

**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 a writ of Certiorari and a writ of Prohibition under and in terms of article 140 of the constitution of the Democratic Socialist Republic of Sri Lanka.

2nd Lt. Mrs. K.H. Gunatilleke (also known as 2nd Lt. Mrs. K. H. Hewage)

5th Battalion Sri Lanka Army Women's Corps (Volunteer),

Panagoda, Homagama.

Petitioner

CA (Writ) No. 642/2010

- Vs -

(1) Commander of the Army
Sri Lanka Army Head Quarters,
Colombo 03.

(2) The Commandant
Sri Lanka Army Volunteer Force,

Battaramulla.

(3) Colonel of the Regiment
Sri Lanka Army Women's Corps,
Kynsey Road,
Colombo 08.

(4) Center Commandant
Sri Lanka Army Women's Corps,
Kynsey Road,
Colombo 08.

(5) 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 : 27/10/2010

WRITTEN SUBMISSIONS : 24/ 11/ 2010

DECIDED ON : 13/ 01/ 2011

D. S. C. Lecamwasam. J

The petitioner in this case is a second lieutenant attached to the 5th battalion of the Sri Lanka Army Women's Corps (Volunteer). There have been three summary trials conducted against her, one being for absence without leave (AWOL), and she had pleaded guilty in all three instances. Now she has taken up the position that AWOL is an offence which is triable only by a court martial and not by way of summary trial. Hence she moves court to quash the decision of the summary trial marked P 3 on the basis that the decision and the punishment are illegal and ultra-vires.

On a consideration of the submissions of both parties I am of the view that AWOL in the same vein as any other offence can be tried either by a court martial or by way of summary trial. According to section 40(1) (b) of the Army Act No.17 of 1949 as amended the Commanding officer of any army personnel is given discretion in deciding whether a charge against the said person is to be tried by a court martial or by way of summary trial. The provisions of section 106 will apply only if the commanding officer decides to empanel a court martial in respect of an offence of AWOL. Section 42 is wide enough to encompass the trial of any offence summarily provided such offence is referred to under section 40 as capable of being dealt with summarily by the authority mentioned in section 40 (1) (b) (ii).

As the fourth respondent has acted within the powers conferred by the Act, this court is not inclined to issue a writ of Certiorari to quash P 3.

The petitioner in this application has further moved for writs of certiorari to quash decisions marked P 5 and P 9. The said P 5 and P 9 are communications of the army by which the petitioner was to be discharged from the army on the ground that an army board has made decisions in respect of officers who have been absent without leave for more than 21 days. In her petition the petitioner states that as she was already punished after a summary trial, she cannot be punished again for the same offence.

On a perusal of P 7 dated 10th December 2009 it is evident that the army headquarters has made a policy decision in regard to the confirmation/ promotion of officers who were on AWOL for more than 21 days. According to which, it is apparent that the army has not targeted any particular officer, but has taken a decision generally. P 7 states that officers are to be considered on a case by case basis before recommendations are made and it is further stated that conduct, discipline, commitment, and contribution in active service and in humanitarian operations, efficiency, professional knowledge and skills should be considered in making recommendations.

Document 'B' filed along with the written submissions of the respondents sheds light on the whole matter. As per 'B' the board of officers has considered the past disciplinary record, service and age of the petitioner before recommendations were made for her discharge. It is clear the decision to discharge is not a decision taken purely on the basis of AWOL. In reaching a decision army has considered other factors such as past disciplinary record, service and age of the petitioner etc.

For purposes of its continuance and efficiency the army is required to make policy decisions periodically. This court is not inclined to interfere with such policy decision unless it is contrary to law or mala fide. As the decisions contained in P 5 and P 9 are policy decisions which do not contravene any of the provisions of law or are not mala fide the petitioner is precluded from challenging the validity of the above decisions/communications. Therefore this court is not inclined to issue notice or an interim order. 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