LT. COMMANDER RUWAN PATHIRANA
v
COMMODORE DHARMASIRIWARDENE & OTHERS

COURT OF APPEAL
SRIPAVAN, J.
SISIRA DE ABREW, J.
CA 1419/2005
JANUARY 25, 2007
FEBRUARY 2, 15, 21, 2007

Writ of certiorari – Navy Act – Section 70, section 122 – Court Marshal – Conviction – Suppression of Material Facts – Fatal? – Criminal Procedure Code – Section 180 – Charge Sheet defective – Both accused charged in same proceedings – Penal Code – Section 156 – Section 157 – Jurisdictional defect – Cured by Consent and acquiescence? – Judicial review? – Scope?

The petitioner and another were charged under section 70 of the Navy Act before a Court Martial. Both were found guilty and convicted.

The petitioner sought to quash the conviction of forfeiture of seniority by three months.It was contended that the charge sheet was defective as it offends section 180 of the Criminal Procedure Code. It was also contended that, the evidence led was insufficent to convict the petitioner and he only exercised his right of private defence. The respondent contended that, the petition should be dismissed *in limine* as the petitioner has suppressed material facts.

Held:

(1) The petitioner before filling this application has appealed to Her Excellency the President to set aside the punishment – but the petitioner has failed to disclose this fact in his petition – it is fatal.

(2) Since the petitioner by this application seeks to quash both the conviction and the sentence, the fact that he submitted an appeal to Her Excellency the President seeking to set aside the sentence becomes a material fact.

Held further

(3) Offence described in section 70 of the Navy Act is an offence which one person cannot commit alone. There is evidence to support that the petitioner too was involved in the fight between him and the other officer. Members of the two opposing factions charged with affray may be tried together.

(4) In any event the petitioner is precluded from raising any objection to the charge sheet since such objection was not raised before the Court Martial.

"In an application for a *writ of certiorari* in respect of a conviction or sentence entered by a Court Martial the defence of review is not the same as in an appeal from a conviction of a Criminal Court – judicial review will lie by way of *certiorari* only in respect of the legality of the conviction or sentence. The merit of the finding will not be subject to review by *Certiorari.*

APPLICATION for a *Writ of Certiorari.*

Cases referred to:

(1) *Alphonso Appuhamy* v *Hettiarachchi* – 77 NLR 131
(2) *Laub* v *AG* – 1995 – 2 Sri LR 88
(3) *Collettes* v *Commissioner of Labour* – 1989 2 Sri LR 6
(4) *Sarath Hulangamuwa* v *Siriwardane* – 1986 1 Sri LR 275
(5) *Blanca Diamonds (Pvt) Ltd.* v *Wilfred Van Els* – 1997 1 Sri LR 360
(6) *Jaysinghe* v *The National Institute of Fisheries* – 2002 1 Sri LR 277
(7) *Velaiden* v *Zoysa* – 14 NLR 140
(8) *Hewavithama* v *Appuhamy* – 30 NLR 33
(9) *Weerasinghe* v *Mohamadu Ismail* – 33 NLR 245
(10) *Nagalingam* v *Luxman de Mel* – 78 NLR 232
(11) *Richard Perera* v *Commodore A.H.A. de Silva* – CA 1133/87-CAM 19.12.1997

Rienzie Arsakularathne PC with *Wasantha Batagoda* for petitioner
Yasantha Kodagoda DSG for respondents

Cur.adv.vult.

April 5, 2007

SISIRA DE ABREW, J.

The petitioner who joined the Sri Lanka Navy on 15.6.1987 as Cadet Officer presently holds the rank of Lieutenant Commander. 01

The petitioner and Commander Thilakarathne who was also an officer of the Sri Lanka Navy were charged under section 70 of the Navy Act before a Court Martial. The charge sheet contained the following charges against both the petitioner and Thilakarathne.

(a) against Thilakarathne (1st accused) for quarrelling with the petitioner, the 2nd accused, an offence punishable under section 70 of the Navy Act.

(b) against the petitioner (2nd accused) for quarrelling with Thilakarathne, the 1st accused, an offence punishable under section 70 of the Navy Act.

The Court Martial commenced its proceedings on 4.7.2005 and concluded on 5.7.2005. The Court Martial, on 5.7.2005, found the 1st accused (Thilakarathne) guilty of the first charge and the 2nd accused (the petitioner) of the 2nd charge and imposed the following punishments.

(a) In respect of Thilakarathne – Forfeiture of seniority by one year.

(b) In respect of the petitioner – Forfeiture of seniority by three months.

The petitioner, by this application, seeks to quash the decision of the Court Martial relating to his conviction.

Learned DSG who appeared for the respondents submitted that the petition of petitioner should be dismissed as he has suppressed material facts from this Court. This matter must be considered first because the petition of the petitioner can be dismissed if this objection is upheld. Learned DSG submitted that the petitioner before filing the present application in this Court, had, by 1R7, appealed to Her Excellency the President to set aside the punishment, but the petitioner had failed to disclose this fact in his petition. The learned DSG, therefore, contended that the petition of the petitioner should be dismissed on the ground of suppression of material facts. Learned President's Counsel who appeared for the petitioner contended that the petitioner, acting under section 122 of the Navy Act, had appealed to Her Excellency the President only to get the sentence imposed on him set aside, but the petitioner, by this application, seeks a *writ of certiorari* to get his conviction

quashed. He therefore contended that the failure to aver the contents of 1R7 could not amount to suppression of material facts. I now advert to these contentions. It is true that the petitioner by 1R7 dated 14.7.2005, made an appeal to Her Excellency the President seeking to set aside the sentence and this fact was not averred in his petition. The petitioner, by 1R7, only sought to set aside the sentence imposed on him and not the conviction. In fact section 122 of the Navy Act deals with revision of sentences imposed by a Court Martial or by a Navel officer exercising judicial powers under the Navy Act and it does not deal with quashing of convictions imposed by a Court Martial or by a Naval officer exercising judicial powers under the Navy Act. Although the learned President's Counsel contended that the petitioner, by this application, only seeks to quash the conviction of the petitioner, the petitioner in these proceedings seeks to quash the findings of the Court Martial contained in P8. P8 contains both conviction and the sentence. (Vide paragraph 60 of the petition) Even if the petitioner argues that the findings of the Court Martial means only the conviction, I have to state here that once the conviction is quashed, automatically the sentence too will get quashed because the sentence has no effect and cannot be implemented once the conviction is quashed. I am, therefore, unable to agree with the contention of the learned President's Counsel that the petitioner, in these proceedings, only seeks to quash his conviction. Since the petitioner, by this application, seeks to quash both conviction and the sentence the fact that he submitted an appeal to her Excellency the President seeking to set aside the sentence becomes a material fact. Learned President's Counsel contended that in any event the petitioner was not guilty of suppression of material facts since the petitioner has disclosed this fact in a further petition dated 8.2.2006. But on 29.3.2006 learned President's Counsel informed Court that he was not supporting the further petition dated 8.2.2006 and would rely on the original petition dated 19.10.2005. Therefore Court is unable to consider the said further petition and as such I am unable to agree with the said contention of the learned President's Counsel. Did the petitioner disclose the facts set out in 1R7 dated 14.7.2006 in his petition dated 19.10.2005? The answer is no. Thus the petitioner has failed to disclose the contents of 1R7 in his petition. For these reason I hold that the petitioner is guilty of

suppression of material facts and the petitioner's conduct lacked *uberrima fides.*

In *Alponso Appuhamy* v *Hettiarachchi*[1] Pathirana, J. held thus: "When an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the petitioner must act with *uberrima fides.*" 80

In *Laub* v *A.G.*[2] *Ismail,* J. held as follows: "The petitioner has not acted with *uberrima fides*, he has suppressed material facts. – this application could be dismissed *in limine.*"

In *Collettes Ltd.* v *Commissioner of Labour*[3] Gunawardene, J. held thus: "It is essential, that when a party invokes the writ jurisdiction or applies for an injunction, all facts must be clearly, fairly and fully pleaded before the Court so that the Court would be made aware of all the relevant matters." Same sentiments were expressed in the following cases as well. 90

In *Sarath Hulangamuwa* v *Siriwardene*[4] Siva Selliah, J. remarked as follows: "*Certiorari* being a discretionary remedy will not be granted where there was – want of *Uberrima fides* in that there was a non-disclosure of the material facts that the petitioner had a residence in Dehiwela far away from Visakha Vidyalaya and that his child had since gained admission to Bishop's College, Colombo." 100

In *Blanca Diamonds (Pvt) Ltd.* v *Wilfred Van Els*[5] Jayasuriya, J. noted thus: "When a party is seeking discretionary relief from Court upon an application for a *Writ of Certiorari*, he enters into a contractual obligation with the Court when he files an application in the Registry and in terms of that contractual obligation he is required to disclose *uberimma fides* and disclose all material facts fully and frankly to Court. The petitioner company has been remiss in its duty/obligation to Court and has failed to comply with that contractual obligation to Court." 110

In *Jaysinghe* v *The National Institute of Fisheries and Nautical Engineering (NIFNE) and others*[6] Yapa, J. made the following observations: "All the documents on which the respondents relied

to support their preliminary objection to the application, except one, were produced by the respondents. The petitioner suppressed those documents and the fact that he had made an application to the Court of Appeal seeking relief in the same matter and thereby misled the Court. The petitioner's conduct lacked *uberrima fides.* The application has to be rejected *in limine* on this ground as well. This is a principle which applies to cases coming up before the Court in writ cases as well as in injunction applications and even in admiralty cases. In such cases relief will be refused *in limine* without hearing the case on the merits even where the decision is alleged to have been made without jurisdiction. The same principle applies to applications under Article 126 (2)."

When an application for prerogative writ is made it is the duty of the party, seeking relief, to place a full and truthful disclosure of all material facts before Court and if he does not do so he cannot obtain any relief from Court and he may be deprived of any relief he may have already obtained. Any party who misleads Court, misrepresents facts to Court, suppresses material facts from Court or utters falsehood in Court will not be entitled to obtain redress from Court and an application made by such party will be dismissed *in limine* without considering the merits of such application.

As I pointed out earlier the petitioner is guilty of suppression of material facts and as such he is not entitled to obtain any relief from this Court. The petition of the petitioner can be dismissed on this ground alone. Learned President's Counsel next contended that the charge sheet is defective as it offends the provisions of section 180 of the Criminal Procedure Code (CPC) since both accused were charged in the same proceedings and that as a result of this incorrect procedure, the petitioner's evidence had been accepted to convict Thilakarathne but the petitioners evidence had been rejected in order to find him guilty. He brought illustration 'd' of section 180 of the CPC to the notice of Court. It was his contention that the petitioner and Thilakarathne should have been charged separately. In order to appreciate the contention of the learned President's Counsel it is necessary to consider section 70 of the Navy Act which reads as follows.

"Every peron subject to naval law who quarrels or fights with any other person, whether such other person is or is not a person

subject to naval law or uses reproachful or provoking speeches or gestures tending to make any quarrel or disturbance, shall be guilty of a naval offence and shall be punished with simple or rigorous imprisonment for a term not exceeding six months or any less severe punishment in the scale of punishments."

The above section contemplates a situation where persons subject to the Naval Law quarrelling and fighting with others. This situation, somewhat is similar to the situation discussed in section 156 of the Penal Code which reads as follows:

"When two or more persons, by fighting in a public place disturb the public peace, they are said to "commit an affray".

Section 180 of the CPC and illustration 'd' to the said section reads as follows.

"When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the Court thinks fit; and the provisions contained in the former part of this Chapter shall apply to all such charges."

Illustration 'd' to section 180 of the CPC – "A and B are accused of being members of opposing factions in a riot. They should be indicted and tried separately."

In order to consider whether there is merit in the contention of the learned President's Counsel it is necessary to consider certain judicial decisions. In the case of *Velaiden* v *Zoysa*[7] Middleton, J. observed thus: "A breach of the rule of law that two accused members of opposing factions in a riot, or two persons accused of giving false evidence in the same proceeding, must be indicted and tried separately is not a mere irregularity which can be cured by section 425 of the Criminal Procedure Code. It is an illegality which invalidates the proceedings."

The question whether two persons charged under section 157 of the Penal Code could be tried together was later considered by a bench of three judges in *Hewavitharana* v *Appuhamy.* [8] In that case the appellant and another person were convicted of

committing an affray under section 157 of the Penal Code. They were tried together. It was contended on behalf of the appellant that the conviction was bad on the ground that they were tried together. Lord Fisher C.J. with whom Drieberg, J. and Jayawardene, J. agreeing held thus. "two persons who are charged with committing an affray may be tried together in the same proceedings." Illustration 'd' in the present CPC is in terms identical with the illustration 'd' in the old CPC. Lord Fisher, CJ in the above case remarked as follows: "In my opinion the words in illustration (d) in section 184 of the Criminal Procedure Code preclude the application of the illustration to a case such as the present."

In *Weerasinghe* v *Mohamadu Ismail*[9] this question was again considered by a bench of three judges. Lord Macdonell CJ with whom Garvin SPJ, Dalton J agreeing held thus: "Members of two opposing factions charged with affray may be tried together."

According to section 70 of the Navy Act if a person subject to naval law quarrels or fights with any other person he shall be guilty of a naval offence, It is therefore seen the above offence described in section 70 of the Navy Act, is an offence which one person cannot commit alone. I have to express the same opinion with regard to the offence described in section 156 of the Penal Code. Illustration 'd' to section 180 of the CPC contemplates a situation where the accused persons, charged, were members of a riot. In the present case there was no evidence of a riot. Therefore illustration 'd' to section 180 of the CPC has no application to the present case. In the present case there is evidence to support that the petitioner too was involved in the fight between him and Thilakarathne. In section 180 of the CPC there are limbs. One limb can be set out as follows: "When more persons than one are accused of jointly committing the same offence, they may be charged and tried together or separately as the Court thinks fit." Thus the petitioner and Thilakarathne could be charged and tried together.

For the above reasons I hold that the charge sheet is not defective and I therefore reject the argument of the learned President's Counsel. In any event the petitioner is now precluded from raising any objection to the charge sheet since such objection was not raised before the Court Martial. This view is supported by

the judgment of Justice Sharvananda (as he then was) in the case of *Nagalingam* v *Luxman de Mel*.[10] His Lordship remarked thus: "Further the petitioner, having participated in the proceeding without any objection and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection to the jurisdiction of the Commissioner of Labour to make a valid order after the zero hour. The jurisdictional defect, if any, has been cured by the petitioner's consent and acquiescence."

Learned President's Counsel next contended that the petitioner's evidence has been accepted to convict Thilekaratne and the petitioner's evidence has been rejected in order to find him guilty. He further contended that the evidence led before the Court Martial was insufficient to convict the petitioner of the charge with which he had been charged and that he only exercised the right of private defence. He further contended that according to the evidence, the petitioner was only holding the shoulders of Thilakarathne. I now advert to these contentions.

According to Colomboge, on the day of the incident when he was passing the place where the petitioner and Thilakarathne were talking to each other in a somewhat loud voice, he looked back and then saw both of them engaging in a scuffle. Lieutenant Commander Obeysekara whose attention was attracted on hearing a rumpus saw both the petitioner and Thilakarathne engaging in a scuffle. When he requested stop the fight, they did not stop it and as such he had to make big effort to separate them. Dr. Jayasinghe attached to the Navy, examined Thilakarathne on the same day and observed the following injuries on Thilakarathne. (a) Lacerated wound on the nasal bone and (b) scratch marks near the left eye and the neck. According to Dr. Jayasinghe, Thilakarathne was bleeding from his nose. It is therefore seen that apart from the evidence of Thilakarathne and the petitioner, there is sufficient evidence to sustain the conviction of the petitioner. In the light of the above evidence, I am unable to agree with the contention of the learned President's Counsel.

Learned President's Counsel also submitted that the Judge Advocate had failed put forward the entire case of the petitioner to the members of the Court Martial. We have considered the summing up of the Judge Advocate and are satisfied that the Judge

Advocate had put forward the case of the petitioner to the members of the Court Martial. In this connection I would like to consider a judgment of Justice S.N. Silva (as he then was) in the case of *Richard Perera* v *Commodore A.H.A De Silva and others*(11). His Lordship remarked thus: "In an application for a *writ of certiorari* in respect of a conviction or sentence entered by a Court Martial, the degree of review is not the same as in an appeal from a conviction 270
of criminal Court. Judicial review will lie by way of *certiorari* only in respect of the legality of the conviction or sentence. The merit of the finding will not be subject to review by way of *certiorari*."

For the reasons set out in my judgment, I see no reason to interfere with the decision of the Court Martial convicting the petitioner and dismiss the petitioner's application.

SRIPAVAN, J. – I agree.

Application dismissed.