
VITHANE**Vs.****COMMANDER, SRI LANKAN ARMY AND OTHERS**

COURT OF APPEAL
SAMAYAWARDHENA, J.
CA/WRIT/354/2015

Writ of certiorari—Recommendation for withdrawal of commission Army Discipline Regulations 1950, Regulation No. 2— Commander’s responsibility to maintain discipline—Reluctance of the court to interfere with disciplinary decisions of tri forces

The petitioner filed this application seeking to quash by way of certiorari the recommendation made to the President by the Commander of the Sri Lanka Army to withdraw the commission of the petitioner from the Sri Lanka Army and the finding of guilt and the lowering of the petitioner’s seniority in the Sri Lanka Army.

Held:

1. In general, recommendations are not amenable to writ jurisdiction. Even assuming recommendations are amenable to writ jurisdiction, the petitioner is challenging a conviction and sentence entered and passed about seven years ago. The petitioner is guilty of laches which disentitles him to discretionary relief such as writ.
2. The recommendation for withdrawal of the commission was not solely dependent upon the recent conviction. The charges were serious and involved inhumane conduct on the part of the petitioner and warranted adequate deterrent punishment.
3. The Army Advisory Board comprising five senior officers has recommended that a direction be sought from the President for the withdrawal of the commission of the petitioner “in the best interest of the Army”.
4. The Commander makes the request in the best interest of the Army in terms of Regulation No. 2 of the Army Discipline Regulations 1950, which states that “The Commander of the Army shall be vested with general responsibility for discipline in the army.”
5. The discipline of the tri forces and the police force is of paramount importance and is best left to the relevant disciplinary authorities

and not to the court to deal with. If there is no discipline, there is no Army, Navy, Air Force or Police Force. The Court in the exercise of writ jurisdiction will not interfere with the internal administration of those establishments which includes taking disciplinary decisions, unless there are compelling cogent reasons to do so.

Faisz Musthapha, P. C., with Arindra Jayasinghe for the Petitioner.

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

cur. adv. vult.

March 25, 2019

SAMAYAWARDHENA, J.

The petitioner filed this application seeking to quash by way of certiorari:

- a) the recommendation made by the Commander of the Sri Lanka Army to His Excellency the President to withdraw the commission of the petitioner from the Sri Lanka Army as evidenced by R14, and
- b) the finding of guilt and the lowering of the petitioner's seniority in the Sri Lanka Army by 150 slots as evidenced by the documents compendiously marked P5.

The learned President's Counsel for the petitioner seeks to quash the recommendation made by the Commander of the Army as reflected in R14 on three grounds.

- a) The recommendation is based on the conviction and sentence imposed by the Court of Inquiry, which had no jurisdiction to do so.
- b) The conviction was in violation of the rules of natural justice as it was inter alia made without giving a proper hearing and without adducing reasons.
- c) The recommendation constitutes the imposition of double punishment.

In general, recommendations are not amenable to writ jurisdiction. Even assuming recommendations are amenable to writ jurisdiction (as the said recommendation was the sole basis for HE the President to withdraw the commission), the petitioner is challenging in these proceedings the

conviction and sentence entered and passed about seven years ago. He is clearly guilty of laches, which disentitles him to successfully pursue discretionary relief such as writ. As seen from P6, the petitioner has appealed against that conviction and sentence to the Director of the Legal Branch of the Army and kept silent. No action has been taken by the Director of the Legal Branch, obviously because he has no authority to sit in appeal against such convictions. At that time, the petitioner was a Major and not a soldier, and therefore he should have known what to do to challenge those convictions. He has started reagitating these convictions after the withdrawal of his commission by HE the President several years later. As I will explain later, the recommendation for withdrawal of his commission is not solely dependent upon this conviction.

The charges, in my view, are serious and, above all, involve inhumane, not to mention undisciplined, activities on the part of the petitioner, and if proved, warrant adequate punishment, nay deterrent punishment.

The learned President's Counsel states in the written submissions that conviction and sentence were imposed by a Court of Inquiry which had no jurisdiction to do so, as a Court of Inquiry is only a fact-finding mission having no authority to convict and sentence an officer, and such conviction and sentence could only have been imposed by a Court Martial.

Such a position has not been taken up in the petition. However, in the reply submissions, learned Deputy Solicitor General for the respondents, drawing the attention of this Court to sections 40 and 42 of the Army Act, No. 17 of 1949, as amended, says that the petitioner could have been so convicted and sentenced after a summary trial without a Court Martial for those offences.

There is a distinction between a Court of Inquiry and summary trial. In this instance, the petitioner has been convicted and sentenced not after a Court of Inquiry but after a summary trial. This has been accepted by the petitioner himself in paragraph 3 of P6- the appeal sent to the Director, Legal where he speaks of conviction after "Summary Trial". Being a Major, the petitioner could not have been unaware of the difference between Court of Inquiry and a summary trial.

Most importantly, I am unable to accept the argument of the learned President's Counsel that the recommendation made by the Commander of the Army is solely based on the said conviction and sentence. The R14 recommendation running into four pages is not solely based on the said

conviction and sentence. That is a part of it but not all of it. There is no necessity to reproduce R14 verbatim, which is self-explanatory. There had been several misdeeds committed by the petitioner in addition to those taken up at the summary trial. As seen from R13, the Army Advisory Board comprising five very senior officers has recommended that a direction be sought from HE the President for the withdrawal of the commission of the petitioner “in the best interest of the Army”.

It is in that backdrop that the Commander of the Army has sent R14. In paragraph 6 thereof the Commander states:

In view of the past records of this officer with considerable number of disciplinary cases, I concur with the recommendations made by the Army Advisory Board. Further, I am of the opinion that further retention of this officer in service would not be in the best interest of the Army as he has set a bad example to his subordinates and his behavior is unbecoming of an officer and a gentleman. Therefore in my appointment as the Commander of the Army in terms of the Army Discipline Regulations 1950 which provides that “the Commander of the Army shall be vested with general responsibility for discipline in the Army”, I am compelled to seek the direction of His Excellency the President regarding the question of further retention of this officer in service.

It is clear from the said excerpt that this recommendation does not constitute the imposition of double punishment. The Commander makes that request in the best interest of the Army in terms of Regulation No. 2 of the Army Discipline Regulations 1950, which states that “*The Commander of the Army shall be vested with general responsibility for discipline in the army.*”

The discipline of the tri-forces and the police force is of paramount importance and is best left to the relevant disciplinary authorities and not to the Court to deal with. If there is no discipline, there is no Army, Navy, Air Force or Police Force. The Court in the exercise of writ jurisdiction will not interfere with the internal administration of those establishments, which includes taking disciplinary decisions, unless there are compelling cogent reasons-such as decisions which are ex facie ultra vires, unlawful and arbitrary-to do so. I see no such reasons in the case at hand.

I dismiss the application of the petitioner with costs.

Application dismissed.

Judgment by: Mahinda Samayawardhena, J.

This PDF was produced by paralegal.lk