

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

In the matter of an application for orders in the nature of writs of Certiorari and Prohibition under article 140 of the constitution of the Democratic Socialist Republic of Sri Lanka.

M. A. N. Wajiraweera

Officer Commanding- B Company

12th Vijayabahu Infantry Regiment

Chavakachcheri.

Petitioner

CA (Writ) No. 623/2010

- Vs -

(1) Commander of the Army

Sri Lanka Army Head Quarters,
Colombo.

(2) The Commandant

Sri Lanka Army Volunteer Force,
Battaramulla.

(3) Colonel of the Regiment

Vijayabahu Infantry Regiment,
Boyagane, Kurunegala.

(4) Commander- 514 Birgade
Nonavil, Chavakachcheri.

(5) Volunteer Force Co- ordinator
Security Forces Head Quarters,
Jaffna.

(6) Director- Legal,
Sri Lanka Army Head Quarters,
Colombo.

Respondents

BEFORE : S. HETTIGE, J. PC, President Court of Appeal
D. S. C. LECAMWASAM, J.

COUNSEL : Kamaran Aziz for the Petitioner
Milinda Gunatilleke SSC for the Respondents

ARGUED ON : 28/09/2010

WRITTEN SUBMISSIONS : 24/ 11/ 2010

DECIDED ON

: 13/ 01/ 2011

D. S. C. Lecamwasam. J

The petitioner by his amended petition has sought writs of certiorari to quash decisions marked p1, p2, p3 and p6 and a writ of prohibition against the respondents from discharging or retiring or dismissing or releasing the petitioner from active service from the Army.

The petitioner has been absent without leave on the following occasions.

- a) From 22nd June 1998 to 22nd November 1998 (153 days)
- b) From 17th August 1999 to 31st July 2003 (1450 days)
- c) From 8th May 2008 to 6th June 2008 (29 days)

A summary trial was held in respect of (a) and (b) and as the petitioner pleaded guilty at the outset he was imposed with the punishment of severe reprimand and forfeiture of pay and relevant decisions are marked as p1 and p2.

Another summary trial was held in respect of charge (c). The petitioner pleaded guilty in that instance too and a punishment of severe reprimand and forfeiture of pay was imposed on the petitioner.

Now the petitioner submits to Court that despite the fact that he had pleaded guilty, the offence of being absent without leave must mandatorily be tried by a Court martial convened in terms of part IX of the Army Act No.17 of 1949 as amended. The above contention of the petitioner is mainly based on Section 106(a) of the Army Act, which states thus;

‘Every person subject to military law who absents without leave shall be guilty of a military 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....?.

On the strength of such the petitioner submits to Court that the disciplinary procedures adopted by the respondents are void abinitio for the reasons that the summary trials were contrary to the procedures stipulated in the Army Act and hence the punishment imposed is ultra vires the provision thereof.

Petitioner further states that as he has been already dealt with upon the conclusion of the said summary trials, to impose a further punishment in respect of the same charges are repugnant to the procedures established by law.

Respondents on the other hand strongly objected to notices being issued on the grounds of submission to jurisdiction, laches, availability of alternate remedy etc. Further the respondents state that under Section 42 any offence can be tried by way of summary trial and they further adverted the attention of Court to powers of commanding officer under Section 40 of the Army Act.

On a consideration of submissions of both parties it is clear that under Section 40(b) the commanding officer has discretion in deciding whether an offence is to be tried by a Court martial or by way of summary trial. If he is tried summarily he can be subjected to the punishments enumerated in Section 42 or in the alternative if the commanding officer decides to try the case by Court martial, upon a conviction, the officer concerned will also run the risk of being cashiered.

On a comparison of Sections 40, 42, and 106 it is abundantly clear that the commanding officer has discretion in deciding whether an officer taken into custody is to be dealt summarily or by Court martial. If he is tried by a Court martial then only the provisions of Section 106 will apply and the consequences are graver than under Section 42.

In the instant case, despite the fact of the petitioner being a habitual absentee, the commanding officer has acted more sympathetically by ordering him to be tried under Section 42. Therefore on a consideration of the relevant Sections, I am of the view that the commanding officer has acted well within the parameters of law and hence punishment meted out to the petitioner is not ultra-vires the powers conferred by the Army Act. In view of the above legal position there is no necessity for this Court to consider the other arguments advanced by both parties and as this is a policy decision taken by the army this Court is not inclined to issue notice on the respondents and the application for interim orders is also refused. Hence the application is dismissed without costs.

Judge of the Court of Appeal

SATHYA HETTIGE P.C J. P/CA

I Agree

President of the Court of Appeal