

**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.

C A 252 / 2010 Writ

Corporal J.A.N.G. Jayasinghe,

6/1, Miriheliya, Alawwa.

(presently in the Welikada Prison)

PETITIONER

Vs.

01. Air Commodore C.R.Gurusinghe,
President, District Court Martial,
Air Force Head Quarters,
Colombo 2.
And 11 Others.

RESPONDENTS

BEFORE : **SATHYA HETTGE, P.C.J.(P/C.A.) And
UPALY ABEYRATHNE, J.**

COUNSEL : **Saliya Peiris for the Petitioner**
: **Iresha de Silva SC for the Respondents**

ARGUED ON : **20.01.2011**

WRITTEN SUBMISSIONS ON: **25.02.2011**

DECIDED ON : **22.03.2011**

UPALY ABEYRATHNE, J.

The Petitioner was a Corporal of the Sri Lanka Air Force serving at Poovarasankulam. He had been prosecuted before a District Court Martial on the following counts. Namely;

1. That at the Special Operations Group Sri Lanka Air Force Poovarasankulam on 12th May 2008 at about 11 hrs that he did refuse to obey the order given by his superior officer 10396 Flight Sergeant Somarathne ET to do fatigue (to fill earth into officer's mess premises), thereby committing an offence punishable under section 99 (1) of the Air Force Act,
2. That at the Special Operations Group Sri Lanka Air Force Poovarasankulam on 12th May 2008 at about 11 hrs that he did offer violence by attempting to open fire at his superior officer 10396 Flight Sergeant Somarathne ET by using a gun (T/56) bearing serial No 3727708, thereby committing an offence punishable under section 99 (1) of the Air Force Act.

After trial the Petitioner was found guilty for both counts and the District Court Martial recommended a sentence, on the 1st count, of 01 year rigorous imprisonment and on the 2nd count, 05 years rigorous imprisonment. Upon the receipt of said recommendation the 12th Respondent, acting under section 65 of the Air Force Act, has confirmed a sentence, on the 1st count, of 01 year rigorous imprisonment and on the 2nd count, 03 years rigorous imprisonment to run concurrently.

The Petitioner is now seeking a mandate in the nature of Writ of Certiorari to quash the said conviction and the sentence. The learned counsel for

the Petitioner strenuously contended that the defence of accident and the burden of proof has not been considered by the District Court Martial and the 11th Respondent, Judge Advocate, in his summing up, has failed to direct the District Court Martial to consider the defence of accident and the burden of proof.

I now advert to the said submission. It appears from the proceedings before the District Court Martial that 11 witnesses have given evidence for the Prosecution. According to the 04 eye witnesses, this incident had taken place in Poovarasankulam Camp. It was a temporary Camp situated in a jungle area consisting of temporary shelters for Officers and Airmen. According to the eye witnesses, on the day in question, the Petitioner and several other Corporals had been ordered by Flight Sergeant Somaratne to attend fatigue duty. The Petitioner had refused to obey the said order. Thereafter Sergeant Somaratne had proceeded to Sergeants' Mess and had complained about the Petitioner's conduct to Warrant Officer Balasooriya. At that time the Petitioner too had come near the rear entrance of the Sergeants' Mess. Then Warrant Officer Balasooriya had informed the Petitioner to attend fatigue duty as ordered by Somaratne. Sergeant Somaratne again had ordered the Petitioner to carry out his order. At that point of time the Petitioner had aimed his weapon (T 56) at Sergeant Somaratne and had pulled the trigger. Due to the safety-catch being on, a shot had not been fired. Thereafter the Petitioner had changed the safety-catch to firing position and had pulled the trigger but a shot had not been fired. Thereafter the Petitioner had cocked the weapon in order to load a bullet in to the chamber of the weapon and had attempted once again to fire his weapon at Sergeant Somaratne. At that moment Sergeant Dissanayake while shouting 'don't shoot' 'don't shoot' had jumped forward and had held the gun. At that instant a shot had been fired by the Petitioner. Thereafter the Petitioner had released the gun from his hand and had shouted 'I did not fire, it

was sergeant Dissanayake who fired'. Then Sergeant Somartne had replied 'don't lie Jayasinghe, Seargeant Dissanayake did not fire, you are the person who fired'.

It is important to note that during the course of cross examination of the said four eye witnesses, the Petitioner did not question about an accidental firing. At least the Petitioner did not suggest to the said witnesses that the shot had been fired accidentally. I have carefully examined the evidence of the case for the prosecution. There is no iota of evidence to suggest that the Petitioner has taken the defence of accident during the hearing of the case for the Prosecution.

It was the position of the Petitioner that the defence of accident was taken up at the hearing of evidence of the Petitioner. I now consider the said position. The Petitioner in his evidence admitted that on the day in question Sergeant Somaratne ordered him to perform fatigue duty. He had further admitted that he did not attend fatigue duty since the others were not at the work place. Thereafter the Petitioner had gone to Corporals' Mess without attending to fatigue duty.

It is apparent from the evidence that the Petitioner had refused to obey the orders given by Sergeant Somaratne.

According to the Petitioner, thereafter Sergeant Somaratne had proceeded towards the Officers' Mess. The Petitioner who was at the Corporals' mess had followed Sergeant Somaratne. The Petitioner further said that when he started to walk behind Sergeant Somaratne he took his weapon and cocked it in order to load a bullet in to the chamber of the weapon. When the Petitioner was questioned about the reason for him to load a bullet in to the chamber of the weapon, he said that they had been instructed to keep the weapon ready with them when they are proceeding to their duty point. On the said evidence it is important

to note that at that time, in fact, the Petitioner was not proceeding towards his duty point. He further said that after he met Warrant Officer Balasooriya he understood that he had to carry out fatigue duty. Then he turned to go by taking weapon in to his hand. At that moment Sergeant Dissanayake jumped on to his weapon and held him. He feared about his weapon may be fired since he inserted a bullet in to it. Therefore he turned his weapon down. Sergeant Dissanayake tried to take the weapon and then a shot emanated from the gun.

I have carefully considered the evidence of the Petitioner. The Petitioner in his evidence had stated that after he met Warrant Officer Balasooriya he understood that he had to carry out fatigue duty and he turned to go by taking weapon in to his hand. When I consider said evidence, it appears to me that the Petitioner had failed to explain why he took his weapon in to his hand when he turned to go back. That is because the Petitioner in his evidence had stated that when he started to proceed towards sergeants' mess behind Sergeant Somaratne he took his weapon and cocked it in order to load a bullet in to the chamber of the weapon. It is apparent from the said evidence of the Petitioner that the conduct of the Petitioner at that time was surreptitious and does not form a part of an accident.

Therefore I am of the view that the evidence of the Petitioner does not form a part of the defence of accident. There is no iota of evidence to conclude or suggest that there had been an accidental firing. In the said circumstances I am of the view that the 11th Respondent Judge Advocate had addressed the District Court Martial on the evidence that had been led before the Court Martial. Since, there had been no evidence led before the District Court Martial in relation to the defence of accident it cannot be alleged that the summing up of the Judge Advocate (11th Respondent) contains non-directions and misdirection when he did not address the Court Martial on the defence of accident.

For the forgoing reasons I dismiss the Petitioner's application for writ without costs.

Application dismissed.

Judge of the Court of Appeal

SATHYA HETTGE, P.C.J.(P/C.A.)

I agree.

President of the Court Of Appeal