

**MAJOR MALLIKARACHCHI
VS.
LT. GENERAL BALAGALLA
AND OTHERS**

COURT OF APPEAL,
SRISKANDARAJAH, J.,
CA WRIT 537/2003,
JULY 30, 2003,
FEBRUARY 16, 2005,
MARCH 16, 2005.

Army Act - Section 40 - Court of Inquiry - Misappropriation of Unit rationing and unit funds - Constitution of the Court of Inquiry - opportunity not given to cross examine - Natural Justice - Summary Trial - Found guilty Principle of Double jeopardy.

A Court of Inquiry inquired into the allegation against the petitioner for misappropriation of Unit rationing and unit funds, misappropriation and misuse of military property.

On the findings of the Court of Inquiry, the 1st respondent had directed that the petitioner to be disciplinary dealt with for the offences committed by him, in accordance with this direction he was summarily dealt with by the 6th respondent. The 1st respondent had thereafter decided to withdraw the commissions of the petitioner and to recover the total amount misappropriated.

The petitioner sought to quash the said orders on the grounds that—

- (1) the Court of Inquiry was not properly constituted, in that, as the alleged sum misappropriated was in excess of Rs.500,000 a civil officer was not nominated to the Court of Inquiry.
- (2) that the inquiry was concluded in his absence, on some days.
- (3) that, he has been punished twice by the Court of Inquiry and the 6th respondent on the same charges - contrary to the accepted legal principles of double jeopardy.

HELD:

- (1) The petitioner was charged for loss amounting to Rs. 593,813.26, out of the total losses in relation to welfare account, simple canteen account and officers mess account are not money belonging to service or state or they are not kept in the custody of the service/state therefore these amounts cannot be considered as losses, defined in the Regulation -

a civilian officer thus need not be appointed to the court of Inquiry, as the loss misappropriation not in excess of Rs.500,000.

- (2) The petitioner's absence on the day of re-examining will not in any way prejudice him, as he was provided an opportunity to cross-examine the witness.
- (3) The Court of Inquiry is only a fact finding inquiry, and no punitive action is taken by the Court of Inquiry against anyone, the Petitioner was summarily dealt with by the 6th respondent in the summary trial and in the summary trial the petitioner was found guilty -
- (4) The petitioner is not tried or punished twice in the summary proceedings and there was violation of the Principles of Double Jeopardy

Application for a writ of Certiorari,

Kalinga Indatissa with Ranil Samarasooriya for petitioner.

A. Gnanathan D. S. G. for 1st respondent.

cur.ad.vult.

April 27, 2005.

Sri Skandarajah. J.

The 2nd Respondent is a Brigadier of the Sri Lanka Army and he functioned as the President of the Court of Inquiry and the 3rd, 4th and 5th Respondents, who are Colonel, Lt. Colonel and Major of the Sri Lanka Army respectively, functioned as members of the Court of Inquiry. The said Court of Inquiry inquired into the allegation against the Petitioner for misappropriation of unit rationing and unit funds, misappropriation and misuse of military property, employment of Army and Civil personnel at the quarters and for possessing unauthorised weapons and ammunitions.

The 6th Respondent is the Colonel of the Regiment of the Gemunu Watch who conducted a Summary Trial into the charges on which the Court of Inquiry referred to above inquired.

The Petitioner submitted that an alleged problem has arisen between 12th March 1997 to 15th February, 2000 in respect of the misappropriation of unit rationing and unit funds, misappropriation and misuse of military property, employment of Army and Civil personnel at the quarters and for possessing unauthorised weapons and ammunitions of the 7th Gemunu Watch for which he functioned as the commanding officer. The Sri Lanka Army Military Police investigated these allegations and the petitioner was arrested on 18th July, 2000 and he was kept in close arrest for 43 days

and thereafter he was in open arrest for 210 days. After the conclusion of the Military Police investigation Court of inquiry was convened on the 15th November, 2001 P3 to inquire into the said allegations against the Petitioner. The inquiry commenced on the 11th January, 2002 and continued until the 6th May, 2002.

The Petitioner submitted that there was a vital deficiency in the constitution of the said Court of Inquiry. In terms of paragraph 4 (a) of the Special Rules made under No. 2 of Financial Regulation No.102 Relating to Losses of Three Armed Forces issued by the Ministry of Defence P1, a responsible civil officer has to be nominated as a member to a court of inquiry by the Secretary to the Ministry of Defence if the alleged loss or misappropriation is in excess of Rs.500, 000. However, this requirement was not followed in the said inquiry. The Petitioner further submitted that non-observance of the aforesaid rules pertaining to the constitution of the Court of Inquiry makes the inquiry illegal and unlawful from its very inception.

The Respondents submitted that even though the total value of the misappropriation and fraud committed by the Petitioner was in excess of Rs.500,000 such fraud had been committed in relation to individual and separate accounts of the 7th Battalion, Gemunu Watch as such the value of the separate and individual accounts did not exceed Rs.500,000.

The individual and separate accounts and the amount of money misappropriated by the Petitioner are :

A. Account of the President of Regimental Institute	Rs. 285,833.84
B. Welfare account	Rs. 44,986.91
C. Unit canteen account	Rs. 67,315.75
D. Officers mess account	Rs. 93,926.76
E. Unit savings account	Rs.101,750.00
	Rs. 593813.26

The Respondents submitted that the above accounts include accounts of commercial nature and they are not public or army funds. Some of these accounts are maintained in order to provide welfare facilities such as canteen facilities for soldiers, Officers' Mess and Welfare Shop. Therefore a civilian officer is not required to be nominated in these circumstances by the Secretary to the Ministry of Defence to serve on the said Court of Inquiry.

The requirement under Regulation 4 (a) to nominate a civilian officer by the Secretary to the Ministry of Defence as a member of the Court of

Inquiry is only in the case where the loss exceeds Rs.500,000. The said Regulation P1 in Regulation 1 defines losses as :

Losses include

- (a) Physical loss of or damage to Service/ Government Property, including money, stamps, stores, livestock's crops, plants, tickets, etc.
- (b) Loss or damage to property of monetary value which though not the property of the Service/Government is held in its custody.
- (c)
- (d)
- (e)
- (f)

The Petitioner was charged for loss amounting to Rs. 593,813.26. Out of this total sum the losses in relation to welfare account, canteen account and officers' mess account are not moneys belonging to Service Government or they are not kept in the custody of the Service/Government therefore these amounts cannot be considered as losses defined in the said Regulation. Therefore the Petitioner's submission that a civilian officer should have been nominated by the Secretary to the Ministry of Defence to serve as a member of the Court of Inquiry has no merit in these circumstances. Therefore, this court cannot accept the submissions of the Petitioner that the Court of Inquiry has not been properly constituted.

The Petitioner also submitted that in the Court of Inquiry 28 witnesses and the Petitioner gave evidence. All the witnesses gave evidence affecting the character and military reputation of the Petitioner. In terms of regulation 15(1) of the Army Courts of Inquiry Regulation 1952, an officer should be afforded an opportunity to be present at the Court of inquiry and cross-examine, the witness whenever an inquiry affects the character and military reputation of an officer. The Petitioner submitted that the aforesaid regulation was violated by the Court of Inquiry by not providing the Petitioner an opportunity to cross examine some of the 28 witnesses though their evidence affected the character and the military reputation of the Petitioner. The Petitioner further submitted that he was not even summoned to the Court of Inquiry at the time certain witnesses were called to give evidence. Therefore the Petitioner submitted that the conduct of the 2nd to the 5th Respondent is irregular arbitrary and is a gross violation of the legitimate rights that was afforded to the Petitioner.

In terms of Regulation 15(1) of the Army Court of Inquiry Regulation 1952, an officer or soldiers shall be given an opportunity to cross - examine the witnesses whose evidence is likely to effect the character and military reputation of the said officer or soldier. Out of the 28 witnesses who gave evidence the Petitioner cross - examined 14 witnesses. The proceedings do not indicate at any stage that the Petitioner's request for cross examination was refused. Even though the Petitioner in this application makes a general allegation that he was not provided an opportunity to cross - examine witnesses who gave evidence against him, does not specifically mention the names of witness whose evidence affect his reputation and that he was not given an opportunity to cross - examine those witnesses. The counsel for the Petitioner in his submission brought to the notice of this court that the proceedings of the court of Inquiry dated 14.03.2002 appearing at page 73 shows that the Court of Inquiry conducted it's proceedings in the absence of the Petitioner, which is in violation of the said regulations. The said proceeding dated 14.03.2002 indicates that witness No. 2 Corporal Weerabahu AWIS was recalled and his evidence was recorded. In fact, Corporal Weerabahu AWIS has given his evidence on 11.01.2002 and he was cross - examined by the Petitioner. After the conclusion of the cross examination, the Court of Inquiry questioned this witness and the recording of the evidence of this witness was concluded. Thereafter several other witnesses were called to give evidence on subsequent dates and witness No. 2 Corporal Weerabahu was called on 14.03.2002 for re examination and he was re-examined on that day Petitioners absence on the day of re-examination will not in any way prejudice the Petitioner as he was provided an opportunity to cross - examine that witness after the examination in chief and he is entitled to get the copy of the proceedings to know what that witness has said in re-examination. Under these circumstances, this court is of the view that the Court of Inquiry did not violate the said Regulations.

The Petitioner submitted that the 6th Respondent conducted a Summary Trial in respect of twelve charges based on the allegations of misappropriation of unit rationing and unit funds, misappropriation and misuse of military property, employment of Army and Civil personnel at the quarters and for possessing unauthorised weapons and ammunitions. At the conclusion of the aforesaid Summary Trial the 6th Respondent had also ordered certain punishments to the Petitioner. The Petitioner submitted that these punishments are in addition to the punishments imposed by the Court of inquiry and therefore he has been punished twice for the same charges and it is totally contrary to the accepted legal principles of double jeopardy.

The Court of Inquiry is only a fact-finding body and no punitive action is taken by the Court of Inquiry against anyone. On the findings of the Court of Inquiry, the Commander of the Army had directed that the Petitioner to be disciplinary dealt with for the offence committed by him. In accordance with this direction, he was summarily dealt with by the 6th Respondent under section 40 of the said Act in the Summary Trial. In the Summary Trial, the Petitioner was found guilty and severely reprimanded for all the charges. Therefore, the Petitioner is not tried or punished twice in these proceedings and this court holds that there is no violation of the principles of double jeopardy.

The observation of the court of Inquiry had been conveyed to the 1st Respondent and the 1st Respondent by his decision dated 15th August, 2002 P4 has decided to withdraw the commission of the petitioner and to recover the total amount that the Petitioner is alleged to have misappropriated. As the Petitioner's contention to set aside the proceedings of the Court of inquiry and the Summary Trial are not accepted by this court for the reasons stated above, there is no ground on which the decisions of the 1st Respondent based on these proceedings could be challenged. Therefore this application is dismissed without costs.

Application dismissed.
