Present : **Sirimane J., Ismail J. and Ratwatte J.**

ATULA RATNAYAKE, Petitioner *and* Lieut. Col. G. R. JAYASINGHE and four other Respondents.

S. C. 1012/74

Application for a Writ of certiorari—inordinate delay—whether the writ would issue.

Where the petitioner applied for a Writ of certiorari to quash the verdict and sentence passed against him by a General Court Martial.

Held, The delay of one year and three months which had not been satisfactorily explained by the petitioner barred the remedy. The Court has a discretion which it could exercise to refuse the application on the ground that there had been undue delay in bringing the proceedings.

Nimal Senanayake with *Rohan Perera* for Petitioner.

K. H. M. B. Kulatunga, Senior State Counsel with *D. L. Premaratne, State Counsel* for Respondent.

July 18, 1975. SIRIMANE, J.—

This is an application for a writ of certiorari quashing the verdict and sentence passed against the petitioner after he was tried by a General Court Martial under the Army Act (Chap-357). He was found guilty on count (2) (Criminal breach of trust in respect of Rs. 32,218.22) and on count (3) (Criminal breach of trust in respect of Rs. 31,031.04) under section 392 of the Penal Code read with the Army Act and sentenced to a term of one year's simple imprisonment and to be cashiered from the Sri Lanka Army. The Court Martial, however, recommended him to mercy on three grounds, one of which was that he had re-paid a sum of Rs. 45,337.13. The term of simple imprisonment was not confirmed by the convening authority. In the result the punishment imposed on the petitioner was only that he be cashiered from the Sri Lanka Army.

At the hearing of this application learned Senior State Counsel, who appeared for the respondents raised two preliminary matters, on which we heard Counsel on both sides, namely :—

(1) that there had been inordinate delay in seeking the discretionary remedy of writ ; and

(2) that the petitioner had not disclosed in his petition a material fact within his knowledge.

The sentence was passed on the petitioner at the conclusion of the trial before the General Court Martial of 3rd July 1973. He appealed on 19th July 1973 and the decision in appeal was made known to the petitioner on 15th August 1973. The present application has been filed in this Court on the 23rd of October, 1974—one year and three months after the final decision. The petitioner in paragraphs 4-18 of his petition sets out the reasons for this delay. According to the petitioner on the very day he was sentenced (3.7.73) his Counsel moved for a certified copy of the proceedings. Thereafter the petitioner and his Counsel made several inquiries and the petitioner was informed that the copies were under preparation and would take a considerable time to complete. In November 1973 the petitioner's Counsel was informed by letter that the preparation of the copy of the proceedings was not complete. The petitioner's Counsel had misplaced this letter but informed the petitioner about it. The petitioner thereafter made several requests for the issue of a copy but was told that the copy was not ready. By letter dated 21.2.74 (B) the petitioner was informed by the 4th respondent that a sum of Rs. 1,000 should be deposited prior to the commencement of the preparation of a certified copy. At this stage I will consider the delay (of nearly 7 months) up to this point of time. The 4th respondent has filed an affidavit and stated therein that he admitted that an application for a certified copy of the proceedings was made by the petitioner on 3.7.73 but states further that a letter dated 2.8.73 (a copy of which has been produced marked 4 R 1) was sent to his Counsel in that connection. This letter requests that a sum sufficient to cover the cost of preparing a certified copy be deposited with the Civilian Accountant of the Sri Lanka Army. This letter would have reached the petitioner's Counsel a few days after 2.8.73. Neither the petitioner nor his Counsel have taken any steps in pursuance of that letter to have the copy prepared. The petitioner tries to make out that after his original application on 3.7.73 the first intimation that was received was a letter to his Counsel in November 1973 stating that the copy was " under preparation ". No such letter has been sent by the 4th respondent who denied this averment in his affidavit. The petitioner's submission that he and his Counsel were put off on numerous occasions by being

informed that the copy was "under preparation", which was followed by the alleged letter of November 1973 to his Counsel, which was not forthcoming, as his Counsel is alleged to have misplaced it, is quite unsupported apart from the petitioner's own averment. No affidavit has been filed from his Counsel that he received such a letter or that he misplaced it. Learned Counsel for the petitioner submitted that it may be the letter 4 R 1 of 2.8.73 that the petitioner's Counsel received and misplaced. If so two facts emerge which completely demolish the petitioner's attempt to explain the delay on the ground that he was under the belief that the copy was "under preparation". Firstly, the letter would have been received in August 1973 and not in November 1973 and secondly and more importantly the contents of that letter in no way showed that the copy was "under preparation" but required a sufficient deposit to be made. It is also improbable that the petitioner, who held the rank of Captain in the Sri Lanka Army, would have believed that the preparation of such a bulky record (nearly 1,000 pages) would have been undertaken without any deposit being made by him. Learned Counsel for the petitioner submitted that the letter of 21.2.74 (B) shows that the petitioner must have gone to the office and made inquiries. The question, however, is when he went there? It would appear from the fairly prompt replies sent in the subsequent correspondence that it must have been a few days prior to 21.2.74. The petitioner's excuse for this delay is in my view, therefore, quite unacceptable and only a pretence for his own default.

The correspondence after 21.2.74 also shows that the petitioner failed to comply with a request to deposit the required fees but continued correspondence on the footing that,

(1) he had been orally informed that the copy would cost Rs. 200.

(2) that the proof of Public Documents Ordinance lays down the rates for a certified copy and that *there was no requirement for the petitioner to make payment to "commence" preparation.*

As regards (1) above the petitioner says he had no written communication to that effect but that his Counsel was so informed when the original application was made on 3.7.73. Here too there is no affidavit from his Counsel to support that statement. As regards (2) above while it is Section 75 of the Army Act that regulates the issue of certified copies in cases such as this and not the ordinance cited by the petitioner, the real reason for the delay becomes apparent in the words underlined by me above. The petitioner was not prepared or able to make the

deposit called for and was making various allegations and trying various methods to get a copy on his terms. The petitioner then wanted a copy of the day to day preceedings issued to him certified as correct and the respondents wanted to know the provision of law under which such application was made. Whilst there appears to be such provision in respect of civil proceedings in Section 205 of the Civil Procedure Code there is no similar provision in the Army Act. Ultimately, the petitioner came into Court on 23.10.74 having prepared the petition from the notes of his Counsel and the original copy of the proceedings (uncertified) issued to him by the Court Martial. If the petitioner genuinely found it difficult to obtain a certified copy of the record because of its high cost, he could have, considering the nature of the remedy he was seeking, come into Court expeditiously and explained his difficulty as indeed he subsequently did when he ultimately filed this petition in Court. I am unable in the circumstances to say that this long delay has been satisfactorily explained or that it was beyond the control of the petitioner.

The delay in applying for a writ of certiorari, depending on the facts and circumstances of each case in that regard, would of itself be a ground for refusal of that discretionary remedy. In the case of *King v. Stafford Justices* (1940—2 KB page 33) it was held,

> " That the Court had a discretion which it could and did exercise to refuse the application on the ground that there had been undue delay in bringing the proceedings. "

Sir Wilfred Greene M.R. stated in the course of that judgment :

> "....It was at that time that quick and speedy action for relief was obviously called for, instead of which five months delay took place before the application was launched. I should have considered myself that that circumstance alone was one which ought to prevent the Court from granting any relief on the facts of this case..... "

In the case of *President Malalgodapitiya Co-operative Society v. Arbitrator of Co-operative Societies* (51 N. L. R. 167) it was held that a writ of certiorari will not be issued when there has been undue delay in applying for the writ. In *Gunasekera v. Weerakoone* (73 N. L. R. 262) a writ of certiorari was refused on the ground of undue delay in making the application. In the present case there has been a delay of nearly one year and three months which has not been satisfactorily explained, and on the contrary shows that it was due to the default of the petitioner. In these circumstances on this ground alone the application has to be refused.

The second ground urged by learned Senior State Counsel is that the petitioner has failed to disclose in his petition that a certified copy of the summing up of the Judge Advocate was in fact issued to him and in his hands before he filed his petition. The petitioner states in paragraph 12 of his petition that he applied for a certified copy of the summing up, and in paragraph 18 that his Counsel prepared the petition in this case without being supplied with the summing up. The 4th respondent's affidavit shows that the petitioner applied for a copy of the summing up by his letter dated 30th August 1974 (4 R 2) and he was informed by the 4th respondent's letter dated 1.10.74 (4 R 3) that it was ready and it was collected by a person sent by the petitioner with his letter (4 R 4) on 9th October 1974. The petitioner's petition is dated 23rd October 1974 when it has been actually filed in Court. Learned Counsel for the petitioner stated that he drafted the petition as stated in paragraph 18 without a copy of the summing up. I have no doubt and indeed unhesitatingly accept that this is so. But even though the petitioner may have received the summing up after the petition was drafted, he received it long before the papers were filed in Court—nearly two weeks before they were filed. I think it was his duty under these circumstances to at least state in his petition that he has since received a copy of the summing up. His failure to do so would create the impression that he was denied even a copy of the summing up to prepare the petition. The petitioner has not disclosed the fact that he applied for the summing up only on 30th August 74, over one year after the trial was concluded. Learned Counsel for the petitioner submitted that the petitioner did not intend to suppress that fact as the copy of the summing up was filed with the petition. This indeed is meaningless and should have never been done. His petition though it refers to documents (A) to (J) filed with the petition makes no reference whatever to the summing up also being filed. If any documents are filed with the petition they must be referred to in the petition itself as this Court would be led by the contents of the petition and affidavit. On reading the papers filed I myself was under the impression that the summing up had not been supplied to the petitioner at all. This type of non-disclosure in the petition and the filing of the document without it being referred to in the petition, tends to create in the mind of the Court a wrong impression and at the same time affords the petitioner, when his bona fides are questioned, to point out as an excuse that the document was infact filed with the petition. The filing of such a document without any reference to it in the petition, is, as I said earlier, meaningless and only meant to give the petitioner an excuse after having misled the Court into a wrong belief. This type of action must be viewed with strong disapproval and

one hopes that it would not be followed in future. In the case of *Alphonsu Appuhamy v. Hettiaratchchi* (77 N. L. R. 131) the petitioner had filed a notice and referred to it both in his petition and affidavit but had not disclosed in express language in the petition and affidavit a material fact contained in that notice. This, amongst other matters, was held to be a non-disclosure of a material fact and the application for a writ of mandamus was refused. I need not repeat here the cases cited in the course of the judgment in that case, on the need for a full and fair disclosure of all material facts so that the Court may not be misled. Both the preliminary grounds raised by learned Senior State Counsel must therefore be answered against the petitioner.

For these reasons I would refuse the application with costs fixed at Rs. 157.50.

ISMAIL, J.—I agree.

RATWATTE, J.—I agree.

Application refused.