

**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 *Writ of Certiorari* under article
140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka**

Seelanga Durage Laxman Wickramasinghe,
362, Samagi Mawatha,
Kurana,
Katunayaka.

PETITIONER

CA/WRIT/87/2015

Vs,

1. Air Martial Gagana Bulathsinghala,
Commander of Air Force,
Sri Lanka Air Force,
Colombo 02.
2. Air Vice Martial Welikala,
Director Administration,
Sri Lanka Air Force,
Colombo 02.
3. Wing Commander A.D.M. Koralage,
Sri Lanka Air Force,
Colombo 02.
4. V.T.S. Sirimana,
Wing Commander,
Sri Lanka Air Force,
Colombo 02

RESPONDENTS

Before: Vijith K. Malalgoda PC J (P/CA)

Counsel: Jagath Abaynayake for the Petitioner

Priyantha Nawana SDSG for the Respondents

Argued on: 26.05.2016

Written Submissions on: 30.06.2016, 30.09.2016

Judgment on: 20.01.2017

Order

Vijith K. Malalgoda PC J

Petitioner to the present application Seelanga Durage Lakxman Wickramasinghe had come before this court seeking inter alia,

- b) To issue a mandate in the nature of a writ of *Certiorari* quashing the decision to discharge the Petitioner with disgrace referred to in P-1 and P-2 by the 1st Respondent.

The Petitioner who joined the Sri Lanka Air Force as an airman in the volunteer Service with effect from 19.07.1990 was recruited to the regular service on 18.07.1994 as a photographer in the same rank.

As submitted by the Petitioner he received promotions to the ranks of Corporal, Sergeant, Flight Sergeant and Assistant Warrant Officer in the years 2004, 2008, 2012 and 2013 respectively and decorated with several medals including, SLAF 50th Anniversary Medal, 50th Independence Anniversary Medal, Purna Bhumi, Riviresa Campaign Service, East Humanitarian Operation and North Humanitarian Operation Medals.

According to the Petitioner, his house at No. 361 Samagi Mawatha, Katunayake was raided by a group of officers attached to Air Force Police and recovered, several items of Sri Lanka Air Force Uniforms and Accessories belonging to several ranks, National Identity Cards and Sri Lanka Air Force Identity Cards belonging to Air Force personnel and the Petitioner too was arrested during the said raid.

Even though the Petitioner claims that the arrest was made by Air Force Police, the Respondents have taken up the position that the said raid was conducted by officers of Seeduwa Police and arrested the Petitioner, produced him before court and remanded for Fiscal Custody. Subsequent to his release on 25th March 2015, the Chief Provost Martial interrogated the Petitioner and a statement was recorded from him.

As admitted by both parties, subsequent to the investigations carried out by the Provost Martial the Petitioner was tried at a summary trial under section 129 (1) of the Air Force Act on following four counts.

1. Conduct prejudicial to Air Force Discipline; In that you at No 361 Samagi Mawatha, Katunayake did keep in your possession unauthorized service uniforms and accessories listed in annex 'A' when detected by a provost team on 21st March which conduct is prejudicial to Air Force good order thereby committing an offence punishable under section 129 (1) of the Air Force Act to be read in conjunction with section 42 of the Air Force Act.
2. Conduct prejudicial to Air Force Discipline: In that you at SLAF Base Ratmalana during the period from 2011 to 21st March 2013 did engage yourself in unauthorized trade for profits by hiring Air Force uniforms and accessories a conduct which is prejudicial to Air Force good order, thereby committing an offence punishable under section 129 (1) of the Air Force Act to be read in conjunction with section 42 of the Air Force Act.
3. Conduct prejudicial to Air Force Discipline; In that you at No 361 Samagi Mawatha, Katunayake on 21st March 2013 did keep in your custody service identity cards/ National Identity Cards of service personal listed in annex 'A' when hiring Air Force uniforms and

accessories to service men which conduct prejudicial to Air Force discipline and thereby committing an offence punishable under section 129 (1) of the Air Force Act to be read in conjunction with section 42 of the Air Force Act.

4. Conduct prejudicial to Air Force Discipline: In that you at SLAF Base Ratmalana during the period from 2011 to 21st March 2013 did engage yourself in unauthorized trade for profits by doing wedding photography a conduct which is prejudicial to Air Force discipline and thereby committing an offence punishable under section 129 (1) of the Air Force Act to be read in conjunction with section 42 of the Air Force Act.

At the conclusion of the said summary trial on a plea of guilt tendered on behalf of the Petitioner, he was found guilty and a punishment of forfeiture of seniority of rank for one year on each charge was recommended at the summary trial which was confirmed by the 1st Respondent Commander of the Sri Lanka Air Force on 12th December 2014. (R1a-d)

However as revealed before this court the 1st Respondent after confirming the said recommendation of the summary trial had decided to discharge the Petitioner with disgrace from the Sri Lanka Air Force for committing offence of conduct prejudicial to Air Force Discipline and was communicated to the Petitioner through Director Administration of the Sri Lanka Air Force by letter dated 18.12.2014. (P-1)

As observed by this court, the said decision was reached by the Petitioner to "Discharge him with Disgrace" on 28th December 2014, at a time when he was engaged in his normal duty after the proceedings in the summary trial.

During the argument before this court the Respondents have further taken up that, the Petitioner was convicted on 21st June 1995 for having given wrong information at the time of enlistment on 18th July 1995 and was awarded a seven-day confinement as the punishment.

Even though the Respondents have relied on the proceedings of the said summary trial held in 1995 to challenge the Unblemished character of the Petitioner, this court is not prepared to consider the said

conviction against the Petitioner since the Air Force itself had not considered the same when the Petitioner was granted promotions in 2004, 2008, 2012 and 2013 as referred to above. The Respondents have further taken up the position that Section 155 of the Air Force Act provides for discharge with disgrace in various situations identifies in Regulation 126 of the Sri Lanka Air Force (Regular and Regular Services) Regulation 1951 read with Table B of the 5th schedule to the said Regulations.

Whilst referring to the said Regulations the Respondents have further argued before this court that, “any conduct prejudicial to the Sri Lanka Air Force punishable under section 129 of the Air Force Act” constitutes “misconduct” which attaches the consequence of ‘discharge with disgrace’ within the meaning of Table B of the Fifth schedule.

Regulation 126 which deals with various cause of Discharge reads thus,

Regulation 126 (1) The various causes of discharge from the Regular Air Force and competent officers to authorize, carryout and confirm such discharge and the special instructions regarding the cause of the discharge, in each case, shall be as specified in Table B of the fifth schedule here to

However when going through the Table B to the fifth schedule it is observed by this court that Discharge with disgrace is only provided;

(vii) (a) Having been convicted by a Civil Court of Civil Offence

(b) Having been sentenced to Rigorous Imprisonment by Court martial or Civil Court

(ix) (a) For misconduct- An Airman will not be discharge under this item unless the misconduct is of such a nature as to justify discharge with disgrace. The application for discharge, which should be put forward as soon as possible after the offence has been delt with, will be made on a **special form** on which full

particulars of the case will be recorded, and to which the conduct sheets and copies of civil convictions will be attached.

(b) For misconduct- Having been sentenced to dismissal from Service- applies to warrant officer dismissed from the service by sentence of Court-Martial

(x) Having been sentenced to be discharged with ignominy-The discharge will be carried out, and the certificate of service completed and sent to the officer in charge of the prison, if the Airman is in prison. The discharge will be confirmed from the date of dispatch.

When going through the above provisions submitted before this court by the Respondents, it is observed that the circumstance under which the Petitioner was discharged with disgrace is not covered under any provision of the above regulation. As further observed by this court the punishment imposed on the Petitioner not by a Court Martial but after a summary trial, only carried a sentence of 'forfeiture of seniority of rank for one year' and not a dismissal from the service by a Court Martial as identified in the said schedule. The Respondents have further failed to place before this court any material to satisfy that there was a conviction and/or sentence by a Civil Court or a Court Martial and any recommendation on a specified form on which full particulars of the case was recorded with conduct sheets attached with copies of civil conviction as required under Table 'B' above.

In the said circumstances it is clear that the said decision of the 1st Respondent to discharge the Petitioner from Sri Lanka Air Force with Discharge was made without having any legal basis to do so and therefore the said decision is an ultravires decision.

The Petitioner has further placed before this court the Supreme Court decision in the case of *Air Marshal G.D. Perera and Other V. K.H.M.S. Bandara SC Appeal 104/2008* reported in Supreme Court Law Report Volume II at page 213 where Wanasundera PC J had held,

1. The Regulations are made under the Air Force Act and under no the other Act of Parliament, anyway regulation 126 does not confer an unfettered discretion on the 1st Appellant to discharge the Respondent from service
2. Having read section 40, 42 and 43 I have observed that 'discharge from service' cannot be granted as a punishment for any person who has been tried under a summary trial.

Even though the circumstances under which the 1st Petitioner had made the discharge order under Regulation 126 of the Sri Lanka Air Force (Regular and Regular Services) Regulations 1951 on the basis of 'Service No Longer Required' this court is in agreement with the conclusion of Supreme Court when their Lordship concluded that 'Regulation 126 does not confer an unfettered discretion on the 1st Appellant (the Commander of the Sri Lanka Air Force) to discharge the Respondent from service.

As observed above, the Commander (1st Respondent to the present application) is bound to follow the provisions of the Air Force Act and the Regulations made there under. Table 'B' to the fifth schedule does not permit the 1st Respondent to discharge the Petitioner with disgrace when he was imposed with a punishment of forfeiture of seniority of rank for one year on each count. When declaring that the said order made by the 1st Respondent is ultravires, this court decides to grant the relief as prayed in paragraph (b) to the Petition "quashing the decision to discharge the Petitioner with disgrace referred to in P-1 and P-2" with cost fixed at Rs. 25,000/-

Application is allowed with cost.

PRESIDENT OF THE COURT OF APPEAL