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

Koswetiye Gedera Ajith Ananda
Weerathilaka,
Pasal Mawatha,
Beligamuwa,
Galewela.
Petitioner

CASE NO: CA/WRIT/107/2016

Vs.

1. Gagana Bulathsinghala,
   Commander,
   Sri Lanka Air Force,
   Colombo 2.
2. Wing Commander,
   N.K. Thanippuliarachchi,
   Sri Lanka Air Force,
   Colombo 2.
3. Air Commodore,
   R.N. Thilakasinghe,
   Commanding Officer,
   Sri Lanka Air Force Base,
   Ratmalana.

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Jagath Abeynayaka for the Petitioner.
Suranga Wimalasena, S.C.C., for the Respondents.

Decided on: 05.03.2019

Samayawardhena, J.

The petitioner, a warrant officer in the Sri Lanka Air Force, filed this application seeking to quash, by way of a writ of certiorari, the decision of the 1st respondent, the Commander of the Sri Lanka Air Force, marked P2, to discharge him from service under the clause "Service No Longer Required".

This decision has been made following a summary trial whereby the petitioner was found guilty for assisting a soldier by the name of Passi of the Central African Air Force in stealing of some aircraft fuel. This has happened in Central Africa whilst the petitioner was serving in the Sri Lankan Aviation Unit deployed in the Republic of Central Africa under the United Nations Peace Keeping Forces.

As seen from R8 tendered by the respondents, summary trial on the charge of "Conduct Prejudicial to Air Force Discipline", has been conducted by the Officer Disposing the Charge, Air Commodore Payoe.

In R8, the Officer Disposing the Charge has come to the following conclusion:

> *As per the evidence given by the two witnesses summoned to the summary trial and the accused himself and as per the inquiry report, it is clearly evident that this accused Warrant Officer had assisted the Central African soldier to remove Avtur (aircraft fuel) from aircraft which is an Air Force property during the period mentioned in the charge. Allowing outsiders to take Air Force properties intentionally is an Air Force offence in the absence of any authority regarding it. The availability of evidence herein established the charge levelled against him and upon which the accused was found guilty.*

Then in R8, the Officer Disposing the Charge states as follows:

> *Committing such an offence by an Air Force serviceman whilst performing duties in peace keeping mission in a foreign country attributes disrepute to the Air Force before foreigners which can't be condoned under whatsoever the circumstances. The offenders of this nature should be sentenced with exemplary punishment to arrest future occurrence of such offences. Therefore, undersigned awarded the following punishment to the accused considering the gravity of the offence.*

The punishment is as follows:

> ***AWARD OF PUNISHMENT***
>
> ***Severe Reprimand***
>
> *Sgd/ MDAP PAYOE*
> *Air Commodore*
> *OFFICER DISPOSING THE CHARGE*
> *Date: 17 November 2015*

Approval of the Commander of the Air Force

Agree with the award/ ~~amend the punishment as follows~~.
Sgd/ GP BULATHSINGHALA
Air Marshal
COMMANDER OF THE AIR FORCE
Date: 1 January 2015

Then it is clear that upon found guilty for conduct prejudicial to the Air Force Discipline, as the punishment, the petitioner has been severely reprimanded. Severe Reprimand is a punishment. It is important to understand that this punishment was given with the approval of the Commander of the Air Force. It is also very important to note that, as seen from the above, the Commander of the Air Force could amend the punishment, but he deleted that part and agreed with the punishment suggested by the Officer Disposing the Charge, i.e. Severe Reprimand.

After this punishment was meted out, the petitioner had continuously served in the Air Force as a Warrant Officer until he was served P2 dated 21.01.2016 whereby he has been Discharged from Service under the clause "Service No Longer Required" by the Commander of the Air Force.

The petitioner challenges only P2 in these proceedings. In my view, the petitioner shall succeed on three grounds.

The first ground is that the petitioner cannot be punished for the same offence twice. That is against the Doctrine of Double Jeopardy. Upon found guilty he was punished by the Commander of the Air Force by reprimanding severely. That was not subject to any qualifications or conditions. If the Commander wanted at that time, as I explained earlier, he could

have amended the punishment and substituted it with Discharge from Service under the clause "Service No Longer Required". Whether a Warrant Officer can be discharged from service after summary trial without a Court Marshal is another matter, which need not be considered in these proceedings. Once punishment of "Severe Reprimand" is given, the same Commander after sometime cannot give another punishment by sacking the petitioner from service under the clause "Service No Longer Required". What is the meaning of reprimanding an officer if he is to be sacked from the service? Reprimanding as a punishment is given to correct the officer as his services is required by the Commander.

In *Air Marshal G.D. Perera v. K.H.M.S. Bandara*[1], an officer cadet of the Sri Lanka Air Force was tried summarily and found guilty for entering one of the abandoned officers' married quarters of the Air Force without due authority, and committing criminal trespass. He was imposed a punishment of 14-day detention for the former offence and 30-day detention for the latter offence. Later the officer has been exonerated on the latter charge and only the punishment for the former charge was carried out. After serving that sentence, when he reported for duty, he has been informed that he has been discharged from service.

The Court of Appeal quashed that decision of discharge by certiorari. In appeal to the Supreme Court, affirming the Judgment of this Court except in respect of costs, Wanasundare J. with the agreement of Ekanayake J. and Dep J. (later C.J.) *inter alia* held as follows:

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[1] SC Appeal 104/2008 decided on 29.09.2014. This is also reported in Supreme Court Law Report Volume 2 by Atula Bandara Herath at pages 213-220

> *Furthermore, the appellants have not explained as to what caused the respondent to be punished and discharged from service. He was punished at the end of the inquiry. After he completed the detention period, he was ordered to be discharged. This is equal to a second sentencing which is not allowed in law. No person can be punished twice over. I hold that the discharge of the 1st respondent was ultra vires.*

The second ground why P2 shall not be allowed to stand is that punishment should commensurate with the offence committed.

The petitioner has not stolen the Air Force property, but the allegation is that he assisted a Central African soldier to steal some aircraft fuel taken out from the aircraft for testing purposes, which is meant to be destroyed, and thereby behaved in a manner prejudicial to the Air Force discipline.

Is this attract complete dismissal from service? The petitioner has joined the regular force of the Air Force on 05.07.1995. That means, he had served the Air Force more than 20 long years when he was sacked from the service, it appears, without even pension. This punishment, after summary trial, even if it is legally possible to award, is, in my view, *ex facie* excessive.

In the aforesaid Supreme Court case, the officer was still a trainee when he was discharged from service for more serious offences, and had, according to the Judgment, served about 3 years in the Air Force. Still, the Supreme Court took the view that, after serving the punishment of 14-day detention, dismissal from service was unreasonable. Wanasundara J. stated:

> *It is blatantly clear that the discharge from service which means losing his occupation was totally disproportionate to the punishment of 14 days which he was subjected to, which is unreasonable and cannot be justified and as such arbitrary……..The Regulations are made under the Air Force Act and under no other Act of Parliament. Anyway Regulation 126 does not confer an unfettered discretion to the 1st appellant to discharge the respondent from service.*

I am of the view that the second punishment meted out to the petitioner in the case at hand, is clearly excessive and therefore arbitrary.

The third ground is that the petitioner being a Warrant Officer cannot be discharged from service under the clause "Service No Longer Required" as seen from page 15 of R7.

The learned Senior State Counsel explains the basis of discharge of the petitioner from service in the following manner:

> *The Ceylon Government Gazette No.10665 dated 23.04.1954 signed and published by the then Minister of Defence and External Affairs stipulates the Regulations made in terms of the Air Force Act No.41 of 1949, the document marked R7.*
>
> *The said Gazette provides provisions in respect of discharging airmen under SNLR and it empowers the Commander of Air Force to discharge an airman under his Services being No Longer Required (SNLR) and accordingly,*

> *the decision of the 1st respondent is in accordance with the applicable regulations—vide top page 15 of R7.*[2]

According to the page 15 of the Regulations marked R7, discharge on Service No Longer Required "*Applies only to an airman who cannot be discharged under any other item*." The learned Senior State Counsel for the respondents has also in the above admitted that it applies to "an airman". The petitioner is admittedly not an Airman but a Warrant Officer above the rank of an Airman—vide for instance R8 above referred to.

When the Regulations marked R7 is perused, it is clear that Discharge from Service can be made on various grounds on various categories of officers. Vide for instance page 14 of R7, which says Discharge from Service can be made "*For misconduct*", which "*Applies to a Warrant Officer dismissed from the service by sentence of court-martial*".

The Discharge from Service under the Regulation (xii) (a) appearing at page 15 of R7 is clearly *ultra vires* and has no force or avail in law.

For the aforesaid reasons I quash P2 (also marked as R6) dated 21.01.2016 whereby the petitioner was discharged from service on the clause "Service No Longer Required".

Application allowed. No costs.

Judge of the Court of Appeal

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[2] Vide paragraphs 21 and 22 of the written submissions dated 30.10.2018.