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

In the matter of an Application for mandates in the nature of a Writ of Certiorari, Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/229/2021

1. Commander M. S. D. Perera
   NRX 1229,
   No. 220, Shanthasiri,
   Wevita, Bandaragama.

Petitioner

Vs.

1. Commander of Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Sri Lanka Navy.

2. Commodore K. K. I. U. Casiwatte
   NRX 0652,
   President of the Court Martial,
   Sri Lanka Navy Headquarters,
   Sri Lanka Navy.

3. Commodore (C. E.) H. S. Balasooriya
   NRC 0730,
   Member of the Court Martial,
   Sri Lanka Navy Headquarters,
   Sri Lanka Navy.

4. Captain (E.) T. G. S. K. Udugamage
   NRE 0962,
   Member of the Court Martial,
   Sri Lanka Navy Headquarters,
   Sri Lanka Navy.

5. Commodore Chethiya Gunasekere
   NVA 5872,
   Judge Advocate,
   Sri Lanka Navy Headquarters,
   Sri Lanka Navy.

Respondents

Before **:** Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel **:** Shavindra Fernando, PC with Mirthula Skandarajah, N. Wijesekara and Tharani Mayadunne for the Petitioner.

Sumathi Dharmawardena PC, ASG with Manohara Jayasinghe DSG for the Respondents.

Argued on **:** 03.11.2022

Written Submissions: Petitioners - 17.01.2023

Respondents - 03.02.2023

Decided on **:** 24.02.2023

Sobhitha Rajakaruna J.

The Petitioner is an officer attached to the Sri Lanka Navy and was holding the rank of Commander at the time of filing the instant Application. The Petitioner is seeking, inter alia, for a mandate in the nature of a writ of Certiorari quashing the order dated 05.03.2021 ('P9') made by the 2nd to 4th Respondents who are the members of the Court Martial. By 'P9', the Court Martial upon the reasons mentioned therein has disallowed Rear Admiral (Retired) W. W. J. S. Fernando, President's Counsel from appearing on behalf of the Petitioner at the said Court Martial.

A writ of Prohibition is also sought restraining the 2nd to 4th Respondents from continuing to serve as the members of the said Court Martial in which proceedings have been instituted against the Petitioner.

When this matter was taken up for support before this Court, the Commander of Sri Lanka Navy-1st Respondent agreed to allow the aforesaid learned President's Counsel to appear on behalf of the Petitioner at the respective Court Martial. Subsequently, during these proceedings, the 1st Respondent further agreed to convene a fresh Court Martial. It appears that by allowing the said learned President's Counsel to appear at the Court Martial and appointing a fresh Court Martial resolved the relevant issues relating to the substantive reliefs sought by the Petitioner.

However, the question which arose after such agreement is whether the Petitioner is entitled to be benefited in terms of Section 26 of the Navy Act No. 34 of 1950, as amended ('Navy Act'). Such question was surfaced as the aforesaid agreement of the 1st Respondent to appoint a fresh Court Martial was subjected to the condition that the Petitioner would not take up an objection under the provisions of the said Section 26 at the commencement of the proceedings before a fresh Court Martial. The Section 26 of the Navy Act;

> 'No person subject to Naval law, unless he is an offender who has avoided apprehension or fled from justice, shall be tried or punished by a court martial or by a Naval officer exercising judicial powers under this Act for any offence committed by that person unless the trial takes place within a period of three years from the date of the discovery of the offence or, where that person has been absent from Sri Lanka during such period, within one year after his return to Sri Lanka.'

As per the Charge Sheet 'P3(a)', the alleged offences have been committed by the Petitioner during the period between 30.08.2017 to 04.07.2018. The records of Summary of Evidence have been submitted on 13.05.2019 along with the circumstantial letter, charge sheet, list of documents and list of witnesses by the Naval Officer In-Charge ('NOIC') of Hambantota. The records of Additional Summary of Evidence ('P3(b)') in respect of the alleged misconduct of the Petitioner have been submitted on 15.11.2019. The same NOIC of Hambantota by his letter dated 14.11.2019 addressed to the 1st Respondent has expressed his opinion that there was enough evidence to substantiate a prima facie case against the Petitioner as per the amended Charge Sheet. As a consequence, a Court Martial has been convened on 28.12.2020.

In terms of the said Section 26, the trial against a person subject to Naval law should take place within a period of 3 years from the date of the discovery of the offence or where that person has been absent from Sri Lanka during such period, within one year after his return to Sri Lanka. It is apparent that the proceedings against the Petitioner should commence afresh before the fresh Court Martial that will be convened as a consequence to the undertaking extended by the 1st Respondent during the proceedings of the instant Application.

The learned President's Counsel for the Petitioner as well as the learned Additional Solicitor General who appears for the Respondents agreed to confine the arguments of this Application only to the question whether the Petitioner would be able to make a claim under Section 26 of the Navy Act when the Commander of Navy convenes a fresh Court Martial as already agreed. As both learned Counsel have invited this Court to confine the examination only to the above question, the Petitioner is not entitled to take a stand that this Court has no jurisdiction to inquire and determine the time bar issue pertaining to the said Section 26 as claimed in the written submissions of the Petitioner. Hence, what needs consideration of this Court is whether the Petitioner is entitled to take refuge under the provisions of the said

Section 26 and raise a preliminary objection on time bar at the commencement of a fresh Court Martial, which will be convened as agreed by the 1st Respondent.

When you sift the provisions of the said Section 26, no person should be tried or punished (a)by a court martial or (b)by a naval officer exercising judicial powers under the Act, if the trial does not take place within a period of three years from the time of the discovery of the offence.

Bonser C.J. in ***Sidoris Silva vs. Palaniappa Chetty 5 NLR 289*** has identified judicial acts and ministerial acts during the judicial process. In the said case, the Court has held;

> *"It appears that this case came on originally before Mr. Mason, who was then District Judge, and he tried one of the issues first, viz., the issue as to the title to the garden, and the result of this trial, in the opinion of Mr. Mason, was that the plaintiff had made out his case, and he accordingly gave judgment in his favour, and adjourned the hearing of the other issues to another day. Before that day arrived he ceased to be District Judge, and was succeeded by Mr. Roosmalecocq. Mr. Roosmalecocq found that the plaintiff was clearly entitled to the house, but declined to enter up a decree in accordance with his predecessor's judgment as to the garden, on the ground that " if Mr. Mason failed " to have a decree entered according to the judgment, he alone was " responsible."*
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> *It seems to me that he took an erroneous view of his duty. The drawing up of a decree is a ministerial act, not a judicial act. It is merely stating in legal language the judgment already delivered, and that that judgment was delivered by his predecessor makes no difference. The decree can be drawn up by any person who for the time being was holding the office of District Judge."*

The Commanding Officer in terms of the provisions of the Navy Act may delegate his judicial powers to summarily try an accused where it is in relation to an offence other than an offence which is expressly required by the said Act to be tried by a Court Martial. The President, or such Officer of a rank not below that of Captain, as may be authorized by the President, may order a Court Martial to be held. By virtue of Section 33 of the said Act, a Court Martial may try and punish a person subject to Naval Law who has committed any naval or civil offence.

In such a backdrop, it appears that the decision taken during the pendency of the instant Application by the 1st Respondent to reconvene the Court Martial cannot be considered as a judicial act but it can be assumed as a ministerial act. Further, by observing the progress of the proceedings of the instant Application in this Court, I am convinced that the said decision was taken during these proceedings in order to get the instant Application disposed expeditiously without conceding the merits of this Application.

I cannot possibly overlook the rationale embodied in Section 48 of the Judicature Act No. 02 of 1978 (as amended) when adjudicating the question of the instant Application. The Section 48;

> 'In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to resummon the witness and commence the proceedings afresh:'
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> 'Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be resummoned and reheard.' (Emphasis added).

The rationale adopted in Section 42(1), among its other sub-sections, read together with Section 42(5) of the Navy Act is also more or less the same. The Section 42(1) of the Navy Act;

> 'Where the number of members of a court martial after the commencement of the trial of a case is, by death or otherwise, reduced below the minimum number of members required for the constitution of the court martial under this Act, the court martial shall be dissolved.' (Emphasis added)

It is obvious that the 1st Respondent has decided to dissolve the existing Court Martial not in terms of the provisions of Section 42 of the Navy Act. Anyway, what is significant is that the said Section 42 of the Navy Act and Section 48 of the Judicature Act have recognized the notion of continuing the proceedings before the successor of such judge or such members of the Court Martial upon, inter alia, (a)disability of any judge and (b)death of a member of a Court Martial or otherwise. I can classify these grounds as reasons beyond the control of parties to a matter or reasons due to ministerial acts.

Then a question arises whether the prescription period stipulated in a particular law will be re-applicable whenever the successor of a judge or members of a Court Martial recommences the proceedings against an accused. Thus, the test that should be adopted here is to determine whether the trial or proceedings against such accused has been duly commenced at the initial stage or the trial has taken place before the end of the relevant prescriptive period.

There are many instances where the courts of law recommence the proceedings by resummoning the witnesses etc. It is pertinent to note that it is highly unreasonable for a party to raise a claim on prescriptive period at the stage of such recommencement of proceedings/trial if the chain of events up to the recommencement of proceedings are unaffected and unbroken. The elements relating to the doctrine of res judicata also may have a functional role in this regard. The above position should be adopted *mutatis mutandis* in an event where the law requires to conclude a trial within a certain period.

Sandesa Ltd. and another vs. Sirimavo Ratwatte Dias Bandaranaike (1980) 2 Sri. L.R. 158 is a case where the judgement and the decree have been set aside and remitted the case for fresh trial to be held, taking into consideration, inter alia, the extent to which the judge had interrupted the Counsel for the defendant. Wimalaratne J. has observed therein;

> *"I think the Judge ought not to have interrupted Counsel for the defendant to the extent he did, especially when Counsel was dealing with the defences raised in issues 3 to 7. Had there not been so many interruptions there may perhaps have been more comprehensive submissions by Counsel for the defendant, which would undoubtedly have assisted the Court."*

The inference of the Court in the above case and the Superior Courts in many similar cases was not to make the prescriptive period to be operative considering the date of recommencement or rehearing of the proceedings which took place due to a judge becoming disable as stipulated in the Section 48 of the Judicature Act or due to expunging an order/a judgement by a Superior Court. No accused should be exonerated by operation of a law which declares time bar merely because of recommencing such proceedings due to the reasons mentioned above, before a successor of a judge or members of a Court Martial.

The Section 42(5) of the Navy Act appreciates that the recommencement of the proceedings should be without prejudice to the provisions of its Section 26. This should not be construed to empower the accused to take up an objection under Section 26 of the Navy Act merely based on the date of recommencement of the trial or proceedings. Similarly, when employing the test I mentioned above, such privilege stipulated in the said Section 42(5) should be available only if the trial was not held within a period of three years from the date of the discovery of the offence (subject to other conditions in Section 26) and also when the Court Martial is dissolved under said Section 42. As observed above, the relevant Court Martial will be dissolved not under the provisions of the said Section 42. Thus, for the reasons set out above, the period from the date of the order 'P9' up to the date of reconvening a Court Martial should not be reckoned to assess whether the respective trial has been held within the stipulated period. The date of the said order 'P9' is the beginning of the dispute or the disagreement among the Petitioner and the members of the Court Martial.

Facts and circumstances of this case clearly envisage that the Petitioner has been arraigned within the time period stipulated in the Section 26 of the Navy Act and no objection upon the said Section 26 has been raised by the Petitioner at the commencement of the trial before the existing Court Martial. Hence, the status quo in respect of the prescriptive period prevailed as per the date of the order 'P9' should be mandatorily maintained until the fresh Court Martial is convened by the 1st Respondent. I take the view that the Petitioner is not privileged to raise any objections in terms of the said Section 26 merely on the ground that he will be tried again by a fresh Court Martial upon the same charges and the circumstances. For the reasons set out above, I proceed to dismiss this Application subject to my above findings in reference to the applicability of the said Section 26 and also subject to convening a Court Martial as

mentioned above by the 1st Respondent to recommence the respective trial against the Petitioner and also permitting Rear Admiral (Retired) W. W. J. S. Fernando, President's Counsel to appear on behalf of the Petitioner, if he wishes to do so.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal