HULANGAMUWA AND ANOTHER
v.
BALTHAZAR

COURT OF APPEAL.
ATUKORALE, J. (PRESIDENT) AND MOONEMALLE, J.
C.A. (S.C.) 61/76 – D.C. COLOMBO 79169/M.
JANUARY 23, 24, 25, 26 AND 27, 1984.

Army Act – Investigation by Court of inquiry into complaint against Army officer – Disciplinary action taken on findings of court of inquiry – Action filed in civil court for damages – Whether action in tort in a civil court can be based on a complaint made under Army Act.

On 14.7.73 the 1st defendant-appellant, an Army officer, made a complaint (P9) to the Army Commander alleging that the respondent who was the commanding officer of the 1st Battalion Gemunu Watch had attempted to rape his wife the 2nd defendant, in his absence. Acting under powers vested in him by virtue of the Army Act, the Commander of the Army appointed a court of inquiry to investigate the complaint. The court of inquiry after investigation reported to the Army Commander that the respondent was guilty of scandalous conduct whereupon he was removed from the office of commanding officer. The respondent then filed action for damages in the District Court on the basis that the complaint (P9) was malicious and false and that as a result he was gravely humiliated and brought into disrepute and contempt and was removed from the position of commanding officer. The District Judge gave judgment in favour of the plaintiff and the defendants appealed.

Held –

The complaint (P9) is one which could have lawfully been made to and entertained by the Commander of the Army. The court of inquiry assembled by the Army Commander is one which exercises jurisdiction over persons subject to military law. The complaint (P9) is one made by one military officer against another military officer regarding a matter of military discipline. It relates to a matter which falls within the exclusive cognizance of a military tribunal. A civil court is not competent to inquire into the truth or falsity of such a complaint and no action in tort can be based thereon in a civil court.

The present action is misconceived and cannot be maintained in law.

Cases referred to :

(1) *Sutton v. Johnstone, (1786) 1 Term Reports 493, 99 E R. 1215.*
(2) *Dawkins v. Lord Paulet, (1869) L.R. 5 Q.B. 94.*
(3) *Dawkins v. Rokeby, (1873) L.R. 8 Q.B. 255,270,271*
(4) *In Re Mansergh, (1861) 1 B & S. 400.*
(5) *Grant v. Gould, (1792) 2 Hy. Bl. 69.*
(6) *Barwis v. Keppel, (1766) 2 Wils 314.*
(7) *Keighly v. Bell. (1866) 4 F & F 763*
(8) *Dawkins v. Rokeby (Lord) (1866) 4 F. & F. 806.*

APPEAL from the District Court, Colombo.

H. W. Jayewardene, Q.C., with *N. Devendra* for the defendant-appellants.

H. L. de Silva, S. A., with *S. Mandeleswaran* for the plaintiff-respondent.

Cur. adv. vult.

May 18, 1984.

ATUKORALE, J. (PRESIDENT)

At the relevant time, i.e., at the time the complaint P 9 dated 14.7.1973 was made by the 1st defendant against the plaintiff, the plaintiff (who is the respondent to this appeal) and the 1st defendant were both army officers. The plaintiff was a Lieutenant-Colonel and was the Commanding Officer of the1st Battalion Gemunu Watch whilst the 1st defendant was a Major. The 2nd defendant is the wife of the 1st defendant and they are the appellants. The plaintiff brought this action on 5.10.1973 (at a time when he had ceased to be an army officer) to recover from the defendants a sum of Rs. 150,000 as damages. In his plaint he averred that on or about 14.7.1973 the 1st defendant maliciously and falsely complained to Major-General Attygalle (who at the time was the Army Commander) that he had on 6.7.1973 in the night at about 8.30 p.m. committed criminal force on the 2nd defendant with intent to outrage her modesty and had attempted to commit rape on her. He stated that this complaint was made by the 1st defendant in pursuance of a conspiracy between the defendants to have him removed from the office of commanding officer and thereby to secure a promotion for the 1st defendant to a higher position in the Army. He further pleaded that by reason of this complaint he was gravely humiliated and brought into disrepute and contempt and was removed from the position of commanding officer. He assessed the damages sustained by him at Rs. 150,000.

The defendants admitted that the 1st defendant did make a complaint to the Army Commander on 14.7.1973 in relation to an incident which occurred on the night of 6.7.1973 but maintained that the complaint related to one of indecent assault on the 2nd defendant by the plaintiff in the absence of the 1st defendant. They further stated that upon this complaint the Army Commander convened a court of inquiry in terms of the Army Act (Chap. 357, Vol.XI, L.E.) to investigate the same. The court of inquiry after investigation, which was by way of hearing and recording of evidence, reported to the

Army Commander that in their opinion the plaintiff was guilty of scandalous conduct ; that the Army Commander acting in terms of the Army Act and the regulations made thereunder removed the plaintiff from the office of commanding officer ; and that the plaintiff could not maintain this action as (1) the complaint was made by the 1st defendant in the discharge of his duties as an officer of the Army to the Army Commander who had a right or interest to receive it and a duty to take action thereon and that therefore the complaint was privileged as it was made on a privileged occasion and as (2) the plaintiff had failed to give notice in conformity with the provisions of s 80 of the Army Act. The defendants also claimed in reconvention a sum of Rs. 200,000 from the plaintiff which it is not necessary for us to consider as it was not pursued by learned Queen's Counsel at the hearing before us.

After hearing the evidence the learned District Judge entered judgment for the plaintiff as prayed for in the plaint against both defendants. He dismissed the defendants' claim in reconvention. The learned Judge reached the following findings of fact :–

(*a*) that the 1st defendant made a complaint on 14.7.1973 to the Army Commander that the plaintiff had on 6.7.1973 attempted to rape the 2nd defendant with intent to outrage her modesty ;

(*b*) that the complaint made by the 1st defendant against the plaintiff of attempting to commit rape and/or of committing criminal force on the 2nd defendant was false and made maliciously and without reasonable or probable cause ;

(*c*) that the complaint was made by the 1st defendant in pursuance of a conspiracy between himself and the 2nd defendant ;

(*d*) that the complaint was not made by the 1st defendant in the discharge of his duties but that the Army Commander had a right or interest to receive it ;

(*e*) that upon receipt of the complaint the Army Commander convened a court of inquiry in terms of the provisions of the Army Act for the purpose of investigating the same ;

(*f*) that the court of inquiry after investigation reported to the Army Commander that the plaintiff was guilty of scandalous conduct ;

(*g*) that in pursuance of this verdict of the court of inquiry the plaintiff was removed from the office of Commanding Officer in terms of the provisions of the Army Act ;

(*h*) that the plaintiff suffered humiliation and was brought into disrepute and was removed from the office of Commanding Officer in consequence of this complaint ;

(*i*) that the plaintiff had suffered damages as a result thereof and was entitled to recover the sum of Rs.150,000 jointly and severally from the defendants ;

(*j*) that in view of the fact that the defendants had acted with malice it is not necessary for the plaintiff to give the notice contemplated by s. 80(c) of the Army Act ;

(*k*) that the plaintiff did not have sexual intercourse with the 2nd defendant on 6.7.1973 ;

(*l*) that there were numerous infirmities in the evidence before the court of inquiry and that it was unworthy of credit and that the court of inquiry should have rejected the evidence of the 2nd defendant in toto when the court of inquiry found that the evidence of the 2nd defendant failed to establish the charge of rape ;

(*m*) that the verdict of the court of inquiry that 'an act of sex' had taken place between the plaintiff and the 2nd defendant is unwarranted ;

(*n*) that the manner in which the inquiry had been conducted by the court of inquiry was unimpeachable ; and

(*o*) that the final decision to withdraw the plaintiff's commission was a necessary consequence of the verdict of the court of inquiry.

The principal contentions of learned Queen's Counsel for the defendants before us were firstly that even on the assumption that the complaint contained allegations of rape and the use of criminal force, the complaint and all proceedings taken in pursuance thereof before the court of inquiry were absolutely privileged and could not form the basis of an action in tort. Secondly he maintained that the complaint, being by one army officer against another relating to a matter concerning discipline in the army was cognizable only by a military tribunal constituted under and by virtue of the provisions of the Army

Act or the regulations made thereunder and the plaintiff thus could not in law maintain any form of action in a civil court based upon the complaint. No local decisions in support or against these propositions were cited at the hearing before us. We were, however, referred to several English authorities. It is not necessary for me to refer to all the authorities that were cited since most of the earlier cases have been considered in the later decisions. An examination of the relevant authorities leads me to the conclusion that the second contention of learned Queen's Counsel is entitled to succeed. In *Sutton v. Johnstone* (1) Lord Mansfield and Lord Loughborough expressed the view that no action for malicious prosecution of a naval officer by the commander-in-chief of a naval squadron before a naval court martial would lie in a court of law. They observed thus : "If this action be admitted, every acquittal before a court-martial will produce one. . . . If every trial that is by court-martial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief will be." In the instant case the plaintiff was found by the court of inquiry to be guilty of scandalous conduct and as such the above observations would appear to me to apply with greater force. In *Dawkins v. Lord Paulet* (2) the plaintiff sued the defendant in libel for falsely and maliciously publishing certain defamatory words in reports made by the defendant for the information of the commander-in-chief whilst forwarding, at the plaintiff's request, certain letters written by the plaintiff to the adjutant-general. As a result of the reports the plaintiff lost the value of his commission as a captain and was compelled to leave his regiment and was deprived of emoluments. The defendant was the superior military officer of the plaintiff and it was his duty to forward to the adjutant-general the letters sent by the plaintiff to him and to make, for the information of the commander-in-chief, reports to the adjutant-general on the subject of such letters. The court by a majority decision (with Cockburn, C. J. dissenting) held that no action would lie against a military officer for an act done in the ordinary course of his duty as such officer, even if done maliciously and without reasonable or probable cause. Meller, J. in the course of his judgment made the following observations which appear to me to have much relevance to the facts of the instant case :

"There was another ground of great importance upon which the Attorney-General insisted, and which strongly supports the opinions expressed above. He argued that the plaintiff, being at the time of the printing and publishing of the letters and reports an officer of the

army, and the defendant being his commanding officer, and the letters and reports in question being matters simply relating to military duties and discipline, and to the administration of the army, the plaintiff, if he had ground of complaint in respect of them, was bound to make it to the tribunal specially provided by the Mutiny Act and articles of war relating thereto ; and that it was the only tribunal to which a military officer could appeal in respect of such matters . . . . . It would seem to follow from the provisions thus made by the articles of war for a special mode of redress for every officer who may think himself wronged by his commanding officer, that it was intended that every officer aggrieved by any order or report made in the course of the administration of the army must follow the special mode of redress pointed out in the articles of war, and that in respect of any grievances or complaint arising out of such administration, he can have no redress in any other way. Certainly this view of the law is supported by the opinions of Lords Mansfield and Loughborough, expressed in the case of *Johnstone v. Sutton* . . . . . I think that these considerations tend strongly to snow that the legislature, in providing special means of redress for officers feeling themselves aggrieved by any exercise of ordinary military authority or duty, by establishing special tribunals for the purpose by the articles of war, did intend to preclude such officers from appealing to the ordinary tribunals in respect of such matters. This view is confirmed by the opinion of Willes, J. in *Dawkins v. Lord Rokeby* upon which he nonsuited the plaintiff in an analogous action, and which, so far as I am aware, was not afterwards questioned He is reported to have said as follows :- 'With respect to military men, I beg to say that I cannot conceive anything more fatal to themselves, anything more fatal to the discipline or subordination of the army, if every officer who considers himself to have been slighted by his inferiors, or every officer aggrieved by his superiors, whom, having become a soldier, he has consented to submit to, should seek to undo their judgment before a tribunal which must necessarily have but slight acquaintance with those matters upon which it is called to pronounce an opinion. I have no doubt that this is the law, and that it is that which is most beneficial to the community.'"

In *Dawkins v. Lord Rokeby* (3) the facts were as follows : The plaintiff and the defendant were army officers. A court of inquiry was constituted under the "Queen's Regulations and Orders for the Army"

to investigate an assertion made by the plaintiff that certain superior officers had made false statements of facts to his injury and to ascertain whether the plaintiff could substantiate his charges against them. At the inquiry the defendant gave certain oral evidence and after his evidence was over he handed over to court a written paper containing in substance a repetition of his oral evidence with some additions. After investigation the court made a report to the Commander-in-chief resulting in certain consequences flowing from the report. The plaintiff then applied to the proper military authority for a court martial on the defendant which was refused. The plaintiff then filed the present action for libel and verbal slander against the defendant. At the hearing into the motion the plaintiff offered to prove that the defendant in handing over the written statement and giving oral evidence acted mala fide and with actual malice, that they were made without reasonable or probable cause and with the knowledge on the part of the defendant that they were false. It was held that even if the allegations of malice and wilful falsehood were probable and true the action was not maintainable. In the course of his judgment Kelly, C B. said :

"But there is another and a higher ground upon which we are of the opinion that the defendant is entitled to the judgment of the Court. The whole question involved in this cause is a military question, to be determined, as we think, by a military tribunal, and not cognizable in a court of law. The attendance of the defendant as a witness, the duty to give evidence when called upon, the validity of the order to hold a court of inquiry, the effect of the evidence upon the military character and upon the military rights and liabilities of the plaintiff, and indeed of the defendant likewise, are purely questions of a military nature. The evidence itself was given by the defendant, a military officer in his military capacity upon a military subject, at the command of his military superior, and concerning the military conduct of another military officer. It may well be that the truth or falsity of the evidence given is also a military question, although apparently in terms a question of fact ; and that which the plaintiff might allege, and a court of law or a jury might hold, to be false, a military tribunal might hold, and rightly hold, to be true ; . . . . . With reference, therefore, to such questions, which are purely of a military character the reasons of Lord Mansfield and the other judges in *Sutton v. Johnstone,* and the

cases *In re Mansergh (4)* and *Grant v. Gould* (5) *Barwis v. Keppel* (6) *Keighly v. Bell* (7) *Dawkins v. Lord Rokeby* (8) and *Dawkins v. Lord F. Paulet* (2) are all authorities to show that a case involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law."

This decision was affirmed in the House of Lords – vide 33 L.T. Rep. 196 ; (1875) L. R. 7 H. L. 744.

In the instant case the 1st defendant made the complaint P 9 to the Commander of the Army seeking redress against 'the offence and injustice' that had been committed on him and his family by the plaintiff, a superior officer. Regulation 13(1) of the Army Discipline Regulations, 1950 framed under and by virtue of the powers vested in the Minister by s. 155 of the Army Act – vide Vol. VI, Subsidiary Legislation, p.157 – stipulates that no officer shall seek to obtain the redress of a grievance except in accordance with the provisions of s.32 of the Army Act. At the hearing before us a doubt arose as to whether the complaint could have been made under s. 32 which seems to contemplate the situation where an officer is aggrieved by any action of his commanding officer, which is not the case here, the plaintiff being a superior officer but not the commanding officer of the 1st defendant. However this point is of no significance as the parties have accepted and acted on the footing that the complaint was one that could be lawfully received by the Commander of the Army and inquired into by a court of inquiry. The right to make the complaint and the proceedings held thereon have not been challenged at any stage by the plaintiff although it was open for him to do so by way of a writ under s. 79 of the Army Act. Further regulation 2 of the above regulations vests the Commander of the Army with the general responsibility for discipline in the army. Hence I am of the opinion that the complaint is one that could have lawfully been made to and entertained by the Commander of the Army. Regulation 3 of the Army Courts of Inquiry Regulations, 1952, provides for the convening of a court of inquiry in respect of the matters enumerated therein. Sub-regulation (9) authorises a court of inquiry to be convened in cases other than those enumerated in the earlier sub-regulations where in the opinion of the officer authorised to do so the holding of a court appears to him to be necessary or expedient. Regulation (4)

empowers the Commander of the Army to assemble a court of inquiry. Regulation 15 enacts that where an inquiry affects the character or military reputation of 'an officer or soldier, he shall be afforded an opportunity of being present throughout the inquiry. He could participate at the inquiry, give evidence and cross-examine any witness. Regulation 16 obliges the court of inquiry to receive evidence and record its findings in regard to the matter or matters into which it was assembled to inquire. The record of the proceedings has to be forwarded by the President of the court of inquiry to the authority who assembled the court. A consideration of these regulations, in particular the procedure prescribed therein and the duties and functions of the court of inquiry, reveals that it possesses all the attributes of a judicial tribunal. It bears a judicial character. In my view a court of inquiry is a tribunal that is sanctioned and recognised by law and is clothed with all the attributes and incidents of a court of justice. It is one which exercises jurisdiction over persons subject to the military law. The complaint is one made by a military officer against another military officer regarding a matter of military discipline. It relates to a matter which, in my opinion, falls within the exclusive cognizance of a military tribunal. I hold that a civil court is not competent to inquire into the truth or falsity of such a complaint and that no action in tort can be based thereon in a civil court. I am therefore of the view that the present action is misconceived and cannot be maintained in law. In view of this finding it is not necessary for me to consider the further objection raised by learned Queen's Counsel as to whether the present action could be maintained without a written notice being given to the defendants in terms of s. 80 of the Army Act.

For the above reasons the appeal is allowed, the judgment of the learned District Judge is set aside and the plaintiff's action is dismissed. The plaintiff will pay the costs of the lower court and a sum of Rs. 1,050 as costs of this appeal.

MOONEMALLE, J.–I agree.

Appeal allowed.