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

In the matter of an application in the nature of writ of certiorari and mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal case no. CA Writ 124/2015, 125/2015 and 126/2015

D.M.U.N.Dissanayake,
No.446, Walauwa Road, Homagama.
(Case No 124/2015)
P.M.M.Madushanka,
No.202/2, Maavihena, Katupotha.
(Case No.126/2015)
W.S.M.A.R.Bandara,
C, 88/1, Atala, Kegalla.
(Case No. 126/2015)
Petitioners

Vs.

1. D.C.J.Weerakoon,
   Air Commodore,
   Commanding Officer, S.A.L.F.Base,
   Colombo

And others

Respondents

Before : L.T.B. Dehideniya J.

Counsel : S.M.Vijithsingh for the Petitioners

: Manohara Jayasinghe SC for the Respondents.

Argued on : 24.07.2017

Decided on : 11.09.2017

L.T.B. Dehideniya J.

The writ application nos. 124/2015, 125/2015 and 126/2015 were on the same issue and were argued together. This judgment is for the said three applications.

The Petitioners in these applications were airmen served in the Sri Lanka Air Force. They were involved in an identity card fraud and were charged under the Air Force Act. After summary trial, they were convicted and punished.

The Commander of the Air Force ordered to terminate the services of the Petitioners on the ground that their service no longer required.

The Petitioners challenged both the conviction and the termination of the service by these petitions, but at the argument stage, the Counsel for the Petitioners restricted their challenge only to the validity of the termination.

The Petitioners have raised several questions on the legality of the conviction in their petitions, but I need not to consider them since the

petitioners are not challenging the conviction. I will consider the validity of the termination only.

The Petitioners main contention is that in terms of section 43 and 155(1) (b) of the Air Force Act, the Petitioners could not have been discharged and a punishment of discharge could be done only by a Court Martial under section 133 of the Act. The Act does not give power to any other officer acting under section 43 of the Act, to impose a punishment under section 133. The learned State Counsel submitted that he is in agreement with the proposition that an accused cannot be imposed a sentence more than what is stipulated in law, but he argues that the punishment is within the law and the termination is valid in law. His argument is that the Commander has the option to proceed under section 129 (1) or section 43. In the instant cases the commander has opted to proceed under section 43. The Petitioners in the case nos. 125/2015 and 126/2015 being officers in the rank of Sergeant, they were given the option of trying the case before a Court Martial but they have declined. The Petitioner in the case no. 124/2015 is being a corporal; he is not entitle to this option under section 40(3) of the Air Force Act as amended by the Act No. 82 of 1988. After conviction and sentence it has been forwarded to the Commander of the Air Force with details of the conviction with an application for discharge for ratification and the Commander has made an order to discharge the Petitioners from the Air Force under the category of "service no longer required". The learned State Counsel further submits that the Commander has the power to discharge servicemen under table B of the Fifth Schedule of the Air Force Regulations of 1954 and the case in hand the Commander has acted under section (xiii) (a) of the said schedule.

The Air Force Amendment Act No. 82 of 1988 has amended the section 43 by giving authority to the officer who is conducting the trial to sentence the accused for three months. The section 43 reads;

43. Where a commanding officer deals summarily with a case in which an airman (not being a warrant officer) under his command is charged with the commission of any offence, he shall, after hearing the evidence, acquit the accused if he finds the accused not guilty, or convict the accused if he finds the accused guilty, and after conviction of the accused may

(a)

(i) if the commanding officer is of the rank of Wing Commander or of higher rank, order the accused to be placed under detention, or imprisonment, for a period not exceeding ninety days, and such order of imprisonment shall not take effect until it is ratified by the Commander of the Air Force ;

In the present case the trial has been conducted by the Base Commander Air Commodore DJC Weerakoon and the Petitioners do not dispute that the inquiry officer is of the rank higher than the rank of Wing Commander. Therefore the sentence imposed is not ultra vires.

If the accused is convicted by a Court Martial under section 133 he can be subjected to a sentence of discharge. The section reads thus;

133.

(1) .....

(2) Subject to the provisions of section 134, the following shall be the scale of punishments, in descending order of severity, which may be inflicted on airmen convicted of offences by courts martial:

(a) death;

(b) rigorous imprisonment;

(c) simple imprisonment;

(d) detention for a term not exceeding three years;

(e) discharge with ignominy from the Air Force;

(f) dismissal from the Air Force ;

(g) in the case of a warrant officer or a non-commissioned officer, reduction to the ranks or to a lower grade, or forfeiture, in the prescribed manner, of seniority of rank;

(h) in the case of a warrant officer or a non-commissioned officer, severe reprimand or reprimand;

(i) such forfeiture of and deductions from pay, and such fines, as are authorized by this Act.

In the instance case the discharge of the Petitioner from the Air Force was not under the section 133. Under the Air Force Regulations 1954, the Commander of the Air Force has the power to discharge any airman if his service is no longer required for the Air Force. In the Fifth Schedule Table B section (xiii) (a) reads thus;

Cause of discharge	***Competent officer to***			***Special instructions***
	Authorize discharge	***Carryout discharge***	***Confirm discharge***	
(xiii)(a) His services being no longer required	*Commander of the Air Force*	*O.C.*	*Officer i/c Records*	*Applies only to an airman who cannot be discharged under any other item. ....*

There is no any limit prescribed in the said rules in exercising this power, but the Commander is expected to act within the parameters of the Administrative Law in this regard. The Commander has to maintain discipline in the Air Force and he must act reasonably.

In the present cases the Petitioners were convicted for an offence relating to service identity card fraud. The identity card of a serviceman is a very important document which gives authority for him to enter in to sensitive areas. The Commander has very correctly decided that the persons who are involved in manufacturing forged service identity cards are not suitable to be kept as members of the Air Force and their services no longer required. The Commander has the authority to come in to this decision under sec (xiii)(a) of the table B of the Fifth Schedule of the Air Force Regulations 1954. This decision cannot be held ultra vires or unreasonable.

I will consider whether this amounts to double jeopardy. The termination of the Petitioners service is not a punishment. The offence that the petitioners committed was of such grave in nature, it could be a threat to the public security of the country to keep those offenders in the Air Force. The said regulations have given the power to the Commander to discharge such persons from the service if they cannot be removed under any other clause. It is not a punishment but only an administrative step.

Mangala Pushpakumara v. Air Chief Marshal Roshan Gunarathne C.A. 448/2009 (Writ) CA Minutes dated 28.03.2013 (incorrectly recorded as 28.03.2012) is a case similar to the case in hand. In that case too the serviceman was discharged from the service after conviction. The discharge was challenged in Court and one ground of challenge was double jeopardy. It has been held by Goonarathne J that;

> *Discharge of the Petitioner was not meted out as a punishment. Therefore the argument of Petitioner that he was punished twice has no merit. Considering (a) to (e) above it is evident that Petitioner was punished as and when an offence was committed. It*

is apparent that the above material is sufficient for the 1st Respondent to arrive at a conclusion that the Petitioner is not a fit and proper person to be discharged under the other category dependant on document 12A produced by the Petitioner. The position as regards the discharge referred to in 12A has been 8 explained as a mistake in 1st Respondent's affidavit and this court does not wish to interfere with 1st Respondent's decision. I reject the argument that the Petitioner has been punished twice. It is in order for the 1st Respondent to discharge the Petitioner. A discharge is no punishment. Court has no reason to conclude that the decision in P15 and P19 is either ultra vires or unreasonable in the context of material placed by document R4. There is enough and more material to support document P15 & P19.

Under these circumstances I see no reason to interfere with the decision of the Commander of the Air Force.

The application dismissed without costs.

President of the Court of Appeal