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

S.A.R.S.P. Kumara,
68/81, 'Suramya Sevana',
Putupagala, Mandawala.
Petitioner

CASE NO: CA/WRIT/178/2014

Vs.

1. Vice Admiral J.S.K. Colombage,
Commander of the Sri Lanka Navy, Navy Headquarters,
Chaithya Road, Colombo 1.

1A. Vice Admiral Jayantha Perera,
Commander of the Sri Lanka Navy, Navy Headquarters,
Chaithya Road, Colombo 1.

1B. Vice Admiral R.C. Wijegunaratne,
Commander of the Sri Lanka Navy, Navy Headquarters,
Chaithya Road, Colombo 1.

1C. Vice Admiral T.J.L. Sinniah,
Commander of the Sri Lanka Navy, Navy Headquarters,
Chaithya Road, Colombo 1.

1D. Vice Admiral S.S. Ranasinghe,
Commander of the Sri Lanka
Navy, Navy Headquarters,
Chaithya Road, Colombo 1.

1E. Vice Admiral Piyal De Silva,
Commander of the Sri Lanka
Navy, Navy Headquarters,
Chaithya Road, Colombo 1.

2. Vice Admiral (Retd) D.W.A.S.
Dissanayaka,
No. 380/2, Vidyaloka
Mawatha,
1st Lane, Hokandara.

3. Commander (Retd) M.
Lamaheva,
No. 10/4, Delgaswatte,
Horethuduwa, Polgaowita.

4. Lieutenant Commander
N.S.M.D.K. Nanayakkara,

5. Lieutenant Commander (V)
M.S.N.K. Ariyaratne,

6. Captain S.B. Senaratne,
All of Navy Headquarters,
Chaithya Road, Colombo 1.

7. Gotabhaya Rajapaksa,
Secretary, Ministry of Defence
and Urban Development,
No. 15/5, Baladaksha
Mawatha, Colombo 3.

7A. Karunasena Hettiarachchi,
Secretary, Ministry of Defence,
No. 15/5, Baladaksha
Mawatha, Colombo 3.

7B. Kapila Waidayarathne, P.C.,
Secretary, Ministry of Defence,
Ministry of Defence,
No. 15/5, Baladaksha
Mawatha, Colombo 3.

7C. General S.H.S. Kottegoda,
Secretary, Ministry of Defence,
Ministry of Defence,
No. 15/5, Baladaksha
Mawatha, Colombo 3.

8. Hon. Attorney General,
Attorney General's
Department, Colombo 12.

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: A.K. Chandrakantha for the Petitioner.

Anusha Fernando, D.S.G., for the Respondents.

Argued on: 18.02.2020

Decided on: 13.03.2020

Mahinda Samayawardhena, J.

The Petitioner, a former petty officer of the Sri Lanka Navy, was caught in the act of obtaining Rs. 2,500 from a fellow Navy officer in January 2010, to provide a fraudulent certificate of residence within the Colombo Municipal limits to the said officer. The Petitioner claims he intended to pass on the money so obtained to a clerk attached to the Divisional

Secretariat of Colombo, who was in the practice of issuing such certificates.

Following this incident, the Petitioner was subjected to a Board of Inquiry, which recommended disciplinary action against him (as seen from the report dated 22.04.2010 marked P2).

This was followed by a summary trial, where the Petitioner was tried on two counts: (1) falsifying official documents; and (2) obtaining gratification to prepare false documents. After trial, he was found guilty on both counts and sentenced to 90 days' imprisonment and also discharged with disgrace from the Sri Lanka Navy (as seen from the proceedings dated 23.06.2011 marked R3).

The Petitioner filed this application seeking a writ of certiorari to quash the said punishment as reflected in P1, and a writ of mandamus for reinstatement with back wages and other monetary entitlements.

The Petitioner in the petition challenges the decision in P1 on four grounds:

a) Illegality of the summary trial on the basis of denial of a fair trial;
b) Illegality of the Board of Inquiry proceedings on the basis of procedural irregularity;
c) Illegality of the summary trial on the basis of procedural irregularity;
d) Lack of evidence for the finding of guilt against the Petitioner.

I will consider each of these grounds separately.

The main ground on which the Petitioner seeks to challenge the decision in P1 is that the summary trial was a sham, as the conviction and punishment to be imposed on him had been determined by the Commander of the Navy before the summary trial was held, as evinced by Minute 17 dated 18.03.2011 contained in the documents compendiously marked P2a.

This argument taken in isolation is *ex facie* valid and renders the proceedings of the summary trial a nullity on breach of basic principles of natural justice.

However, at the argument, learned Counsel for the Petitioner candidly admitted that this directive of the Commander of the Navy contained in the said Minute 17 did not influence the Petitioner in pleading guilty to count (2) at the summary trial, as the Petitioner was unaware of such a directive at that time. This means, the procedural lapse, however serious it may appear to be, caused no prejudice to the Petitioner in entering his plea.

The fact thus remains that at the summary trial the Petitioner pleaded unqualified admission of guilt, of his own accord, to count 2 obtaining gratification to prepare false documents (*vide* R3). He similarly accepted guilt on this count before the Board of Inquiry (*vide* P2); and also in his letter dated 05.10.2011 to the President seeking mitigation of his sentence (*vide* P4). There can be no dispute then that the Petitioner was rightly convicted at least on the second count on which he was charged.

In relation to the first count, during cross examination of the first witness for the prosecution at the summary trial, the Petitioner appears to have accepted guilt for falsification of some but not all of the documents in question (*vide* R3).

Writ being a discretionary remedy, the Court can, in considering the totality of the matter in issue, overlook any error, no matter its severity, if it has not caused injustice to the party applying for writ.

In *Seneviratne v. Urban Council, Kegalle [2001] 3 Sri LR 105 at 108*, J.A.N. de Silva J. (later C.J.) quoted with approval the following passage of *Judicial Review of Administrative Action* by De Smith (5th Edition, 1995), which states: "*If the applicant has not been prejudiced by the matters on which he relies then the Court may refuse relief even though he has succeeded in establishing some defect. The literal or technical breach of an apparently mandatory provision in a Statute may be so insignificant as not in effect to matter. In these circumstances the Court may in its discretion refuse relief.*"

Accordingly, in the unique facts of this case, I take the view that the Petitioner cannot succeed on the first ground.

I will now consider the second ground on which the Petitioner canvasses the sentence passed on him.

The Petitioner states in the petition that he was not given an opportunity to be present at the proceedings of the Board of Inquiry, nor was he allowed to cross-examine the witnesses called against him. This, he states, is in violation of Regulation 13 of the Navy (Board of Inquiry) Regulations 1975, which stipulates: "*Whenever any inquiry affects the character or professional reputation of a person subject to Naval Law, full opportunity shall be afforded to that person of being present throughout the inquiry, and of making any statement and or giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his opinion affects his character or professional reputation and*

of producing any witnesses in defence of his character or professional reputation".

The Board of Inquiry is a fact-finding mission. It has only recommended that disciplinary action be taken against the Petitioner. It is at the summary trial, at which the Petitioner actively participated, that the sentence sought to be quashed was meted out. Hence irregularities, if any, at the Board of Inquiry proceedings need not be given undue weightage.

The third ground relied upon by the Petitioner relates to procedural irregularity at the summary trial. The Petitioner states in the petition that the proceedings of the Board of Inquiry was used as evidence at the summary trial, which contravenes Regulation 21 of the Navy (Board of Inquiry) Regulations 1975: "*The proceedings of a Board of Inquiry, or any other confession, statement or answer to a question made or given at a Board of Inquiry shall, subject to any other law, not be admissible or given in evidence against any person at any other inquiry or trial except at the trial of such person for willfully giving false evidence before the Board*".

The Petitioner alleges in the petition that at the summary trial the first witness for the prosecution had "*by implication drawn the attention of the court in respect of the evidence adduced in the Board of Inquiry*". The proceedings of the summary trial tendered with the Respondents' statement of objections marked R3 reveal that the said witness referred to the proceedings before the Board of Inquiry only in one of seven questions put to him by the prosecution and that too only to provide a sequence of events in his testimony. The proceedings before the Board of Inquiry were never in the forefront of the testimony of this witness at the summary trial and hence the said passing reference can be overlooked.

The fourth and final contention of the Petitioner in the petition is that he has been convicted notwithstanding insufficient evidence pertaining to his guilt.

In the first place, it is not the task of the Writ Court to analyse the evidence and ascertain whether or not the conviction is right or wrong but whether the conviction is legal or illegal. *Vide Kalamazoo Industries Ltd v. Minister of Labour & Vocational Training [1998] 1 Sri LR 235 at 248-249*; *Public Interest Law Foundation v. Central Environmental Authority [2001] 3 Sri LR 330 at 334.*

In any event, this ground cannot be accepted *prima facie* given that, as already stated, the Petitioner has repeatedly admitted guilt in respect of the second charge against him and appears to have implied his guilt in connection to the first charge during cross-examination of the first witness of the prosecution at the summary trial.

At the argument, Counsel for the Petitioner raised proportionality as a further ground to challenge the sentence or to buttress his case. There is merit in Counsel's argument particularly given that, as per the Respondents' statement of objections, 13 officers found guilty of soliciting fraudulent documents received no greater punishment than the issuance of letters of displeasure. However, in the facts and circumstances of this case, the Petitioner evidently has a higher degree of culpability – he was the linchpin of the entire operation, which others were only too keen to use to their advantage. He cannot expect the same punishment having played a greater role in the commission of the offence.

The Petitioner preferred an appeal against his conviction and sentence through the proper channels of the Sri Lanka Navy to the President (as seen from the letter dated 05.10.2011

marked P4). The Respondents have tendered with their statement of objections the letter dated 06.08.2012 marked R4 addressed to the Commander of the Navy, by which the sentence imposed on the Petitioner has been approved by the President.

Learned Deputy Solicitor General for the Respondents in her written submissions raises futility as a preliminary objection, given that (a) the Petitioner has already served the term of imprisonment imposed on him, and (b) the sentence, including discharge from the Navy and forfeiture of pay, has been approved by the President, who is not bound by a decision of this Court.

There is no doubt that futility is a ground to deny relief to the Petitioner. In short, if the end result is futile writ will not lie.

In *Siddeek v. Jacolyn Seneviratne [1984] 1 Sri LR 83* at 90, the Supreme Court observed:

> *The Court will have regard to the special circumstances of the case before it before issuing a writ of certiorari. The writ of certiorari clearly will not issue where the end result will be futility, frustration, injustice and illegality.*

Vide also *Samastha Lanka Nidahas Grama Niladhari Sangamaya v. Dissanayake [2013] BLR 68*; *Rev. Nehinwela Piyadassi Thero v. National Water Supply and Drainage Board [2011] 2 BLR 470*; *De Silva v. University Grants Commission [2011] 2 BLR 474*; *P.S. Bus Co. Ltd. v. Members and Secretary of Ceylon Transport Board (1960) 61 NLR 491*; *Pushpakumara v. Lt. Commander Wijesuriya [2010] 2 Sri LR 393*.

Learned Deputy Solicitor General in her written submissions cites the case of *Brigadier Liyanage v. Chandrananda de*

Silva, Secretary Ministry of Defence [2000] 1 Sri LR 21, where the Supreme Court ruled in favour of implementing the recommendation of the Army Commander to the President to promote the Petitioner in that case to a higher rank. However, the order of the Supreme Court was not carried out and the Petitioner filed an application to the same Court to give effect to the Judgement. At the second instance, the Supreme Court made Order as follows:

> *We are unable to give any further directions other than what we have already made…since the appointment has to be made by the President who is not a party to these proceedings, reliefs are available only against the party to the proceedings.*

Similarly, in the case of *Air Vice Marshall Elmo Perera v. Liyanage [2003] 1 Sri LR 331*, the Petitioner challenged the appointment of the 1st Respondent by the President to inquire into whether the Petitioner was fit and proper to hold a Commission in the Air Force. At the inquiry conducted by the 1st Respondent, the Petitioner raised a preliminary objection that the said appointment was a nullity. This objection was overruled and the Petitioner sought a writ of certiorari to quash the decision. The Court refused to grant the Petitioner relief, holding, *inter alia*, that even if the letter informing the Petitioner of the appointment of the 1st Respondent was set aside, the original act of appointment by the President would still stand. The Court held that writ would not lie if the final relief sought is futile.

In the instant case, it is not the submission of Counsel for the Petitioner that the Commander of the Navy did not have the authority to discharge the Petitioner from service. Nor is it Counsel's submission that the approval of the sentence by

the President is faulty or can be reviewed by this Court. In fact, Counsel admits that so long as the order of approval by the President remains in effect, the Commander of the Navy has no authority to reinstate the Petitioner, notwithstanding a favourable decision by this Court. Counsel's submission in essence is that were this Court to grant this application, the Petitioner could make a second appeal to the President to consider the matter afresh.

In *Flying Officer Ratnayake v. Commander of the Air Force [2008] 2 Sri LR 162* this 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 in view of the fact that by that time the 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.*

In *H.K.U.P. Kavikeshwa v. Lt. Gen. Jagath Jayasooriya, Commander of the Army* (CA/WRIT/260/2011 decided on 03.09.2012), this Court considered the above remark made in that case and stated: "*But there is no material placed before this Court to show that after the said decision of the Court of Appeal His Excellency has reconsidered his decision. In the above circumstances this court is of the view that issuing orders quashing decisions that had been superseded by*

subsequent orders or decisions which are not challenged is futile."

The preliminary objection on futility, raised by learned Deputy Solicitor General, is entitled to succeed.

The application of the Petitioner is dismissed without costs.

Judge of the Court of Appeal