

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

***In the matter of an application
under and in terms of Article 126 of
the Constitution of the Democratic
Socialist Republic of Sri Lanka***

SC/FR 546/ 2012

Captain Ambawalage Dammika
Senaratne De Silva,
No.74, Jayasumanarama Road,
Rathmalana.

PETITIONER

-Vs-

1. Lieutenant General Jagath Jayasuriya,
Commander of Sri Lanka Army,
Sri Lanka Army Headquarters,
Colombo 01

1A. A.W.J.C. De Silva (RWP.USP)
Commander of Sri Lanka Army,
Sri Lanka Army Headquarters,
Colombo 01.

1B. Lieutenant General
N.U.M.M.W. Senanayake
RWP. RSP.USP.PSC
Commander of Sri Lanka Army,
Sri Lanka Army Headquarters
Colombo.

1C. Lieutenant General

N.U.M.M.W. Senanayake

RWP. RSP.USP.PSC

Commander of Sri Lanka Army,

Sri Lanka Army Headquarters

Colombo 1.

1D. Lieutenant General Shavendra Silva

Commander of Sri Lanka Army,

Sri Lanka Army Headquarters,

Colombo 1.

1E. Lieutenant General H.L.V.M Liyanage

(RWP.RSP.ndu)

Commander of Sri Lanka Army,

Sri Lanka Army Headquarters,

Colombo 1.

2. Lieutenant Colonel Ediriweera,

Regimental Headquarters,

20th Sri Lanka Infantry,

Panagoda.

3. Regimental Centre Commandant,

20th Sri Lanka Light Infantry,

Regimental Headquarters,

Panagoda.

4. Major G.S.M. Perera,
Chairman of the Court of Inquiry
held against the Petitioner,
20th Sri Lanka Light Infantry,
Akkarayakulam Army Camp,
Pooneryn.

5. 2nd Lieutenant K.A. Roshan,
Member of the Court of Inquiry held
against the Petitioner,
20th Sri Lanka Light Infantry,
Akkarayakulam Army Camp,
Pooneryn.

6. Sergeant J.M.T.H. Perera
Member of the Court of Inquiry held
against the Petitioner,
20th Sri Lanka Light Infantry,
Akkarayakulam Army Camp,
Pooneryn.

7. Major Mahesh Kumara,
Sri Lanka Military Police
Headquarters,
Polihengoda, Colombo 5.

8. Secretary
Ministry of Defence and Urban
Development

Ministry of Defence, Colombo 02.

9. Mr. Lalith Weeratunge

Secretary to His Excellency the
President
Presidential Secretariat,
Colombo 1.

9A. Mr. P.B. Abeykoon,

Secretary to His Excellency the
President
President Secretariat, Colombo 01.

9B. Mr. Austin Fernando,

Secretary to His Excellency the
President,
President Secretariat, Colombo 01.

9C. Mr. Udaya Ranjith Seneviratne,

Secretary to His Excellency the
President,
Presidential Secretariat, Colombo
1.

9D. Mr. P.B. Jayasundara,

Secretary to His Excellency the
President
Presidential Secretariat,
Colombo.

9E. Mr. Gamini Sedara Senarath
Secretary to His Excellency the
President,
Presidential Secretariat,
Galle Face Centre Road,
Colombo 01.

10. Honourable Attorney General,
Department of the Attorney
General,
Colombo 12.

RESPONDENTS

BEFORE : **B. P. ALUWIHARE, PC, J**
S. THURAIRAJA, PC, J AND
JANAK DE SILVA, J

COUNSEL : Saliya Peris PC with Thanuka Nandasiri for the Petitioner
M. Gopallewa SDSG for 1st-10th Respondents

WRITTEN Petitioner on 1st April 2021

SUBMISSIONS : Respondent on 27th April 2021

ARGUED ON : 18th November 2022

DECIDED ON : 31st October 2023

S. THURAIRAJA, PC, J.

The Petitioner namely, Captain Ambawalage Dammika Senaratne De Silva (hereinafter referred to as "the Petitioner") served in the rank of Captain in the Sri Lanka Army attached to the 20th Sri Lanka Light Infantry. The Petitioner has made the instant application seeking relief in respect of the infringement of his Fundamental Rights guaranteed under and in terms of the Constitution, in the manner hereinafter more fully set out, against the Respondents.

The 1st Respondent is the Commander of the Sri Lanka Army. The 2nd Respondent was the Commanding Officer of the Alampil Army Camp (Nandikadal) where the Petitioner served at the time the alleged incident took place. The 3rd Respondent is the Centre Commandant of the Regimental Headquarters of the 20th Sri Lanka Light Infantry. The 4th Respondent is the Chairman of the Court of Inquiry held against the Petitioner as described below, while the 5th and 6th Respondents are members of the said Court of Inquiry. The 7th Respondent is the officer who conducted the investigation against the Petitioner at the Sri Lanka Military Police Headquarters. The 8th Respondent is the Secretary to the Ministry of Defence and the 9th Respondent is the Secretary to His Excellency the President. The 10th Respondent is the Hon. Attorney General who has been made a party to this application in compliance with the law.

The Petitioners instituted this action under Article 126 of the Constitution, through Petition dated 14th September 2012 against the 1st-10th Respondents claiming that the Fundamental Rights of the Petitioner as guaranteed by Articles 12(1), 13(3), 13(5) and 14(1)(g) of the Constitution have been infringed by the Respondents and further requesting to quash the recommendation of the 1st Respondent to withdraw the commission of the Petitioner from the rank of Captain of the Sri Lanka Army.

This matter was supported before this court on 24th October 2012 and the Court was inclined to grant Leave to Proceed for the alleged violations of Article 12(1) and Article 14(1)(g) of the Constitution.

I find it pertinent to refer to the factual matrix of this application as enumerated by the parties in order to ascertain whether the Petitioner's Fundamental Rights guaranteed under Article 12(1) and 14(1)(g) of the Constitution have been violated by the 1st-10th Respondents. However, as there are substantial disparities between the narration of facts provided by the parties, I find it necessary to narrate both positions.

The Facts as recounted by the Petitioner

The Petitioner asserts that on 5th December 1990, he joined the Sri Lanka Army as a soldier. As claimed by the Petitioner, due to his exemplary performance in the said operations he was enlisted as a Cadet Officer and upon completion of a training course at the Diyathalawa Army Camp he was commissioned in the rank of 2nd Lieutenant on 13th October 1997 and was attached to the 20th Sri Lanka Infantry of the Sri Lanka Army. Following this, the Petitioner was promoted as a Lieutenant on 13th April 2001 and as a Captain on 2nd August 2004 and has served in several operational areas of the country continuously for a period of 19 years, participating in various operations.

As per the Petitioner, in January 2009 he was appointed as the Officer Commanding of one of the companies of the 20th Light Infantry, namely Alfa Company, while the 2nd Respondent was the Commanding Officer. It was the position of the Petitioner that during his period of service in the said Company, differences of opinion arose between the Petitioner and the 2nd Respondent with regard to military strategies adopted by the 2nd Respondent. This had resulted in heavy losses both to soldiers and material and as a result the 2nd Respondent had harboured an animosity towards the Petitioner.

The Petitioner states that while the Petitioner was serving as the Officer Commanding of the aforesaid Company of the 20th Light Infantry, on 22nd April 2009, a soldier named Saman Kumara died from gunshot injuries at the Nandikadal Army Camp area which gunshots were fired from the said Saman Kumara's own weapon. Further the Petitioner states that at the time of his death, said Saman Kumara was

-serving in a different company to that of the company where the Petitioner was the Officer Commanding.

As claimed by the Petitioner, with the report of the said gunshots, on the directions of the 2nd Respondent and one Major Weerakoon, the Petitioner searched the area and discovered Saman Kumara (hereinafter sometimes referred to as "the deceased") fallen in the jungle with gunshot injuries 300 meters away from where the Petitioner stood. Following which, the Petitioner had dispatched Saman Kumara to the Camp upon instructions, and after informing, the 2nd Respondent. Thereafter, the Petitioner came to know that Saman Kumara had succumbed to his injuries.

It is the position of the Petitioner that on or about 31st May 2009, while he was serving in the aforementioned Company, the Petitioner was directed by the 2nd Respondent to take the body of a deceased soldier named Silva to the Vavuniya Army Camp. As soon as the Petitioner had left the Army Camp the 2nd Respondent had relieved him of his duties as the Commanding Officer of the Alfa Company and replaced him with a much junior officer without a valid reason.

According to the Petitioner, his belongings had been removed and kept under the custody of the 2nd Respondent. Upon the request of the Petitioner, due to the adverse environment created at the army camp, he was permitted to report back to the Regimental Headquarters, Panagoda.

According to the Petitioner, on 9th June 2009 he had come home and had reported back to the Regimental Headquarters on 10th June 2009. However, on or about 12th June 2009, the Petitioner returned home on medical advice to rest, as he was suffering from an eye infection and soon after reported back to Headquarters on the 14th June 2009. Subsequently, the Petitioner was informed by the then Regimental Centre Commandant that there was an anonymous petition made against him and he was detained in a cell in the said Camp.

As asserted by the Petitioner, on 16th June 2009, the Petitioner was brought to the Sri Lanka Military Police Headquarters on the allegation that he had committed the murder of aforementioned Soldier Saman Kumara. Moreover, on 17th June 2009 around 9.45 am, the Petitioner was handed over to the 7th Respondent who carried out the investigation against the Petitioner. The Petitioner further contends that, the officers attached to the Sri Lanka Military Police, including the 7th Respondent threatened to shoot the Petitioner if he fails to tell the truth. Additionally, the Petitioner alleges that the 7th Respondent had brutally assaulted and threatened to kill him in an attempt to obtain a forcible confession to the effect that the Petitioner had shot the said Saman Kumara.

Consequent to the above, the Petitioner was kept under the custody of the 7th Respondent and was denied any visits by his family members despite their continuous requests. As a result, the Petitioner's mother wrote a complaint (marked P1) to His Excellency the President regarding the manner in which the purported investigation was being conducted against the Petitioner. Additionally, she lodged a complaint to the Human Rights Commission of Sri Lanka bearing no. HRC 2855/09 dated 3rd July 2009 (marked P2a) regarding the same. Subsequently, on 7th July 2009, the officers attached to the Human Rights Commission telephoned the 7th Respondent and requested him to allow the family members of the Petitioner to visit him, to which the 7th Respondent agreed to comply with. Accordingly, the Petitioner was allowed to meet his family for the first time on 7th July 2009 after 23 days of arrest.

The Petitioner states that, his aide Dilum Sanjeewa, had also been detained by the Military Police and had been forced to give a statement to the effect that he had shot the deceased on the direction of the Petitioner. Petitioner contends that this statement was given by the said Dilum Sanjeewa under the influence of the officers attached to the Military Police, the 2nd Respondent and the 7th Respondent.

The Petitioner states that the investigation conducted against him was illegal as he was subjected to torture, cruel, inhuman and degrading treatment by the Military

Police. Therefore, the Petitioner's Attorney at Law Ms. Niluka Dissanayake had filed a Fundamental Rights Application bearing No. SC/FR/556/2009 on behalf of the Petitioner, against the 7th Respondent, 2nd Respondent, Commanding Officer of the Sri Lanka Military Police and several other responsible officers on the alleged infringement of the violation of the Fundamental Rights of the Petitioner as guaranteed by Articles 11, 12(1), 13(1), 13(2), and 13(3) of the Constitution.

As enumerated by the Petitioner, on 6th August 2009 around 10.30 am, he was handed over to the Criminal Investigation Department with the aforesaid Dilum Sanjeewa. Following which, on 7th August 2009, the Petitioner was produced before the learned Magistrate of Anuradhapura under B report bearing No. B/1228/09 on the allegation that, the Petitioner and the said Dilum Sanjeewa committed the murder of the deceased, an offence punishable under Section 296 of the Penal Code. Eventually, the Petitioner was remanded.

Consequently, on 18th January 2010, the Petitioner's mother filed a Bail Application bearing No. HCBA 125/2009 on behalf of the Petitioner in the Provincial High Court of Anuradhapura. On consideration of the said bail application, the learned High Court Judge had released the Petitioner on bail. Upon being enlarged on bail, the Petitioner had reported back to the Regimental Headquarters. Accordingly, on 18th March 2010, the Petitioner had received a message (marked P14) that he was interdicted with effect from 18th March 2010.

As per the Petitioner, while he was detained in the Sri Lanka Military Police Headquarters, he was questioned by the officers on allegations of sexual assault against the deceased in reference to a letter addressed to the 2nd Respondent by the deceased (marked P15), which alleged that the Petitioner had sexually abused the deceased on 15th April 2009. As revealed from investigations, the deceased had been subject to sexual harassment by the Petitioner on 14th April 2009. Accordingly, the said deceased had given a statement to the 2nd Respondent confirming the said sexual harassment, following which the 2nd Respondent had reprimanded the Petitioner on

18th April 2009. However, it is the position of the Petitioner that the said allegation was a fabrication of the 2nd Respondent or was obtained under duress.

Challenging the purported statement of the 2nd Respondent, the Petitioner asserts that he was in the Anuradhapura Military Hospital from 17th to 18th April 2009 in order to obtain his medical reports (marked P16) for his next promotion to the rank of Major. Therefore, he had reported back to the Camp only on the 19th April 2009. The Petitioner further states that if such a complaint had been made against him on an allegation of sexual harassment, the 2nd Respondent should have taken steps according to the Military Law rather than merely issuing a warning. As such the Petitioner questions the credibility of the 2nd Respondent's statement.

The Petitioner states that the non-summary inquiry in respect of the alleged murder of the said Saman Kumara commenced in the case bearing No. 29204. However, on 24th April 2012, the said Dilum Sanjeewa whom the prosecution claimed to be the assassin of the deceased, was discharged from the proceedings on the instructions of the Hon. Attorney General. While the Petitioner was held in custody of the Military Police, he became aware that there was a Court of Inquiry held against him and his aide Dilum Sanjeewa. Dilum Sanjeewa had informed the Petitioner that he gave a statement at the said inquiry, however, the Petitioner is of the position that no such statement was recorded nor was he summoned before a Court of Inquiry. Therefore, the Petitioner had no knowledge of the said Court of Inquiry held whilst they were in custody.

Subsequently, the Petitioner discovered that the 1st Respondent had convened a Court of Inquiry and the 4th Respondent was appointed the Chairman, whilst the 5th and 6th Respondents were appointed members to the said Court of Inquiry. Accordingly, by letter dated 18th August 2011 (marked P18), the Petitioner was informed by the Centre Commandant of the 20th Light Infantry, that the said Court of Inquiry was scheduled to be held on the 8th September 2011 and the Petitioner was instructed to be present.

At the said Court of Inquiry, the Petitioner had given a written statement (marked P-18a). Furthermore, as per the Petitioner, the statement given by his aide Dilum Sanjeewa (marked P-18b) was in total contradiction with his previous statements given to the Court of Inquiry and/or the Military Police and/or the Criminal Investigation Department.

Moreover, the Petitioner claims that he was not given an opportunity to cross examine any of the witnesses and his signature was never obtained to the proceedings of the Court of Inquiry except to the statement made by him. Additionally, the eye witnesses to the alleged incident categorically stated that the Petitioner had no involvement to the said incident. The Petitioner further states that the persons who have been named as witnesses had testified before the Court of Inquiry in his absence and therefore, the 4th, 5th and 6th Respondents have acted contrary to the army Regulations in relation to Court of Inquiry and claims that it is a violation of the principles of Natural Justice.

Upon the conclusion of the said Court of Inquiry, its members had submitted their findings to the 1st Respondent for his determination and recommendation. Despite the Petitioner's requests for a copy of the said findings and convening order of the 1st Respondent, he has not been furnished a copy up to date. Further, the Petitioner states that at the said Court of Inquiry, he was not questioned about the alleged sexual assault against the deceased.

The Petitioner states that on or about the 7th September he was informed by his Regimental Headquarters that, after submitting the findings of the Court of Inquiry, the 1st Respondent had decided to discharge him from his service in the Sri Lanka Army and to withdraw his rank of Captain. The said recommendation had been sent to His Excellency the President for the purpose of withdrawing the commission of the Petitioner.

It is the position of the Petitioner that, as per the Army Courts of Inquiry Regulations 1952, punishments cannot be imposed on a Respondent Officer upon

findings of a Court of Inquiry. In terms of Section 2 of the said Regulations, it is only convened to collect and record evidence, hence it cannot be equated to a trial. Therefore, the Petitioner states that the 1st Respondent has no authority to discharge the Petitioner by recommending a withdrawal of his commission, without having recourse to a Court Martial in terms of law. Accordingly, the Petitioner believes that the said decision of the 1st Respondent is arbitrary, capricious, ultra vires, unlawful, illegal and has no force in law, as the Court of Inquiry was held contrary to the procedure set out in the Army Court of Inquiry Regulations.

Based on the above submissions, the Petitioner claims that his Fundamental Rights guaranteed under Articles 12(1), 13(3), 13(5) and 14(1)(g) of the Constitution have been violated.

Variations in facts as per the Respondents

It is the position of the 1st and 2nd Respondents that, on 22nd April 2009 around 6.45 pm, a soldier named Lance Corporal Saman Kumara was found dead with gunshot injuries, which was initially treated as an accidental discharge of his own weapon. However, prior to his death, the deceased had complained to his superior officers that the Petitioner had sexually assaulted him, and upon the request of the 2nd Respondent, the deceased made a complaint in writing. Following which, his Commanding Officer had taken steps to remove him from the Petitioner's command and assign him to the Headquarters Camp.

Therefore, suspicion had arisen as to whether the Petitioner was involved in the shooting of the deceased and by June 2009, sufficient evidence had surfaced with regard to his involvement, as a result of which, the Petitioner was arrested.

Furthermore, the 1st Respondent states that, in terms of Regulation 3(7)(a) of the Army Court of Inquiry Regulation 1952, in an event where a member of the Army dies, it is mandatory to appoint a Court of Inquiry to determine the cause of death. Accordingly, a Court of Inquiry was convened and in the said Inquiry, the Petitioner's

aide Dilum Sanjeewa testified that on the night of 14th April 2009 around 11.30 pm, the Petitioner had forced the deceased to massage his legs, following which the deceased had deserted the camp on 16th April 2009. Moreover, as alleged by the said Dilum Sanjeewa, on 22nd April 2009 around 6.30 pm he had seen the Petitioner shooting the deceased. Consequent to that, at around 9:00 pm, the petitioner asked and threatened Dilum not to tell anyone about the incident, and the petitioner said that if he did, he and the entire family would be killed with the help of the underworld (As per the document marked R3- the testimony given by the Dilum Sanjeewa on 16/6/2009 before Army Court of Inquiry).

As asserted by the 7th Respondent, on 17th June 2009, the Provost Marshal had submitted to him an anonymous letter that was received by the Army Commander, regarding the death of the said Saman Kumara. As per the contents of the letter, the Petitioner was accused of being responsible for the death of the said Saman Kumara. Accordingly, the 7th Respondent initiated a Military Police investigation and arrested the Petitioner. Furthermore, the 7th Respondent denies all allegations made by the Petitioner against him, with regard to him assaulting the Petitioner and treating him arbitrarily and illegally whilst in the custody of the Military Police.

With regards to the Court of Inquiry, the 1st Respondent states that, it is an internal inquiry held to determine whether an officer is fit to hold his office when criminal charges are preferred against him in a court of law. A pending criminal case in a court of law is not a bar to the conduct of an inquiry with regard to the Petitioner's acts of misconduct. Therefore, the second Court of Inquiry was convened for this purpose. At the said inquiry, the Petitioner was given an opportunity to respond to the allegations against him, he had testified under oath and denied any knowledge of the incident and further stated that his statement to the Military Police was obtained under duress. Having considered the reports of the said two Courts of Inquiries, the 1st Respondent came to the conclusion that the retention of the Petitioner was not desirable for the maintenance of good order and discipline in the Army, hence decided

to recommend to His Excellency the President to withdraw the commission of the Petitioner.

Validity of the decision to discharge the Petitioner from the Army and to withdraw his commission

In deciding upon the merits of this case, I find it pertinent to examine the matter of contention claimed by the Petitioner that the actions of the Respondents are in violation of Article 12(1) and Article 14(1)(g) of the Constitution.

Article 12(1) reads as follows:

"All persons are equal before the law and are entitled to the equal protection of the law."

Article 14(1)(g) reads as follows:

"The freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise."

In the instant case, a Petition had been submitted to the Commander of the Army on 17th May 2009 by the 20th Battalion of the Sri Lanka Light Infantry where the deceased was served requesting the Commander to carry out justice to their deceased brother (deceased Lance Corporeal Saman Kumara) who succumbed to the gunshot injuries on 22nd April 2009.

In terms of Regulation 3(7)(a) of the Army Courts of Inquiry Regulation 1952, where a member of the Army dies, it is mandatory to appoint a Court of Inquiry to ascertain the cause of the death and to determine whether the death is duty related or not. Accordingly, a Court of Inquiry was convened to investigate to the circumstances leading to the said soldier's death.

However, it is the position of the Petitioner that he was not informed that a Court of Inquiry had commenced against him and was only made aware of it when his aide Dilum Sanjeewa had informed him that a statement was recorded from him at the

said Inquiry. He further alleges that he was not allowed to cross examine the witnesses that testified before the Court of Inquiry. The Petitioner alleges that several other witnesses who have given adverse evidence against the Petitioner had testified in the absence of the Petitioner. The Petitioner submits that it is a violation of fundamental principles of natural justice, which should be followed in such kind of inquiries and Fundamental Rights guaranteed in the Constitution of Democratic Socialist Republic of Sri Lanka.

With regard to the Court of Inquiry, the 1st Respondent states that, it is an internal inquiry held to determine whether an officer is fit to hold his office when criminal charges are preferred against him in a court of law. The second Court of Inquiry was convened for the purpose of determining the criminal liability of the Accused. At the said second inquiry, the Petitioner was given an opportunity to respond to the allegations against him, he had testified under oath and denied any knowledge of the incident and further stated that his statement to the Military Police was obtained under duress. In **Y.B.A.M. Premakumara vs Army Commander and others** (CA WRIT/1153/2006 CA minutes dated 29/10/2009), discussed about the difference between a Court of inquiry and Disciplinary Inquiry which reads as follows,

"A Court of Inquiry is different from a disciplinary inquiry. In a disciplinary inquiry a charge sheet will be served and the person accused will have an opportunity to answer the charges and defend himself. In a Court of Inquiry there is no accused or charge sheet, all those who appear before the Court of Inquiry are witnesses as it is a fact finding inquiry."

As such, whether the opportunity of cross examination was given or denied will not change the character of the Court of Inquiry as it is a fact finding inquiry conducted to unveil the surrounding facts and circumstances. Hence, I am of the view that the Petitioner was given a fair hearing and the Principles of natural justice was followed as the Petitioner has no contentions against the conduct of the disciplinary inquiry.

As per the evidence adduced by the witnesses before the Court of Inquiry it is revealed that the deceased who initially belonged to the Alfa Company had been transferred to the Delta Company after the allegation was made that he was sexually assaulted by the Petitioner, who at the time functioned as a Commanding Officer of the Alfa Company. The written statement of the deceased explaining the said sexual assault is marked 2R1. Following this complaint, the deceased was relocated in the Southern part of the defence line and he was found shot dead on 22nd April 2009 enroute towards the South of the line of defence.

The Petitioner was arrested for the death of the deceased. Petitioner alleges that he was seriously physically assaulted whilst in the custody of Military Police. On the date of his release from the Military Police he had been produced for a physical examination at the Institute of Legal Medicine and Toxicology in Colombo where the medical practitioner who examined him stated the following in the Medico-Legal Examination Report dated 21st August 2009 (Marked RX10).

According to the details given by the examinee he had been kept in a cell. He had been assaulted on several occasions with a wooden club and hand. He has experienced pain in the mouth and there had been bleeding from the mouth.

General conditions – He was conscious and rational and talked freely, no physical deformities detected.

External examination – Examination of the mouth did not reveal damaged teeth or mucosal injuries.

Opinion: 1. The examinee was conscious and rational and was in good physical and mental state

2. No injuries or scars related to the present incident detected during the examination.

Therefore, as divulged above, no signs of physical injury are evident, hence, the Petitioner's claim of physical assault cannot be considered before this court.

The initial Court of Inquiry was convened on 16th June 2009 (marked 2R2). According to the evidence adduced by Staff Sergeant Premathilaka (1st Witness), the deceased was on movement with one Private Soldier named Rukmal, towards the Southern area of the defence line where the Delta Company was to be relocated. The route of relocation was passing through the front headquarters of the Alfa Company.

As per the evidence adduced by Private Soldier Rukmal (4th Witness), while passing the front headquarters of the Alfa Company, the Petitioner officer had inquired from him about the deceased, who then had met him. The relevant portion of evidence testified by the 4th witness is quoted below.

ප්‍ර05:- ඔබ එසේ ප්‍රකාශ කලාට පසුව කපිතාන් සිල්වා කුමක් පැවසුවේද?

පි05:- ලාන්ස් කොර්පරල් සමන් කුමාරට කතා කරන්න කීවා. මා ඉන් පසු ලාන්ස් කොර්පරල් සමන් කුමාර යැයි කතා කර කපිතාන් සිල්වා කතාකරන බව පවසා සිටියා.

ප්‍ර06:- ලාන්ස් කොර්පරල් සමන් කුමාර කපිතාන් සිල්වා වෙත එනවා ඔබ දුටුවාද?

පි06:- ඔව් මට ඉදිරියෙන් සිටි නිසා මා පසුකරගෙන පැමිණියා.

ප්‍ර08:- ඔබ ඒ කන්ඩායම අසලින් පැමිණෙන විට කපිතාන් සිල්වා සිටින ස්තනය අසල වෙත අයෙකු සිටියාද?

පි08:- නැත. කපිතාන් පමණයි සිටියේ.

ප්‍ර11:- ඔබ ලාන්ස් කොර්පරල් සමන් කුමාරට වෙඩි වැදී තිබූ භූමි ප්‍රදේශය දන්නවාද?

පි11:- ඔව් කපිතාන් සිල්වා ඔහුට කතාකරන විට පෙට්ටිටිය බිම තබා ආ ස්තනයයි.

The unofficial English translation of the above is as follows:

Q05:- What did Captain Silva say after you said so?

A05:- He asked me to call Lance Corporal Saman Kumara. Thereafter, I called out to Lance Corporal Saman Kumara and told him that Captain Silva was looking for him.

Q06:- Did you see Lance Corporal Saman Kumara come towards Captain Silva?

A06:- Yes, he (Saman Kumara) passed me because he (the Captain) was in front of me.

Q08:- When you were coming past that company, was there anyone near Captain Silva?

A08:- No, it was only Captain Silva.

Q11:- Do you know the place where Lance Corporal Saman Kumara was shot?

A11:- It's the place where he left the box and came when Captain Silva called for him.

The question arises as to who fired the two gunshots which caused the death of Lance Corporal Saman Kumara. As revealed in the evidence that transpired before the Court of Inquiry, there was no terror attack in close proximity of the incident of death on that particular day. The cause of death was revealed to be two gunshots fired at a close range. Hence, the death cannot be as a result of an attempt of suicide as the deceased could not have fired two shots at himself.

With the above reasoning together with the testimony of the 4th witness, a reasonable inference could be drawn that the Petitioner officer with the support of his aide Dilum Sanjewa would have shot at Lance Corporal Saman Kumara, from the anger instigated when the deceased had complained of and reported the sexual assault caused to him, to the superior officers of the Petitioner's Regiment.

In terms of Regulation 3(7)(a) of the Army Courts of Inquiry Regulation 1952, where a member of the Army dies, it is mandatory to appoint a Court of Inquiry to ascertain the cause of the death and to determine whether the death is duty related

or not. A Court of inquiry as laid down in Regulation 2 of The Army Courts of Inquiry Regulations 1952 means:

“an assembly of officers or, of one or more officers together with one or more warrant or non-commissioned officers, directed to collect and record evidence and, if so required, to report or make a decision with regard to any matter or thing which may be referred to them for inquiry under this regulation.”

Accordingly, a Court of Inquiry was convened to investigate the circumstances leading to the death of Lance Corporal Saman Kumara. At the said Court of Inquiry, the Petitioner’s aide Dilum Sanjeewa had testified that on 22nd April 2009 around 6.30 pm he had seen the Petitioner shooting the deceased and therefore he was threatened to be killed, if he divulged the said incident.

Having considered the reports of the two Courts of Inquiry, the Army Commander came to the conclusion that the retention of the Petitioner was not desirable for the maintenance of good order and discipline (which is mandatory in the military), in the Army and hence declared to recommend to His Excellency the President to withdraw the commission of the Petitioner. The Respondents further submit that, the Petitioner has not sought for a relief to quash the findings of the two Courts of Inquiry.

However, the question arises as to whether the Commander of the Army is authorised upon the findings of the Court of Inquiry to make recommendations seeking the discharge and withdrawal of commission of the Petitioner officer. In terms of Regulation 2 of the Army Disciplinary Regulation 1950 read with Section 8 of the Army Act No. 17 of 1949, the Commander of the Army is vested with the responsibility of maintaining discipline in the Army and has a paramount public duty to ensure that the soldiers are commanded by fit and proper officers. Furthermore, in terms of Regulation 2 of the Army Officer Service Regulations (Regular Force) 1992 the

Commander of the Army is authorised to forward recommendations to the Minister of Defence for the approval of His Excellency the President.

As per Justice Vijith K. Malagoda PC, in the case of **Major K.D.S. Weerasinghe vs Colonel G.K.B. Dissanyake and others (SC minutes dated 31.10.2017)**

“the Commander of the Army shall be vested with general responsibility for discipline in the Army and in the case in hand the Commander acting under the above position had sought a direction from His Excellency the President regarding the further retention of Petitioner. As revealed before us, the above conduct of the Commander of the army when seeking a directive from His Excellency the President was an independent act and was done for the best interest of the Army, in order to maintain the discipline of the Army.”

This is further supported by the Extraordinary Gazette bearing No. 780/7-1993 dated 17th August 1993 which reads as follows:

38. In forwarding an application from an officer to retire or resign his commission, a commanding officer shall, when such application, is the result of misconduct or anything affecting the officer's honour or character as gentleman, state all circumstances and particulars of the case, the Commander of the Army shall ensure that the statement contains a complete account of the case before forwarding it to the Secretary.

39. An officer may be called upon to retire or resign his commission for misconduct or in any circumstances which in the opinion of the President, require such action. An officer so called upon to retire or to resign his commission may request an interview with the Secretary, in order that he may be given an opportunity of stating his case.

Accordingly, the Respondents are empowered to forward the said recommendation to withdraw the commission of the Petitioner to the President.

Since the Petitioner is a Presidential appointee who has been granted his commission in terms of Section 9(1) of the Army Act No.17 of 1949, he holds the said commission during the pleasure of the President in terms of Section 10 of the same Act. In the case of **Air Vice Marshall Elmo Perera vs Liyanage and Others (2003) 1 Sri L R 331** 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."

Therefore, in the instant case, although the 1st Respondent made the recommendation regarding the Petitioner's withdrawal, the authority to withdraw the Petitioner's commission is on the President.

Based on the above submissions, it is the position of the Respondents that the application of the Petitioner cannot be instituted in this Court as what is sought to be challenged in an indirect manner is the right conferred on His Excellency the President to grant and withdraw a commission to an Army Officer under Section 9(1) of the Army Act No.17 of 1949. Since such acts qua President which directly flows from Article 4(1)(b) read with Article 30 of the Constitution, it cannot be challenged in a Court of Law in view of the provisions contained in Article 35 of the Constitution. The Respondents further claim that this application has been filed out of time.

Furthermore, the Petitioner's service was suspended with half pay with effect from 15th March 2010 upon the commencement of the non-summary inquiry bearing No. N/S 29204 before the Magistrate's Court of Anuradhapura. The Petitioner's services were suspended in adherence to the Special Army Order bearing No. 3/75. Hence, although the Petitioner's services were suspended, he continued be paid in accordance with Regulation 2(2) of the Army Pay Code of 1982 which reads as follows:

“when an officer is suspended from exercising the duties and functions of his office, other than on any ground referred to in the sub-paragraph (b) here to, such officer shall receive in respect of each month for the period during which he is so suspended one half of the consolidated pay payable to him.”

As per Regulation 3(1)(b) of the Army Pension and Gratuities Code of 1981, an officer shall retire on the expiry of the period in the substantive rank he holds unless he is promoted to the next higher rank within that period. As per the said Regulation the relevant period for a Captain to hold office is 11 years. Accordingly, the Petitioner in the instant case had reached the maximum period permissible within the said rank with effect from 4th August 2015 (he was promoted as a Captain on 2nd August 2004).

Decision

As such, upon careful consideration of all relevant facts and circumstances of the immediate case, I see no reason to allow the Petitioner’s application based on the violations of his Fundamental Rights guaranteed under Articles 12(1) and 14(1)(g).

Article 126(4) empowers the Supreme Court “to grant such relief or make such directions as it may deem just and equitable” depending on the facts and circumstances of each individual case. Hence, this court can overlook certain objections in order to serve justice. As evident from the facts above the Petitioner did commit an act which is unbecoming of the character of an officer and did thereby commit an offence punishable under Section 107 of the Army Act No.17 of 1949.

Considering all, it is my view that the 1st Respondent’s decision to recommend the withdrawal of the Petitioner’s commission is not in violation of his Fundamental Rights as it is required to maintain good order and discipline in the Army.

Application Dismissed.

JUDGE OF THE SUPREME COURT

B. P. ALUWIHARE, PC, J

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

I agree.

JUDGE OF THE SUPREME COURT