CAPTAIN NAWARATHNA
vs
MAJOR GENERAL SARATH FONSEKA AND 6 OTHERS

SUPREME COURT
SARATH N. SILVA, C.J.
SHIRANEE TILAKAWARDANE, J. AND
P. A. RATNAYAKA, J.
S.C. APPEAL NO. 43/07
SC SPL L.A. NO. 91/2007
C.A. WRIT NO. 2402/2004
OCTOBER 8TH, 2008

Army Act No. 17 of 1949 Section 40, - Section 107 and 129(1) - Conduct prejudicial to the good order and to military discipline which are military offences - Bias - Test for bias - Real likelihood of bias or reasonable suspicion of bias - Writ of Certiorari - Availability - Invalid exercise of power and valid exercise of power containing an error of law on the face of the record.

The petitioner who is a captain of the Sri Lanka Army, sought a grant and issue of a Mandate in the nature of Writ of Certiorari from the Court of Appeal to quash the decisions to dismiss the petitioner from the Army and to forfeit the petitioner's seniority, and also sought a grant and issue of a Mandate in the nature of Writ of Prohibition prohibiting the respondent from conducting further summary trial in respect of the same charge against the petitioner.

The Court of Appeal set aside the recommendation made by the 1st respondent to discharge the petitioner from the Army but it rejected the petitioner's application for a Writ of Certiorari quashing the decision to forfeit the petitioner's seniority in 109 numbers among others.

The Supreme Court granted the petitioner special leave to appeal against the 2nd part of the order of the Court of Appeal, refusing to grant a Writ of Certiorari to quash the decision to forfeit the petitioner's seniority.

Held:

(1) Where the petitioners denies that rules of natural justice have not been complied with and the respondents assert the contrary, a

petitioner can do no more than deny the compliance with the rules of natural justice and the burden is on the respondents to establish that rules of natural justice have been complied by producing an acceptable record of proceedings. In the absence of production of such a record of proceedings the Court would not have any option other than to accept the petitioner's version that there has been procedural impropriety leading to a denial of the rules of natural justice.

(2) When an allegation of bias is made the test is whether the facts, as assessed by Court, give rise to a real likelihood of bias.

Cases referred to:-

1. *Mohamed Mohideen Hassan Vs. N. S. Peiris* - (1982) 1 S.L.R. 195.
2. *W. D. Simon v. Commissioner of National Housing* - 75 N.L.R. 471.
3. *Metropolitan Properties Co. (F. G. C.) V. Lannon* - (1969) 1 Q. B. 577
4. *Kumarasena V. Data Management Systems Ltd.*, - (1987) 2 S. L. R. 190
5. *Dimes v. Grand Junction Canal* (1852) 3 H.L.C. 759.
6. *R. V. Sussex Justices ex. p. McCarthy* - (1924) 1 K. B. 256

APPEAL from the judgment of the Court of Appeal.

J. C. Weliamuna for Petitioner.

Janak de Silva, S. S. C. for Respondents.

Cur.adv.vult.

May 28, 2009

P. A. RATNAYAKE, J.

This is an appeal from a judgment of the Court of Appeal. The Petitioner in this case who is a Captain of the Sri Lanka Army, filed an application in the Court of Appeal seeking the grant and issue of a Mandate in the nature of a Writ of Certiorari quashing the decisions to dismiss the petitioner from the Army and to forfeit the Petitioner's seniority in

109 numbers and the grant and issue of a Mandate in the nature of Writ of Prohibition prohibiting the Respondent from conducting a further summary trial in respect of the same charge for which the petitioner has been purportedly found guilty.

According to the pleadings before Court, the Petitioner has joined the Sri Lanka Army on 15.07.1996 as a Cadet Officer. After 2 years training he has passed out as a Second Lieutenant and was promoted to the rank of Lieutenant on 23.04.2000 and thereafter to the rank of Captain on 01.01.2004. He was attached to the 'Singha Regiment' of the Sri Lanka Army from the time he passed out as a 2nd Lieutenant.

It was submitted on behalf of the Petitioner that the 2nd Respondent informed him on 10.05.2004, to appear before the 1st Respondent on the next day at 9.00 a. m. When he appeared before the 1st Respondent, accompanied by the 2nd Respondent at his office as directed, his then fiancée Ms. Rosika Chandrasena and her mother were present at the 1st Respondent's office. The 1st Respondent has submitted that the Petitioner has been summoned to inquire into the complaint made by the said Ms. Chandrasena and her mother. The petitioner had stated that he met Ms. Chandrasena in 1994 prior to joining the Sri Lanka Army and had been associating her as his fiancée since then. When inquired by the 1st Respondent, the Petitioner has admitted that he had an intimate affair with Ms. Chandrasena for over 10 years and that he had sexual intercourse with her on several occasions during the said period having promised to marry her, but he had informed her that he is not prepared to marry her. The 1st Respondent-submits that as the principle Staff Officer of the Sri

Lanka 'Singha Regiment' who is vested with general responsibility of maintaining good order and discipline among the officers and soldiers of his Regiment and also as a responsible senior Officer of the Sri Lanka Army, he explained to the petitioner the gravity of such an act. He had also expressed his view to the effect that when an Officer of the Army conducts himself in such a manner the confidence placed by the General Public on the Army will be lost and as a result of such conduct the reputation of the Army would suffer. At this stage, the Petitioner having discussed the issue with Ms. Chandrasena has voluntarily informed the 1st Respondent that he would take steps to marry Ms. Chandrasena within a period of 6 months. In addition he had voluntarily given in writing to the 2nd Respondent an undertaking to marry Ms. Chandrasena within 6 months from 11.05.2004. A copy of this undertaking has been produced to the Court of Appeal by the 1st Respondent marked as '1R1'.

The petitioner's position is that the letter containing the undertaking to marry Ms. Chandrasena was given based on the direction of the 1st Respondent to hand over such a letter and that he had no option but to hand over a letter to that effect. The Petitioner further states that thereafter his relationship with Ms. Chandrasena was not amiable and accordingly he had informed her on 23.08.2004 that he would not marry her under any circumstances.

When this matter was brought to the notice of the 1st Respondent, he had convened a Court of Inquiry to inquire into the said incident in terms of Army Court of Inquiry Regulation 1952 on the basis that the Petitioner has acted in a manner prejudicial to the good order and military discipline which are military offences punishable under Sections 107 and 129 (1) of the Army Act No. 17 of 1949.

The Court of Inquiry was held and the proceedings of the Court of Inquiry were submitted to the Army Commander who is the 3rd Respondent who directed that disciplinary action be taken against the Petitioner. Thereafter a summary trial was held under Section 40 of the Army Act No. 17 of 1949. The petitioner and the 1st Respondent appear to differ on many aspects of this summary trial. The petitioner states that he was never served a charge sheet but, Respondents have taken up the position that he had been served a charge sheet. Discretion is given to the petitioner as to whether he elects to be tried by a Court Martial. The Petitioner states that he elected to be tried by a Court Martial, but the 1st Respondent states that the petitioner did not do so. The 1st Respondent states that evidence of 4 witnesses were led at the summary trial and the Petitioner was given an opportunity to cross examine the witnesses, but the petitioner has denied these facts. In a case such as this, where the Petitioner denies that the rules of natural justice have not been complied and the Respondents assert the contrary, a Petitioner can do no more than deny the compliance with the rules of natural justice and the burden is on the Respondents to establish that the rules of natural justice have been complied by producing an acceptable record of the proceedings. In the absence of production of such a record of proceedings the Court would not have procedural impropriety leading to a denial of the rules of natural justice by the denial of affording the Petitioner the option to elect a trial by court martial and the opportunity to cross-examine the witnesses.

The petitioner and the 1st and 2nd Respondents agree that the summary trial was held by the 1st Respondent and the Petitioner was found guilty by the 1st Respondent who imposed two punishments i.e. seniority forfeited by 109 number and recommended discharge from the Army.

After the matter was argued before the Court of Appeal, the Court of Appeal has set aside the recommendation made by the 1st Respondent to discharge the Petitioner from the Army. The Petitioner has appealed from the said judgment of the Court of Appeal, in so far as it rejected the Petitioner's application for a Mandate in the Nature of a Writ of Certiorari quashing the decision to forfeit the Petitioner's seniority in 109 numbers among others. This court has granted the Petitioner Special Leave to appeal on the following questions set out in paragraph 11(a), (b), (c), (d) and (e) of the Petition of Appeal and a further question of law raised by the Counsel for the Respondent.

Paragraph 11(a), (b), (c), (d) and (e) of the Petition of Appeal states as follows:

(a) "Did the Court of Appeal err in law, by declining to decide on the procedural impropriety of the Court of Inquiry and the Summary Trial on the basis that no prejudice being caused to the Petitioner?

(b) Did the Court of Appeal err in law when it failed to consider and/or examine the material before Court and/or rule on the question whether the intimate relationship of the Petitioner with Rosika Chandrasena was against the military discipline and Section 129 of the Army Act?

(c) Did the Court of Appeal err in law when it failed to consider the mala fide conduct of the 1st Respondent in the purported disciplinary procedure adopted against the Petitioner?

(d) Has the Court of Appeal erred in law in not setting aside the proceedings and findings of the Court of Inquiry and the Summary Trial?

(e) Did the Court of Appeal err in law when it failed to grant the reliefs sought for by the Petitioner?"

In paragraph 21(iv) of the affidavit, the 1st Respondent states as follows:-

"On the said direction, a charge sheet containing two charges under Section 129(1) of the Army Act, No. 17 of 1949 was framed against the Petitioner. On 15.11.2004 morning he was marched before the 2nd Respondent at the Regimental Headquarters, Ambepussa and served with a copy of the said charge sheet. He had been further informed to be ready to go to Colombo on the following day for the hearing of the said charges. On the following day, he was accompanied to Colombo and marched before me at about 2.00 p.m. on the said date for the purpose of hearing the said charges summarily under Section 40 of the Army Act No. 17 of 1949. There I read the charges to the Petitioner and he confirmed that he understood the charges when it was so clarified. Thereafter when the opportunity was granted to the Petitioner to plead, he pleaded not guilty to the said charge, but did not elect to be trial by a Court-Martial as claimed by the Petitioner in the said averments. Thereafter the four witnesses including Ms. Rosika Chandrasena and her mother were called upon to give oral evidence and the Petitioner was afforded the opportunity to cross-examine them. After following all the formalities required to be adopted at a Summary Trial in accordance with law, the Petitioner was found guilty on the evidence, and a punishment of forfeiture of seniority by 109 numbers on the Officer's Seniority List, 2004 was inflicted on him. Further it was recommended that his commission be withdrawn and he be discharged from the Army according to the direction of the Commander of the Army as mentioned in his opinion on the Court of Inquiry."

In paragraph 30 of his affidavit, the 1st Respondent states as follows:-

> "Answering the averments contained in paragraphs 28(f) and 28(g) of the said affidavit, it is stated that the Petitioner was found guilty at the said summary trial held on 16.11.2004 at the Army Headquarters in terms of Section 40 of the Army Act No. 17 of 1949 on the evidence revealed at the said summary trial, and not on the evidence revealed at the above mentioned Court of Inquiry as claimed by the Petitioner.
>
> Four witness including Ms. Rosika Chandrasena and her mother gave evidence at the summary trial held on the said date."

Accordingly, the 1st Respondent states that he held the summary inquiry of the Petitioner. In accordance with '1R6', overleaf the punishment has also been given by the 1st respondent in respect of losing seniority by 109 numbers. Further, it is he who has recommended in the remarks column to discharge the Petitioner from the Army and made a reference to the opinion expressed by the Army Commander.

The charge sheet of the summary inquiry was annexed by the 1 st Respondent marked as '1R6'. The 2nd offence on which the Petitioner was charged in the charge sheet states as follows:-

> *"Being an Officer of the Regular Force whilst on active service, you are charged with* ***Conduct Prejudicial to Military Discipline.*** *In that whilst you were serving as an Officer of Sri Lanka Sinha Regiment on a complaint made by Miss Rosika Chandrasena regarding your failure to honour your promise to marry her, on being advised by*

the Colonel of the Regiment Sri Lanka Sinha Regiment on 11th day of May 2004 to honour your promise as a gentleman officer undertook to marry the said Miss Rosika Chandrasena within a period of six months but subsequently failed to comply with the undertaking given to the Colonel Commandant and did thereby act in a manner unbecoming of an officer and a gentlemen and did thereby commit an offence punishable under Section 129(1) of the Army Act."

'Colonel of the Regiment Sri Lanka Sinha Regiment' and 'the Colonel Commandant' Referred to in the above charge sheet is the 1st Respondent.

Therefore, the charge framed against the Petitioner related to a breach of an undertaking given by the Petitioner to the 1st Respondent. It is the 1st Respondent himself who conducted the summary trial, found the Petitioner guilty of the charge after the summary trial and imposed the punishment. In these circumstances, the Petitioner contends that the decision of the 1st respondent is vitiated by the rule against bias.

The test for bias is "real likehood of bias" or "reasonable suspicion of bias"; vide *Mohamed Mohideen Hassen vs. N.S.Peiris*[1] and *W.D. Simon v the Commissioner of National Housing*[2]. *Senevirathne, J.* in *Mohamed Mohideen Hassen vs. N.S.Peiris (supra)* illustrated these terms at 197 to 198 in the following manner:

'According to English authorities "Bias" is a ground on which the proceeding of a judicial or quasi judicial body can be quashed. The nature of the bias which the petitioner in an instance like this should prove on grounds of probability is a "Real likelihood of bias or reasonable suspicion of bias."

A "real likelihood of bias" means at least a substantial possibility of bias. The Court, it has been said, will judge of the matter as a reasonable man would judge of any matter in the conduct of his own business." The test of real likelihood of bias, ... is based on the reasonable apprehensions of a reasonable man fully apprised of the facts..... However, the pendulum has now swung towards a test of reasonable suspicion, founded on the apprehensions of a reasonable man who had taken reasonable steps to inform himself of the material facts. "Reasonable suspicion" tests look mainly to outward appearances "Real likelihood" tests focus on the court's own evaluation of the probabilities; but in practice the tests have much in common with one another, and in the vast majority of cases they will lead to the same result."

In *Mohamed Mohideen Hassen vs. N. S. Peiris(supra)* Seneviratne, J. also cites with approval the following dictum of Lord Denning in the case of *Metropolitan Properties Co. (F.G.C) Ltd. v. Lannon*[3] with regard to the test for bias:

> *"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the Justice himself or at the mind of the chairman or the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think, that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand..... Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture*

is not enough. There must be circumstances from which reasonable men would think it likely or probable that the justice, or chairman, as the case may be, would or did favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice, is that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right -minded people go away thinking: "The Judge was biased."

The above dictum of Lord Denning in *Metropolitan Properties Co. (F. G. C.) Ltd. vs. Lannon (supra)* was cited with approval more recently in *Kumarasena v. Data Management Systems Ltd*[4] at 201.

H. W. R. Wade on Administrative Law (9th Edition, Page 450 to 452) cites with approval the two famous cases of *Dimes v Grand Junction Canal*[5] and *R v Sussex Justices ex. p. McCarthy*[6]

In *Dimes (supra)* Lord Chancellor Cottenham had affirmed several decrees made by the Vice Chancellor in favour of a canal company in which Lord Cottenham was a shareholder to the extent of several thousand pounds. Lord Cottenham's decrees were set aside by the House of Lords on account of his pecuniary interest. Lord Cambell said:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim, that no man shall be a judge in his own cause, should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest....."

McCarthy(supra) a solicitor was acting for a client who was suing a motorist for damage caused in a road accident. The solicitor was also an acting clerk to the justices before whom the same motorist was convicted of dangerous driving and he retired with them when they were considering their decision. The fact that the clerk's firm was acting against the motorist was held to invalidate the conviction even though it was proved that the justices had in fact not consulted the clerk and the clerk had scrupulously refrained from saying anything prejudicial. This case resulted in the celebrated dictum of Lord Hewart, C. J. who said:

> "It is of fundamental importance that justice should not only be done but should mainfestly and undoubtedly be seen to be done".

In the instant case the undertaking referred to in the charge was given by the petitioner to the 1st Respondent. An important issue that required determination by the 1st Respondent in relation to the charge was whether or not the failure to honour the undertaking to marry concerned military discipline. If it did concern military discipline, another important decision would have been the appropriate punishment that should have been imposed on the petitioner having regard to the principles of proportionality. Since the undertaking to marry was given to the 1st Respondent and the breach of that undertaking was the gravamen of the charge, reasonable men having regard to all the circumstances would think that the 1st Respondent would have had an interest to decide against the petitioner and impose a rigid punishment. In all the circumstances of the case I hold that the test of bias set down in the above judicial precedents has been satisfied in relation to the decision of the 1st Respondent.

Therefore, I allow the appeal and issue a Writ of Certiorari quashing the decision of the 1st Respondent to forfeit the

Petitioner's seniority in 109 numbers as prayed for in paragraph (c) in the prayer to the Petition filed in Court of Appeal together with costs. I note that the Court of Appeal had decided to grant partial relief by issuing writ of certiorari to set aside the recommendation made by the 1st Respondent to withdraw the commission and discharge the Petitioner from the army and a writ of certiorari to quash the recommendation to dismiss the Petitioner, which decisions will stand.

S. N. SILVA, CJ - I agree

TILAKAWARDANE, J. - I agree.

Appeal allowed.