Cashiering of a...

Contd. from Page 11

There are three charges brought by the Prosecution against the accused and each charge must be considered separately. Each charge contains many points that have to be proved before it could be considered that the said charge or all the ingredients of the said charge have been proved beyond reasonable doubt. What is a fact and what is law? Now I may say to prove this charge there are three facts in issue that have to be proved. However, whether such facts, I mentioned, have been proved by evidence or not, is a decision that you have to make. So once I have stated that to prove a charge you need these facts to be proved that is a question of law and my advice on that you should follow but as to whether one by one those three facts have been proved or not is a matter of fact which you have to decide by yourself. I will at this stage refer to some legal principles. Some of them I may have stated earlier .I may have already briefly advised you on such matters. However, these legal principles are so important that at this final stage I will remind you once again of such principles. Fundamental among them, is the presumption of innocence. At no stage during the trial, can you consider the Accused as a person other than an innocent person in front of you in the eyes of the law. The presumption of innocence is a fundamental principle and although the accused is charged unless and until the Prosecution has proved those charges beyond the expected requirement unless and until you decide that has been done the presumption of innocence will accrue to the Accused in this case. Secondly, the burden of proof, the entire burden of proving this case rests on the prosecution. The Defence has no burden to discharge. The Defence can remain silent throughout the trial. However, the Accused has certain rights which he may or may not decide to exercise. The proof required in a case of this nature is one of proof beyond reasonable doubt. In the event at any stage of the case or at the end of the case you entertain any reasonable doubt about the guilt of the Accused it is your duty and obligation to give such doubt in favour of the accused and acquit him from the proceedings. When I say that the Prosecution is expected to prove its case beyond any reasonable doubt, it does not mean that the law expects the Prosecution to prove their case to a degree of mathematical accuracy. That is because the Prosecution has to rely on witnesses who are human who will come before your court and give evidence and answer questions. When one says it is a reasonable doubt, any other doubt, a doubt without a valid reason a doubt based on superstitious or any hypothetical factor should be taken out. But any doubt that comes to your mind, based on some reason is a reasonable doubt and such reasonable doubt if it occurs to you should be given to the benefit of the accused. Firstly the Prosecution has to prove that the Accused was a person subject to military law. Secondly, that he used traitorous or disloyal words regarding the president, so there are two limbs to satisfy in Section 124 of the Army Act. One is the Accused General was a person subject to military law and while being so a person subject to military law that he did use traitorous or disloyal words regarding the President. Now, in the particulars of the charge the Prosecution has stated that General Fonseka being an officer of the Regular Force of the Sri Lanka Army whilst serving as the Chief of Defence Staff and being a member of the Security Council between 01st day of October 2009 and 14th day of November 2009 during a telephone conversation you had with Mr. Fernando did use and there by committed an offence. Now before you go into whether or not the Accused General used these words as alleged in the first charge as stated in evidence by Mr. Fernando you have to first consider whether General Fonseka was an officer of the Regular Force of the Sri Lanka Army and whilst on active service serving as the Chief of Defence Staff and being a member of the Security Council did have this telephone conversation and did utter the words as stated by Mr. Fernando as stated in the charge sheet.

If the words uttered were disloyal against the President or traitorous against the President then the President by virtue of being the head of the government as stated in the particulars of the offence such words are disloyal regarding to the sovereign. The most critical question with regard to charge No. 1 that you have to decide is whether in fact such words were uttered as alleged by the Prosecution by the Accused General in a telephone conversation with Mr. Fernando. And secondly, if such words are traitorous and disloyal words against the president or the sovereignty. So the words used as alleged and stated in the charge sheet under the particulars of charge No. 1 are ඇමරිකන් ආණ්ඩුවට අවශ්‍ය කරන යුද්ධය සම්බන්ධව සාක්ෂි දීලා ආණ්ඩුවයි යුධ හමුදා ජයග්‍රහණයයි අපහසුතාවයට පත්කරලා ලංකාවට එනවා ජනාධිපතිවරණයට අපේක්ෂකයා හැටියට තරග කරන්න. එන්නේ ගුවන්තොටුපලට වීරයෙක් වගේ. පිළිගන්න ලැස්ති වෙලා ඉන්න' If on the evidence you consider that such words were uttered then you have to also consider these words and consider whether such words are traitorous and disloyal towards the president or the sovereign. Now, what is the evidence placed by the Prosecution with regard to charge No. 1 that the Accused General did utter these words? The only evidence with regard to the utterance of these words has been by Mr. Fernando. Mr. Fernando's evidence as you would recall is that he got a message from one Ruwan Weerakoon to come to a particular place called the Cricket Club and when he went there after informing witness No. 2, Gamini Abeyrathna that there was such a request by Mr. Weerakoon he was advised by Gamini Abeyrathna to take an instrument that would record the conversation which he placed under his arm pit and went for the said meeting. At the said meeting that Mr. Weerakoon came to with a CDMA phone and after speaking to Mr. Fernando for some time, at which point he was a member of parliament, he then wanted Mr. Fernando to be able to have a conversation with the Accused General. The prosecution witness has said during that telephone conversation that he identified that the person who spoke on the other end was General Sarath Fonseka. He says that he had spoken to General Sarath Fonseka earlier and that he was familiar with his voice and therefore he recognized him. Now Mr. Fernando did not see whom he was talking to. He was talking to a person said to be General Sarath Fonseka by Mr. Weerakoon. So first and foremost you have to decide whether in fact if as alleged Johnston Fernando did have a discussion as stated in evidence. Did he speak to the Accused General Sarath Fonseka? He says he was convinced that it was Gen. Sarath Fonseka. But you have to accept that beyond a reasonable doubt. If you have or entertain a reasonable doubt that it may or may not have been General Sarath Fonseka then you have to give that benefit of doubt to the General. Secondly, it is the evidence of Mr. Fernando. So that is what Mr. Fernando has stated in his evidence. I will give you a little later how you should decide whether to believe or disbelieve a witness. At this stage I wish to remind you that the Defence on behalf of the Accused General has made two suggestions. One suggestion is that there was an investigation against Johnston Fernando pertaining to a conspiracy to murder His Excellency the President. Because of that allegation against Mr. Fernando he changed his political allegiance and made up this story against the Accused General. And that he did so for his personal benefit so that he could get out of these allegations.He has of course denied these allegations. So this remains as a suggestion made by the Defence on behalf of the Accused. However that is a suggestion that you have to consider when analyzing the evidence of Mr. Fernando and when determining whether or not you believe Mr. Fernando. Further it was alleged by the Defence on behalf of the Accused General, that Mr. Fernando has continued to increase the culpability of the Accused General from the BOI inquiry to the Summary of Evidence through the evidence given in this court. Now that too has been denied by Mr. Fernando.

You will also recall that in many instances when the Defence asked questions from Mr. Fernando whether he said this to the police, whether he said this at the BOI or whether he said this at the Summary of Evidence, his answer was to the effect that this is what happened, what I am saying here is true but I cannot recall exactly what I told the police or the other proceedings which took a statement pertaining to this incident. So all that has to be considered by you before coming to a decision; whether you consider Mr. Fernando as a reliable, credible witness. If you think that Mr. Fernando was not a reliable or credible witness, then you should disbelieve him. If you disbelieve him then you should acquit the accused of charges 1 and 2.

If you think that you cannot decide whether he is telling a truth or a lie still you have to acquit the accused of charges 1 and 2. Only if you are satisfied beyond a reasonable doubt that you accept the evidence of Mr. Fernando can you go any further with regard to the charges 1 and 2. So if by any chance after analyzing the evidence, after considering the suggestions made by the Defence on behalf of the Accused General, after considering the demeanor of Mr. Fernando who gave evidence before you after considering the totality of that evidence it is only if you accept Mr. Fernando as a truthful credible witness that you can even consider convicting the Accused General on charges 1 and 2. Even if you decide the accept Mr. Fernando as a credible witness then you have to consider with regard to charge No I whether what was stated by him what was read in Sinhalese whether those words amount to traitorous or disloyal words. Now what the Prosecution stated in their address was that engaging in any form of political activity has to be given the widest possible meaning. That is suggestions made by the Prosecution which you can consider whether engaging in any form of political activity even if you were to believe the witnesses who said that the Accused General solicited the support for his own candidature at a future election or if he is stated with a person who was holding a political office or as a Member of Parliament that after retirement he intends to come into politics whether that would or that could be considered as engaging in any form of political activity.

What the Accused General is suppose to have or alleged to have done you have to consider whether it falls within the definition of engaging in any from of political activity. If so, you have to then consider the Section that the Accused General is charged with-- Section 102. Section 102(1) says, 'person subject to military law who neglects to obey any general or garrison or other order shall be guilty of a military offence'. So if the Prosecution alleges that the Accused General was a person subject to military law and they alleged that he neglected to obey a General order-- that is an order relating to political rights--you have to consider if you are satisfied that the Accused was a person subject to military law and whether he neglected to obey a General order.

Once again you have to also consider the evidence of witness Mr. Senevirathne who the Prosecution alleges was a reluctant witness, because at one stage he asked the court whether he was obliged to give answers to the questions posed by the Prosecution. This was a suggestion made by the Prosecution because he asked the question and he was a somewhat reluctant witness and that he was a member of a political party that supported the candidature of the Accused General. With all that considering his demeanor and his evidence do you find the witness a credible witness? Now Mr. Abeyrathne's evidence was that Mr. Fernando before and after the conversation came and discussed the matter with him. Mr. Abeyrathne does not corroborate everything that Mr. Fernando says, because Mr. Abeyrathne was not present at the time the alleged conversation between Mr. Weerakoon and Mr. Fernando took placeor witness to the telephone conversation allegedly between Mr. Fernando and the Accused General. Mr. Abeyrathne only knows what Mr. Fernando came and told Mr. Abeyrathne. Mr. Abeyrathne cannot corroborate Mr. Fernando's evidence, when Mr. Fernando says this was stated by the Accused General. If Mr. Fernando is telling something that is not the truth to this court he could have told the same thing to Mr. Abeyrathne also. The only thing that Mr. Abeyrathne corroborates as far as Mr.n Fernando's evidence is concerned is that before this conversation took place he mentioned about the conversation with Mr. Weerakoon to Mr. Abeyrathne.

Mr. Abeyrathne knew that Johnston Fernando went for a meeting with Mr. Weerakoon and Mr. Abeyaratne knew that at this meeting Mr. Fernando will have an opportunity of speaking to the Accused General and he knew after the meeting what Mr. Fernando came and told him. Those are the only factors that Mr. Abeyrathne-- if you consider him as a truthful reliable witness and accept his evidence-- it is only up to that point that he can corroborate Mr. Fernando.

As to whether during that telephone conversation, the Accused General said what Mr Fernando said, is only the evidence of Mr. Fernando. But in accepting or rejecting or analyzing the credibility of a witness it is a factor you can take into consideration if you believe Mr. Abeyrathne that soon after Mr. Fernando is alleged to lave spoken to the Accused General that he came and repeated the conversation to Mr. Abeyrathne.

With regard to the first and the second charges with regard to what the Accused General is suppose to have said, for that part of evidence the Prosecution relied entirely on Mr. Fernando. The corroboration by Mr. Abeyrathne is only so far as to the fact that such a conversation took place, such a meeting took place that is on what Mr. Abeyrathne was told by Mr. Fernando. Subsequently with regard to charge No. 3 also he said that Mr. Senevirathne discussed these matters with him. Now with regard to the charges, there are more than one ingredient for the Prosecution to prove. As I have stated these are the points that the Prosecution has to prove beyond a reasonable doubt and if any one of those ingredients you consider as not been proved beyond reasonable doubt., then that entire charge has to fail. Then you have to consider that that entire charge was not proved beyond reasonable doubt and acquit the accused on that.

Once again I remind you that if there is any reasonable doubt that crops up in your mind that benefit must accrue to the benefit of the accused and he should be acquitted. If at the end of your deliberations you are in a position after all your considerations, after all your deliberations if you can look at the accused in the eye and say I am satisfied beyond reasonable doubt that on charge 1 or charge 2 or 3 that you can say confidently that you find the accused guilty beyond reasonable doubt, it is then and only then you should bring a verdict of guilty against the accused. Society expects from you to bring a just and fair verdict in accordance to the law and I hope you will be able to satisfy that requirement. Is there anything you wish me to add on any area?

Prosecuting Counsel: No Your Honour.

Judge Advocate: So now the time is 5 minutes past 4 O'clock. I have concluded my summing up and the President and Members of the Court Martial will retire to the room assigned for them for their deliberations. And once again I remind the court that if they need any further advice they are free to inform and come before the open court for such advice. Till the court considers to either call for further advice or are in a position to give their verdict the court will be adjourned.

COURT ADJOURNED AT 1610 HRS).

(COURT RE-OPENED AT 1720 HRS.)

Judge Advocate: I will now ask President of the Court Martial whether they have arrived at their verdict with regard to the three charges. Have you arrived at a verdict?

President: Yes.

Judge Advocate: Is the verdict unanimous or divided?

President : Unanimous.

Judge Advocate : With regard to chargeNo1 you find the accused guilty ór not guilty?

Maj Gen Jayathilake: I found the accused is guilty.

Judge Advocate: Do you find for charge No.1, the accused guilty or not guilty?

Maj Gen Wijethunga: Found guilty.

Judge Advocate: With regard to charge.No.I, do you find the accused guilty or not guilty?

President: Found guilty.

Judge Advocate: With regard to charge.No.2, do you find the accused guilty or not guilty?

Maj Gen Jayathilake : I found the accused is guilty.

Maj Gen Wijethunga: Found guilty.

President: Found guilty

Judge Advocate: With regard to the 3rd Charge do you find the accused guilty or not guilty?

Maj Gen Jayathilake : I found the accused is guilty.

Maj Gen Wijethunga: Found guilty.

President: Found guilty

Judge Advocate: The President and Members have unanimously found the accused guilty as charged for all three charges. At this stage since the findings: have been indicated under Regulation 118 if the finding of any charge is guilty then for the guidance of the Court Martial in determining its sentence, and of the confirming authority in considering the sentence, the Court Martial before deliberating on the sentence, shall, wherever possible take evidence on the following matters, that to say the character, age, service, rank and any recognize acts of gallantry or distinguished conduct, of the accused, and the length of time he has been in arrest or in confinement on any previous sentence, and any naval, military, or air force decoration, or military reward or deferred pay of which he may be in possession or to which he is entitled. A record shall be made of such evidence. I believe all that is included in the personal file of the Accused General. Evidence on the above matter may be given by a witness verifying a statement which contains a Summary of the Entries in the Regimental books relating to the accused and identifying the accused as the person referred to in that summary. The personal file of the accused, was it submitted as evidence by an officer?

Prosecuting Counsel: Yes, Your Honour. The person who had the custody :of the personal file personally brought it to this court and produce it.

Judge Advocate: The Accused General, do you have anything to state with regard to the matters that have to be taken into consideration before passing the sentence? The court has found you guilty of all three charges and the court in considering the sentence can consider all the factors I mentioned as specified in Regulation 118, which I believe is contained in your personal file is there an you wish ;to, add in mitigation of the sentence? Now the sentence according to the regulations will be not notified in open court after deliberating on that sentence it will be sent to the convening authority, who is, the confirming authority. It is the convening authority that will inform you of the sentence. But if there is anything you wish to state that the court could or should take into' consideration before passing sentence, in mitigation of the sentence you're given an opportunity to do so now.

Accused General : Only thing I want to say is that I did not expect any justice from this place. I don't believe the justice was done. I did not expect any justice here.

Judge Advocate : Is there anything you want the court to take into consideration in mitigation of the sentence?

Accused General: No.

Judge Advocate : At this stage, I have to advise the Tribunal that the first charge is under Section 124 which says, 'every person subject to military law who uses traitorous. or disloyal words regarding the President shall be guilty of a military offence and shall, on conviction by a Court Martial, be liable, if he is an officer, to be cashiered or to suffer any less severe punishment in the scale set out in Section.133. I draw the attention of the tribunal to Section 133, subject to the provisions of Section 134; the following shall be the scale of punishments, in descending order of severity,- which may be, inflicted on officers convicted of offences by Court-martial.

(a) death
(b) rigorous imprisonment
(c) simple imprisonment
(d) cashier rig
(e), (f), (g), (h) onwards.

Section 124 of the Army Act under which the first charge is framed, the court can consider as a legal punishment any of the punishments in 133(l)(d) or below. That is;

(d) cashiering,
(e) dismissal from the Army.
(f) forfeiture, in the prescribed manner of seniority of rank either in the army or in The corps to which the offender belongs are in both or in the case of an officers whose promotion defense upon length of service forfeiture of all or any part of his service for the purposes of promotion.
(g) severe reprimand or reprimand
(h) Such penal deductions from pay as are authorized by this Act.

The second and third charges are based on Section 102(i) the Army Act where again the punishment is specified 'every person subject to military law who neglects to obey any general or garrison or other order shall be guilty of a military offence and shall; on, conviction by a Court-martial, be liable, if he is an officer, to be cashiered or to suffer any less severe punishment in the scale set out in Section 133, and, if he is soldier, to suffer simple or rigorous imprisonment for a term not exceeding three years. Since the punishment is the same as for charge No. 01, once again the legal punishment that could be considered are under 133(1)(d), (e), (g) or (h). Now I also advise the court that in deciding on the punishment they may now peruse the personal file of the Accused General and take into consideration both the positive and any negative factors that are reflected in the personal file. Under Regulation 136 of the Court-martial Regulations it says, 'when an offender is convicted on two or more charges the sentence shall be that which is considered adequate for the gravest of the offences with some addition for each the other charges.' So I would advise the Tribunal to go through carefully all the .good entries of the 'Accused Officer as well as anything adverse that is found and to come to a reasonable and fair conclusion with regard to sentence. Does the Prosecution wish to add anything with regard to sentence?

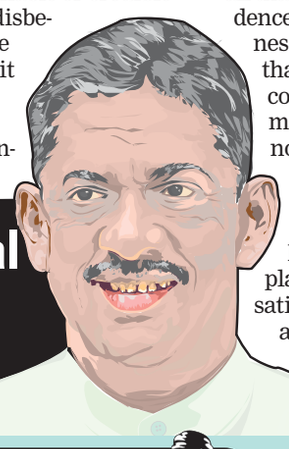
Prosecuting Counsel: No, Your Honours.

Judge Advocate : Now the court will retire to consider the sentence and it will not reassemble, because. once they have come to a decision on the sentence that will be communicated under the provisions of the Army Act and Regulations to the convening authority in this case, His Excellency the President. And the convening authority will inform the sentence in due course subject to confirmation of that conviction and sentence in this case the proceedings of this Court martial are now at an end, until such time that the convening authority as the confirming authority, informs the sentence of the court to the Accused General

(Court Closed)

The convening officer of the Court Martial - 1, President Mahinda Rajapaksa as the Confirming Authority confirmed General G.S.C. Fonseka be cashiered from the Sri Lanka Army as recommended by the tribunal that probed his involvement in politics on three separate charges.

He was charged for Traitorous / Disloyal Word and Neglect to obey garrison or other orders (two counts)



Court Martial 1 and 2

Tribunal
Major General H.L.Weeratunga (President)
Major General A.R.L.Wijetunga
Major General D.R.A.B. Jayathilaka
Judge Advocate: Rear Admiral W.W.J.S.Fernando

Court Martial 1

Charges:

1. Utterance of traitorous / disloyal words
Use of disloyal words in a telephone conversation with Mr. Johnston Fernando (at that time a UNP MP and now a Minister) saying (In Sinhala) " I will return to Sri Lanka after giving all evidence that the US government needs about the war and discredit the military victory. I will come prepared to contest the Presidential election. Be ready to welcome me at the air port as a hero".

2. Neglect to obey garrison or other orders:
Engaging in political activities by soliciting the support of Mr Jhonston Fernando to propose his name at the UNP working Committee as the Presidential candidate, while being an officer of the Regular Force of the Army and serving as the Chief of Defence Staff.

3. Neglect to obey garrison or other orders:

Engaging in political activities by having discussion with MP Lakshman Seneviratne with regard to his political career, while being an officer of the Regular Force of the Army and serving as the Chief of Defence Staff.

Progress : After 14 hearings the Tribunal ended the hearings. The Defense lawyers were not present on the final day as they had already informed the tribunal that they would not be available due to court vacation.

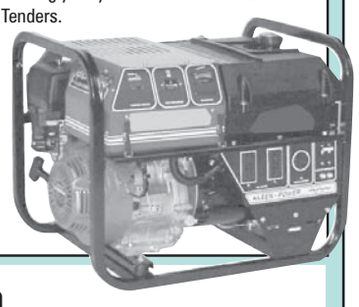
Current Status : The Tribunal recommended that General Fonseka be cashiered from the Army and President Mahinda Rajapaksa confirmed the recommendation. (See page 11 for summary of final day proceedings)

Court Martial 2

Charges:
Whilst on active service being the Commander of the Army served as Chairman of the Tender Board for the procurement of Day Vision Binoculars – 234 Nos, 12 v Maintenance Free Battery – 50 Nos, 5 KV Generator – 50 Nos and VHF Direction Finders – 3 Nos - from British Borneo Defence –Australia through M/S Hicorp (Pvt) Ltd and awarded the tender to the British Borneo Defence – Australia through M/S Highcorp (Pvt) Ltd with the knowledge of the fact that his son-in-law Danuna Thilakaratne had an interest or concern with M/S Hicorp (Pvt) Ltd thereby committing a fraudulent act punishable under the Army Act.

Progress : The Court Martial proceedings commenced on March 17, 2010 and during the process army officers involved in procurement testified. The Defence counsel argued that the Tenders had been awarded on the recommendations of the Technical Evaluation Committee (TEC) after their bids were accepted and in a similar manner six other tenders they bid for had been rejected by the TEC and accordingly they were not awarded the respective Tenders.

Current Status: A hearing was held yesterday.



Other cases against Sarath Fonseka

1. White Flag comments:
High Court Trial-at-bar presided by Ms. Deepali Wijesundera and H.T. N.P.B. Warawewa and Mohammed Razin.
Charges: Mr. Fonseka has been indicted on charges for making comments that Defence Secretary Gotabhaya Rajapaksa had given instructions not to spare any of the LTTE cadres who were surrendering, even with white flags.
Next date: September 27

2. Harbouring military personnel
High Court Colombo
Judge: Deepali Wijesundara
Charges: Fonseka and his former Secretary Senaka Haripriya Silva have been indicted for harbouring army deserters from September 15, 2009 to January 27, 2010 without authority, obstructing the duties of the military police and making the disloyal to the state. They have 41 charges against them and 29 witnesses are due to give evidence while 13 court productions have been listed in the case. **Next date:** September 15.

3. Hicorp case
High Court Colombo
Judge: Sunil Rajapaksa

Charges: Serving as the Chairman of the Tender Board while being the Commander of the army and approving the tender for the procurement of Day Vision Binoculars – 234 Nos, 12 v Maintenance Free Battery – 50 Nos, 5 KV Generator – 50 Nos and VHF Direction Finders – 3 Nos - from British Borneo Defence –Australia through M/S Hicorp (Pvt) Ltd of which Fonseka's son-in-law Danuna Thilakaratne had an interest or concern.
In this case Mr. Thilakaratne and a Director of Hicorp Wellington Dyhood also have been charged.
Next date: August 30 – The court is due to hear evidence to determine on continuing the case in the absence of Mr. Thilakaratne who has been evading arrest.

ST Graphic by Indramurthi Jayasuriya