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

Jagath Kumara Imaduwa Vithane,
No.247/1,
Uswatte,
Meegoda,
Vanchawala,
Galle.
Petitioner

CASE NO: CA/WRIT/354/2015

Vs.

The Commander,
Sri Lanka Army,
Army Headquarters,
Colombo 3.
And 5 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Faisz Musthapha, P.C., with Arindra Jayasinghe for the Petitioner.
Anusha Fernando, D.S.G., for the Respondents.

Decided on: 25.03.2019

Samayawardhena, J.

The petitioner has filed this application seeking to quash by way of certiorari:

a) the recommendation made by the Commander of the Sri Lanka Army to His Excellency the President to withdraw the commission of the petitioner from the Sri Lanka Army as evidenced by R14, and
b) the finding of guilt and the lowering of the petitioner's seniority in the Sri Lanka Army by 150 slots as evidenced by the documents compendiously marked as P5.

The learned President's Counsel for the petitioner seeks to quash the recommendation made by the Commander of the Army as reflected in R14 on three grounds.

a) The recommendation is based on the conviction and sentence imposed by the Court of Inquiry, which had no jurisdiction to do so.
b) The conviction was made on violation of rules of natural justice *inter alia* without giving a proper hearing and without adducing reasons.
c) The recommendation constitutes the imposition of double punishment.

In general, recommendations are not amenable to writ jurisdiction.

Assuming it is (as the said recommendation was the sole basis for HE the President to withdraw the commission), the petitioner is challenging in these proceedings, the conviction and sentence entered and passed about 7 years ago. He is clearly guilty of lashes, which disentitles the petitioner to successfully pursue a discretionary relief such as writ. As seen from P6, he has

appealed against that conviction and sentence to the Director of the Legal Branch of the Army and kept silent. No action has been taken by the Director of the Legal Branch, obviously because he has no authority to sit in appeal against those convictions. At that time, he was a Major and not a soldier, and therefore he should have known what he should do, if he were to challenge those convictions. He has again started talking about these convictions, after the withdrawal of his commission by HE the President, several years later. As I will explain later, the recommendation for withdrawal of commission is not solely dependent upon this conviction.

The charges, in my view, serious and, above all, involve inhuman, apart from indiscipline, activities on the part of the petitioner, and if proved, warrant adequate punishment, nay deterrent punishment.

The learned President's Counsel in the written submissions states that conviction and sentence was imposed by a Court of Inquiry, which had no jurisdiction to do so as a Court of Inquiry is only a fact-finding mission having no authority to convict and sentence an officer, and such conviction and sentence could only have been imposed after a Court Marshal.

Such a position has not been taken up in the petition. However, learned Deputy Solicitor General for the respondents, in the reply submissions, drawing attention of this Court to sections 40 and 42 of the Army Act, No.17 of 1949, as amended, says that the petitioner could have been so convicted and sentenced after a summary trial without a Court Marshal for those offences.

There is a distinction between a Court of Inquiry and Summary Trial. In this instance, the petitioner has been convicted and sentenced not after a Court of Inquiry but after a Summary Trial. This has been accepted by the petitioner himself in paragraph 3 of P6—the appeal sent to the Director/Legal—where he speaks of a conviction after "Summary Trial". He being a Major could not have been unaware of the difference between Court of Inquiry and Summary Trial.

Most importantly, I am unable to accept the argument of the learned President's Counsel that the recommendation made by the Commander of the Army is solely based on the said conviction and sentence. R14 recommendation running into 4 pages is not solely based on the said conviction and sentence. That is only a part of it but not all. There is no necessity to reproduce R14 verbatim, which is self-explanatory. There had been several misdeeds committed by him in addition to the ones he was subjected to Summary Trial. As seen from R13, the Army Advisory Board comprising of five very senior officers has recommended to seek direction from HE the President for the withdrawal of commission of the petitioner "in the best interest of the Army".

It is in that backdrop, the Commander of the Army has sent R14. In paragraph 6 thereof the Commander states:

> *In view of the past records of this officer with considerable number of disciplinary cases, I concur with the recommendations made by the Army Advisory Board. Further, I am of the opinion that further retention of this officer in service would not be in the best interest of the Army as he has set a bad example to his subordinates and*

> *his behavior is unbecoming of an officer and a gentleman. Therefore in my appointment as the Commander of the Army in terms of the Army Discipline Regulations 1950 which provides that "the Commander of the Army shall be vested with general responsibility for discipline in the Army", I am compelled to seek the direction of His Excellency the President regarding the question of further retention of this officer in service.*

It is clear from the said excerpt that this recommendation does not constitute the imposition of double punishment. The Commander makes that request for the best interest of the Army in terms of Regulation No. 2 of the Army Discipline Regulations 1950, which states that "*The Commander of the Army shall be vested with general responsibility for discipline in the army*."

The discipline of the Army is paramount importance, and shall be best left to the Commander and not to the Court to deal with. If there is no discipline, there is no Army. The Court in the exercise of writ jurisdiction will not interfere with the internal administration of the Army, which includes taking disciplinary decisions, unless there are compelling cogent reasons—such as decisions are *ex facie ultra vires*, unlawful and arbitrary—to do so. I see no such reasons in the case at hand.

I dismiss the application of the petitioner with costs.

Judge of the Court of Appeal