

**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

CA Writ Application No. 37/2010

Corporal T.W.G. Wijayalal
“Wikasitha” Dunkoratuwa
Bandaththara Thihagoda

Petitioner

Vs.

01. Air Commodore C.P. Welikala
President, District Court Martial
Air Force Head Quarters, Colombo 02
02. Wing Commander P. Ranasinghe
Member, District Court Martial
Air Force Head Quarters, Colombo 02
03. Wing Commander P.B. Liyanage,
Member, District Court Martial
Air Force Head Quarters, Colombo 02
04. Squadron Leader J.M.R.S. Jayasundera
Member, District Court Martial
Air Force Head Quarters, Colombo 02
05. Squadron Leader N. Sapugasthenna
Member, District Court Martial
Air Force Head Quarters, Colombo 02

06. Wing Commander R.G.C.D. Ravihansa
Waiting Member, District Court Martial
Air Force Head Quarters, Colombo 02
07. Wing Commander S.T.R. Devasiri
Waiting Member, District Court Martial
Air Force Head Quarters, Colombo 2
08. Squadron Leader N.H.D.N. Dias,
Waiting Member, District Court Martial
Air Force Head Quarters, Colombo 02
09. Squadron Leader G.T.K. Amarasena,
Waiting Member, District Court Martial
Air Force Head Quarters, Colombo 02
10. Group Captain A.D. Gamachari
Judge Advocate
Air Force Head Quarters, Colombo 02
11. Air Marshal W.D.R.M.J. Goonetilleke
Commander of the Sri Lanka Air Force
Air Force Head Quarters, Colombo 02
- 11A. Air Marshal K.A. Gunatilleke,
Commander o the Sri Lanka Air Force
Air Force Head Quarters, Colombo 02

Respondents

BEFORE : **K.T. CHITRASIRI, J. &**
L.T.B. DEHIDENIYA, J.

COUNSEL : Saliya Peiris with A.Ratnasiri for the Petitioner
Priyantha Nawana, D.S.G. for the Respondents

ARGUED ON : 24.02.2015 and 10.08.2015

WRITTEN : 01.04.2015 by the Petitioner

SUBMISSIONS

FILED ON : 27.03.2015 by the Respondents

DECIDED ON : 10.09.2015

K.T.CHITRASIRI, J.

The Petitioner was employed as a Corporal in the Sri Lanka Air Force and at the time the impugned decision was made, he was attached to Air Force Base in Vavunia. Whilst serving at the Vavunia camp, he was charged on three counts under the Air Force Act before a District Court Martial. The three counts upon which he was charged is found in the Documents marked P1a, P1b and P1c, annexed to the petition filed in this Court.

The first count referred to in the charge sheet relates to the Petitioner having contravened an official order committing an offence punishable under Section 102 (1) of the Air Force Act and the second count relates to the Petitioner been under the influence of liquor during duty hours committing an offence punishable under Section 102 (1) of the Air Force Act. The third count pertains to an act of opening fire with a T 56 weapon with the intention of causing fear and thereby committing an offence under Section 341 of the Penal Code read with Section 132 (a) of the Air Force Act.

There had been a full scale trial against the petitioner before the Court Martial which comprised of 1st to 5th Respondents. Finally, the District Court Martial found the Petitioner guilty of the 2nd and the 3rd counts and was acquitted from count 1 referred to in the charge sheet. Findings of the Court Martial are found in the Document marked P5 filed with the Petition.

Being aggrieved by the aforesaid findings of the Court Martial, the Petitioner came to this Court praying for a mandate in the nature of a Writ of Certiorari to have the findings of the District Court Martial, quashed.

In the statement of objections, respondents having answered each and every paragraph of the petition have taken up a preliminary objection as well. The preliminary objection so raised is found in Paragraph 3 of the statement of objections dated 14th June 2010. In that paragraph 3, the respondents have stated that the petitioner is not entitled in law to have and maintain this application for the reason:

- 1) that he Petitioner has absented himself from duty from the 7th January 2010 without obtaining leave from the Sri Lanka Air force.
- 2) that the Petitioner has been guilty of suppression and mis-representation of material facts by wrongfully asserting that he is presently (at the time the application was filed in this Court) serving in Sri Lanka Air Force Base, Katunayake.

This Court decided to consider the matters pertaining to the aforesaid preliminary objection along with the matters pertaining to the main

application since the matter concerning preliminary objection involves even the facts of the case. Accordingly, both Counsel were heard in support of their respective cases.

I will first advert to the matters concerning the preliminary objection to ascertain whether there is merit in that objection raised by the learned DSG. In Para 2 of the Affidavit dated 18th January 2010 which was deposed to by the Petitioner, he has stated that he had been a Corporal serving in the Sri Lanka Air Force at that point of time, namely the date on which he has affirmed the said affidavit. It is the basis upon which the rest of the paragraphs in the Affidavit also had been set out and drafted. In Paragraph 11 of that same affidavit, he has further stated thus:

“I state that on or about 15th January 2010 while I was away from the Camp, I became aware that the Court Martial had imposed the following sentence on me.

- *Count 2 - Detention of 14 days in the Barracks*
- *Count 3 – One year imprisonment & dismissal from service.*

I state that upto date I have not received the written notice of the sentence. I seek that Your Lordships be pleased to direct the 11th respondent to submit the same to Your Lordships’ Court.”

Upon a careful reading of the contents in the aforesaid paragraphs 3 and 11 in the affidavit, the obvious impression that a reasonable person may get is that the Petitioner had been in the active service and working in the Air Force up to the date that this application was filed and never been absented from duty without prior notice.

However, in Paragraph 3 of the statement of objections of the respondents, it is clearly stated that the Petitioner was absent from duty without obtaining leave from 7th January 2010 onwards. Such a material fact had not been disclosed in the petition of the petitioner. In paragraph 9 of the same statement of objections, it is also stated that the conclusion of the proceedings of the Court Martial including the award and promulgation of the sentence was impeded due to the absence of the petitioner. In that statement of objections, it is also stated that the Petitioner has not even given any notice to the authorities of his failure to report for work before he absented himself. The petitioner has not formally obtained leave either.

Admittedly, on the 2nd of December 2009, the Petitioner was convicted by the Court Martial. Upon a person being convicted by the District Court Martial, it is a requirement under the regulations to confirm the said conviction and then to pass the sentence accordingly by the authority having the power under Section 64 of the Air Force Act. **[Section 63 (1) of the Air Force Act]** Upon such a confirmation by the said authority, any officer or airman has the right to forward a petition for relief, to the confirming authority under Rule 140 of the Regulations made under the Air Force Court Martial (General and District) Regulations. Thereafter, Rule 142 of the said Regulations comes into play and it provides to promulgate the conviction and the sentence.

In this instance, promulgation of the conviction and the sentence imposed on the Petitioner was prevented due to the absence of the Petitioner. He has kept away from duty without permission being obtained. He has even failed to inform the authorities or the Court Martial of his absence. Such



conduct of the petitioner was the reason for not promulgating the conviction and the sentence. Looking at those circumstances, it may also lead to think that the petitioner has come to this court prematurely without waiting for the promulgation of the conviction and the sentence.

Be that as it may, the matters discussed hereinbefore clearly show that the Petitioner has failed to disclose the facts and circumstances of the case in the proper manner for this Court to understand properly the grievance that he has complained of even though those were well within his knowledge. Moreover, the manner in which the petitioner has presented his case in his petition to this Court shows that he has purposely suppressed material facts to Court having been kept away from work. His absence was the reason that made the Court Martial for not promulgating the conviction and the sentence. It is a material fact to the incident alleged by the petitioner. Had he disclosed all those material facts to Court, especially his absence without permission, this matter would have taken a different line. Furthermore, the manner in which the Petitioner has stated the facts of the case in his petition, indicate that the Petitioner was making an attempt to misrepresent the material facts of the case to this Court.

In a Writ Application such as this, it is necessary that the person who makes the application should come to Court with *uberrima fides*. Accordingly, it is necessary for such a person to divulge all material facts to court. Also, such a person should not misrepresent when making an application seeking to have a mandate in the nature of a writ. This position of law is adverted to in the case of **Siddeek vs. Jacolyn Seneviratne**. [1984 (1) S L R 83] In that decision it was held thus:

“It {was} necessary at this stage to bear in mind that certiorari {was} a discretionary remedy. (see Wade) ‘Wade’ Administrative Law: 5th Ed. (1982) 546, 591. As de Smith says in his work ‘Judicial Review of Administrative Action’ 4th Ed. (1980) p.404:

‘Thus, certiorari is a discretionary remedy and maybe withheld if the conduct of the applicant, or it would seem the nature of error does not justify judicial intervention.’”

In **Jayaweera v. Asst. Commissioner of Agrarian Services Ratnapura and Others** [1996 (2) S.L.R. 70 at 73] Jayasuriya J., held that a petitioner who was seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court had discretion to deny him relief having regard to his conduct. Also, see the decisions in **Mendis vs. Karannagoda and Others**, [CA (Writ) Application No. 444/2007, Court of Appeal Minutes dated 28. 02. 2008] **Alponso Appuhamy V.Hettiarachchi**, [77 NLR 131] **Dilan Perera V. Rajitha Senaratne**, [2000 (2) S L R 79] **Dahanayake V. Sri Lanka Insurance Corporation Ltd.** [2005 (1) S L R 67]

The observance of *uberrima fides* and the adherence to the requirement of full and frank disclosure are, thus, held to be *sine quo non* in applications for prerogative writs. As mentioned hereinbefore, the facts of this case clearly show that the Petitioner has failed to disclose fully and in a fair manner of the material facts of the case. Above all, it is seen that the Petitioner has willfully misrepresented the facts of the case. Therefore, I am

of the opinion that this Court, under those circumstances, is not in a position to exercise its Writ Jurisdiction in favour of the petitioner.

For the aforesaid reasons, the preliminary objection raised by the learned DSG is upheld and accordingly, the petition of the petitioner stands dismissed. Now that this Court has decided not to grant relief to the Petitioner considering the Preliminary Objection taken up by the Respondents, it is not necessary for this Court to look at the merits of the main matter.

For the reasons set out hereinbefore, this application of the Petitioner is dismissed. Circumstances of the case do not warrant making an order for costs.

Application dismissed

JUDGE OF THE COURT OF APPEAL

L.T.B.DEHIDENIYA, J

I agree.

JUDGE OF THE COURT OF APPEAL