

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

*In the matter of an application for a Writ of
Certiorari and Mandamus in terms of Article
140 of the Constitution.*

D. Nuwan Weerawickrama De Silva (28029)
278, Sampaththige Watta,
Karandagoda, Ahangama.

Petitioner

CA Writ Application No. : 311/21

-VS-

- 1) Commander, Sri Lanka Air Force,
Air Force Head Quarters,
Colombo 2.
- 2) A.J. Amarasinghe
Air Commander,
S/L Air Force BIA Unit,
Katunayake.
- 3) Chief Medical Officer
Air Force Hospital,

Katunayake.

- 4) Sergeant Amarasinghe,
Medical Unit, Air Force,
Katunayake.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Dharmasiri Karunarathne for the Petitioner.
Z. Zain, DSG with P. Kumaratnam, SC for the
Respondents.

Argued On : 08.08.2022

Written Submission : Petitioner : 13.09.2022

Tendered On : Respondent : 16.09.2022

Decided On : 03.11.2022

Dhammika Ganepola, J.

The Petitioner in this case is an Aircraftsman who joined the Sri Lanka Air Force on 05.07.2003. In 2020 April, when a Covid -19 cluster was reported among the Navy personnel, the Petitioner was taken into a Quarantine Centre in Aadiambalama. As

a consequence of an incident that occurred at the Quarantine Centre, urine samples of five Airmen, including the Petitioner, were taken and tested. The Petitioner's sample tested positive for dangerous drugs (Cannabis). Afterwards, a charge sheet was served on the Petitioner, and a disciplinary inquiry has been conducted in Sections 40 and 43 of the Air Force Act. The relevant medical report was submitted at the said inquiry. Based on the evidence, the Petitioner was found guilty of the charges reflected in R6 and was punished with 28 days of detention and forfeiture of pay and allowances for the period of detention. Thereafter the Petitioner has been expelled from the Sri Lanka Air Force by the 1st Respondent declaring that the Petitioner's "service no longer is required". The Petitioner claims that the said decision is based on fictitious grounds; is in violation of the Principles of Natural Justice; is adverse to the Petitioner's Legitimate Expectations and violates the principle against the Duplicity of Punishment (Doctrine of Double Jeopardy). The Petitioner seeks inter alia mandates in the nature of a Writ of Certiorari quashing the decision to expel the Petitioner from Sri Lanka Air Force dated 03.07.2020 (P3) and a Writ of Mandamus ordering the Air Force to reinstate the Petitioner with back wages.

The Petitioner's stance is that he was falsely implicated in an incident which took place at the Quarantine Centre. Although the Petitioner was charged with consumption of cannabis, gambling and failure to follow verbal orders, he has categorically denied the charge of consumption of cannabis and the impugned urine report. The Petitioner complains that the procedure followed in taking and testing the urine samples was ad hoc, irregular and does not conform to the standard medical procedures. However, the Respondents state that the urine samples were drawn by a qualified medical lab assistant according to the relevant protocol which is marked R3.

The said protocol R3 specifies the Standard Operating Procedure (SOS) for Urine Analysis for Dangerous Drugs at Sri Lanka Air Force Hospital Katunayake. As per clause 06 of the protocol marked R3, the result of the urine test must be informed to the person who has undergone the test and his/her signature must be obtained after inquiring whether the result is accepted or not. Furthermore, clause 07 signifies that if the individual does not accept the positive test result, necessary arrangements should be made to send the second sample to the Government

Analyst Department for a confirmatory test. For convenience, said clauses 06 and 07 are reproduced below.

06. Result will be informed to person who has undergone test and get his/her signature after informing whether the result is accepted or not accepted by him or herself.

07. However, if the individual does not accept the positive test result, make necessary arrangement to send the second sample or remaining of the sample to Government by hand with escorted police person for confirmatory test.

It is evident that the Petitioner has categorically denied the charge of consumption of cannabis and the related urine report. In the statement recorded from the Petitioner by the Sri Lanka Air Force Police on 06.05.2020, a day after the incident marked R5, Petitioner has denied the allegation of consumption of drugs. According to the inquiry proceedings submitted by the Respondents marked R6, at the inquiry, after being duly affirmed, the Petitioner(accused) has pleaded not guilty to the charge of consumption of cannabis and in mitigation, the Petitioner (accused) has stated that he did not use cannabis.

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After been duly affirmed the accused 28029 Corporal De Silva DNW (Operations Ground II) plead not guilty for the offence committed. In mitigation, the accused stated he did not use cannabis on 05 May 2020. (Vide R6)

According to the declaration form to be filled by service personnel undergoing drug testing in the Sri Lanka Air Force (submitted with the document marked R4 by the Respondents) the respective service personnel's signature is necessary to confirm the acceptance or non-acceptance of the said report. The above confirmation is imperative because if the respective service personnel has not accepted the report, the second sample of urine would be sent to the Government Analyst.

As the Petitioner submits, the best evidence to ascertain whether the proper procedure was followed in taking and testing the urine sample, would be the said declaration form signed by the Petitioner which should be in the custody of the Respondents. Although the Respondents submitted the protocols marked R3 and R4 such a declaration form relating to the urine test of the Petitioner has not been

submitted before this court. However, one Drug Abuse Test Report in the Petitioner's name has been submitted by the Respondents along with the inquiry report marked R7. Nevertheless, the said Drug Abuse Test Report is also not in conformity with the Standard Operating Procedure (SOP) for Urine Analysis marked R3 and the annexed declaration form to the R4. The requisite declaration to the effect of acceptance/non-acceptance by the service personnel undergoing the drug test as specified in the declaration form annexed with the document marked R4 has not been included in the said Drug Abuse Test Report.

The Petitioner pleading not guilty as mentioned above in my view will amount to a denial of the urine report. Accordingly, the Respondents will be bound to follow the other steps in compliance with the protocol when the accused denies the urine report, and no material has been submitted to establish that another urine report has been obtained as prescribed in the protocol. This in my view amounts to a blatant error nullifying the inquiry process.

Further, it is evident that the urine sample of the Airman (No.39009), who was taken into custody with the Petitioner at the incident and who admitted to consumption of cannabis, has become negative while the urine sample of the Petitioner who denied the charge has become positive. Such circumstances also create a strong doubt as to whether the due procedure has been followed in conducting the impugned urine analysis test.

Failure to follow the procedure laid down by the authorities or defects in the procedure followed has deprived the Petitioner's right to a fair trial. Such procedural defects will affect the quality of the decision and stand to invalidate the same.

As per the proceedings of the inquiry marked R6, reasons for the order have been provided. Said reasons are as follows,

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According to the documentary evidence produced before the court the accused did use cannabis on 05th May 2020 at the detachment established by Sri Lanka Air Force Station Bandaranayake International Airport at Andiambalama Maha Vidyalaya. Hence, the accused was found guilty for the offence committed and following punishment was awarded by the undersigned.

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Awarded 28 days detention with forfeiture of pay and allowances for the period of detention. (Vide R6)

As per the above reasons for the said judgement, the inquiring officer has come to the conclusion based on the documentary evidence produced before the court that the accused (Petitioner) did consume cannabis. Therefore, it is obvious that the inquiring officer has arrived at his decision on the said urine report.

In such circumstances, I am of the view that the failure to follow the correct procedure laid down in the Standard Operating Procedure (SOP) for Urine Analysis marked R3 has deprived the Petitioner of his right to a fair hearing.

The Petitioner further complains that the expulsion of the service of the Petitioner after the punishment (P3) is also illegal. The Respondents state that the Sri Lanka Air Force maintains a zero-tolerance policy in cases of consumption/possession of dangerous drugs defined in the Poisons, Opium and Dangerous Drugs Ordinance. The said policy has been specified in the relevant Station Routine Orders (R8), the circular dated 15.09.2017 (R9) and the 5th schedule (xiii) in the Ceylon Government Gazette No.10665 dated 23 April 1954 (R10) submitted by the Respondents. The personnel convicted for the above offences will be discharged from the service under the clause of "Service No Longer Required" provided for in the Air Force (Regular and Regular Reserve) Regulations of 1951. It is apparent that the said expulsion order pertaining to the Petitioner is wholly based on the conviction of the charge of consumption of cannabis. However, since the said conviction for the charge of consumption of cannabis is void as mentioned above, the consequent impugned expulsion order based on the said conviction also cannot prevail in law.

In such circumstances and for the reasons given above, I am inclined to issue a Writ of Certiorari quashing the decision to expel the Petitioner from Sri Lanka Air Force and a Writ of Mandamus ordering the Sri Lanka Air Force to reinstate the Petitioner

with back wages and allowances only in respect of the said charge of consumption of cannabis. However, this decision shall not stand as a bar for the operation of the penalties in respect of the rest of the two charges contained therein R6. I order no costs.

Judge of the Court of Appeal

Sobhitha Rajakaruna, J.

I agree.

Judge of the Court of Appeal