

1968 Present : H. N. G. Fernando, C.J., and Weeramantry, J.

R. S. JAYANETTI, Petitioner, and K. M. MARTINUS and 5 others,
Respondents

S. C. 414/65—Application for a Mandate in the nature of a Writ of Certiorari on Captain (S) K. M. Martinus, Royal Ceylon Navy, and five others

Naval Court Martial—Judge-Advocate—Quasi-judicial character of his office—Navy Act, ss. 39 (d), 91—Criminal Procedure Code, s. 243—Certiorari.

In court martial proceedings under the Navy Act, the failure of the Judge-Advocate to perform the statutory duty, explicitly imposed by section 39 (d) of the Act, to sum up on the evidence before the court deliberates on its finding is a fatal illegality. It is also the duty of the Judge-Advocate to sum up on the law.

APPPLICATION for a writ of *certiorari* in respect of certain court martial proceedings under the Navy Act.

H. W. Jayewardene, Q.C., with Nimal Senanayake, Bala Nadarajah and N. J. Abeysekera, for the Petitioner.

H. L. de Silva, Crown Counsel, for the Respondents.

Cur. adv. vult.

July 14, 1968. H. N. G. FERNANDO, C.J.—

After hearing argument, we made order quashing the finding of a Naval Court Martial, and the order of punishment imposed against the petitioner, the finding being that he was guilty of having negligently suffered to be stranded a ship in his charge, an offence punishable under s. 91 of the Navy Act. We now state our reasons.

Section 39 of the Navy Act prescribes the powers and duties of the Judge-Advocate in court martial proceedings. They are *inter alia*, to give advice on questions of law or procedure during the proceedings of a court martial, to give advice on any matter before the court, to ensure that the accused does not suffer any disadvantage at his trial, and at the conclusion of the case to sum up the evidence and advise the court upon the law relating to the case.

The reason why such powers and duties are vested and imposed on the Judge-Advocate is almost obvious. A court martial, although it has the power to try and punish offences, which if committed by civilians would be tried by the ordinary courts, is not ordinarily composed of officers with legal knowledge or judicial experience. In fact the court in the present case was composed of two supply officers and one surgeon officer. It is because of this lack of legal or judicial training and experience that the function of advising courts martial is committed by law to the Judge-Advocate. Indeed, his functions are comparable to those of a Judge of Assize in cases tried by Jury. Although it is the function of the Jury to decide all questions of fact, the law requires that before the Jury deliberates on the facts, the Judge must sum up to them the evidence. Section 39 (d) imposes a similar requirement in the case of a trial by court martial :—

“(d) At the conclusion of the case he shall, unless both he and the court martial consider it unnecessary, sum up the evidence and advise the court martial upon the law relating to the case before the court martial proceeds to deliberate upon its finding.”

In the present case, the Judge-Advocate did address the Court before the Court deliberated upon its finding. It cannot therefore be thought, and learned Crown Counsel quite properly did not argue, that this was a case in which both the Judge-Advocate and the court considered a summing-up unnecessary. With reference, however, to the charge on which the petitioner was ultimately found guilty, there was not in the summing-up any reference whatsoever to any of the evidence relevant to the consideration of that charge. The Judge-Advocate told the Court that, if they had any reasonable doubt on the question whether the petitioner had acted negligently, they should not convict him of the charge. But he failed to discuss the items of evidence which might justify a finding of negligence, or which on the other hand might create doubts as to the issue of negligence. This failure of the Judge-Advocate was the more lamentable because of certain special circumstances present in this case.

A relevant provision of the King's Regulations requires that in the case of a charge concerning the stranding of a ship, the court must obtain a report from experts based on an examination of entries in various ship's books, including the ship's log book. The importance of having such a report becomes clear in the present case, which at the least appears to be one in which the members of the court martial had themselves no knowledge of matters concerning navigation. But no such report was obtained in this case, nor even were any of these books produced at the trial. The petitioner's evidence was that he had taken certain actions at particular times in regard to the navigation of his ship, and that appropriate entries made contemporaneously in the log

book would bear out his testimony at the trial. The principal prosecution witness admitted that the books had been taken from the custody of the petitioner and subsequently delivered to the appropriate authorities; and he also quite fairly admitted that in the ordinary course the log book would contain entries as to the actions which the petitioner claimed to have taken. The failure of the prosecution to produce these books to the court martial was therefore seriously prejudicial to the petitioner's defence. Hence the Judge-Advocate had a duty to advise the court that the petitioner was deprived of the benefit of evidence which under the relevant King's Regulation should have been produced by the prosecution, and to further advise the court that no adverse inference could be drawn against the petitioner on the ground that the books were not produced.

Moreover, there was no direct evidence at the trial which could establish a *prima facie* case of negligence against the petitioner. The evidence, if any, which might have justified a finding of negligence, was purely circumstantial. The Judge-Advocate failed to refer to this feature of the facts of the case, and he failed to advise the court upon the principles of law applicable where the prosecution relies only on circumstantial evidence to prove a charge.

Had it been necessary for me to decide that the failure of a Judge-Advocate to sum up on evidence and on the law will be a ground for quashing the finding of a court martial only if that failure resulted in a miscarriage of justice, the matters discussed in the two preceding paragraphs of this judgment would compel me to hold that there did result in this case a miscarriage of justice.

I prefer, however, to rely on the ground that the failure of a Judge-Advocate to perform the statutory duty, explicitly imposed by s. 39 (*d*) of the Navy Act to sum up on evidence before the court deliberates on its finding, is a fatal illegality. I hold that a finding reached without such a summing-up is one reached without jurisdiction, just as would be a verdict of a jury reached at the conclusion of a trial without there having been the charge of the trial Judge which is required by s. 243 of the Criminal Procedure Code. It is true that s. 39 (*d*) of the Navy Act allows the summing-up to be dispensed with, if both the Judge-Advocate and the court consider it unnecessary. But the Legislature surely assumed that such a dispensation would be permitted only if the facts of a particular case are unusually simple, or perhaps if both parties consent to the dispensation. The Legislature could not have contemplated that a Judge-Advocate, the very title of whose office denotes its quasi-judicial character, might through caprice or inadvertence deny to an accused person his right to a summing-up on the evidence and on the law.

We quashed, by our order of 6th July 1968, both the finding and the sentence or punishment imposed on the petitioner by the court martial.

The quashing of the sentence or punishment has the consequence that, in relation to seniority in the Navy and to his entitlement to pay and privileges, the petitioner must be treated as though the sentence or punishment was never imposed. We have no doubt that the proper authorities will heed the observation which we have just made.

WEERAMANTRY, J.—I agree.

Proceedings quashed.
