

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

CA Writ 211/2016

R.M. Wijerathne
No. 105/16/1, Keenawala Estate, Galgamuwa,
Veyangoda.

Petitioner

Vs.

1. Lt. Gen. A.W.J.C. De Silva
Commander of the Sri Lanka Army,
Army Headquarters, Colombo 03.

2. Maj. Gen. K.C. Gunawardena
Col. Commandant, Vijayabahu Infantry Regiment,
Boyagane, Kurunegala .

3. Maj. Gen. H.C.P. Gunathilake
Commandant-Sri Lanka Army Volunteer Force,
Salawa, Kosgama.

4. Maj. Gen. N.J. Walgama
Military Secretary, Army Headquarters,
Colombo 03.

5. Karunasena Hettiarachchi
Secretary, Ministry of Defence, No 15/5,
Baladaksha Mawatha, Colombo 03.

6. Col. R.L.C. Fernando

7. Lt. Col. H.M.K.P.H.K. Nawarathne

8. Maj. R.M.K.B. Rathnayake
6th to 8th all of Sri Lanka Army, Army Headquarters,
Colombo 03.

9. Brig. R.P. Rajapathirana
legal Branch, Sri Lanka Army, Army Headquarters,
Colombo 03.

Respondents

CA 211/2016 WRIT

BEFORE : Vijith K. Malalgoda, PC. J(P/CA) &
P. Padman Surasena, J.

COUNSEL : J.C. Weliamuna for the petitioner.
Chaya Sri Nammuni SC for the Respondents.

DECIDED ON : 28.07.2016

VIJITH K. MALALGODA, PC. J(P/CA)

Heard learned counsel for the petitioner and learned State Counsel representing the respondents in this case.

Petitioner in this case who was an officer in the army had gone abroad in the year 2005 without obtaining leave for employment. When he returned to the country in the year 2013 he was apprehended at the airport and was subject to a summary of evidence while he was assigned with certain duties to perform. After the summary of evidence was recorded the Court Marshal proceeding was commenced in the year 2014. The petitioner complaints before this court that when he was apprehended in the year 2014 he was treated only as an officer who had got absent without official leave (AWOL) and not as a deserter.

In support of this position, petitioner submits before us three documents which are marked P 4a, P 4b and P 4c. Petitioner had further taken up the position that the said Court Marshal which proceeded for some time had

been cancelled since the judge advocate was retired and subsequently in the year 2016 the 2nd Court Marshal was commenced with a new judge advocate general. As submitted by the petitioner he was caught at the Airport when he returned to Sri Lanka on 28.02.2013 and the 2nd Court Marshal was commenced on 29.02.2013. One day after completing 03 years after his arrest. The learned counsel for the petitioner brings to the notice of Court Section 56 of the Army Act where it says that a Court Marshal cannot commenced after 03 years of the date of offence unless the offence is one of desertion and few other offences. Based on this fact, the petitioners argued before this Court that the army had first considered him as a person who had got absent without leave and if he is a person considered as a person who is absent without leave then the army cannot proceed with this Court Marshal after 03 years. He secondly takes up another position while referring to the Volunteer Force Regulation, Regulation 29(6) and submits that the only cause of action available to a volunteer force officer, for the Commander to transfer him to volunteer reserve as stipulated in the above provision.

Based on these grounds the petitioner has come before this Court seeking a writ of certiorari to quash the decision to hold a Court Marshal, and to quash the charges framed against him and also asking for interim relief in order to suspend the Court Marshal proceedings which are in progress at present. However, the learned State Counsel who is representing the respondents has brought to our notice the provisions of Section 61(5) of the Army Act and submits that Section 56 will operate subject to the provision

of Section 61(5) according to the said Section if there was a pending Court Marshal, a fresh Court Marshal can commenced even after 03 years. She further submits that the fresh Court Marshal which was commenced in 29.02.2016 was also based on the same charges levelled against the petitioner in the first Court Marshal inquiry. Therefore she submits that Section 56 has no application to the present application. With regard to the charge of desertion, she brings to the notice of Court that Regulation 70(1) & (2) of the Army Disciplinary Regulations which reads thus:-

70(1) - "up to 21 days no absentee shall be considered as a deserter unless there are good reasons for satisfaction of the Commanding Officer for supporting him that he has deserted.

70(2) - "after 21 days every absentee shall pending investigations be considered as a deserter".

As observed by this Court the said regulation is very clear when considering an absentee to be treated as a deserter. In the present case the petitioner was apprehended after 641 days of his absence. His absent is well over 21 days. After the Court of inquiry the army had decided to prosecute him for desertion i.e. on the above facts it is clear that the army in this instance had acted under section 70 of the Army Disciplinary Regulations. We observed that 4(a) was issued immediately after he left the army in the year 2005 i.e. well within 21 days period. Documents which were marked as 4b and 4c are messages sent by various units immediately after his arrest at the Airport prior to any decision based on the summary of evidence. With

regard to the submissions made by the learned counsel for the petitioner based on Regulation 29(6) of the Volunteer Reserve Regulations, we observe that this was another option available to the Army when a volunteer force officer is found going abroad without obtaining leave. But it does not say that it is the only available cause of action for a volunteer force officer. Otherwise the provisions of the Disciplinary Regulations will become nugatory.

For the above reasons, we see that the decision by the Army to Court Marshal, the petitioner on a charge of desertion had been taken according to the available provisions of the Army Act and the Disciplinary Regulations of the Army. Therefore, we see no reason to interfere with any decision taken by the Army to Court Marshal the petitioner and therefore we refuse to issue notices in this matter.

Notices are refused.

PRESIDENT OF THE COURT OF APPEAL

P. PADMAN SURASENA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

KRL/-