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

In the matter of an application for mandate in the nature of Writ of Certiorari made in terms of Article 140 of the Constitution of the Republic of Sri Lanka read with Section 79(1) of the Army Act.

Capt. M. D. Perera
Tissa Tank Road,
Udagama, Mahawa,
Kurunegala.

CA/WRIT/127/2022

Petitioner

Vs.

1. Gen. L. H. S. C. Silva, WWV
   RWP RSP VSV USP ndc psc
   MPhil
   Army Commander,
   Sri Lanka Army,
   Army Headquarters,
   Sri Jayawardenapura.

2. Maj/Gen. E.S. Jayasinghe USP
   Judge Advocate General,
   Sri Lanka Army,
   Judge Advocate General's Office,
   Army Headquarters,
   Sri Jayawardenapura.

3. Brig. M. C. de Zoysa
   Sri Lanka Army,
   Army Headquarters,
   Sri Jayawardenapura.

4. Col. K. P. L. Amunupura RWP
   RSP USP
   Sri Lanka Army,
   Army Headquarters,
   Sri Jayawardenapura.

5. Maj. G. G. M. G. de Silva
   Sri Lanka Army,
   Army Headquarters,
   Sri Jayawardenapura.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Ranil Samarasooriya with Wimukthi Weragama for the Petitioner.

Vikum De Abrew, ASG, PC with M. Fernando, SC for the Respondents.

Supported on : 10.10.2022

Decided on : 03.11.2022

Sobhitha Rajakaruna J.

The instant application was taken up for support along with the Applications bearing Nos. CA/Writ/117/2022 and CA/Writ/118/2022 filed by the same Petitioner in this Court against the above named Respondents.

The Petitioner was serving in the 1st Regiment of the Sri Lanka Army Medical Corps as a Medical Officer when he was served with three different charge sheets and such charge sheets have been annexed separately, marked as 'P2', in all three applications.

The instant application concerns the Petitioner's charge under Section 129(1) of the Army Act No.17 of 1949 ('the Act') for conducting himself in a manner prejudicial to military discipline. The charge relates to the Petitioner, while serving in South Sudan, allegedly giving instructions to another officer with regard to arranging a vehicle on hiring basis for collateral purposes.

CA/Writ/117/2022

The Application CA/Writ/117/2022 concerns the Petitioner's charge under Section 107 of the Act for behaving in a scandalous manner, unbecoming the character of an officer and a gentleman. The charge relates to the Petitioner's alleged misbehavior on or about 11.07.2017 whilst being a legally married officer serving as a Medical Officer at the Army Hospital, Narahenpita.

CA/Writ/118/2022

The Application CA/Writ/118/2022 concerns the Petitioner's charge under Section 102(1) of the Act for neglecting to obey garrison or other orders. The charge relates to an alleged violation of the Standing Order 1.ඇ of No.109/01 dated 10.10.2016 imposed by the Director of Management and Maintenance.

The 1st Respondent by three Orders issued on the same date i.e., 10.06.2020, marked 'P1', convened General Courts Martial to try the Petitioner in reference to the above charges. After the close of the prosecution case, the learned Counsel for the Defense made an application to the General Court Martial in terms of Regulation 71(1) of the Court Martial (General and District) Regulations 1950 ('Regulations') for an acquittal of the Petitioner on the basis that

no prima facie case in respect of the relevant charges under the Army Act had been established.

As per the proceedings of the General Court Martial the prosecution witness who has served as a driver attached to the Army Hospital in Narahenpita has revealed certain evidence including the occurrences on 11.07.2017, in relation to the charges against the Petitioner. The learned Counsel for the Petitioner submits that the Prosecution has not made out a prima facie case by proving the elements of the offence charged with and that the Prosecution's only witness was not competent to provide any evidence in support of the allegations and no other documents were submitted by the Prosecution to corroborate the testimony of the witness. The contention of the Petitioner is that in the absence of the Prosecution providing evidence substantiating the elements of the charges under Sections 107, 102(1) and 129(1) of the Army Act, the General Court Martial should have acquitted the accused.

The learned Additional Solicitor General for the 1st to 5th Respondents contends that the Defence (Petitioner in the instant application) in their cross examination has failed to attack or discredit any of the evidentiary matters prima facie established by the Prosecution. Referring to ***L. Edrick De Silva vs. A. N. D. L. Chandradasa De Silva 70 NLR 169***, and ***X (Employer) vs. Deputy Commissioner of Labour and others (1991) 1 Sri. L.R. 222 (at p. 226)*** he submits that;

> *"Where the petitioner has led evidence sufficient in law to prove his status, i.e., a factum probandum, the failure of the respondent to adduce evidence which contradicts it adds a new factor in favour of the petitioner."*

The 2nd Respondent, Judge-Advocate General by his order dated 16.03.2022, marked 'P5b', relating to the instant application, dismissed the application of the learned Counsel for the Defence for the acquittal of the Petitioner under Regulation 71(1) and called upon the accused for his defence. The 2nd Respondent has arrived at that conclusion on the basis that the Prosecution had made out a prima facie case.

The impugned order marked ‘P5b’ which is in Sinhala language provides;

> මෙම යුධ අධිකරණයේ චූදිත නිලධාරිට එරෙහිව යුද හමුදා පනතේ 129/1 වගන්තිය යටතේ නගා ඇති චෝදනාව සම්බන්ධයෙන් ගෙනෙන ලද සාක්ෂි මගින් පැමිණිල්ල විසින් බැලූ බැල්මට පෙනෙන නඩුවක් ස්ථාපිත කර ඇති බැවින් විත්තියේ උගත් නිතිඥ මහතා විසින් යුද්ධාධිකරණ රෙගුලාසි මාලාවේ 71 රෙගුලාසිය යටතේ සිදුකරන ලද ඉල්ලීම එකි රෙගුලාසි ප්‍රතිපාදන ප්‍රකාරව මෙම අවස්ථාවේදි ප්‍රතික්ෂේප කර සිටි. ඒ අනුව චූදිත නිලධාරිට සාක්ෂියක් දෙන්න් පුළුවන්. ඊට අමතරව විත්තිය විසින් සාක්ෂියක් කැඳවීමට අවස්ථාව තියෙනවා.

The learned Counsel for the Petitioner contends that the decision of the Court Martial, marked 'P5b', is bad in law and contrary to the provisions of the said Regulation 71(1) as the said Order is not accompanied with reasons. The Petitioner seeks for a writ of Certiorari quashing the respective decision of the General Court Martial, marked 'P5b'.

The said Regulation 71(1) provides;

> ‘At the closure of the case for the prosecution, it shall be open to the accused, his counsel or defending officer to submit that the evidence given for the prosecution has not established a prima facie case against him and that he should not, therefore, be called upon for his defence. The court martial shall consider that submission in closed court, and if it is satisfied that the submission is justified, it shall acquit the accused. The submission may be made in respect of any one or more charges in a charge sheet.’

Regulation 71(2) provides;

> ‘If the court martial decides at the close of the evidence for the prosecution that a prima facie case has been made out for the prosecution, the accused shall be told by the court martial that he may, if he wishes, give evidence as a witness but that if he gives evidence he shall subject himself to cross examination.’
>
> ‘The accused shall then be asked whether he wishes to give evidence as a witness himself, and whether he intends to call any witnesses to the facts of the case other than himself.’

The Petitioner's primary argument is that the decision ('P5b') pronounced by the 2nd Respondent should be considered as a judicial decision, as such the 2nd Respondent is bound to give reasons when he exercises his jurisdiction to dismiss an application of the defence under Regulation 71(2). I agree with the learned Counsel for the Petitioner to a certain extent that a judicial decision given by a Court of Law should be accompanied with the reasoning behind such decision since such decision in many occasions affects the rights of the parties of the case. This position may vary when the Court of Law is bestowed with unfettered discretion to exercise prerogative powers.

The Court of first instance delivers a judgement upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard. The requirement for the General Court Martial to pronounce an order upon an application under Regulation 71 is that it should be satisfied whether a 'prima facie case' is available.

The Regulation 71(1) connotes a slightly higher burden on the part of the General Court Martial as it can acquit an accused only if the evidence given for the prosecution has not established a prima facie case. In such instances General Court Martial is ordinarily bound to make a prima facie assessment of evidence already led by the prosecution. Anyhow, the wordings of Regulation 71(2) can be easily differentiated as the Court Martial is required therein to decide only whether a prima facie case has been made out for the prosecution.

The orders issued by a General Court Martial under Regulation 71(2) to call upon the defence after conclusion of the prosecution case are certainly not in the nature of final orders/judgements. It is important to bear in mind that giving reasons in a judgement of a Court of Law and the requirements to be fulfilled when making orders under Regulation 71(2) should not be confused, as the latter is not a final order when it decides to proceed with the case.

What is pertinent to the instant application is Regulation 71(2) as the General Court Martial has not exercised its powers under Regulation 71(1) to acquit the Petitioner. It is important to note that the words embodied in the Regulation 71(2) is "prima facie case" and not "prima facie evidence". The term 'prima facie' is a legal presumption. It has derived from the Latin language and means 'at first sight' or 'at first appearance'.

In this sense, it is necessary to assess whether the General Court Martial is duty bound to give reasons expressly when it decides that a prima facie case has been made by the Prosecution under Regulation 71(2). Perhaps, a reasonably detailed analysis may be necessary when the Court Martial acquits the accused under Regulation 71(1). However, it cannot be assumed that in view of the rational interpretation for the term 'prima facie case' that the Court Martial, who exercises the jurisdiction under Regulation 71(2) in closed Court, is required to elaborate reasons for the decision that there exists a prima facie case.

When assessing whether there is a prima facie case, I take the view that the Court Martial should not confine to the evidence led by the Prosecution but it can arrive at a conclusion that there is a prima facie case even in order to examine the availability of further evidence. Thus, it should not be the duty of the Court Martial to take a decision solely based on the evidence adduced up to the conclusion of the Prosecution case.

Even if I am to assume that the Court Martial in reference to an application under Regulation 71 should consider whether the case before it has a real prospect of success, the decision of the Court Martial should be proportional to the importance of the issues involved and the gravity of the charges. I have carefully perused the charges in all three applications and one of the charges particularly grills not only his official conduct but also his moral conduct.

At this stage, I need to draw my attention to the following passage of His Lordship Justice Mahinda Samayawardhena in ***Jagath Kumara Imaduwa Vithane vs. The Commander, Sri Lanka Army, CA/WRIT/354/2015 decided on 25.03.2019***;

> *"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."*

The submissions of the learned Counsel for the Petitioner are based on purported failure of giving reasons for the order under Regulation 71(2) and further, the judgements cited by him are apparently based on 'prima facie evidence'. The Petitioner relies on the cases of ***Sinha***

Ratnatunga vs. The State (2001) 2 Sri. L.R. 172; Hapuarachchi and others vs. Commissioner of Election and another (2009) 1 Sri. L.R. 1; W. M. R. B. Wijayaratna and four others vs. Hon. Attorney General (2010) BLR 169. The precedent of those cases cannot be directly adopted to the issues of this case as the Court in said judgements has not considered a situation as in Regulation 71(2). As I have mentioned earlier, the circumstances of a decision under Regulation 71(2) are different from a decision under Regulation 71(1). Moreover, such Regulations deal with military offences whereas the Court in the above cases has not made an inference in relation to the Military law. In terms of the provisions of the Army Act, if a person who is subjected to Military law is guilty of a military offence shall, on conviction by a court martial, be liable even for a simple or rigorous imprisonment.

The Petitioner relies on the case of ***Harold Rex Jansen vs. Hon. Attorney General, CA Application No.151/13, decided on 26.02.2014*** to spotlight only two paragraphs of the said judgement whereby the Court has considered on giving reasons for the refusal of an application to acquit an accused pursuant to an application made under Section 200(1) of Code of Criminal Procedure Act[1]. The Petitioner's reliance on the said judgement is surprising as, in my view, the precedent laid down in the said case eliminates his own principal argument. The learned Counsel for the Petitioner has not confronted the view point of A. W. A. Salam J. and Malini Gunaratna J. in the said case on the obligation on the part of the Hight Court judge to write two judgements, one at the close of the case for prosecution and the other at the close of the defence under Section 200(1) and 200(3) of the Code of Criminal Procedure Act. The said judgement elucidates my above findings on the distinct nature of the Regulation 71(1) and 71(2). The Court has observed;

> *"The expression* ***"there are grounds for proceeding with the trial"*** *as used in Section 200(1) cannot certainly suggest or convey that the High Court Judge is obliged to give elaborate reasons*

[1] Section 200(1) of the Code of Criminal Procedure Act; "When the case for the prosecution is closed, if the Judge wholly discredits the evidence on the part of the prosecution or is of the opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he shall record a verdict of acquittal; if however the Judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence".

for the defence. The grounds for proceeding with the trial at the close of the case for the prosecution means nothing more than that the High Court Judge ***CONSIDERING*** *that there are grounds for proceeding with the trial. The ordinary meaning of the word 'CONSIDER' as it occurs in Section 22(1) would mean "to think about carefully", especially in order to make a decision. Quite obviously, the Section does not make it obligatory on the part of the High Court Judge to give reasons as to why he considers the case as disclosed by the prosecution merits further trial. If elaborate reasons are required to be assigned before calling the defence, then, every High Court criminal trial (without a jury) ought to carry two Judgments, one at the close of the case for prosecution and the other at the close of the defence, i.e under Sections 200 and 203 respectively."*

A. W. A. Salam J. and Malini Gunaratna J in the said case has further held;

"….We have given our anxious consideration to this contention and our considered view is that the decision of the High Court Judge to consider that there are grounds to proceed with the trial is not a decision which materially affects the final outcome of the case, in the sense expressed in the case of Wijeratna[2]*. It is only a procedural step taken by Court towards the conclusion of the trial".*

"…As such, when the High Court Judge proceeds to call for the defence, it is unsafe for a higher court to interfere with such a decision as the decision of the High Court to call for the defence involves the credibility of the evidence adduced before him on the charges preferred in the indictment or any other offence that may have been disclosed in evidence".

"….The learned Deputy Solicitor General adverted us to three important judgments of which one has been decided by this court and the other two by the Supreme Court. The Attorney General vs Heeraluge Neil Gunawardena (S.C503/76) decided jointly by Samarawickrama ACJ, Rajaratnam J, Wijeysundara J, Vythalingam J and Thiththawala J. on 14 September 1976 is a landmark judgment on this issue. The law that has been discussed in this judgment pertaints to Section 212 (2) of the Administration of Justice Law No 25 of 1973 which corresponds to Section 200(1) of the Code of Criminal Procedure Act. By this judgment a divisional bench of the Supreme Court clearly laid down the guidelines towards the correct application of the law relating

[2] W. M. R. B. Wijayaratna and four others vs. Hon. Attorney General (2010) BLR 169

to the return of a verdict of "not guilty" (by the jury) when the judge considers at the close of the case for the prosecution that there is no evidence that the accused committed the offence."

For the foregoing reasons, I take the view that there is no necessity for the General Court Martial to issue a detailed order when exercising jurisdiction under Regulation 71(2) rejecting an application to acquit an accused, immediately after the prosecution case.

Now I advert to examine the orders made by the General Court Martial in respect of the other two Applications which are before this Court. The 2nd Respondent in view of the same application by the Defence held in his orders dated 10.03.2022 and dated 14.03.2022, marked 'P5b', in CA/Writ/117/2022 and CA/Writ/118/2022 respectively, that it is not the right time to decide on the competence of the witness.

The impugned order marked 'P5b' in the Application CA Writ 117/2022;

"In this content, this court martial is of the opinion that, this is not the right time to decide on the competence of the witness brought by the prosecution where a prima facie case has been made out of the prosecution in regulation 71(2) of the Court Martial General and District Regulation 1950. Hence, the application made by the learned defence counsel under Regulation 71(1) of the Court Martial General and District Regulation 71(1) of the Court Martial General and District Regulation 1950, requesting the acquittal of the accused officer, is dismissed."

The impugned order marked 'P5b' in the Application CA Writ 118/2022;

"This court martial is of the opinion that, this is not the right time, this is not right time to decide on the competence of the witness provided by the prosecution where a prima facie case has been made out for the prosecution as stipulated in Regulation 71(2) of the Court Martial (General and District) Regulations 1950."

The proceedings of the General Court Martial evince that the prosecution witness has been examined-in-chief in respect of all three charges at the same occasion and such witness has been cross-examined by the Defence counsel thereafter. Upon perusal of those two orders, I cannot see any reason to deviate from my above findings in the instant case and my considered view is that the effect of the all three impugned orders is the same.

For the reasons set out above, I take the view that the impugned decisions of the respective General Court Martial in respect of all three Applications were made after having followed the necessary procedure under Regulation 71. It appears that the 2nd Respondent has contemplated the undesirable effect of interfering with the evidence already led by not issuing a detailed order when he chose to take a decision under Regulation 71(2) to call upon the defence. In the circumstances, I am of the view that the impugned decisions are ex facie not ultra vires, unlawful or arbitrary as claimed by the Petitioner.

Having considered carefully the facts and circumstances of this case along with the principles enunciated in the decisions of this Court and the Supreme Court as cited above, I am not inclined to issue formal notice of this Application to the Respondents and to exercise the discretionary powers of this Court in favour of the Petitioner.

This Court in ***S. Ravindra Karunanayake vs. Attorney General & others,*** **CA/Writ/63/2020 decided on 07.07.2020** has held;

> *"Whether there is an arguable ground for judicial review includes whether there is some properly arguable vitiating flaw such as unlawfulness, unfairness, or unreasonableness. The vitiating ground must be arguably material to the impugned decision. That decision must be arguably amenable to judicial review – see* ***R v Chief Rabbi ex p. Wachmann****(1992) 1 WLR 1036, at1037H".*

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal