Petitioner is now precluded from raising any objection to the charge sheet since such objection was not raised before the Court Martial.* This view is supported by the judgment of Justice Sharvananda (as he then was) in the case of Nagalingam v Luxman de Mel. His Lordship remarked thus: "Further the petitioner, having participated in the proceeding without any objection and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection to the jurisdiction of the Commissioner of Labour to make a valid order after the zero

hour. *The jurisdictional defect, if any, has been cured by the petitioner's consent and acquiescence*." [Emphasis added]

To formulate it in another way, the Petitioner took part in the Court Martial without objecting to the procedure adopted. Now the Petitioner cannot be heard to state otherwise as it would amount to allowing him to Approbate and Reprobate.

As Sharvananda J. (as he was then) held in *Ranasinghe v. Premawardene* [(1985) 1 Sri.L.R. 63]:

> "…The rationale of the principle appears to be that a defendant cannot approbate and reprobate. 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. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts one he cannot afterwards assert the other, he cannot affirm and disaffirm…"

I hold that the Petitioner cannot raise any defect in the charge sheet now without having raised it before the Court Martial.

The Petitioner further contends that the Judge Advocate failed to sum up properly to the Court Martial how to evaluate the credibility of the prosecution witnesses. I see no merit in this submission since the summing up covers this aspect.

The Petitioner also complains that the virtual complainant H.N. Damayanthi gave evidence as the 5th witness whereas the corroborative witnesses gave evidence prior to the virtual complainants and that this amounts to corroboration in advance which is not recognized by our law. This submission is untenable in the circumstances of the case. Sections 136(2) and 157 of the Evidence Ordinance govern the order in which witnesses may be called on the basis of admissibility of evidence.

However, neither of them is engaged in the circumstances of this case. In such a situation the practice is that the right to determine the order in which witnesses may be called is given to Counsel subject to overriding discretion given to Court [*Bandaranaike v. Premadasa* (1979) 2 Sri.L.R. 369].

The learned Counsel for the Petitioner further submitted that the Court Martial failed to consider the credibility of the main witness. Again I see no merit in this submission given that the Judge Advocate has properly summed up as to how to evaluate the credibility of the prosecution witnesses. Once that duty is performed judicial review cannot be extended to decide whether the Court Martial acted in accordance with the said direction or not.

A further point was made on the contradictory nature of the prosecution witnesses. The Judge Advocate has in his summing up properly directed the Court Martial on the credibility of witnesses.

Thereafter it is up to the Court Martial to decide the creditworthiness of witnesses and evaluate their evidence. This Court cannot step into the shoes of the Court Martial, as much as a Court does not do to a Jury, and determine that issue differently. The Court Martial is the final authority on the facts of the case.

For all the aforesaid reasons, the application is dismissed. I make no order as to costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal