

**PUSHPAKUMARA VS.
LIEUTENANT COMMANDER WIJESURIYA AND OTHERS**

COURT OF APPEAL
SRI SKANDARAJAH, J.
CA 1280/2005
MAY 17, 2007
JUNE 14, 2007

Writ of Certiorari - Navy Act Section 107 - Board of Inquiry - Dismissal with dishonor - Confirmed by HE the President - Does writ lie? Constitution Art 35.

After summary trial, the petitioner was informed that he would be dismissed from service with dishonor - for a sexual offence committed.

The appeal made to HE the President was rejected, and was informed that he was dismissed from the Navy with dishonour.

The petitioner sought to challenge the dismissal.

Held

- (1) The dismissal of the petitioner from the Navy with dishonour was confirmed by HE The President. Court in exercising its writ jurisdiction cannot question the decision of the President in view of the immunity of the President from suit as prescribed by Art 35.
- (2) 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.
- (3) Court cannot quash the recommendation of the 6th respondent as it is not a decision as determination that affects the petitioner's right and interest but it is only a step leading to a final decision by Her Excellency the President.

APPLICATION for a writ of certiorari.**Cases referred to:**

- (1) *Mallikarachchi vs. Shiva Pasupathi - Attorney General* - 1985 1 Sri LR 74.
- (2) *Vice Marshal Elmore Perera vs. Liyanage and others* - 2003 1 Sri LR 331.
- (3) *Fernando vs. Nelum Gamage, Bribery Commissioner* - 1994 3 Sri LR 194.

M. Samarakoon for Petitioner.

L. M. K. Arulanandan DSG for Respondent.

Cur.adv.vult

December 03rd 2007

SRISKANDARAJAH, J.

The Petitioner joined the Sri Lanka Navy on 23rd December 1991 as a Naval Recruit and was subsequently promoted to other higher ranks and at the relevant time he was in the rank of Leading Seaman. The Petitioner submitted that whilst he was serving at Boosa Naval Recruitment Training Centre on or about 26th July 2004 the Petitioner participated in a party organised at the said centre. The said party commenced at about 9 pm on 26.07.2004 and that the Petitioner was continuously present at the party until about 2.15 a.m. in the early hours of the next day. The Petitioner further submitted that on 27.07.2004 he was placed under open arrest. On 29.07.2004 a board of inquiry was convened and statements from him as well as from B. P. S. Dissanayake, a naval recruit were obtained for an alleged sexual offence committed by the Petitioner. A statement from one Pahampitiya a friend of the said recruit was also recorded on the same day. The Respondents contended that a board of inquiry was held on 12.08.2004 and not on 29.07.2004 and the

said Board consisted of Lieutenant Commander W. S. K. K. Ratnayake, Lieutenant M. M. B. A Mapa, Sub Lieutenant W. Premachandra and Fleet Chief Petty officer H. P. B. Tisaruwan. The Petitioner had not made any complaint in the manner in which the board of inquiry recorded statements. The Respondents further contended that the summary trial commenced on 17.08.2004 and the charge had been read over to the Petitioner at the Summary Trial. The trial was thereafter postponed to the 23rd of August 2004. Hence the Respondents submitted that the Petitioners allegation that he was not given adequate time to prepare for trial has no basis. The Respondents further contended that the Petitioner on his own selected to defend himself and as the charge against the Petitioner was under Section 104 of the Navy Act as amended an election of Court Martial cannot be made in respect of this offence.

The Petitioner admitted that he was given an opportunity to cross examine the prosecution witness including the victim the 1st Respondent the Petitioner had also led evidence of eight witnesses on his behalf in the summary trial. The Petitioner submitted that at the conclusion of the summary trial that he was informed by the 3rd Respondent that he had arrived at a finding and he would only give a minor punishment by warrant to which he objected and pleaded his innocence since the charges against him was not proved. On 10.12.2004 the 6th Respondent read out the punishment of the Petitioner to the effect that the Petitioner was to be dismissed from service with dishonour.

The Petitioner appealed to her Excellency the President through the 6th and the 7th Respondents. On or about 07.06.2005 when he was serving at Mannar the Petitioner

was informed that his appeal had been rejected and that he was dismissed from the Navy with dishonour.

The Petitioner in this application is seeking a writ of certiorari to quash the order of the Summary Trial and to issue a writ of mandamus to compel the Respondents to reinstate the Petitioner in service with all back wages on the ground that the summary trial as well as the decision to dismiss the Petitioner from the navy is null and void and has no force or avail in law.

The Petitioner's position is that there was no evidence to indicate that the Petitioner had sexually abused a person. All witnesses whose evidence was led by the Petitioner maintained the position that the Petitioner was present at the party until about 2.30 a.m. of the 27th July 2005 and that therefore the Petitioner was clearly unable to commit the offence he was charged of which was allegedly committed at about 12.15 a.m.

The dismissal of the Petitioner from the Navy with dishonour is confirmed by the Excellency the President of the Democratic Socialist Republic of Sri Lanka and it is stated in the letter of the Secretary Defence dated 16.05.2005 addressed to the Commander of the Sri Lanka Navy. This Court in exercising its writ jurisdiction cannot question the decision of the President in view of the immunity of the President from suit as provided by Article 35 of the Constitution of the Democratic Socialist Republic of Sri Lanka, *Mallikarachchi v. Shiva Pasupathi, Attorney - General*⁽¹⁾

In *Air Vice Marshall Elmo Perera v. Liyanage And Others*⁽²⁾ the Court held:

“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. The essential requirement for the grant of certiorari is that rights of subject should be affected.”

This Court cannot quash the recommendation of the 6th Respondent as is not a decision or determination that affects the Petitioner’s right or interest but it is only a step leading to a final decision by His Excellency the President. In *Fernando v. Nelum Gamage, Bribery Commissioner*⁽³⁾ it was held by the Supreme Court that the decision of the investigating police officer to make an application to the Magistrate to make an order to assist the conduct of a criminal investigation is not amenable to certiorari.

In the above circumstances the application of the Petitioner is dismissed without costs.

application dismissed.