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 Writs of *Certiorari* and *Prohibition* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 313/2021

C.J. Ranasinghe
Leading Seaman, XS45538
Sri Lanka Naval Ship *Uththara,*
Kankesanthurai,
Sri Lanka Navy.

PETITIONER

Vs.

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

2. Chief of Staff
   Sri Lanka Navy Headquarters,
   Sri Lanka Navy.

3. Captain (ASW) M.A.G. Priyantha
   Commanding Officer
   Sri Lanka Naval Ship *Uththara,*
   Kankesanthurai.

4. A.P.K. Subasinghe
   Commander (A.S.W.), NRX 1725,
   Prosecuting Officer,
   Sri Lanka Naval Ship *Uththara,*
   Kankesanthurai.

5. B.K.S.E. Rodrigo
Lieutenant Commander, NRX 2729
Defence Officer [before Summary Trial]
Sri Lanka Naval Ship *Uththara*,
Kankesanthurai.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel: Shavindra Fernando, PC with Mirthula Skandaraja and

Sandani Wijendra for the Petitioner.

Ms. A. Gajadheera SC for the Respondents.

Argued on: 12.06.2023

Written submissions tendered on:

18.07.2023 by the Petitioner

Decided on: 06.12.2023

S.U.B. Karalliyadde, J.

The Petitioner is a leading Seaman in the Regular Force of the Sri Lanka Navy and when the incident relevant to this action occurred was attached to the Sri Lanka Naval Ship "*Uththara*" located in Kankasanthurei. On 21.01.2021, the Naval Provost Branch conducted a search on the junior sailors' mess No.2 at Sri Lanka Naval ship "*Uththara*" and arrested the Petitioner for being in possession of foreign cigarettes and two other sailors for being in possession of narcotic substances (cannabis). Subsequently, urine samples were obtained from all three sailors and were dispatched to the Naval Medical

Officer of the Northern Naval Area for a rapid urine test for cannabis. On 22.01.2021 by the report marked as P-1, the Naval Medical Officer reported that the urine samples obtained from all three sailors were positive for Tetrahydrocannabinol (THC) i.e., cannabis. Ensuing the Naval Medical Officer's report, a Board of Inquiry was conducted, and the report of the said Inquiry dated 28.01.2021 marked as P-2 was forwarded to the Commander of the Northern Naval Area. There were two recommendations made in respect of the Petitioner in the report marked as P-2, i.e., to take strict disciplinary action against him for consuming narcotic substances (cannabis) and for selling foreign cigarettes to the other sailors. In pursuant to the recommendations approved by the Commander, Northern Naval Area (P-3), on 09.03.2021 Summary Trial proceedings were instituted against the Petitioner. The Petitioner alleges *inter alia*, that he was not served with a charge sheet, not given the opportunity to choose a Defending Officer or a Counsel to appear on his behalf and not given adequate time to prepare his defence. The Petitioner further alleges that at the Summary Trial, he had admitted only the liability to the charge of selling foreign cigarettes and specifically pleaded "not guilty" to the charge of consumption of Cannabis. Pursuant to the Summary Trial, the Petitioner was informed by the Commanding Officer of the Ship 'Uththara', the 3rd Respondent who had presided over the proceedings of the Summary Trial that the punishment intended to be carried out is a warrant punishment. In April 2021, after the warrant was approved by the Chief of Staff of the Navy (the 2nd Respondent) on behalf of the Commander of the Navy (the

1st Respondent) the Petitioner was informed by the 3rd Respondent that the punishment for the offence of consuming narcotic substances (cannabis) is dismissal of the Petitioner from the Sri Lanka Navy without disgrace. The Petitioner submitted an Appeal (P-5) on 19.04.2021 against the sentence imposed on him to His Excellency the President under section 122 of the Navy Act, No. 33 of 1976 as amended (hereinafter referred to as the Navy Act).

The Petitioner by this Writ Application challenges his conviction and the sentence imposed on him on the grounds that the manner in which the Summary Trial was conducted is *ultra vires*, against the principles of consistency, contrary to law and the Sri Lanka Navy Order, in violation of the fundamental principles of law and violation of the right of representation of the Petitioner.

The substantive reliefs sought by the Petitioner in this Writ Application are, *inter alia*,

b) Grant and issue a mandate in the nature of a Writ of Certiorari quashing the conviction against the Petitioner given at the Summary Trial dated 9th March 2021 and the subsequent sentence imposed both marked P-7.

f) In the alternative, grant an order for retrial in the form of a Court Martial, in which the Petitioner may be represented by Counsel of his choice.

The position of the Respondents is that the 1st Respondent transmitted the Appeal forwarded by the Petitioner to His Excellency the President on 01.07.2021 before this Court directed to issue notices on the Respondents on 02.08.2021 and issued a direction against the 1st Respondent to stay the execution of the sentence imposed at the Summary

Trial on 01.09.2021 in the event the Petitioner's appeal to His Excellency the President has been transmitted. On **03.08.2021**, His Excellency the President approved the sentence imposed on the Petitioner.

By way of preliminary objections, the Respondents have raised that the Petitioner is not entitled to maintain this Writ Application for the reason that by a letter dated 03.08.2021, an Order has been made by His Excellency the President dismissing the Petitioner's Appeal and approving the sentence (R2(b)). It is submitted by the Respondents that the Order of the President is a supervening event which has altered the nature of the case and therefore, this Court is suffering from patent and total want of jurisdiction in view of Article 35 of the Constitution which confers constitutional immunity on the President from suit. However, the learned President's Counsel appearing for the Petitioner argues that the Petitioner has neither challenged any Order made by the President nor made the President a party to the instant Application and therefore, dismissal of the Appeal by the President does not render this Writ Application unsustainable. Further, he has submitted that section 122 of the Navy Act provides for an Appeal to the President only to revise a sentence and the President by virtue of the provisions of that section does not examine the correctness and legality of the convictions of courts-martial or Summary Trials. The position of the Respondents is that the conviction, sentence, and the decision of the President are inextricably intertwined in the context of section 10 and section 122 of the Navy Act and therefore, the conviction cannot be severed from the sentence, especially in circumstances where

the Petitioner preferred an Appeal under section 122 of the Navy Act. Accordingly, the learned State Counsel appearing for the Respondents contends that the proper course of constitutional remedy for the Petitioner is by way of a Fundamental Rights Application under Article 126 of the Constitution.

Section 132(1) of the Navy Act expressly provides that,

> "Such of the provisions of Article 140 of the Constitution as relate to the grant and issue of writs of mandamus, certiorari, and prohibition shall be deemed to apply in respect of any court-martial or of any naval officer exercising judicial powers under this Act."

In *Lalith Deshapriya v Captain Weerakoon*[1], Saleem Marsoof, J. (P / CA) held that**,**

> *"The petitioner invokes the writ jurisdiction of this Court in terms of Article 140 of the Constitution of Sri Lanka read with section 132(1) of the Navy Act, No. 34 of 1950 as subsequently amended. It is worth noting at the outset that the supervisory jurisdiction of this Court extends to proceedings conducted by a court martial or a commanding officer or other officer dealing summarily with an offender in view of section 132(1) of the Navy Act …"*

Therefore, it is clear that in general, this Court has powers to exercise its writ jurisdiction over the proceedings of any court-martial or any naval officer exercising judicial powers under the Navy Act.

[1] [2004] 2 Sri LR 314

While Section 132(1) of the Navy Act invokes the powers of judicial review of this Court in respect of courts-martial and naval officers exercising judicial powers, section 122 of the Navy Act vests a discretionary power on the President on appeal to annul, suspend or modify any sentence passed by a court martial or a naval officer exercising judicial powers under the Navy Act.

Lord Brightman in *Chief Constable of North Wales Police v Evans*[2] held that,

> *"**Judicial review is concerned, not with the decision, but with the decision-making process**. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power... **Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made**..."* [emphasis added]

The distinction between the review and appeal has been referred to in *Administrative Law* by Wade and Forsyth[3] in the following manner:

> *"The system of judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the*

[2] [1982] 1 WLR 1155 at 1174

[3] Wade H.W.R and Forsyth C.F, *Administrative Law* (11th Edition), Oxford University at page 26.

powers granted? On an appeal, the question is 'right or wrong? On review, the question is 'lawful or unlawful'?"

Rights of appeal are always statutory. Judicial Review, on the other hand, is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary; the court is simply performing its ordinary functions to enforce the law…

Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not."

According to Edward F. Sherman[4], the traditional English concept regarding reviewability of court martial determinations is that military courts provide an autonomous system of jurisprudence which, due to the exigencies of military life and the necessity for discipline, should not be interfered with by the civil authorities. But it has been changed over the years and exceptional circumstances have been carved out in which court review is permitted, particularly involving claims of denial of constitutional rights during the course of courts-martial and discharge proceedings. He refers to *Reed v. Franke*[5], where a serviceman with 18 years of service sued to enjoin

[4] Sherman E.S., *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, Virginia Law Review , Apr., 1969, Vol. 55, No. 3 (Apr., 1969), pp. 483-540

[5] 297 F.2d 17 (4th Cir. 1961)

the Navy from administratively discharging him as an alcoholic because of two courts-martial concerning his driving while under the influence of intoxicants (He had the misfortune of colliding with a Vice Admiral's automobile). The court held that,

> *"While there can be no direct judicial review of the administrative proceedings, the procedure involved will be subject to review where there is a substantial claim that prescribed military procedures* ***violate constitutional rights****."*

In *Pushpakumara vs Lieutenant Commander Wijesuriya and Others*[6], while referring to *Air Vice Marshall Elmo Perera v. Liyanage and Others*, the Court held that,

> *"It was open to the President to terminate the services of the petitioner on the basis that the petitioner holds office at the pleasure of the President."*
>
> *The 1st respondent was merely carrying out a fact-finding inquiry and the findings or recommendations of the respondent would not be binding on the President.* ***The essential requirement for the grant of certiorari is that the rights of the subject should be affected****."*

In *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene & Others,*[7] Sisira De Abrew J. held that:

> *"In an application for a writ of certiorari in respect of a conviction or sentence entered by a Court Martial the defence of review is not the same as in an appeal from a conviction of a Criminal Court –* ***judicial review will lie by way of***

[6] [2010] 2 Sri LR 393

[7] [2007] 1 Sri LR 33

certiorari only in respect of the legality of the conviction or sentence. *The merit of the finding will not be subject to review by Certiorari."* (Emphasis added)

The Respondent's position in the instant action is that Article 35 of the Constitution which confers constitutional immunity on the President from suit ousts the jurisdiction of this Court. In *Karunathilaka and another v. Dayananda Dissanayake, Commissioner of Elections and others*[8], Fernando J. held that,

"I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity; ***immunity is a shield for the doer, not for the act. A very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one nor renders it one which shall not be questioned in any Court****."*

In the instant action, the Petitioner has neither challenged the Order of the President nor made him a party to the action. He challenges only the manner in which the Summary Trial proceedings were held and takes up the position that it is *ultra vires*, against the principles of consistency, contrary to law and the Sri Lanka Navy Order, in violation of

[8] [2003] 1 SLR at page 177

the fundamental principles of law and violation of the right of representation of the Petitioner.

However, there is a fundamental issue as to whether the instant Application would be futile even if the said conviction is quashed by this Court since the affirmation of the relevant sentence by His Excellency the President remains un-expunged. Sharvananda CJ in *Mallikarachchi vs. Siva Pasupathy*[9] explained the rationale of the immunity granted to the President as follows:

> *'...**the President is not above the law**. He is a person elected by the people and holds office for a term of six years. **The process of election ensures in the holder of the office correct conduct and a full sense of responsibility for discharging properly the functions assigned to him**. It is, therefore, necessary that special immunity must be conferred on the person holding such high executive office from being subject to legal process or legal action and being harassed by frivolous actions. If such immunity is not conferred only the prestige, dignity and status of the high office would be adversely affected but the smooth and efficient working of the Government of which he is the head would be impeded. That is the rationale for the immunity cover afforded to the President's actions both official and private."*

Accordingly, the President's power is subject to the rule of law and therefore, even though the commissioned officers of the Sri Lanka Navy hold the appointment at the

[9] [1985] 1 SLR 74 at 77

pleasure of the President in terms of section 10 of the Navy Act, the approval of a sentence to dismiss any commissioned officer in contravention of principles of natural justice cannot stand out. Wade and Forsyth's, *'Administrative Law'*[10] is apposite to quote in this regard:

> *"It is a cardinal axiom that every power has legal limits. If the Court finds that the power has been exercised oppressively or unreasonably, or if there has been some procedural failing… the act may be condemned as unlawful. Although lawyers appearing for government departments have often argued that some Act confers unfettered discretion on a minister, they are guilty of constitutional blasphemy.* ***Unfettered discretion cannot exist where the rule of law reigns. The same truth can be expressed by saying that all power is capable of abuse and that the power to prevent abuse is the acid test of effective judicial review****."*

Lord Wrenbury in the celebrated House of Lords decision in *Roberts v. Hopwood*[11] articulated this in the following manner:

> *"A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought.* ***In other words, he must, by the use of***

[10] Wade H.W.R and Forsyth C.F, *Administrative Law* (11th Edition), Oxford University at page 27.

[11] [1925] AC 578 at 613

his reason, ascertain and follow the course which reason directs. *He must act reasonably."*

The Court observes that His Excellency the President has approved the impugned sentence on the following day this Court had ordered to issue notices on the Respondents, and it is questionable whether the President has exercised his powers reasonably under section 122 of the Navy Act. However, no need to say that His Excellency the President who is elected by the people's mandate is duty-bound to uphold the rule of law. If the Court could by exercising the judicial review find that the conviction of the Petitioner is unlawful, the sentence cannot stand and will be rendered nugatory which consequently would pressurize the President to reconsider his decision. In Writ Application *S.A.R.S.P. Kumara vs. Vice Admiral, J.S.K.Colombage, Commander of the Sri Lanka Navy and 7 others*[12] Mahinda Samayawardhena J. further referred to *Flying Officer Ratnayake v. Commander of the Air Force*[13] in which the Court quashed by way of Certiorari the decision of the Commander of the Air Force recommending the withdrawal of the Commission of the petitioner, upon him being convicted not by a Court Marshal but after a Summary Trial, which is incorrect. However, the Court was not inclined to direct the Respondents by mandamus to hold a Court Martial afresh, as it would have been a futile exercise because by that time the

[12] CA/Writ/178/2014

[13] [2008] 2 Sri LR 162

President had approved the withdrawal of the Petitioner's Commission. Nevertheless, the Court further remarked:

> *"This order* ***does not prevent Her Excellency the President from reconsidering the withdrawal of the Petitioner's Commission****, which was based on the recommendation of the 1st Respondent*."

As the competency of this Court to exercise judicial review is thus established, the fundamental questions at issue are,

i. Whether there is any procedural error made during the proceedings of the Summary Trial against the Petitioner and

ii. Whether the rule of natural justice has been breached by not allowing the Petitioner to be represented at the said Trial by an appropriate defence officer or counsel.

The Petitioner states that based on the findings of the Inquiry, the Board of Inquiry Report marked as P-2 contained **two** recommendations in respect of the Petitioner.

> "4. නිර්දේශ
>
> (ඇ.) නාවික නැවි සී.ජේ. රණසිංහ එක්ස් එක්ස් 45538 යන නාවිකයා කංසා නැමැති තහනම් මත්ද්‍රව්‍ය භාවිතා කිරීම හේතුවෙන් මෙම නාවිකයා හට දැඩිව විනයානුකූලව කටයුතු කිරීමට නිර්දේශ කෙරේ.
>
> (ඇ.) නාවික නැවි සී.ජේ. රණසිංහ එක්ස් එක්ස් 45538 යන නාවිකයා කඳවුර තුළ අනෙකුත් නාවිකයන් හට දුම්වැටි අලෙවි කළ බවට තහවුරු වන බැවින් මෙම නාවිකයා හට දැඩිව විනයානුකූලව කටයුතු කිරීමට නිර්දේශ කෙරේ."

The first recommendation mentioned as (ඇ.) pertains to the offence of consumption of narcotic substances (cannabis) which the Petitioner asserts that he categorically pleaded not guilty at the Summary Trial. The second recommendation mentioned as (ඈ.) is regarding the sale of foreign cigarettes for which the Petitioner had pleaded guilty. The learned President's Counsel appearing for the Petitioner argues that since the Petitioner pleaded not guilty to charge (ඇ.) the burden of proving the charge lay entirely on the prosecution beyond reasonable doubt. The position of the Respondents is that there is no such burden of proof on the prosecution owing to the reason that the Petitioner has initially pleaded guilty to both charges. The relevant copy of the Commanding Officer's Defaulter Book marked as R-7(a) and the relevant copy of the Executive Officer's Defaulter Book marked as R-7(b) include the two charges against the Petitioner which are recorded as Petitioner had pleaded guilty and found guilty. As per R-7(a), the charge (ඇ.) is recorded as to be punished by a warrant and the charge (ඈ.) is to be punished by admonition. In contrast, the proceedings of the Summary Trial dated 09.03.2021 marked as R-6 only contain the charge (ඇ.) and as per the said document, the Petitioner has pleaded guilty to the charge (ඇ.). There is neither a record in R-6 that the Petitioner has pleaded guilty to charge (ඈ.) nor to be punished by admonition. At the end of the trial, the Petitioner had moved to submit written submissions. The written submission marked as P-4 also addresses only one charge but does not elaborate in clear and specific terms as to what charge he had pleaded guilty to. According to the written submissions, it was the first offence which the Petitioner had committed during his

service in the Sri Lanka Navy. The Court could observe that there is an ambiguity in the language used in the judgement reflected in R6. Firstly, it has been mentioned that "charges"/ "චෝදනාවන්" (in the plural form implying that there was more than one charge) were read over to the accused. Subsequently, the plural form of "charges" had been converted to the singular form and mentions that "it"/ "එය" was understood and the accused admitted the liability to "that charge" / "එම චෝදනාවට."

> "උසාවියේ මතය හා විනිශ්චය
>
> චූදිතයාට එරෙහිව **නඟා ඇති චෝදනාවන්** ඔහු ඉදිරියේ කියවන ලද අතර ඔහු විසින් **එය** තේරුම්ගත් බවත්, **එම චෝදනාවට** ඔහු වැරදිකරු බවත් චුදිතයා විසින් පිළිගෙන ඇති හෙයින් සහ පැමිණිල්ල විසින් උසාවිය වෙත ඉදිරිපත් කරන ලද ලිඛිත සාක්ෂි සම්බන්ධයෙන් අවධානය යොමු කිරීමෙන් පසු උසාවිය විසින් චුදිතයා වැරදිකරු බව තීරණය කරයි." [emphasis added].

Under the above-stated circumstances, a doubt arises as to whether the Summary Trial proceedings against the Petitioner had been held according to the basic principles of law.

Section 5 of the Sri Lanka Navy Order 0501 marked as R3 provides that,

> "All officers exercising judicial powers are required to draw their attention to the following facts, **including rules of natural justice** when exercising their powers."

The Petitioner asserts that he was not served with a charge sheet and that contention was not addressed by the Respondents. Subparagraph (f) of Section 5 of the Sri Lanka Navy Order marked R3 states that,

> "The charge sheet shall be served on the accused giving sufficient time for him to prepare for his defence."

In *Asanga vs. Commander of the Navy and others,*[14] the Supreme Court referred to *Issadeen vs Director General of Civil Aviation*[15] in which Kulathunga J. observed,

> *An irreducible minimum of the requirements of natural justice are:*
>
> *(1) the right to be heard by an unbiased tribunal.*
>
> *(2) the right to have notice of charges of misconduct, and*
>
> *(3) the right to be heard in answer to those charges.*

In *De Vertend v Knaggs*[16] at p.560 it was laid down as follows:

> *"In general, the requirements of natural justice are first, that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, that the tribunal should act in good faith."*

Further, the Petitioner states *inter alia* that the 5th Respondent was appointed by the 3rd Respondent as the Defending Officer to appear on behalf of him the Petitioner was not given the opportunity to choose the Defending Officer on his behalf and he was not

[14] [2006] 3 Sri LR 342

[15] [1962] 2 Sri LR 348

[16] [1918] AC 557 at 560.

given adequate time to prepare his defence. Subparagraph (g) of Section 5 of R3 provides that,

"Every accused shall have the right to be defended by a defending officer. Every possible step to be taken by the Commanding Officers to provide the services of a defending officer at the will of the accused subject to service exigencies."

However, the position of the Respondents is that the Petitioner never objected to the 5th Respondent for being his defence officer before or during the Summary Trial. Further, the Respondents argue that the Petitioner has failed to mention his objection and purported request for a defence officer of his choice in his Appeal to His Excellency the President. The law is clear that the Commanding Officer's power to appoint a defending officer is subject to the will of the accused as it is a fundamental requirement in conducting a fair trial. At the same time, a concurrent right lies with the accused to object at the earliest possibility to any such appointment by the Commanding Officer disregarding his will as such conduct would be based on the legal maxim that equity aids the vigilant not the indolent. Although it is observed that the passiveness in requesting a Defence Officer of his choice, the Court cannot condone the Respondents for failing to serve the accused a charge sheet, failure to provide adequate time to prepare his defence and most significantly on the grave violations of the Sri Lanka Navy Order 0501 marked R3 when conducting the Summary Trial.

As per the above-stated facts, it is the view of this Court, that the Summary Trial proceedings conducted against the Petitioner violate the Sri Lanka Navy Order and

fundamental principles of natural justice. In the circumstances, I hold that the entire proceedings of the Summary Trial are a nullity and the conviction of the Petitioner at the Summary Trial dated 9th March 2021 and the subsequent sentence imposed both marked P-7 are nullity and should be quashed. Accordingly, I issue a Writ of Certiorari quashing P7 as prayed for in prayer (b) of the Petition dated 05.07.2021. No costs ordered.

Application allowed.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL