

MENDIS
v.
COMMANDER OF THE ARMY

COURT OF APPEAL
DE SILVA, J. (P/CA)
C.A. 1/2000
JUNE 28, 2000
JANUARY 11, 2001
FEBRUARY 08, 2001

Army Act - S. 40, S. 40(1), S. 42 of Amending Act 33 of 1990 - Reverston as punishment - Discharge - Non Warrant Officer - necessity to hold formal Inquiry or Court Martial?

The Petitioner Sergeant was arrested in connection with certain offences committed under the Army Act. Prior to the inquiry the Regimental Sergeant Major removed one of the tapes of the petitioner resulting in the Petitioner being reverted to the rank of Corporal. After summary trial, with the Petitioner pleading guilty he was reverted to the rank of private as a punishment. Thereafter he was discharged from the Army;

It was contended that (i) the Petitioner has been subjected to double punishment i. e. demoting the Sergeant to Corporal rank and then from Corporal rank to rank of a private.

(ii) The Petitioner's discharge is contrary to the Army Act and as the Petitioner has been punished summarily a further punishment of discharge cannot be imposed subsequently.

Held :

- (i) In terms of Clause 114 of Special Army order 1 of 1985 the Commanding Officer could revert a non commissioned and temporary ranker to his previous substantive post if he deems the ranker to be unfit to hold the temporary rank.
- (ii) According to S. 40(1) of the Army Act in the case of a non warrant officer it is not necessary to hold a formal inquiry or to hold a Court Martial.
- (iii) The Petitioner has been discharged from the Army in terms of Clause (XIII) (a) of Table A of Soldier Service Regulation 1 of 1994, on his services being no longer required for the Army. In terms of the Regulations, it was a Major General who had authorised the discharge of the Petitioner.

APPLICATION for a Writ of Certiorari.

J. C. Wellamuna with Varuna Mallawarachchi for Petitioner.

Ms M. Fernando, S. S. C for 1 - 5 Respondents.

Cur. adv. vult.

March 21, 2001.

J. A. N. DE SILVA, J. (P/CA)

The petitioner by this application seeks a mandate in the nature of a writ of certiorari to quash the decision made by the Sri Lanka Army to discharge the petitioner from the Army and to quash the disciplinary procedure adopted against him.

The facts relating to this application briefly are as follows. The petitioner who was a sergeant and few other soldiers were arrested by the Military Police on 04. 11. 1997 in connection with certain offences committed under the Army Act namely misappropriation of public property (an ECG machine and Infra Red Lamp and selling food items to outsiders) in the Victory Hospital Anuradhapura. They were detained till 12. 12. 1997 and a statement of the petitioner was obtained. According to document marked P1 the then Commander of the Army has approved the recommendation of a Court of inquiry that disciplinary action should be taken against the said soldiers including the petitioner.

On 08. 03. 1999 the petitioner was summoned for an inquiry. Prior to the said inquiry the Regimental Sergeant Major removed one of the tapes of the petitioner resulting in the petitioner being reverted on the rank of Corporal. Thereafter on the same day he was marched before the 2nd respondent as a corporal. On or about 10. 03. 1999 the petitioner was summarily tried on a charge sheet under Section 40 of the Army Act. Upon the petitioner pleading guilty to the said charges he was reverted to the rank of private as a punishment. The Commanding Officer of the Sri Lanka Medical Corp recommended the discharge of the petitioner from the service and the Major General authorized the discharge from Sri Lanka Army with effect from 20. 01. 2000.

When this application was taken up for hearing the petitioner relied on the following grounds in support of the application namely,

- (a) That the petitioner has been subjected to double punishment i. e. demoting from sergeant rank to corporal rank and then from corporal rank to the rank of a private.
- (b) The petitioner's discharge has not been properly done in that the decision to discharge the petitioner from the Army without a Court Martial is contrary to the Army Act and Regulations made thereunder and in any event as the petitioner had been punished summarily a further punishment of discharge cannot be imposed subsequently.

On the 1st ground the petitioner's contention is that prior to the Court of inquiry he held the rank of sergeant of the Sri Lanka Army Medical Corp. The petitioner was reverted from sergeant rank to corporal rank on 08. 03. 1999 prior to him being marched before the 2nd respondent in connection with the Court of Inquiry. The learned Counsel for the petitioner contended that this was a punishment. As stated earlier consequent to the Court of Inquiry the petitioner was reverted to the rank of private. Learned Counsel contended that this was a second punishment. It was his submission that a person cannot be subjected to multiple punishments for the same offence.

Senior State Counsel Ms. Fernando who appeared for the respondents submitted that the petitioner was not punished twice. She pointed out that at the relevant time the petitioner was holding a "temporary" rank of sergeant. This position has not been denied by the petitioner in his counter affidavit even though in his original affidavit he affirms as a "sergeant". It was her submission that the Commanding officer could revert a non - commissioned and temporary ranker to his previous substantive post, if he deems the ranker to be unfit to hold the temporary rank. Attention of Court was drawn to clause 114 of Special Army Order 1 of 1985 which reads thus,

"If an other ranker, promoted under provisions of the Special Army Order is found unfit to hold the appointment to which he is promoted the Commanding Officer will revert the other ranker to his previous appointment which he held prior to such temporary promotion".

In these circumstances I hold that the action of the Regimental Sergeant Major on behalf of the Commanding Officer of removing one of the three tapes of the petitioner is in accordance with the law specially because the petitioner was holding a temporary rank of sergeant and as the conduct of the petitioner was "disgraceful".

Therefore the only punishment meted out to the petitioner was reverting him to the rank of "private" from his substantive post of "corporal" which was done consequent to the petitioner been summarily tried and charged under Section 40 and 42 of the Army Act as amended by Act No 33 of 1990.

The petitioner's second complaint was that as the respondents failed to hold a Court Martial the decision to discharge him from the Army was bad in law. According to Section 40(1) and 42 of the Army Act it is clear that in the case of a non warrant officer it is not necessary to hold a formal inquiry under the Army Act or to hold a Court Martial, since there is a clear discretion granted by Statute to hold summary trial and punish a soldier by reverting him to the lower rank. Therefore this objection too has to fail.

The petitioner further contended that according to Army Regulations the authority to discharge a soldier from service is vested with the Commander of the Army or an officer authorized thereto not below the rank of Major General. Learned Counsel for the petitioner submitted that in the instant case the decision to discharge had been taken either by Lieutenant Gunaratne or by Brigadier Jayasundera who are officers below the rank of Major General and therefore the discharge is contrary to the Soldiers Service Regulations.

On a close examination of document marked 1R11 it is clear that the decision to discharge the petitioner from the Army has taken place in the following manner. By letter dated 17. 12. 1999 the Center Commandant recommended the discharge of the petitioner in view of the many fraudulent acts committed by him and this recommendation was communicated to the Colonel Commandant of the Sri Lanka Medical Corp. By letter dated 20. 12. 1999 the Commander of the Medical Corp recommended the discharge and communicated the same to the log commander who in turn recommended to Major General Kularatne. By his minute dated 04. 01. 2000 (vide page 3 of 1R11) Major General Kularatne authorized the discharge of the petitioner from Sri Lanka Army and instructed Brigadier Jayasundera who was the Director Personal Administration to activate the discharge which Jayasundera did on 05. 01. 2000. Thus the petitioner has been discharged from the Sri Lanka Army in terms off clause (XIII) (a) of Table A of Soldier Service Regulations No 1 of 1994 (R10) as his services being no longer required for the Army by proper authority. It is observed that when some patriotic soldiers sacrifice their lives for the country there are some who make money from this miserable war situation.

This application is dismissed with costs.

Application dismtssed.