

**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 Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Lt. Cdr. Samantha Pushpakumara Pathirage,
'Asiri', Temple Road,
Kandana, Horana.

Presently in the custody of
Welikada Prison.

PETITIONER

CA (Writ) Application No. 689/2011

Vs.

1. Vice Admiral Jayantha Perera,
The Commander of the Navy,
Naval Headquarters, Colombo 1.
2. Rear Admiral D. S Udwatte
Naval Headquarters,
Colombo 1.
3. Commodore J. J Ranasinghe
Naval Headquarters,
Colombo 1.

4. Commodore P. R. B Dissanayake,
Naval Headquarters,
Colombo 1.

5. Rear Admiral S.P. Fernando,
Judge Advocate,
Naval Headquarters, Colombo 1.

6. Commodore M. N. H. Gamage,
Naval Headquarters, Colombo 1.

7. Captain C.S. Dahanayake,
Additional Provost Martial,
Naval Headquarters, Colombo 1.

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

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: J.M.Wijebandara with Ms. Shalani Chandrasena for the Petitioner

Ms. Anusha Fernando, Deputy Solicitor General for the Respondents

Written Submissions: Tendered on behalf of the Petitioner on 12th December 2018

Tendered on behalf of the Respondents on 2nd November 2018

Decided on: 14th February 2019

Arjuna Obeyesekere, J

When this application was taken up for argument on 12th September 2018, the learned Counsel for the parties informed Court that written submissions have been filed and moved that this Court pronounce judgment on the said written submissions as well as the further written submissions that would be tendered.

The Petitioner has filed this application, seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the proceedings of the Court Martial held by the Sri Lanka Navy against the Petitioner;
- b) A Writ of Certiorari to quash the verdict of the Court Martial delivered on 2nd November 2011;
- c) A Writ of Mandamus directing the Petitioner to release the Petitioner from the custody of the Sri Lanka Navy.

The facts of this application very briefly are as follows.

The Petitioner had joined the Sri Lanka Navy on 30th July 1997 as an Officer Cadet and was serving as a Lieutenant Commander at the time Court Martial proceedings were instituted against him. The Petitioner states that in 2008 he was appointed as the Supplies Officer and assigned duties relating to the maintenance of dry rations within the Naval establishment 'Nipuna'. The scope of his duties included the regular procurement of dry rations from registered

suppliers and the supervision of the distribution of the said dry rations to the relevant kitchens.

On 30th September 2011, the Petitioner had been served with a charge sheet annexed to the petition marked 'P1' containing 9 charges¹. These charges relate *inter alia* to certain irregularities that took place in the procurement of dry rations and the onward supply of such dry rations to the Naval kitchens and thereby acting contrary to Naval discipline and good order.

The 1st Respondent Commander of the Sri Lanka Navy had appointed a Court Martial consisting of the 2nd – 4th Respondents to inquire into the said charges. The Court Martial proceedings had been held over several days with the participation of the Petitioner. While the prosecution had led the evidence of 4 witnesses, the Petitioner had opted not to lead any evidence or to give evidence on his behalf. At the conclusion of the said proceedings, the prosecution had withdrawn three charges and the Petitioner had been found guilty of the rest of the charges by the Court Martial which had sentenced the Petitioner to a 2 year period of imprisonment. The Court Martial had also recommended that the Petitioner be discharged dishonourably from the Sri Lanka Navy. Being dissatisfied with the said decision, the Petitioner had submitted an appeal² on 8th November 2011 to HE the President in terms of Section 122 of the Navy Act and thereafter filed this application on 26th December 2011, seeking the aforementioned relief. By letter dated 27th April 2012, produced by the Respondents marked 'R2', the Secretary, Minister of Defence and Urban Development had informed the 1st Respondent that HE the President has approved the sentence imposed by the Court Martial.

¹ A signed copy of the charge sheet has been produced by the Respondents marked 'R1'.

² A copy of the appeal has been annexed to the petition marked 'P2'.

The Petitioner's complaints to this Court are three fold. In considering the said complaints of the Petitioner, this Court must remember that what this Court is exercising in this application is its Writ jurisdiction and not its appellate jurisdiction. The distinction between these two remedies has been set out in "Administrative Law" by H. W. R. Wade and C.F Forsyth³ 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 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 in order to enforce the law. The basis of judicial review, therefore, is common law. This remains true even though nearly all cases in administrative law arise under some Act of Parliament.

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

³ 11th Edition at page 26.

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."

The above position has been consistently followed by this Court over the years. In Kalamazoo Industries Ltd v. Minister of Labour & Vocational Training and others⁴, the petitioners sought a Writ of certiorari to quash an arbitral award. Dismissing that application, this Court stated as follows:

"This court must keep prominently in forefront that it is exercising in this instance a very limited jurisdiction quite distinct from the exercise of appellate jurisdiction. Relief by way of certiorari in relation to an award made by an arbitrator will be forthcoming to quash such an award only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently irrational or unreasonable or is guilty of an illegality. The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order and if the arbitrator's award was not set aside in whole or in part, it had to be allowed to stand un-reversed.

In the circumstances the objective of this court upon judicial review in this application is to strictly consider whether the whole or part of the award of the arbitrator is lawful or unlawful. This court ought not to exercise its appellate powers and jurisdiction when engaged in the exercise of supervisory jurisdiction and judicial review of an award of an arbitrator."

⁴ [1998] 1 Sri LR 235 at 249.

A similar view was expressed in Public Interest Law Foundation v. Central Environmental Authority and another⁵ where this Court held as follows:

"There is a distinction between appeal and review. If one appeals against a decision, one is claiming that the decision is wrong and that appellate authority or court should change the decision. The Court of Appeal, if it is persuaded by the merits of the case (appeal), may allow the appeal and thereby substitute its view for that of the Court or tribunal of first instance. Under judicial review procedure, the Court of Appeal is not concerned with the merits of the case, that is, whether the decision was right or wrong, but whether the decision is lawful or not. In the words of Lord Brightman: "Judicial review is concerned, not with the decision but with the decision making process" (Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1155 at 1173). It is worth observing that the review procedure is not well suited to determination of disputed facts-factual issues arising in this case being imprecise and disputed."

The first complaint of the Petitioner is that the evidence led at the Court Martial does not disclose any involvement on his part and, on the basis that there was no evidence against the Petitioner, it was submitted by the learned Counsel for the Petitioner that the decision of the Court Martial is illegal, arbitrary, irrational and unreasonable.

Lord Diplock, in his classic statement on judicial review in Council of Civil Service Unions vs Minister for the Civil Service⁶ has identified irrationality as

⁵ [2001] 3 Sri LR 330 at 334.

⁶ 1985 AC 374 .

one of the grounds upon which administrative action is subject to control by judicial review, which he has described in the following manner:

"By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

A consideration of the said complaint of the Petitioner requires this Court to consider whether the evidence led before the Court Martial was sufficient for the Court Martial to have arrived at the aforesaid decision.

According to the Respondents, the *modus operandi* followed by the Petitioner, as borne out by the evidence led before the Court Martial, was as follows. The supplier of the dry rations, a company this Court shall refer to as 'AA' for the reason that they are not a party to this application, acting in concert with the Petitioner who was the Supplies Officer, would supply to the Sri Lanka Navy quantities less than what is requested by the purchase orders. The Petitioner would direct the Store Keepers, who gave evidence before the Court Martial, to enter the quantities requested by the Purchase Orders in the relevant books, although the quantities supplied are less than what is entered in the books. The Petitioner had directed the Store Keepers to hand out quantities less than what is ought to be given when handing over food items to the kitchen but enter in the books the correct quantities. In this manner, the

⁷ Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948(1)KB 223.

quantities short supplied by the supplier is offset by the lesser quantities actually supplied to the kitchen.

It was also in evidence that the Store Keepers maintained a table setting out the quantities that were short supplied to the Stores as well as supplied to the kitchen, and that this table was made available to the Petitioner whenever requested.⁸

Although it was alleged by the Respondents that the Petitioner accepted money from the supplier, the Respondents conceded that it did not have any direct evidence of this fact except the evidence of the three Store Keepers who stated before the Court Martial that the Petitioner had given them large sums of money for carrying out his instructions. It is in this factual background that the charge sheet was issued to the Petitioner alleging that the above conduct of the Petitioner was contrary to Naval discipline and good order.

The argument of the Petitioner that there was no evidence against him to prove the charges has been contradicted by the learned Counsel for the Respondent who has drawn the attention of this Court to the following evidence⁹, which sets out the involvement of the Petitioner.

Evidence of Abeyratne¹⁰

පු: විසේ කරගෙන යාමට¹¹ ඔබට උපදෙක් ලැබුණේ කාගෙන්ද?

පි: මුතිනන් කොමාන්ඩර් පතිරාගේ නිලධාරීනා තුමනි.

⁸ Page 6 of the proceedings of 27th October 2011 before the Court Martial – evidence of Abeyratne.

⁹ The entire proceedings before the Court Martial has been annexed to the petition, marked 'X'.

¹⁰ Page 6 of the proceedings of 27th October 2011 before the Court Martial.

¹¹ i.e. to carry out the *modus operandi* referred to earlier.

පු: කොහොදිද ඔය උපදෙස් ඔබට තබා දුන්නේ?

පි: සැපයුම් නිලධාරී කාර්යාලයේදී තුමනි.

පු: මම අභ්‍යන්තරේ සැපයුම්කරු එවන බඩු ප්‍රමාණය දැන් ඔබ කිවිවා එවන ප්‍රමාණයට වඩා සමඟර අවස්ථා වලදී වැඩිපූර එවිටා කියල පොත්පත් වල සඳහන් කරනවා කියලා?¹²

පි: එසේය තුමනි.

පු: එසේ කොපමණ ප්‍රමාණයක් සංඛ්‍යාත හෝ මාස්පත වැඩිපූර ප්‍රමාණයක් සඳහන් කෙරුවද කියන එක කොහොමද මතක තබා ගන්නේ හෝ සටහන් තබා ගන්නේ?

පි: ඒ සඳහා අපි වෙනම වාට එකක් හාටිනා කරනව තුමනි.

පු: එසේ සකසන වාට එක කාටහරි හාර දෙනවාද?

පි: සැපයුම් නිලධාරී තුමාට හාර දෙනවා.

පු: පුද්ගලිකව හාර දෙනවාද?

පි: එසේය තුමනි.

පු: කවුද ඔබ හාර දුන්න ඒ කාලයේ හිටපු සැපයුම් නිලධාරීතුමා?

පි: ලුතිනන් කොමාණ්ඩර් පතිරෙගේ සර්.

The fact that the Petitioner shared the money that he received from the supplier is borne out by the following evidence.

Evidence of Senadheera¹³

පු : තමා පතිරෙගේ සර්ගේ උපදෙස් ලබුණු ආකාරයට දිගටම තමන් එලෙක ක්‍රිය කළා?

රි: ඔව තුමනි.

පු : එසේ කිරීමේද තමන්ට මොකක් ඇ ලබුණු වාකිය?

¹² Page 30 of the proceedings of 27th October 2011 before the Court Martial.

¹³ Page 53 of the proceedings of 13th October 2011 before the Court Martial.

උ : ස්වාමිනි මට රු 35000/- ලබා දුන්නා මාසයකට.

පූ : තමා ඒ හිටපු කාලය තුළදීම තමාට ලබුනේ විපමනද?

උ: තහැර සර් මට කොහොමත් මාස 8 ක පමණ කාලයක් ලුදල් හමබ වුනා.

පූ : විසේ මාසයකට කොපමණ විතර හමබ වුනාද?

උ : රු 35000/- ගාන්.

පූ: කුවුරු සපයුම් තිළඳවා හැවයට හිට කාලයේද?

පී: පතිරගේ සර්.

පූ: කුවුද මුදල් ලබා දෙන්නේ?

පී: පතිරගේ සර්.

පූ: කොහොදිද ලබාදුන්නේ?

පී: සැපයුම් තිළඳවාගේ කාර්යාලයේදී.

පූ: මුදල් නොවු වලින්ද දුන්නේ?

පී: මුදල් නොවු වලින් කවරයක දාලා දුන්නේ.

පූ: ඒ මොකක් ගඳහා කියලාද ගඳහන් කළේ?

පී: එහෙම සඳහන් කළේ තහැර. මම අර ඇඩ්වෙන් ගත්ත ජ්වාට තමා විශ්වෙම දුන්නේ.

පූ: තමන් කුවුවා ලියුම් කවරයක බහා තමා ඒ මුදල් දුන්නේ කියලා ඒ දෙන හැම අවස්ථාවේ රු. 35000/- ගාන් තිබුනාද?

පී: ඔවා තිබුනා තුමන්.

පූ: තමන් කිවිවා වාර 08 ක් පමණ තමන්ට මුදල් හමබ වුනා කියලා?

පී: විසේය තුමන්.

පූ: ඒ කියුම් අවස්ථාවල තමන්ට කුවුද මුදල් ලබා දුන්නේ

පී: සැපයුම් තිළඳවා.

පූ: ඒ කියන්නේ කුවුද?

පී: පතිරගේ සර්.

Evidence of Abeyratne¹⁴

¹⁴ Supra. Page 11.

පු: දැන් ඔබට මාස්පතා කියක් වෙතර හමුබවුනාද?

පි: රු 70000 ක් වගේ ප්‍රමාණයක් මාස තුනක් ලබනා තුමනි.

පු: දැන් මෙලෙස ඔබ සැන්තැමෝබේ මාසේ තිපුණු ආයාතනයෙන් වෙන්ව යන කාලය තොක්ම මෙලෙස ඔබට මුදල් ලැබුණාද?

පි: ඔවා තුමනි.

පු: දැන් ඔබ ආහාර ගබඩාවට අනුයුත්තව සේවය කරපු මුළු කාලය තුළම ඔබ ඔය කියන ආහාර ගබඩාවේ ඔබ සඳහන් කරපු ඒ වංචාව සිදුවුනාද?

පි: ඔවා තුමනි.

පු: දැන් ඔබට රු 70000 ක් පමණ හමුබවුනා කියලා කිව්වා කුවුද ඔබට ඒ සල්ලි ලබා දුන්නේ?

පි: සැපයුම් නිළධාරී කාර්යාලයේදී ලබා දෙනවා තුමනා.

පු: පතිරෙගේ සර්ගේ කාලයේදී කුවුද ඔබට සල්ලි ලබාදුන්නේ?

පි: ලුතිනන් කොමාණ්ඩිර් පතිරෙගේ තමයි ලබාදෙන්නේ තුමනි.

Evidence of PO Chandrasiri¹⁵

පු: සාක්ෂිකරු ඔබ ගරු අධිකරණය වෛවේකයට හතර කිරීමට ප්‍රථම කියා කිවියා මෙම වංචාව සිදුකිරීම සම්බන්ධයෙන් ඔබට යම්කිසි මුදලක් ලැබුන බවට

පි: වියේය තුමනි.

පු: කොපමණ මුදලක් ඔබට ලැබුණාද?

පි: වික් වික් මාස වලට වෙනස් වෙනවා තුමනි. සමහර මාස වල රු. 30000 ක් පමණ සමහර මාස වල රු. 35000 ක් ඒ ආදි වගයෙන් තුමනි.

පු: දැන් ඔය මුදල් ඔබට ලැබුනේ කාගෙන්ද?

පි: සැපයුම් නිළධාරීතුමාගේ තුමනි.

පු: කොජේද ඔය මුදල් ලැබුනේ?

පු: සැපයුම් නිළධාරීතුමාගේ කාර්යාලයේදී.

පු: දැන් ඔය මුදල් ලබාදුන්නේ වෙක්පතකින්ද නොවූ වලින්ද?

පි: නොවූ වලින් තුමනි.

පු: වියේ ඔබට මුදල් ලබා දුන්න සැපයුම් නිළධාරීගේ නම මොකක්ද?

¹⁵ Page 31 of the proceedings of 27th October 2011 before the Court Martial.

ඩී: ලුතිනන් කොමාන්සර් පතිරගේ නිපුබැංතමා තුමනි.

The above evidence led before the Court Martial clearly sets out the involvement of the Petitioner with regard to the matters set out in the Charge Sheet 'P1'. It is clear to this Court that the decision of the Court Martial is based on the evidence led before it. The said decision is certainly not outrageous and is a decision that any sensible person who had applied his mind to the evidence led before the Court Martial would have arrived at.

In these circumstances, this Court cannot accept the submission of the Petitioner that the evidence led at the Court Martial did not implicate the Petitioner or that the conclusion reached by the Court Martial is unreasonable or *ultra vires* its powers. For the above reasons, this Court does not see any merit in the first complaint of the Petitioner.

The second complaint of the Petitioner is that the prosecution relied on the evidence of three Store Keepers who had also been charged for the same offences and that it is unsafe to act on their evidence, as the said Store Keepers were accomplices. The Respondents have in fact conceded that the prosecution relied mainly on accomplices to prove the charges against the Petitioner, as the acts referred to in the charge sheet have been carried out by the Petitioner by using his subordinates.

At the outset, this Court observes that the matters set out in the charges were discovered during an investigation that was carried out by Lieutenant Commander Dassanayake of the Provost Division of the Sri Lanka Navy. In order to prove the charges against the Petitioner, it was open to the

prosecution to lead the evidence of the Naval officers who assisted the Petitioner in carrying out the said activities. The only other party who could have been summoned to give evidence was the supplier, who too was involved with the Petitioner. Thus, the prosecution was left with no option but to lead the evidence of the three store keepers who had assisted the Petitioner and allow the members of the Court Martial to take a decision, after having considered the truthfulness and reliability of the said witnesses.

The question that arises from the second argument of the learned Counsel for the Petitioner is whether an accomplice is a competent witness. In terms of Section 133 of the Evidence Ordinance, 'an accomplice shall be a competent witness against an accused person, and the conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.' Section 133 should be considered with Section 114 illustration (b) of the Evidence Ordinance, which reads as follows: "The Court may presume an accomplice is unworthy of credit, unless he is corroborated in material particulars."

If Section 114 illustration (b) presupposes the unreliability of the accomplice's evidence, why does the prosecution depend on the evidence of an accomplice? One explanation is that there may be instances where it is difficult and sometimes impossible to detect offences which have been secretly planned and executed without obtaining the evidence of a partner in crime. Unless their evidence is led, those responsible cannot be held accountable for the crimes that they have committed, thereby making the evidence of accomplices essential for the prosecution.

This Court observes that the Petitioner, as a senior Commissioned Officer of the Sri Lanka Navy was required to act with utmost honesty and adhere to high standards of discipline required of a Commissioned Officer. Any breach thereof has to be taken serious note of. Thus, in order to establish its case and ensure that any breach of discipline is dealt with, this Court is of the view that the prosecution was entitled to lead the evidence of the three store keepers, and leave the decision as to whether their evidence is truthful and reliable to the members of the Court Martial.

The combined effect of sections 133 and 114 illustration (b) is that it is not illegal to convict on uncorroborated evidence of an accomplice, even though it may be dangerous and unsafe to do so. What then are the safeguards that can be adopted?

The Respondents have cited the judgment in P. Sivasambu, Inspector of Police vs Nugawela¹⁶ where it was held that, while it is not illegal to proceed on the uncorroborated testimony of an accomplice, "it is necessary that the Magistrate should have clearly before his mind the fact that he is dealing with the evidence of an accomplice and he must give clear and satisfactory reasons for convicting in the absence of corroboration."

In Fernando vs The Republic of Sri Lanka¹⁷ the appellant was indicted on a charge of voluntarily causing a woman to miscarry, an offence punishable under Section 303 of the Penal Code. The woman had been a voluntary participant in the commissioning of the offence and came within the definition

¹⁶ 41 NLR 363 at 368.

¹⁷ 1980 (2) Sri LR 79

of an accomplice. In considering whether the jury had been adequately warned of acting on the evidence of an accomplice, this Court stated as follows:¹⁸

"The learned trial Judge no doubt has cautioned the jury several times in his summing-up against accepting Janet's evidence without careful scrutiny for the reason that the whole prosecution case more or less rested on her evidence. But he has failed to direct them that her evidence must be treated as that of an accomplice and that it is tainted evidence... As a matter of fact he was about to conclude his summing-up without any direction on this aspect of Janet's evidence when prosecuting state counsel drew his attention to sections 114 illustration (b) and 133. But even then his emphasis was more on section 133 and section 114 was left to be dealt with only in the last paragraph of his summing-up. That was just a bare recital of the section..."

The cumulative effect of the above judgments is that it is not illegal for the prosecution to rely on the evidence of the three Store Keepers who confirmed the involvement of the Petitioner and disclosed the *modus operandi* adopted by the Petitioner to prove the charges made against the Petitioner, as long as the members of the Court Martial, who are the judges of fact and law, are warned of the perils of acting on the evidence of accomplices and advised that they must be satisfied of the truthfulness and reliability of the said witnesses, prior to acting upon such testimony.

As the learned Counsel for the Petitioner has strenuously argued that it is unsafe to act on the evidence of the three store keepers, this Court has

¹⁸ Ibid; at page 81.

examined carefully the direction of the Judge Advocate to the members of the Court Martial, in order to see if the members of the Court Martial had in fact been apprised of the correct legal position.¹⁹ The Judge Advocate has explained in detail to the Court Martial, the presumption of innocence, the fact that there must be proof beyond reasonable doubt, that any benefit of the doubt must be given to the Petitioner, that they must assess the credibility of the witnesses, and arrive at a decision of guilt on the part of the Petitioner only if they are satisfied that their evidence is credible.²⁰

Having done so, the Judge Advocate has explained the provisions of Section 114 illustration (b) and 133 of the Evidence Ordinance and had stated as follows:

“වබැවින් අපරාධ සහායකගේ කාඩමිය අනෙක් කාඩමි මගින් තහවුරු වන්නේ නම් මස පිළිගත නොහැකි යයි ඔබට තිරණය කළ හැක. නමුත් ඔබ විත් තිරණය කළයුතුයයි නිගමනයක් නැත. වෙෙන්ම අප සහායකයෙකුගේ කාඩමිය මත පමණක් පදනම් වූ පමණින් වරදකරු කිරීමත් නිතිවිරෝධ වන්නේද නැත. නමුත් අප සහායකයෙකුගේ කාඩමිය ඔබ ප්‍රවේකමෙන් වශ්‍යලේඛනය කළ යුතු ය. වියට හේතුව වන්නේ අපසහායකයෙකු යනු වරදව සම්බන්ධ ව ඇති තැහැන්තේක් වම තැහැන්තා තමාගේ බේරීමට වෙනත් කෙනෙකු අසුකර ගැනීමට කාඩමි දෙනවාද යන්න ඔබ ඉතාමත් සැලකිල්ලෙන් සැලකිල්ලට ගත යුතුයි. වෙත් තමාගේ බේරීම සඳහා ඔහු අසත්‍ය කාඩමියක් කියන්නේද යන්න සැලකිල්ලට ගැනීම ඔබ විසින් ඉතාමත්ම පරිසිස්මින් කළයුතු බව මා ඔබ වෙත උපදෙස් දීමට අදහස් කරනවා.

එහුගේ²¹ කාඩමියද අපරාධ සහයකයෙකුගේ කාඩමිය දෙක බලන දුෂ්ධිකෝණයයෙන්ම ඔබ බැලිය යුතුය. කාමානස අපරාධ සහයකයෙකු නමන් බේරී වෙන අයකු අල්ල ගැනීමට කටයුතු කරන අවස්ථා තියෙනවා එය කාමානස මත්‍යාජා ගතියක් වබැවින් මේ

¹⁹ Page 185 of the proceedings of the Court Martial, annexed to the petition marked 'X1'. In terms of Section 39(d) of the Navy Act, it shall be the duty of the Judge Advocate at the conclusion of the case to 'advise the court martial upon the law relating to the case before the court martial proceeds to deliberate upon its finding.'

²⁰ Pages 171 and 198 of the proceedings of the Court Martial, annexed to the petition marked 'X1'.

²¹ Evidence of Abeyratne.

සාක්ෂි කරු එමෙන් සාක්ෂි දෙන්නේද යන්න ඔබ සැලකිල්ලට ගෙ දූතුව නිබෙනවා එයේ සැලකිල්ලට ගෙන ඒ සාක්ෂිකරුගේ සාක්ෂිය වෙනත් සාක්ෂිකරුවකුගේ සාක්ෂිය තක්සේරු කරන ආකාරයටම මා දුන් උපදෙස් අනුව තක්සේරු කර ඔබට වම සාක්ෂිකරුගේ සාක්ෂිය පිළිබඳවද නිගමනයකට පැමිණීමේ හැකියාව හියෙනවා.

එබැවින් අප සහයකයෙකුගේ සාක්ෂිය එළඹද ඔබ ප්‍රවේශමෙන් සලකා බැලිය දූතුයි. අපසහයකයෙකු වූ පමණින්ම ඔහුගේ සාක්ෂිය ප්‍රතික්ෂේප කිරීමේ අවශ්‍යතාවයක් නැහැ. සැලකිල්ලෙන් සහ ඉතාමත්ම ප්‍රවේශමෙන් ඔහුගේ සාක්ෂිය සලකා බැලීමට ඔහුගේ අවධානය ගොමුකළ දූතුයි.”

This Court is of the view that the above direction of the Judge Advocate was sufficient guidance to the members of the Court Martial of the manner in which the evidence of the three store keepers should be considered. The decision of the Court Martial has been arrived at only after having the benefit of the said direction. This Court is therefore of the view that the members of the Court Martial have arrived at their decision, after having been correctly apprised of the law and after having been satisfied of the truthfulness and reliability of the evidence of the three store keepers. This Court, in the exercise of its Writ jurisdiction, will not interfere with the said decision, in the absence of any illegality, irrationality or procedural impropriety. In these circumstances, this Court is not in agreement with the second submission of the Petitioner.

The final complaint of the Petitioner was that the three witnesses were produced at the Court Martial from Naval custody and hence, it is unsafe to act on their testimony. The argument of the Petitioner was that the three witnesses may have been provided with an assurance of leniency in return for implicating the Petitioner.

This Court must observe that in terms of Section 256(1) of the Code of Criminal Procedure Act No. 15 of 1979, as amended, "the Attorney-General himself may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission thereof." Thus, the course of action followed by the prosecution is part of the criminal justice system of this country and hence, this Court does not see any illegality in the prosecution leading the evidence of the three store keepers.

While the Respondents as well as the witnesses have denied the allegation of the Petitioner, the Judge Advocate, having addressed the members of the Court Martial on how to assess the credibility of a witness and having addressed them that the Petitioner must be acquitted if the members of the Court Martial are not satisfied about the credibility of the witnesses, has stated as follows:²²

"මෙම සාක්ෂියා අප සහයකයෙක් වනවා පමණක් නොව බලපෑම මත යම් යම් ඇයගේ ඉගැන්වම මත සාක්ෂි දෙන සාක්ෂියාවෙක් වගයෙන් වහ්තිය පෙන්වුම කළ. වහ්තිය කළීන සාක්ෂියා වන දේනාධර්ගේ සාක්ෂිය සමඟන්ධයෙනුත් මෙම සාක්ෂියාගේ සාක්ෂියෙනුත් පෙන්වා දීමට උත්සහ කළේ වරිතයෝධනාගාරයේ අඩිස්කියේ කිව සාක්ෂිදීමට පැමිණී මොවුන් තැවතත් වරිතයෝධනාගාරය වෙතම යනවා ඔවුන් විනි පදුච්චන්නේ නාවික හමුදාව හාරයේ. එබැවින් ඔවුන්ගේ ගැලවීමක් සඳහා යම් කිසි සහනයක් බලාපොරොත්තුවෙන් මෙම වහ්තියාට එරෙහිව ඔවුන් සාක්ෂි දෙන බව වහ්තිය පෙන්වීමට උත්සහ කළ.²³

²² Ibid; Pages 189, 190 and 195 of the proceedings before the Court Martial.

²³ Page 190 of the proceedings before the Court Martial.

එබැවින් 1 වන ටෝරුව සමඟත්තයෙන් තබ සලකාබැවූ යුත්තේ අදාළ කාලය තුළදී නිපුහ ආයතනයේ සැපයුම නිලධාරීව සිට නාවික නිතියට යටත් පුද්ගලයකු වගයෙන් පිළිගෙන ඇති මේ වත්තිකරු ආහාර ගබඩාව වෙතින් මුළුතැන්ගෙය වෙත සැපයීමට කිදුකරන ආහාර අඩුවෙන් සඳහන් කිරීමට උපදෙස් දුන්නාද ව්‍යෙක වත්තිකරු එවති උපදෙස් දීමක් කිසිදු ආකාරයෙන් තොකළ අතර කාක්ෂිකරුවන් ඔවුන් ව්‍යෙක උපදෙස් දුන් බව කියත්තේ කාගේවත් බලකිරීමකට තම කාක්ෂිකරුවන් ව්‍යෙක කියත්තේ ඔවුන්ගේ බෙරිමටතම වයෝග් තැන්තම කාක්ෂිදෙන ව්‍යෙක සැලකිල්ලට ගැනීමෙන් වම කාක්ෂිකරුවන්ගේ කාක්ෂි පිළිගැනීමට ඔබට යම් අපහසුතාවයක් ඇත්තම ව්‍යෙක අවස්ථාවක තබ අනිවාර්යයෙන්ම වත්තිකරු තිදුහස් කිරීමක් කළ යුතුය.”²⁴

Thus, while it is not illegal to act on the evidence of the said witnesses merely because they were produced from Naval custody, the members of the Court Martial who are the sole arbiters of the facts and the law, were fully apprised of the objection taken by the Petitioner. The Judge Advocate had directed that the Petitioner be acquitted of the charges, in the event the Court Martial was of the view that the evidence of the three store keepers may have been compromised. As held earlier in this judgment, this Court is exercising its writ jurisdiction and therefore, will not go into the question of whether the decision of the Court Martial is right or wrong. That of course does not mean that this Court has any doubt with regard to the findings of the Court Martial. For these reasons, this Court does not agree with the final complaint of the Petitioner.

In the above circumstances, this Court does not see any legal basis to issue the Writs of Certiorari sought by the Petitioner. The necessity for this Court to consider the Writ of Mandamus to release the Petitioner from the custody of the Sri Lanka Navy does not therefore arise.

²⁴ Page 195 of the proceedings before the Court Martial.

There is one other matter that this Court would like to advert to, that is the submission of the learned Deputy Solicitor General that the application of the Petitioner is futile as HE the President has confirmed the findings of the Court Martial. It has been consistently held by our Courts that the Writ of Certiorari, being a discretionary remedy will not issue where it is futile to do so and that the Court will not engage in an exercise in vain.²⁵ This Court, while being reluctant to exercise its discretion where it would be futile to do so, takes the view that it would be open to this Court to issue the Writ in any case in which the facts and circumstances warrant such a course of action. In this application, as the Court Martial findings have been confirmed by HE the President, this Court takes the view that even if the Petitioner was to succeed on the above grounds urged on his behalf, issuing the Writs prayed for would be futile as the confirmation of the decision of the Court Martial would remain intact.

The application of the Petitioner is accordingly dismissed, without costs.

Judge of the Court of Appeal

²⁵ See P.S.Bus Company vs Ceylon Transport Board 61 NLR 491 at 495; Ratnasiri vs Ellawala 2004 (2) Sri LR 180 at 208. See also Kavikeshawa vs Lt.-Gen. Jagath Jayasuriya [CA (Writ) 260/2011; CA Minutes of 3rd September 2012] where it was held that, "issuing orders quashing decisions that had been superseded by subsequent orders or decisions which are not challenged, is futile."