

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an appeal to the
Supreme Court of the Democratic
Socialist Republic of Sri Lanka.

SC. Appeal 104/2008

C.A. (Writ) Application No.414/2005

K.H.M.S. Bandara
No. 46, Circular Road,
Malkaduwawa,
Kurunegala.

Petitioner

Vs.

1. Air Marshal G.D. Perera,
Commander of the Sri Lanka
Air Force,
Air Force Headquarters,
Katunayake.
2. Group Captain K.A. Gunatilleke,
Base Commander,
Sri Lanka Air Force Base,
Katunayake.
3. Wing Commander Prakash
Gunasekera,
Commanding Officer-
14th Battalion,
Sri Lanka Air Force Base,
Katunayake.
4. Wing Commander P.R. Perera
Sri Lanka Air Force Base,
Katunayake.
5. Mr. Ashoka Jayawardane,
Secretary,
Ministry of Defence,
Colombo.

SC. Appeal 104/2008

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

Respondents.

And Now Between

1. Air Marshal G.D. Perera,
Commander of the Sri Lanka
Air Force,
Air Force Headquarters,
Katunayake.
2. Group Captain K.A. Gunatilleke,
Base Commander,
Sri Lanka Air Force Base,
Katunayake.
3. Wing Commander Prakash
Gunasekera,
Commanding Officer-
14th Battalion,
Sri Lanka Air Force Base,
Katunayake.
4. Wing Commander P.R. Perera
Sri Lanka Air Force Base,
Katunayake.
5. Mr. Ashoka Jayawardane,
Secretary,
Ministry of Defence,
Colombo.
6. Hon. The Attorney General
Attorney General's Department,
Colombo 12.

Respondents-Appellants

SC. Appeal 104/2008

Vs.

K.H.M.S. Bandara
No. 46, Circular Road,
Malkaduwawa,
Kurunegala.

Petitioner-Respondent

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BEFORE : Chandra Ekanayake, J.
Priyasath Dep, PC. J. &
Eva Wanasundera, PC.J.

COUNSEL : Rajitha Perera, SC. for the -Respondent-Appellants.
Rohan Sahabandu, PC for the Petitioner-Respondent.

ARGUED ON : **08.05.2014**

Written
Submissions filed : By the Respondents-Appellants on 22-05-2014
By the Petitioner- Respondent on 30-05-2014

DECIDED ON : **29.09.2014**

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Eva Wanasundera, PC.J.

Leave was granted in this matter on 23.07.2008 on the grounds pleaded in paragraph 6 of the petition dated 05.05.2008. At the commencement of the hearing on 08.05.2014 the questions of law was confined to only paragraph 6(c), (d), (e) and (f) of the Petition. They are as follows:-

- 6(c) Did the Court of Appeal err in not considering the violation of the base standing orders by the Respondent?
- (d) Did the Court of Appeal misconstrue the facts in this case by holding that upto date no formal discharge of the Respondent from the Air Force has been made?
- (e) Did the Court of Appeal err in holding that the inquiry and the discharge appear to be arbitrary and outside the provisions of the law when a disciplinary inquiry following principals of natural justice was held against the Respondent?
- (d) Did the Court of Appeal err in applying the concept of proportionality to this case when the Respondent was not covered by any statutory provisions?

The Court of Appeal judgment from which the Respondent-Appellants (hereinafter referred to as the "Appellants") have appealed to this Court is marked X1 dated 26.03.2008. The said decision of the Court of Appeal granted a Writ of Certiorari quashing the decision of the 1st Respondent-Appellant contained in the document marked 1R7 in the pleadings of the Court of Appeal, in so far as it affects the Petitioner-Respondent in this case. The decision of the Court of Appeal awarded costs in a sum of Rs.25000/- payable by the 1st Respondent-Appellant to the Petitioner-Respondent (hereinafter referred to as the "Respondent").

I observe that 1R7 is an internal document of the Air Force issued by the Department of Administration of the Air Force Head Quarters, Colombo under Ref. SLAF/C. 11224/P2 under the heading Discharge Officer Cadets-Officer Cadet Bandara KHMS(11224)-GD/P, addressed to 'List A-Z' mentioning that the Commander, who is the 1st Respondent-Appellant in the present Supreme Court case, has approved the discharge 'on SNLR' (meaning services no longer required) of Officer Cadet Bandara KHMS (11224)-GD/P with effect from 22.12.2004. I find that this is the only document available in the brief amongst all

the documents pleaded and filed by both parties to indicate that the Respondent was discharged from the service of the Air Force. If any other document informing the same to the Respondent was available in the files of the Army, the Appellants would have brought the same before the Court of Appeal or this Court and they have not done so, I believe, because there is no such document.

The arguments of the Appellants were that (a) the Respondent is an Officer-Cadet (b) he is a probationer and holds a provisional enlistment. (c) Sri Lanka Air Force Act Sections 40.1, 40.3, 42 and 43(a) have no application in this matter. (d) the Respondent was informed of the discharge on 21.12.2004 and to clear immediately (e) the Appellants had authority to hold an inquiry and discharge the Respondent and (f) the inquiry was according to the rules of natural justice.

The arguments of the Respondent were that (a) the Respondent even though an Officer-Cadet comes under the Provisions of the Air Force Act (b) Sections 42 and 43 lay down the punishments for Officers after a summary trial (c) in terms of Section 43 the 1st Appellant has no authority to discharge the Respondent from the Air Force and (d) the discharge is ultra vires.

It is clear to me, that the Cadet Officer, Respondent was tried summarily under Regulation 126 of the Air Force Regulations which are referred to normally as the base standing orders, and discharged. The discharge only was the subject matter in the Court of Appeal. The Court of Appeal quashed the decision of the 1st Appellant by a Writ of Certiorari and ordered costs of Rs.25000/- to be paid by the 1st Appellant to the Respondent. The Appellants have appealed to the Supreme Court against that order of the Court of Appeal dated 26.03.2008.

The facts of this case are as follows:- One Plt. Officer named Sanjeewa was looking for a serviceable fan as the fan fitted to his room was out of order and beyond repair. The Respondent helped Sanjeewa being a batch-mate, to find an electric fan in working order in a residential quarter appearing to be abandoned, which was one of the 'Officers married Quarters' and recognised as 'OMQ 28'. Flt. Lt. C.J.C. de Silva made a complaint that the Respondent and Sanjeewa

entered into his residential OMQ No. 28 on 11.10.2004. A Board consisting of Wing Commander Nissanka and Sgt. Lt. Hemasinghe held an investigation on 13.11.2004. It was revealed that the Respondent with Sanjeewa seemed to have violated base Standing Orders Chapter 2, namely entering premises of OMQ 28 without due authority and committing criminal trespass. An inquiry was held on 29.11.2004 and the Respondent was found guilty of both charges. He was imposed 30 days detention on charge 1 of criminal trespass and 14 days detention on entering premises OMQ 28 without authority. Later the Respondent was exonerated on the 1st charge and only the sentence of the second charge was carried out.

The Petitioner reported for work on 19.12.2004. On 21.12.2004 he was informed orally that he was discharged from Sri Lanka Air Force and to clear immediately. 1R7 filed in the Court of Appeal by the Appellants show that the Respondent was discharged from service with effect from 22.12.2004 as that fact was informed to other departments by 1R7. He had been listed as a Cadet Officer with effect from 09.01.2002 on the "Sri Lanka Air Force from 75c(A) under the heading 'Entry as an Aircraft Apprentice or Airman' with service No. 11224 and name Bandara K.H.M.S." These details are contained in the document of 8 sheets of paper marked B filed by the Appellants in the Court of Appeal by way of a motion dated 05.02.2007. The very 1st paragraph in Part 1 of the document B specifically states that "you are hereby warned, that if after enlistment,, it is found that you have willfully or knowingly made a false answer to any of the following questions, you will be liable under the Air Force Act to a maximum punishment of three months imprisonment with hard labour". So, it is amply evident that the Respondent was taken subject to the Air Force Act. It cannot be heard as correct when the State submits that the Respondent is not subject to the Provisions of the Air Force Act as he was only a trainee. He had worked in the said capacity for almost 3 years when he was subjected to the punishment of only 14 days detention. Thereafter he was discharged meaning that he was dismissed from service and he lost his occupation in which he had performed well as a clever officer as evident from the documents filed by him in the Court of Appeal.

It is blatantly clear that the discharge from service which means losing his occupation was totally disproportionate to the punishment of 14 days which he was subjected to, which is unreasonable and cannot be justified and as such arbitrary.

It is obvious that the Officer Cadet even though a trainee was recruited under the Air Force Act and the oath and attestation was done under the provisions of the Air Force Act. The Respondent was an Officer enlisted in the Regular Force of Sri Lanka Air Force. The documents on which the Respondent was enlisted bears ample evidence to show that the Respondent was subjected to the provisions of the Air Force Act. Regulation 126 of the base regulations have come into place according to the provisions of the Air Force Act. The 1st Respondent cannot be heard to say that the Respondent was tried summarily as provided by the Regulations and that the provisions of the Air Force Act do not apply. The Regulations are made under the Air Force Act and under no other Act of Parliament. Anyway Regulation 126 does not confer an unfettered discretion on the 1st Appellant to discharge the Respondent from service.

Having read Sections 40,42 and 43, I have observed that a “discharge from service” cannot be granted as a punishment for any person who has been tried under a summary trial.

The Respondent was charged under Section 102(1) and Section 129 of the Air Force Act. Under these two Sections, the person who is the suspect has to be tried by a Court Martial. The Respondent was not tried by a Court Martial. The Appellants have acted wrongfully and against the provisions of law in the Air Force Act.

It is apparent that no person could be “discharged from service” consequent to a summary trial in terms of Sections 42 and 43 of the Air Force Act. It has to be after a conviction by a Court Martial. Under the Air Force Act, criminal trespass is an offence punishable under section 129 of the Air Force Act read with Section 427 of the Penal Code. Entering any premises without due

authority is an offence punishable under Section 102(1) of the Air Force Act. Charges under Section 129 and 102(1) of the Air Force Act should be tried by a Court Martial. The Respondent, even though charged under the aforementioned sections at the inquiry against him was not tried by a Court Martial. Ordering a discharge from service is one of the punishments that could be imposed under Section 133 of the Air Force Act, by a Court Martial.

I hold that the Respondent could not have been tried under summary trial and thereafter discharged. The discharge was bad in law. The 1st Appellant had acted contrary to the provisions of the Air Force Act in ordering the discharge after the summary trial.

Furthermore, the Appellants have not explained as to what caused the Respondent to be punished and discharged from service. He was punished at the end of the inquiry. After he completed the detention period, he was ordered to be discharged. This is equal to a second sentencing which is not allowed in law. No person can be punished twice over. I hold that the discharge of the 1st Respondent was ultra -vires.

I answer the questions of law in the negative and hold that the findings of the Court of Appeal should not be disturbed. The Court of Appeal has analysed the provisions of law quite well and quashed the decision of the 1st Appellant. However, I vary the judgment to the effect that no costs be granted to the Respondent payable by the 1st Appellant. The costs ordered in the Court of Appeal in a sum of Rs.25000/- payable by the 1st Appellant to the Respondent is set aside. The appeal is dismissed. I order no costs.

Judge of the Supreme Court

SC. Appeal 104/2008

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

Priyasath Dep, PC. J.

I agree.

Judge of the Supreme Court