

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 in terms of Article 140 of the Constitution.

Lokubalasuriyage Don Nishantha Udayasiri
No. 228, Walpola, Andiambalama.

Petitioner

Case No. CA (Writ) 104/2016

Vs.

1. Air Marshal Kapila Jayampathi
Commander of Air Force,
Sri Lanka Air Force,
Air Force Headquarters, Colombo 2.
2. Wing Commander A. D. M. Koralage
Director of Administration,
Sri Lanka Air Force,
Air Force Headquarters, Colombo 2.
3. Group Captain M. J. R. Perera
Commanding Officer,
Sri Lanka Air Force, Ekala.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Jagath Abeynayake for the Petitioner

Kanishka De Silva Balapatabendi SSC for the Respondents

Argued on: 19.06.2019

Written Submissions tendered on:

Petitioner on 21.08.2019

Respondents on 07.08.2019

Decided on: 19.12.2019

Janak De Silva J.

The Petitioner is impugning document marked "P4" dated 31.12.2015 by which he was discharged from the Sri Lanka Air Force (SLAF) on the basis "Service No Longer Required" (SNLR). It is alleged that such discharge is based on fictitious grounds, violates the principle against the duplicity of punishment, was made by way of conspiring to conceal issues from the Petitioner and a violation of the rules of natural justice.

The Petitioner was recruited to the SLAF on 19.07.1994. He was posted to the Katunayake Base and was assisting the commissioned officers in relation to work pertaining to Command Agro Fund (CAF).

A Court of Inquiry under was convened to investigate into circumstances leading to the loss of payment vouchers in the Command Agro Unit of the SLAF in connection with the purchase of motor spare parts, repairs and removal of pages from the Motor Vehicle Spare Parts Register. At the conclusion of the inquiry the Petitioner was issued with a letter of warning (R1) on 09.05.2013 which was acknowledged by the Petitioner with an indorsement thereon. This letter clearly sets out four consequences that will ensue if the Petitioner is guilty of any subsequent offence and includes the discharge from the Sri Lanka Air Force on the basis SNLR.

Subsequently, the Petitioner was found guilty of failure to prevent misappropriation of funds of the CAF amounting to Rs. 1256300.10 which constituted an offence in terms of section 129(1) of the SLAF Act and was awarded a reprimand (R4) and consequently demoted to the rank of flight sergeant w.e.f. 29.06.2015 in terms of clause (1) of R1. It is observed that the Petitioner pleaded guilty to charge no. 1 (R3).

Subsequently, the Petitioner was issued a charge sheet (R5) in respect of dishonest misappropriation of property of the SLAF in terms of section 43 of the SLAF Act read together with section 386 of the Penal Code. The Petitioner admitted this offence (Petitioner's statement annexed to R6). Accordingly, the Petitioner was reprimanded with a deduction of Rs. 4500/= from his salary.

For the same period the Petitioner was served with a charge sheet (R7) in terms of section 116(a)(i) read with section 43 of the SLAF Act pertaining to making false entries in the personal and impersonal ledgers during the period of 01.01.2014 to 31.03.2014. The Petitioner admitted this offence (Petitioner's statement annexed to R8). Accordingly, the Petitioner was reprimanded.

It is the contention of the Respondents that the discharge of the Petitioner was in accordance with Regulation 126(1), 5th schedule, Table B, section (xiii) (a) of the SLAF Regulations (R9).

Section 126(1) reads:

“The various causes of discharge from the Regular Air Force and competent officers to authorise, carry out 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 hereto.”

5th schedule, Table B, section (xiii) (a) of the SLAF Regulations (R9) identifies the Commander of the Air Force as the competent officer to discharge an airman. The letter marked P4 states that the Petitioner was discharged from the SLAF on the basis SNLR by the Commander of the Air Force for the reasons set out therein. These include the offences for which the Petitioner was found guilty namely failure to prevent misappropriation of funds of the CAF amounting to Rs. 1256300.10 (R3 and R4), charge sheet (R5) in respect of dishonest misappropriation of property of the SLAF in terms of section 43 of the SLAF Act read together with section 386 of the Penal Code to which the Petitioner admitted guilt. (Petitioner's statement annexed to R6).

I will now address the grounds on which the Petitioner seeks to assail P4. Before that, I will advert to the question of suppression/misrepresentation of material facts as the learned SSC submitted that this application must be dismissed in limine on that ground alone.

Suppression/Misrepresentation of Material Facts

It is trite law that Court will not consider the merits in a writ application if the Petitioner is guilty of suppression/misrepresentation of material facts. [*Hulangamuwa v. Siriwardena* [(1986) 1 Sri.L.R.275], *Collettes Ltd. v. Commissioner of Labour* [(1989) 2 Sri.L.R. 6], *Laub v. Attorney General* [(1995) 2 Sri.L.R. 88], *Blanca Diamonds (Pvt) Ltd. v. Wilfred Van Els* [(1997) 1 Sri.L.R. 360], *Jayasinghe v. The National Institute of Fisheries* [(2002) 1 Sri.L.R. 277] and *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene & Others* [(2007) 1 Sri.L.R. 24].

In *Fonseka v. Lt. General Jagath Jayasuriya and Five Others* [(2011) 2 Sri.L.R. 372] a divisional bench of this Court held:

“(1)A petitioner who seeks relief by writ which is an extra-ordinary remedy must in fairness to Court, bare every material fact so that the discretion of Court is not wrongly invoked or exercised.

(2) It is perfectly settled that a person who makes an ex parte application to Court is under an obligation to make that fullest possible disclosure of all material facts within his knowledge.

(3) If there is anything like deception the Court ought not to go in to the merits, but simply say" we will not listen to your application because of what you have done."

The Petitioner in this case is guilty of suppression/misrepresentation of material facts. The Petitioner at paragraph 19 of the petition states that he never committed any of the offences referred to in P3. However, the documents produced by the Respondents show that the Petitioner pleaded guilty to the charges (Petitioners statements annexed to R6 and R8).

Fictitious Grounds

The submission of the Petitioner that P4 is based on fictitious grounds is devoid of merit. The Petitioner has been found guilty of many offences (some of which he failed to disclose to court which itself is a suppression of material facts) and the decision in P4 has been taken only after warning the Petitioner which was to no avail.

Double Jeopardy

The learned counsel for the Petitioner submitted that the discharge of the Petitioner is a violation of the doctrine of double jeopardy embodied in the Latin maxim "*Nemo debet bis vexari pro una et eadem causa*".

This common law rule prevents a person from been punished twice for the same offense. However, the discharge of an airman on the basis of SNLR after considering his past disciplinary record is not a punishment [*Mangala Pushpakumara v. Air Chief Marshal Roshan Gunathilake* (C.A. 448/2009, C.A.M. 28.03.2012), *D.M.U.N. Dissanayake v. Weerakoon and Others* (C.A. Writ 124/2015, 125/2015 and 126/2015; C.A.M. 11.09.2017)].

The learned counsel for the Petitioner relied on the Supreme Court decision in *Air Marshall G.D. Perera & Others v. K.H.M.S. Bandara* (S.C. Appeal 104/2008, S.C.M. 29.09.2014) where the Supreme Court held, after considering sections 40, 42 and 43 of the SLAF Act, that "discharge from service" cannot be granted as a punishment for any person who has been tried under a summary trial. However, in the present case the discharge of the Petitioner did not take place as a result of a summary trial. It was after considering the prior record of the Petitioner which show several offences relating to moral turpitude.

In an organisation such as the SLAF integrity is essential. The record of the Petitioner does not meet this criterion. The 1st Respondent cannot be faulted for deciding that the services of the Petitioner are no longer required.

Rules of Natural Justice

The submission of the Petitioner that P4 is in violation of the rules of natural justice is devoid of merit. The offences for which he was found guilty was arrived at after affording him an opportunity of been heard. It is observed that he had pleaded guilty to several of them.

For all the foregoing reasons, I dismiss the application of the Petitioner with costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal