

KORALAGAMAGE
v
COMMANDER OF THE ARMY

COURT OF APPEAL
SRIPAVAN J.,
CA 1094/2000
JUNE 3, 2003
JULY 4, 2003

Army Act, No.17 of 1949 – Section 108, and 129 (1) – Regulation 48, 48 (2) b, 48 (2) c – Court Martial – Summary of evidence to be recorded – No opportunity to cross examine witnesses referred to in the summary of evidence – Principles of natural justice – Nullity.

The petitioner was tried by a General Court Martial for two offences, namely, framed under section 108 and prejudicial conduct under section 129(1).

The petitioner raised a preliminary objection that there was no proper summary of evidence recorded in terms of Regulation 48, and that no opportunity was given to cross examine the witnesses referred to in the summary of evidence – Regulation 48 (2)b.

Held:

- (i) Analysis of Regulation 48 shows that a charge is a prerequisite for an investigation by the Commanding Officer. The petitioner has every right to cross examine the witness.

The Commanding Officer investigating the charge failed to apply the minimum rules of procedure referred to in Regulation 48 (2) b.

- (ii) If the impugned acts are not done in the genuine exercise of the regulations then they are not done in the "Exercise of a power conferred by law and are a nullity."

APPLICATION for a *writ of certiorari*.

Cases referred to:

1. *MacFoy v United Africa Company Ltd.* – 1961 3 All ER 1169 at 1172.
2. *Equipment and Construction Co. Ltd., v Ranasinghe* – 1985 1 SRI LR 82 at 85.

3. *Rajan Phillip v Commissioner of Inland Revenue* – Vol. I Srikantha Law Reports 133.

R. Jayawardana for the petitioner.

Y.J.W. Wijetilleke, DSG for the respondent.

Cur. adv. vult

September 2, 2003

SRIPAVAN, J.

The petitioner joined the Sri Lanka Army (Regular Force) on 26th December 1972, commissioned as a Lieutenant (Quarter Master) and attached to Artillery Brigade at Panagoda at the relevant time. In February 1999, the petitioner was charged before a General Court Martial for committing an offence punishable under Sec. 108 of the Army Act, No. 17 of 1949 as amended, for having dishonestly sold one hundred and fifty empty Artillery Shells (130 mm) to Mr. A.P. Jayasiri Perera for a sum of Rupees 93,000. When the General Court Martial assembled for trial on 24th February 1999, the petitioner pleaded not guilty to the charge against him and raised a preliminary legal objection that the summary of evidence recorded was contrary to Regulation 48 (2) [c] of the Army Discipline Regulations, 1950 inasmuch as the commanding officer failed to caution the petitioner in the manner provided therein. Having considered the submissions, the eighth respondent advised the General Court Martial that the petitioner should be discharged from the proceedings and the Court Martial made order on 24th February 1999 discharging the petitioner from the said proceedings as evidenced by X4. 01 10

On 11th May 2000, the first respondent convened another General Court Martial comprising the second to the eighth respondents to try the petitioner for two offences, namely 20

- (a) Fraud committed under sec. 108 of the Army Act; and
- (b) Conduct of the petitioner prejudicial to military discipline under Sec. 129 (1) of the Army Act.

When the General Court Martial assembled on 28th July 2000 to proceed with the trial, the counsel appearing for the petitioner raised a preliminary objection that there was no proper summary of evidence recorded in terms of Regulation 48 of the Army Disciplinary Regulations in that the first respondent made use of the same evidence recorded earlier marked X3 in addition to two new statements from two police officers, namely, P.C. 27254 Prematilleke and P.C. 889 Jayashantha from the Kadawatha Police. Learned Counsel for the petitioner submitted that the petitioner was not afforded an opportunity to cross examine the witnesses referred to in the summary of evidence marked X3 on the second charge, in violation of Regulation 48 (2)(b). 30

The learned Deputy Solicitor General appearing for the respondents argued that the addition of the second charge would not cause prejudice to the petitioner as he would have every right to defend himself at the court martial by cross examining every witness who gave evidence against the petitioner. Counsel contended that where there is a two-tire system of inquiry, the principles of natural justice do not require that the petitioner be given the right of cross examination at every stage. 40

Regulation 48 of the Army Discipline Regulations, 1950 reads as follows:-

48 (1) It shall be lawful for a commanding officer investigating **a charge** against a person subject to military law to adjourn such investigation for the purpose of taking a written summary of the evidence on oath or affirmation in the presence of the accused. 50

(2) At any hearing held for the purpose of taking a written summary of evidence referred to in paragraph (1), the following provisions shall apply:

- (a)
- (b) The accused may put questions in cross examination to any witness, and the questions with the answers shall be added, in writing, to the evidence already taken down.

An analysis of the aforesaid Regulation shows that **a charge** is a pre-requisite for an investigation by the commanding officer. 60

Thus, the petitioner has every right to cross examine the witnesses in respect of the second charge, namely, "Conduct Prejudicial to Military Discipline". The ambit of natural justice extends not merely to protect the rights of the petitioner but any legitimate expectation he has to cross examine the witnesses. It would not be fair to deprive the petitioner the right to cross examine the witnesses in terms of Regulation 48(2)(b) of the Army Discipline Regulations. What is required is substantial compliance of the said regulations taking into consideration the gravity of the matter in issue and the nature of the decision to be made finally which would have grave consequences affecting the petitioner's rights. In the absence of any documentary proof to show that the petitioner waived his right to cross examination, I hold that the commanding officer investigating the charge failed to apply the minimum rules of procedure referred to in Regulation 48(2)(b). 70

If the impugned acts are not done in the genuine exercise of the regulations then they are not done in the "exercise of a power conferred by law" and are a nullity. The jurisdictional principle serves as the main plank of judicial review. **"No legally recognised rights found on the assumption of its validity should accrue to any person even before the act is declared to be invalid or set aside in a Court of Law"** – Hailsham (4th edition) Vol.1 para 27. **"You cannot put something on nothing and expect it to stay there, it will collapse"** – Lord Denning in *MacFoy v United Africa Company Ltd* ⁽¹⁾. 80

Learned Deputy Solicitor General contended that since the petitioner did not raise any objection to the jurisdiction of the General Court Martial, he cannot take up such objection later, in view of the provisions contained in Regulation 57 of the Court Martial (General and District) Regulations. As observed earlier, if an act is a nullity, it is null and void for all purposes. The General Court Martial lacks jurisdiction in view of the failure on the part of the commanding officer to afford an opportunity to the petitioner to cross examine the witnesses. Hence, the proceedings of the General Court Martial has no legal consequences. As observed by Wanasundera, J. in the case of *Equipment and Construction Co., Ltd v Ranasinghe* ⁽²⁾. **"We are of the view that it is always open to an aggrieved person in a criminal case to raise an issue** 90

going to jurisdiction even at a late stage of the proceedings. In this case, however, it would appear that the question of jurisdiction was very much in issue in the proceedings and had in fact been raised more than once in the present proceedings." In the case of *Rajan Philip v Commissioner of Inland Revenue*⁽³⁾ – G.P.S. De Silva, J., (as he then was) held that " *Since the objection taken is of a fundamental nature which strikes at the heart of the jurisdiction of the court, I hold that the conduct of the petitioner in this case does not disentitle him from taking the objection after a certificate has been filed in terms of sec. 111 (7) of the Act*". 100

For the above reasons, a writ of *certiorari* is issued quashing the convening of the General Court Martial by order dated 11th May 2000 marked X5 and the proceedings before the second to the eighth respondents dated 28th July 2000 marked X10. This order however does not prevent the first respondent from initiating proceedings afresh against the petitioner in terms of the provisions of the Army Act and the regulations framed thereunder. The application of the petitioner is accordingly allowed. There will be no costs. 110

Application allowed.