

**KUMARESAN**  
v.  
**PANNANWELA AND OTHERS**

COURT OF APPEAL.

S. ANANDA COOMARASWAMY, J.,

C.A. APPLICATION No. 47/89.

OCTOBER 11, 1989 AND DECEMBER 7 AND 8, 1989.

*Writs – Certiorari – Order of Court Martial – Air Force Act, S. 46 and 129 (1) – Rule 21(1)(b)(iii) and (v) of the Court Martial (General and District) Regulations – Charge of ill treating and harassing – Failure to rule on preliminary objections to charges – Failure to state particulars of the offences – Failure of Judge Advocate to caution the Court Martial that the case against each accused should be considered separately and that the preliminary record should not be used as substantive or corroborative evidence – Requisites of a charge.*

The petitioner and two others of the Air Force were arraigned before a Court Martial on two counts that by ill treating and harassing Flying Officer Samarasinghe they did behave in a manner prejudicial to good order and Air Force discipline. A preliminary objection was taken that the charges were bad for duplicity and failure to comply with Regulation 21 of the Regulations made under the Air Force Act. The Court Martial on a ruling by the Judge advocate stated the objections would be ruled upon at the conclusion but this was not done. The petitioner complained of prejudicial conduct of the case, failure to consider the case against each accused separately and improper use of the record of the preliminary inquiry.

**Held :**

(1) The Court Martial was required to be satisfied in respect of each of charge that it has the particulars stipulated by rule 21(1) (b)(iii) and (v) of the Court Martial (General and District) Regulations, to wit. There each charge should be divided into two parts :

(a) statement of the offence, and

(b) statement of the particulars of the act, neglect or omission constituting the offence.

A mere statement in the charges that by "ill treating and harassing" the accused behaved in a manner prejudicial to good order and Air Force discipline did not comply with the requirements of Rule 21. "Ill treating and harassing" are vague and general and a form of composite terminology which may embrace wide variety of acts of mistreatment or ill-treatment.

(2) The charges of harassing and ill-treatment levelled against all three officers would imply that the acts alleged were identical against all three accused. It was incumbent on the prosecution to set down the particulars of the separate and different acts alleged against each of the accused. Failure to do this would result in prejudice being caused to them. The Judge advocate failed to advise the lay members of the Court Martial of this requirement.

(3) The proceedings showed that reference was made to the record of the preliminary inquiry right through the inquiry but the Judge advocate failed to caution the Court Martial that this record could not be used as substantive or corroborative evidence.

(4) No ruling was given on the preliminary objection.

*Application for certiorari to quash verdict of Court Martial.*

*H. L. de Silva, P.C. with Gomin Dayasiri for petitioner.  
D. Sarath Piyasena for respondent.*

*Cur. adv. vult.*

January 12, 1990.

### **ANANDACOOMARASWAMY, J.**

This is an application for a Mandate in the nature of a Writ of Certiorari to quash the proceedings and order of the Court Martial.

The facts relevant to this application are briefly as follows :—

The Petitioner is a Flight Lieutenant in the Sri Lanka Air Force. 1st, 2nd and 3rd Respondents are officers of the said Air Force and Members of the Court Martial constituted under the Air Force Act. The 4th Respondent is the Commander of the Sri Lanka Air Force.

On 5th October, 1988 the Petitioner and two others of the Air Force were arraigned before a Court Martial convened by the 4th Respondent under Section 46 of the Air Force Act, on charges under Section 314 of the Penal Code and Section 129 (1) of the Air Force Act.

After several dates of hearing and immediately after the summing up by the Judge Advocate, the 1 to 3 Respondents returned a verdict of "Not guilty" on count (1) and "Guilty" on count (2) against the Petitioner. Both the 2nd and 3rd accused charged along with the Petitioner were found "Guilty" on both counts. The sentence of the Court Martial confirmed by the 4th Respondent was that the Petitioner should forfeit two years seniority in the Air Force.

The Petitioner states that at the commencement of the trial, his lawyer took an objection in limine to the charges that they were bad in law on account of —

(a) Duplicity,

(b) Non compliance with the express provisions of Regulation (21) of the Regulations made under the Air Force Act.

It was further stated that the Petitioner, was gravely prejudiced in his defence on that account, and that if the said objection was upheld the charges should be dismissed.

The Court Martial on a ruling by the Judge Advocate, directed that these objections would be decided at the conclusion of the trial. However, neither the Judge Advocate in his summing up nor the Court made any reference whatsoever to the objection at the conclusion of the trial.

Several grounds have been urged by the Petitioner to quash the order of the Court Martial.

(1) It has been submitted that count 2 in the charge sheet does not conform to Rule 21 (1) (b) (iii) and (v) of the Court Martial (General and District) Regulations (Page 311 of the Subsidiary Legislation) under which the Court Martial is required to be satisfied in respect of each charge that is brought before it of the following :-

That (iii) each charge shall be divided into two parts -

(a) the statement of the offence ; and

(b) the statement of the particulars of the act, neglect or omission constituting the offence.

(v) The particulars shall state such circumstances respecting the alleged offence as will enable the accused to know every act, neglect or omission which it is intended to be proved against him as constituting the offence.

The charges in this case merely stated that "by ill-treating and harassing Flying Officer Samarasinghe" that the accused Officer did behave in a manner prejudicial to good order and Air Force discipline.

The words "ill-treating and harassing" are vague and general and do not allege particular or specific acts which may amount to conduct prejudicial to good order and discipline. They are a form of composite terminology which may embrace a wide variety of acts of mistreatment or ill-treatment. To harass another means to vex, worry or trouble a person which may be merely verbal attacks and do not necessarily mean physical attacks.

This was a serious omission because each of the three accused officers were separately charged of the same offence under Section 129 (1) of the Air Force Act, in the identical manner, *i.e.*, "harassing" and "ill-treating" which would indicate that the alleged acts of harassing and ill-treating are identically the same against all three accused. This was far from being the case because against each Officer there were widely different allegations, although one or two acts were common. The accused would have been misled. It was therefore incumbent on the prosecution to set down the particulars of the separate and different acts alleged against each of them in each of the charges.

Had the Petitioner not taken up this objection at the outset he could not be heard now to complain against those charges. The charges as they stood not only caused prejudice to the Petitioner but also misled the Court Martial. If a Ruling had been given on the objection by the defence counsel before the commencement of the trial this question would not have arisen now. The Court Martial erred in not giving the Ruling on the objection.

- (2) It is submitted that the Judge Advocate in summing up the facts and law to the lay members of the court Martial has failed to direct them on a vital matter which amounts to a misdirection in law. When addressing them on the 2nd charge of acting in a manner prejudicial to good order and Air Force discipline he failed to direct them that the case against each officer had to be considered separately and in doing so it was necessary to consider what were the specific or particular acts of ill-treatment or harassment which were alleged and proved against each accused. A failure to do this would lead the laymen who had to decide the question, to mistakenly assume that if some act of ill-treatment or harassment of the victim was proved then all three accused would be guilty of the charge, irrespective of their complicity in the acts proved.

The Learned Counsel for the Petitioner drew the attention of the Court to the language in the summing up which is particularly objectionable on this ground. The passage reads as follows :-

"In respect of Nos 2,3 and 4 charges (*i.e.* the three charges of acting in a manner prejudicial to good order and discipline) you will have to consider the acts other than assault and see whether acts did

occur and if so whether these acts amount to conduct prejudicial to good order and Air Force discipline. If you accept the evidence of the witnesses these acts are forcing liquor, getting them to walk nude in the bar, getting same to do push ups and forcing them to take vinegar mixed with stout. It is not necessary for me to go through the entire evidence.....”

This charge may mean that if these acts did merely occur or happen irrespective of who did what, all these accused are guilty. Failure to instruct the Court Martial that they had to consider the specific allegations of harassment or ill-treatment made against each accused separately caused serious prejudice to the Petitioner.

Prior to the convening of the Court Martial the Air Force Commander had ordered a Court of Inquiry be held in regard to the incident at the Officers’ mess, China Bay on the night of the 24th October, 1987. This investigation involved charges against three other Officers apart from the three officers who were eventually charged before the Court Martial. The defence strongly urged that the Summary of Evidence had been illegally recorded in the absence of the accused Officers and falsely certified. This Summary of Evidence which contains the Statement of eight witnesses and runs into nearly 20 pages was placed in the hands of the Court Martial and the proceedings indicate that reference to it was made throughout the trial. Nowhere in the charge is any caution given by the Judge Advocate against using this as substantive evidence or as corroborative evidence. This is a non direction amounting to a misdirection.

It is therefore quite clear that the Court Martial failed to properly evaluate the case against the Petitioner and therefore the Petitioner is entitled to the reliefs prayed for.

For the foregoing reasons I issue a Mandate in the nature of a Writ of *Certiorari* quashing the proceedings and the order of the Court Martial referred to above.

The Petitioner’s application is accordingly allowed with costs.

*Writ of Certiorari issued.*