LALITH DESHAPRIYA
v
CAPTAIN WEERAKOON AND OTHERS

COURT OF APPEAL
SALEEM MARSOOF, P.C.J., (P/CA)
SRIPAVAN, J.
C.A. 968/2002
MAY 27, 2004

Writs of Certiorari and Mandamus – quash conviction – dismissal from service – Constitution Articles 126, 140, 11, 13(1), 13 (2), 13(4) – Violation of Fundamental Rights – Navy Act – Section 29, 6, 69, 8A, 82(b), 84, 132(1) – Summary Trial – Conviction – Rules of natural justice not followed? – No fair hearing? – nemo judex in causa sua potest– qui aliquid statuerit parte inaudita altera acqum licet discerit, hand acqun fecerit.

The petitioner was arrested for the loss of pistol from the main Armoury. The petitioner after summary trial on 6 charges – not disciplinary as well as disciplinary – was convicted and the petitioner was sentenced to imprisonment and dismissed from the Sri Lanka Navy with disgrace.

Held:

i) A plain reading of section 29 would reveal that an accused charged with a disciplinary offence is entitled to a Court Martial except in situation under section 148 and cannot be dealt with summarily without being asked whether he desires to be dealt with summarily or by Court Martial.

This option was offered after the petitioner pleaded to the charges before him.

ii) The petitioner did not have the benefit of a fair hearing.

The trial was conducted when the petitioner was not in a condition to face the trial freely and benefit from the protection afforded by law.

iii) No charge sheet was served prior to the summary proceeding before the 1st respondent.

iv) The petitioner was not afforded the opportunity of obtaining the services of a Defence Officer.

v) The impugned proceedings have been conducted by the very Commanding Officer who was found by the Supreme Court to have been responsible for the assault and torture of the petitioner while in custody.

vi) The entire proceedings before the 1st respondent are a nullity.

APPLICATION for writs in the nature of *certiorari* and *mandamus*.

Cases referred to:

1. *Lindara Mudiyanselage Lalith Deshapriya* v. *Captain Weerakoon, Commanding Officer, SL Navy Ship Gemunu and others* – SCFR 42/2002 – SCM 8.8.2003.
2. *Board of Education* v *Rice* – 1911 AC 179 at 182.
3. *De Vertend v Knaggs* – 1918 AC 557 at 560.
4. *Chulabadra v University of Colombo*, 1985 1 Sri LR 244 at 303.
5. *R.* v *Sussex Justice* - 1924 – 2 KB 256.
6. *Needra Fernando v Ceylon Tourist Board and others* 2002 – 2 Sri LR 169 at 180, 181.

Saliya Pieris with *Chamath Madanayake* for petitioner.

Nalinda Indatissa with *Gamini Silva* for 1st respondent.

L.M.K. Arulanandan D.S.G. with *Ms. Uresha de Silva*, S.C., for 2nd and 3rd respondents.

Cur. adv. vult.

June 11, 2004

SALEEM MARSOOF, J. (P / CA)

This is an application for writs of *certiorari* to quash the conviction, imprisonment and dismissal from service of the petitioner and for a writ of *mandamus* to re-enlist him to the rank of Petty Officer in the Sri Lankan Navy. The petitioner invokes the writ jurisdiction of this Court in terms of Article 140 of the Constitution of Sri Lanka read with section 132(1) of the Navy Act, No. 34 of 1950 as subsequently amended. It is worth noting at the outset that the supervisory jurisdiction of this Court extends to proceedings conducted by a court martial or a commanding officer or other officer dealing summarily with an offender in view of section 132(1) of the Navy Act which expressly provides that -

> "Such of the provisions of Article 140 of the Constitution as relate to the grant and issue of writs of *mandamus, certiorari,* and prohibition shall be deemed to apply in respect of any court martial or of any naval officer exercising judicial powers under this Act."

The petitioner originally joined the Sri Lanka Navy as a Sailor and was promoted to the rank of Able Seaman in 1993, and thereafter to the rank of Leading Seaman in 1997. In paragraph 5 of the petition and paragraph 6 of the petitioner's affidavit dated 15th May 2002 tendered along with the petition, the petitioner has stated that he was informed of his promotion to the rank of Petty Officer and was "told that the official letter of appointment will follow." This position has been admitted by the 2nd respondent, who is the Commander of the Sri Lanka Navy, in his affidavit dated 22nd November 2002 filed in these proceedings.

Act One of the drama of the petitioner's arrest and conviction begins with the report of the alleged loss of a pistol from the main armory of the Sri Lanka Ship 'Gemunu', in which the petitioner was serving at the relevant time. It is alleged that the loss was discovered when an inventory was taken to facilitate the transfer of the petitioner from the said Navy Ship to the naval base at Kirinda. It is in evidence that by reason of the suspicion that the petitioner may be responsible for the loss of the pistol, the petitioner was kept under 'close arrest' from 4th September 2001 to 8th January 2002.

The next episode in this intriguing drama begins after the other six persons arrested along with the petitioner on 4th September 2001 were released, while the petitioner continued in detention. In paragraphs 10, 11 and 12 of his affidavit the petitioner has described what transpired while he was held by the 1st respondent in the following words:-

"I state that one Sailor Fernando and Able Seaman Premasiri who were attached to the Navy Detention Barrack had blind folded me and tied me up and suspended me from a wooden pole which was hung from the roof. The way in which I was suspended enabled them to revolve me around the wooden pole. I state that this method of torture is commonly known as "Dharmachakraya". While I was being thus revolved said persons assaulted me with poles and I was questioned about the missing pistol.

I state that I was assaulted by the aforesaid Premasiri and Fernando and two others namely Able Seaman Meegahakumbura and Lieutenant Commander H.D. Gamage continuously and the 1st respondent had obtained my signature to several documents forcibly which I was not allowed to read nor explained to me. I state that the 1st respondent forced me to make a statement admitting that the pistol was taken by me and it was recorded to a cassette. I did the same because I had no alternative and under duress.

I state that on one occasion I was blind folded and a heated clothes iron was placed on my back where the scar is still visible. I state that a barbed wire was inserted in to my anus and as a result of which I sustained injuries in the anal area. I further state that I identified the respondents from their voices. I state that while I was blind folded the respondents put chillie powder onto my nose, penis and anus ....."

In paragraph 14 and 15 of his affidavit, the petitioner has explained how with the assistance of his father and an Attorney-at-law, he was able to invoke the jurisdiction of the Supreme Court under Article 126 of the Constitution of Sri Lanka seeking redress for the alleged violation of his fundamental rights guaranteed by Articles 11, 13(1), 13(2) and 13(4) of the Constitution. These

proceedings eventually resulted in the determination of the Supreme Court in *Lindara Mudiyanselage Lalith Deshapriya* v *Captain Weerakoon, Commanding Officer, Sri Lanka Navy Ship 'Gemunu' and Others,*(1) that the fundamental rights of the petitioner under Article 11 of the Constitution had been violated by the 1st respondent and some of his subordinate officers. The Supreme Court held that the petitioner was kept in custody on the specific orders of the 1st respondent and that he is responsible for the said violation of the petitioner's fundamental rights. The Court accordingly awarded the petitioner a sum of Rs. 150,000 as compensation and further directed that costs amounting to Rs. 20,000/= should be paid by the 1st respondent personally.

Act Three of this drama simply consists of the summary trial of the petitioner conducted by the 1st respondent on 6 charges which are set out at the commencement of the proceeding dated 8th January 2001, a copy of which has been produced with the 1st respondent's affidavit marked 1R2. It is noteworthy that Charges I, II and VI related to disciplinary offences based respectively on sections 61, 69 and 104 of the Navy Act. The other charges were non-disciplinary charges based respectively on sections 82 (b), 81 and 84 of the Navy Act. Evidence had been led and concluded on 8th January 2002 though in the proceedings marked 1R2 the date is given as 8th January 2001 by reason of what has been described as "a typographical error" by the 1st respondent in paragraph 16 of his affidavit dated 2nd November 2002. The said summary trial culminated in the conviction of the petitioner with respect to four out of the six charges and the approval by the 2nd respondent on 7th February 2002 of the recommendation of the 1st respondent dated 8th January 2002 (IR3) that the petitioner be sentenced to imprisonment for 120 days in addition to being dismissed from the Sri Lankan Navy with disgrace. It is this determination that the petitioner seeks to have quashed by *certiorari*, while also seeking a writ in the nature of *mandamus* directing the respondents to re-enlist him to the rank of Petty Officer in the Sri Lanka Navy.

The petitioner has sought to challenge the said conviction, sentence of imprisonment and order of dismissal from service on the ground that they are unreasonable, arbitrary, illegal, capricious, *mala fide* and *ultra vires.* However, at the hearing the learned

Counsel for the petitioner was content to rest his case on the ground that the said orders have been made contrary to the procedure established by law and in violation of the rules of natural justice.

Learned Counsel for the petitioner relied on section 29 of the Navy Act, as amended by Act, No. 11 of 1993, which is quoted below:

> "Where a warrant officer or petty officer is charged with a non-capital naval offence other than a disciplinary offence or an offence which is expressly required by this Act to be tried by a court martial, his commanding officer shall ask him whether he desires to be dealt with summarily or to be tried by a court martial, and, if he elects to be tried by a court martial, shall take steps for his trial by a court martial."

Counsel for the petitioner contended that although in terms of this provision, the 1st respondent who was the petitioner's commanding officer, should have offered to the petitioner the option of being dealt with summarily or being tried by a court martial, no such option was afforded to the petitioner prior to being asked to plead before the 1st respondent. It was, however, submitted on behalf of the respondents that as three out of the six charges levelled against the petitioner related to disciplinary offences with respect to which an accused is not entitled to an option under section 29, the procedure followed was in order. It was also submitted that in any event, the petitioner was in fact asked by the 1st respondent whether he desires to be dealt with summarily or to be tried by a court martial *after* he pleaded before the 1st respondent. A plain reading of section 29 would reveal that an accused charged with a disciplinary offence is entitled to a court martial (except in the situation contemplated by section 148) and cannot be dealt with summarily without being asked whether he desires to be dealt with summarily or by court martial. The 1st respondent made a mockery of this section by purporting to offer the option after the petitioner pleaded to the charges before him.

Even more serious is the violation of the two cardinal principles of natural justice embodied in the maxims *audi alteram partem* and *nemo judex in causa sua potest*. The first of these principles postulates a fair hearing before the rights of a citizen are affected by a *quasi* judicial or administrative decision. In this context, it is now recognised that *qui aliquid statuerit parte inaudita altera acquum licet*

discerit, hand acquum fecerit – which means that he who determines any matter without hearing both sides, though he may have decided right, has not done justice. According to the jurisprudence built around the *audi alteram partem* principal, there should not only be a hearing of both sides, but the hearing should be more than a pretence. The procedure followed should be fair and conducive to the achievement of justice. In *Board of Education v Rice*[2] at 182 Lord Loreburn, L.C. in his famous *dictum* laid down that a tribunal was under duty to "act in good faith, and fairly listen to both sides for that is a duty lying upon every one who decides anything." In *De Verteud* v *Knaggs*[3] at p.560 it was laid down as follows:

> "In general, the requirements of natural justice are first, that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, that the tribunal should act in good faith."

As his Lordship Sharvananda, C.J. observed in *Chulabadra* v *University of Colombo* [4] at 303, "the obligation to give the person charged a fair chance to exculpate himself or fair opportunity to controvert the charge may oblige the tribunal not only to inform that person of the hearsay evidence, but also give the accused a sufficient opportunity to deal with that evidence."

Did the petitioner have the benefit of a fair hearing? As noted earlier, the Supreme Court has held in *Lindara Mudiyanselage Lalith Deshapriya* v *Captain Weerakoon, Commanding Officer, Sri Lanka Navy Ship 'Gemunu' and Others (supra)*, that the petitioner has been subjected to assault and torture while he was in custody within the period 4th September 2001 to 8th January 2002 and the trial against the petitioner was commenced and concluded by the 1st respondent on 8th January 2002, which shows that the trial was conducted when the petitioner was not in a condition to face the trial freely and benefit from the protection afforded by law. Furthermore, in proceedings conducted by a court martial or a commanding officer or other officer dealing summarily with an offender, it is usual to serve a charge sheet on the accused to give him notice of the allegations against him so that he would have a fair chance of meeting these allegations. The petitioner has alleged that he was not served with a charge sheet before hand, and that he was brought before the 1st respondent from the place where he was detained on 8th January 2002 and certain

charges were read out to him. He has further asserted that although he pleaded not guilty to the charges read out to him, the 1st respondent threatened and abused him and went on to record a plea of guilty and forced him to sign certain papers under duress. On a perusal of the proceedings marked IR2 it appears that the charges are set out at the commencement thereof, and the absence of a separate charge sheet as an annexure to the affidavit of either the 1st or the 2nd respondent, gives credence to the petitioner's position that no charge sheet was in fact served on him prior to the summary proceedings before the 1st respondent. It is also difficult to believe, in the peculiar circumstances of this case, that the petitioner freely pleaded guilty to all the charges leveled against him.

Learned Counsel for the petitioner has emphasised that the *audi alteram partem* rule was further violated by failing to afford the petitioner the opportunity of obtaining the services of a Defence Officer at the proceedings before the 1st respondent. Counsel for the respondent relied on the proceedings marked IR2 in which it has been recorded that the petitioner was defended by a lieutenant by the name of K.B. Wijesooriya, but the respondents have failed to file any affidavit from the said officer in these proceedings to contradict the petitioner's position that he was not provided with a Defence Officer. The assertion of the petitioner is plausible in all the circumstances of this case, and in particular the fact that on the face of IR2 none of the prosecution witness have been subjected to any cross-examination by Lieutenant Wijesooriya.

What is most disturbing to this court is the flagrant violation by the 1st respondent of the maximum *nemo judex in causa sua potest.* This is a rule of natural justice that prevents a person suspected of being biased from deciding a matter. That maxim literally means that no man shall be a judge in his own cause. This rule is based on the fundamental requirement which was highlighted in Lord Hewart's judgment in *R* v *Sussex Justice*(5) that "it is not merely of some importance, but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". As pointed out by Gunawardana, J. in *Needra Fernando* v *Ceylon Tourist Board and Others*(6) at 180 and 181 -

> "This is a safeguard which is really not concerned with the fact that the decision-maker was actually biased but with the

possibility that he or she might have been biased. People who are likely to be biased cannot realistically be expected to make fair decisions."

The impugned proceedings have been conducted by the very commanding officer who was found by the Supreme Court in *Lindara Mudiyanselage Lalith Deshapriya* v *Captain Weerakoon, Commanding Officer, Sri Lanka Navy Ship 'Gemunu' and Others (supra)*, to have been responsible for the assault and torture of the petitioner while in custody. It is true that in the judgment of the Supreme Court there is no specific finding that the 1st respondent had personally assaulted or tortured the petitioner, and this fact was stressed by the learned Counsel for the 1st respondent. However, it is important to note that Supreme Court has held that the petitioner was subjected to torture while he was in custody on the specific orders of the 1st respondent who was at the relevant time the Commanding Officer of the Naval Ship 'Gemunu'.

In the opinion of this Court, the entire proceedings conducted by the 1st respondent are in violation of the two fundamental principles of natural justice noted above. In the circumstances, the Court finds that the entire proceedings before the 1st respondent are a nullity and should be quashed along with the consequent order dated 7th February 2002 (IR3) imposing on the petitioner a sentence of 120 days of imprisonment in addition to dismissal from the Sri Lankan Navy with disgrace. It follows that the *mandamus* prayed for directing the respondents to re-enlist the petitioner to the rank of Petty Officer and to pay him back wages and other allowances for the relevant period should be allowed. Court accordingly makes order granting the writs of *certiorari* and *mandamus* as prayed for by the petitioner in prayers (c), (d) and (e) to the petition. This order will not preclude the respondents from commencing fresh proceedings in accordance with law with respect to any breach of discipline or misconduct that may have been committed by the petitioner. In all the circumstances of this case, the Court makes no order for costs.

SRIPAVAN, J. – I agree.

Application allowed.