CHANDRA KUMAR AND ANOTHER
v.
CAPTAIN SAMARAWICKRAMA AND OTHERS

COURT OF APPEAL
GUNAWARDANA, J.
CA NO. 775/99
APRIL 05, 2001

Navy Act, No. 34 of 1950 – Court Martial – Quash conviction – Evidence Ordinance s. 33 – Judicial proceedings? – What are judicial decisions ? – Error of Law.

The petitioners sought to quash their convictions by a Court Martial.

It was contended that, the Judge-Advocate has misconstrued s. 33 of the Evidence Ordinance by not allowing the evidence given by one D. who had given evidence before that officer recording the summary of evidence, to be read before the Court Martial and further that the Judge-Advocate had flouted rule 21 of the Navy order 0513 in that, the trial Judge-Advocate had given a firm direction to the Court Martial that it was completely bound by the directions of the Judge, on points of law when the rule indicates that the Court Martial need not accept the directions of the Judge-Advocate on points of law, and that it is open to the Court to take, on points of law, a view different from that of the trial Judge-Advocate. In such a case the Court has only to give reasons for not accepting the advice of the Judge-Advocate.

Held:

(1) The primary object of recording a summary of evidence being to consider whether there is a *prima facie* case against the accused, it cannot be said that recording a summary of evidence is not a judicial proceeding. The direction given by the Judge-advocate to the Court Martial that the evidence given by D, at the stage of recording the summary of evidence was irrelevant and inadmissible under s. 33 Evidence Ordinance, is patently wrong as such the conviction has to be quashed.

(2) The rule in the Navy order merely reaffirms the general principle that everybody is entitled to take a correct view of the law and act accordingly. The direction of the Judge-advocate is wrong in law since it has taken away that general right given, by the law or rather the duty imposed by

law upon anybody who decides anything to take the decision according to a correct view of the law. In this instance the Court had no choice but to act in obedience to the directions given by the Judge-advocate on points of law which direction too constitutes a manifest error of law.

APPLICATION for a writ of *Certiorari.*

Cases referred to :

1. *Barnard v. National Labour Board* – 1953 2 QB 18.
2. *In Re Shaw – 1952 – 1 ALL ER 122.*
3. *In Re Anisminic* – 1969 2 AC 147.

Aloy Ratnayake, PC with *Dr. R. A D. Kumarawickrema* for petitioners.

Palitha Fernando, DSG with *M. R. Ameen,* SC for respondents.

Cur. adv. vult.

July 26, 2001

GUNAWARDANA, J.

This is an application made by the 1st and 2nd petitioners seeking an order of *Certiorari* to quash the conviction of the petitioners by a Court Martial constituted under the Navy Act, No. 34 of 1950 (as amended).

The decision of this case will centre largely if not wholly on the interpretation of section 33 of the Evidence Ordinance and as such it would be well to reproduce the relevant excerpt of that section which is as follows:

"Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of facts which it states when the witness is dead or cannot be found . . ."

Provided :

(*a*) that the proceeding was between the same parties or their representative in interest;

(*b*) that the adverse party in the first proceeding had the right and opportunity to cross-examine;

(*c*) that the question in issue were substantially the same in the first as in the second proceeding.

The learned President's Counsel for the petitioner had raised two points in support of the application:

(i) that the learned Judge-Advocate (4th respondent) had misconstrued section 33 of the Evidence Ordinance by not allowing the evidence given by one Dissanayake, who had given evidence before the officer recording the summary of evidence, to be read before the Court Martial – the proceedings before the Court Martial being, so it was argued by the learned President's Counsel for the petitioner – "a later stage of the same judicial proceeding or a subsequent judicial proceeding between the same parties": The learned Judge-Advocate had refused to allow the evidence of Dissanayake to be read at the Court Martial for a rather strange, if not a bizarre reason, i.e. that the prosecution (party) at the Court Martial did not have the opportunity to cross-examine Dissanayake at the stage that the summary of evidence was recorded – summary of evidence being recorded as preliminary or preparatory, so to say, to the holding of a Court Martial. It is to be observed that Dissanayake had been called, in fact, as a witness to give evidence (at the stage that the summary of evidence was recorded) against the accused who had cross-examined Dissanayake – at the state of summary of evidence;

(ii) that the Judge-Advocate erred (the learned President's Counsel for the petitioner stopped short of submitting that the Judge-Advocate erred in law) by directing the Court Martial that it was completely bound to follow the directions given by the Judge-advocate on points of law.

The learned Deputy Solicitor-General sought to counter the above-mentioned points in two ways.

He argued that –

(i) the proceedings before the officer recording the summary of evidence could not be designated judicial, or held to be so;

(ii) that there was no prosecutor at the stage that the summary of evidence was recorded which robs the proceeding of recording the summary of evidence of the aspect of a judicial proceeding. The learned Deputy Solicitor-General was at pains to impress upon me, to use his own words: ". . . there should be two parties at the summary of evidence for it to be considered judicial proceedings". As a proposition of law that argument is impeccable and is faultless to a fault;

(iii) in any event, the proceedings, at the stage of summary of evidence, were not recorded by a person authorized by law to take the evidence.

The submission of the learned Deputy Solicitor-General to the effect that the proceedings before the officer who recorded the summary of evidence were not judicial seeks to overwhelm the truth by show of reasons. The very first object, if I may say so, as spelt out at paragraph 2 (*a*) in Sri Lanka Navy Order No. 0512, of recording a summary of evidence is, to use the very words in that Navy order:

"to enable the commanding officer to determine whether there is a *prima facie* case against the accused and whether he should remand the accused for trial". Of course, the decision in this instance, as to whether or not there is a *prima facie* case had been taken not by the officer who recorded the summary of evidence but by the commanding officer himself.

But, the officer who recorded the summary of evidence is, in fact, a delegate of the commanding officer – he having being authorized by the commanding officer to record the summary of evidence, for the purpose of enabling the commanding officer to take a decision on the evidence so recorded as to whether or not there was a *prima facie* case against the accused in relation to the charges that had been read over to the petitioners who were the accused. The commanding officer had committed to the officer (who recorded the summary of evidence) the authority to record the evidence which authority, if not for such committal or reposal, would reside in the commanding officer himself.

Although the summary of evidence had been recorded by an officer nominated by the commanding officer – the commanding officer himself must be deemed, in the circumstances, to have acted in his own person in recording the summary of evidence. This is an aspect of which the learned Counsel were oblivious. As the maxim goes, he who does a thing by the instrumentality of another is considered as if he had acted in his own person (*Qui facit per alium, facit per se*). To say that the summary of evidence is not a judicial proceeding because no decision was taken in that proceeding affecting the petitioners who were the accused in that proceeding, is a veritable half truth. A decision was, in fact, taken on the evidence so recorded although not by the selfsame person or officer who recorded the summary of evidence but by the commanding officer. Any act could be treated as judicial if it affected a person's rights or freedom or

of it entailed a penalty. In fact, a person whose exercise of power affects the rights of others is required to act judicially. The idea of a judicial function is now greatly stretched. In a way, it could even be said that the fact that power is administrative does not make it any the less judicial if the exercise of that power affects the rights of other parties. Sri Lanka Navy Order No. 0512 clearly sets out the objects of recording a summary of evidence – the main object being to enable the commanding officer to assess the strength of the evidence and decide whether a *prima facie* case arises on such evidence against the accused. The primary object of recording a summary of evidence being to consider whether there is a *prima facie* case against the accused (who is described or identified as such at the recording of the summary of evidence) it cannot be said that the recording a summary of evidence is not a judicial proceeding. Summary of evidence is recorded to enable the commanding officer to determine on the basis of that evidence whether the accused is "*prima facie*" guilty of any offence with which he (the accused) must be take to be charged, for under section 12 (*b*) of the relevant Navy Order No. 0512, the charge is required to be read to the accused at the commencement of the recording of summary of evidence. And, in case, the commanding officer thinks so, that is, that there is a *prima facie* case, on the summary of evidence, it can even entail the loss of personal liberty of the accused for the commanding officer can then, in terms section 2 (*a*) of Sri Lanka Navy Order No. 0512, remand the accused pending trial by a Court Martial. MAKING A DECISION ON THE BASIS OF EVIDENCE, AFFECTING THE RIGHTS OF INDIVIDUALS IS A SIGNAL QUALITY OF THE JUDICIAL FUNCTION. The main object of recording the summary of evidence being, as stated in section 2 (*a*) of the relevant Navy Order itself, to enable the commanding officer to take a decision as to whether or not there is a *prima facie* case, the taking of that decision by the commanding officer is an integral constituent of the proceeding of recording the summary of evidence and is necessary to the completeness of that

proceeding. That being so, the taking of the decision as to whether or not there was a *prima facie* case was very much – a part of the proceeding of recording the summary of evidence and cannot be separated off from the stage of recording the summary of evidence – the very object of recording – the summary of evidence being, as repeatedly stated in this order, to enable that decision to be made by the commanding officer. In this context, I may refer to the case of *Barnard v. National Labour Board*[1] for the purpose of explaining that in general, judicial functions cannot be delegated, but as authority for the proposition that disciplinary functions are judicial in nature because they affect a person's rights.

The proceeding in which the summary of evidence is recorded commences with the reading of the charges to the accused (petitioners) and then it culminated in the commanding officer holding on the basis of the evidence so recorded that there was a *prima facie* case against the accused with reference to those charges which resulted in the accused being tried by a Court Martial. The taking of a decision by the commanding officer, on the evidence recorded at the summary of evidence, is an integral part of the proceeding of recording the summary of evidence because, as stated in the Navy Order No. 0512 the primary object of the recording a summary of evidence is to determine whether or not there is a *prima facie* case against the accused, in relation to the charges which had been, as stated above, read to the accused at the very outset of recording the summary of evidence.

The officer recording the summary of evidence is distinguished by several features which strengthen the impression that he is invested with judicial power or was exercising a function of a judicial nature. He has certain procedural attributes which resemble even if, in fact, they are not identical with those of a regular court of law: for instance, witnesses give evidence on oath and they are cross-examined by the

accused. Moreover, at the commencement of the summary of evidence, charges were read over to the accused (petitioners) which meant that they were formally accused or indicted which is reminiscent of an ordinary criminal trial.

In fact, in terms of paragraph 12 (*b*) of the Navy Order No. 0512 the officer recording the summary of evidence is required to read the charges to the persons who are, in fact, referred to as the accused and whose degree of culpability will be determined, as stated above, by the commanding officer on the basis of that selfsame evidence. In other words, to repeat what has been stated above as well, the object of recording a summary evidence, as stated at paragraph 2 (*a*) of the Sri Lanka Navy Order No. 0512 (in pursuance of which order the summary of evidence was recorded) was to reproduce the very words of the relevant Navy Order: "to enable the commanding officer to determine whether there is a *prima facie* case against accused and whether he should remand the accused for trial".

The point made by learned Deputy Solicitor-General is that the officer authorized to record the summary of evidence does not make any decision and as such his functions could not be described as judicial or likened thereto. According to section 04 of the aforesaid Navy Order No. 0512 the summary of evidence may be recorded by the commanding officer himself or by a person authorized by him. If the commanding officer himself had recorded the summary of evidence, there could have been no scope whatever for the argument that the proceeding of recording the summary of evidence is not a judicial proceeding. Since, in such a situation, the officer recording the summary evidence would himself determine the question as to whether or not there is a *prima facie* case against the accused on the evidence so recorded. I do not think the proceeding of recording a summary of evidence ceases to be a judicial proceeding merely because the evidence is recorded by a person authorized by the

commanding officer who, in fact, will make a judicial decision on that selfsame evidence because, as stated above, the main object of recording the summary of evidence, whoever records it, is to enable the commanding officer to decide whether there is a *prima facie* case against the accused – which decision is undoubtedly a judicial decision. To consider whether a *prima facie* case arises on the summary of evidence the commanding officer has, in the exercise of his discretion, to decide whether an inference of guilt can be drawn against the accused on the summary of evidence – in the absence of proof to overcome the inference. *Prima facie* evidence is evidence that will suffice as proof of a fact in issue until its effect is overcome by other evidence – if forthcoming. To decide that question, ie whether or not a *prima facie* case arises on the summary of evidence, it is necessary to bring to bear upon that question a judicial mind – that is, a mind to determine what is fair and just, what is right and wrong in respect of the matter or matters under consideration.

The direction, complained of, given by the Judge-Advocate to the Court Martial is as wrong as wrong can be. His direction was that the evidence given by one Dissanayake, at the stage of recording the summary of evidence, was irrelevant and inadmissible under section 33 of the Evidence Ordinance – since the prosecution (at the stage of recording the summary of evidence) had no opportunity to cross-examine that witness. I am at a loss to understand why such a direction, which is patently wrong, was given. At the argument before me the learned Deputy Solicitor-General freely conceded that such a direction was not countenanced by the terms of section 33 of the Evidence Ordinance. But, now in his lucid written submissions, the learned Deputy Solicitor-General had altered his stance a little by seeking to show that there were no two parties at the recording of the summary of evidence, since (according to his belated submission put forward in writing as supplementary to oral submissions) there was no "prosecutor" at the stage of recording the summary of evidence.

One of the three conditions that had to be fulfilled in order to be able to introduce (in a subsequent or a later stage of the same judicial proceeding) evidence given in an earlier one, is that the "adverse party in the first proceeding had the right and opportunity to cross-examine" that witness whose evidence is sought to be marked as substantive evidence in a later proceeding without calling him again as a witness. Section 33 (*b*) of the Evidence Ordinance only contemplates that the "adverse party in the first proceeding" ought to have had a right and opportunity to cross-examine that witness whose evidence is sought to be made use of without calling the witness once again. The adverse party in the first proceeding is clearly the accused – first proceeding being the proceeding in which the summary of evidence was recorded. In section 12 (*e*) of the aforesaid Navy Order it is stated thus : "That he (the accused) has the right to cross-examine each witness who gives evidence against him". In terms of the relevant Navy Order No. 0512, no other party has that right, ie the right to cross-examine a witness who testifies at the recording of the summary of evidence. The relevant Navy Order itself presupposes or treats the accused as the "adverse party in the first proceeding", that is, the proceeding of recording the summary of evidence. Navy Order No. 0512 does not contemplate witnesses being cross-examined other than by the accused – at the stage of recording the summary of evidence.

Of course, section 33 contemplates a *lis* (controversy) *inter partes* situation, that is, there must be two parties who are at variance in regard to a certain matter. The submission of the learned Deputy Solicitor-General that the proceeding at the stage of recording the summary of evidence is not *inter partes* since there was no prosecutor had no basis either in fact or law, I think the officer who recorded the evidence played a dual role. Not only did he record the evidence but he also led the evidence of the witnesses, whether favourable or unfavourable to the accused. I suppose, he was required to play the role of an ideal or exemplary prosecutor – such a prosecutor being

detached and disinterested in the outcome, he would elicit evidence irrespective of whether or not such evidence is favourable to the prosecution. The fact that the "introduction" to the relevant Navy Order No. 0512 requires the officer recording the summary of evidence to record "all the available evidence whether favourable or unfavourable to the accused" calls for remark.

Assuming, that there was no prosecutor physically present at the proceedings in which the summary of evidence was recorded – yet there was undoubtedly a prosecution. Prosecutor is not be confused with the prosecution. Prosecutor is one who takes charge of the prosecution and performs the function, usually, of trial lawyer for the State or prosecution. The proceeding, at the stage of recording the summary of evidence, commences after the charge is read over to the accused and was instituted and carried on for the purpose of determining whether or not there was a *prima facie* case against the accused in relation to the charges (that had been read over to the accused) who were charged with certain offences, which is what reading over the charges, at the outset of recording of the summary of evidence, to the accused entails or involves – or means.

Reading over the charges as required by the Navy Order (in pursuance of which the summary of evidence was recorded) is to prefer an accusation against the petitioners who were the accused and also presupposes the existence of a prosecution (party). And, it is the prosecution that prefers the charge and for a charge to be made, the existence of a prosecution is necessary and is a condition – precedent for without a prosecution (party) no charge could have been preferred. To charge is to proceed against a person criminally which is more or less, the same, as to prosecute. *The fact that a charge was preferred and read over to the accused at the stage of recording the summary of evidence is proof of the existence or presence of the prosecution* (party).

There can be a prosecution (party) without there being a prosecuting officer conducting the prosecution. At the stage of recording the summary of evidence there were distinct charges which were read to the accused, which was tantamount to the accused (petitioners) being formally accused, be it noted, with reference to certain crimes that the accused (petitioners) were alleged to have committed. So that the framing of the charges and reading them over to the accused at the commencement of recording the summary of evidence, involves the institution of criminal proceedings in respect of certain offences against the accused. And, the prosecution so instituted had been carried on by leading or recording evidence in relation to those charges. The situation has to be realistically appreciated without raising over – subtle arguments. That being so, there is no scope for the belated argument that proceedings at the stage of summary of evidence were not judicial in character inasmuch as they were not *inter partes* – there being – according to the submission of the learned Deputy Solicitor-General – no prosecutor. As explained above, there is no gainsaying that there was a prosecution (party) – at the stage of recording the summary of evidence.

What has been stated above would serve to show that the proceedings at the stage of summary of evidence were :

(*a*) *inter partes* and

(*b*) judicial in character

So that the evidence given by Dissanayake at the stage of recording the summary of evidence becomes relevant and admissible at the trial in the Court Martial, under section 33 of Evidence Ordinance, provided the following three conditions are also satisfied :

(*a*) that the proceeding was between the same parties. There was no controversy at the argument before me, as to the fact that

it was so, ie that subsequent proceeding in the Court Martial was between the same parties, if, in fact, there had been a prosecution (party), at the stage of summary of evidence, as had been held by me in this judgment;

(*b*) that the adverse party in the first proceeding had the right and opportunity to cross-examine. I have explained above that the "first proceeding" was the proceeding wherein the summary of evidence was recorded and that the adverse party were the two accused (petitioners). That the accused did cross-examine the relevant witness, viz Dissanayake is an admitted fact;

(*c*) that the questions in issue were substantially the same in the first as in the second proceeding. The parties were not at variance on this aspect either, at the argument before me, and the fact that the question in issue was identical must also be taken to have been admitted – question at issue always being the guilt or otherwise of the accused on the charges which were identical in both proceedings – subsequent proceeding being the trial in the Court Martial;

So that the direction of the Judge-Advocate to the Court Martial that the evidence of Dissanayake recorded at the stage of summary of evidence, which preceded the trial in the Court Martial, is not admissible under section 33 of the Evidence Ordinance because the prosecution (party) at the Court Martial did not have the opportunity to cross-examine Dissanayake (at the inquiry in which summary of evidence was recorded) was patently wrong in law. In fact, under paragraph 12 (*e*) of the Navy Order it was the accused who had the right to cross-examine Dissanayake. At the inquiry in which the summary of evidence was recorded Dissanayake was not called by the accused. The directions of the Judge-Advocate would, perhaps, have been correct if that had been the case, that is, if at the stage

of summary of evidence, it was the accused who had called that witness. (That witness Dissanayake cannot now be traced is also an admitted fact).

It is to be observed that the direction of the Judge-Advocate complained of had not been given on the basis that there were no two parties or that there was no *lis inter partes* situation at the stage of recording the summary of evidence, which is a position thought of or added later only at the argument before me.

Thus, the perusal of the record of the proceedings of this case reveals a blatant error of law (on the face of the record) in that the learned Judge-Advocate, in his directions to the Court Martial had misinterpreted section 33 of the Evidence Ordinance. As such the decision or conviction of the accused has to be quashed. In Shaw's case[2] Lord Denning held that *Certiorari* could be used to correct errors of inferior tribunals and the like even when errors do not go to the jurisdiction. Shaw's case established the principle that an error of law on the face of the record renders the decision of the tribunal liable to be quashed although that error does not affect or go to the jurisdiction of the tribunal. However, in the aftermath of the decision in *Anisminic*[3] there had been much discussion as to whether the distinction between jurisdictional and non-jurisdictional error of law still persists, since the Anisminic decision was to the effect that all errors of law committed by administrative bodies and inferior tribunals are really to be regarded as going to jurisdiction.

The second point raised by the learned President's Counsel for the petitioner remains to be considered. The learned President's Counsel had pointed out that the learned Judge-Advocate had flouted the rule spelt out in section 21 of the Navy Order No. 0513 which is as follows: "The Court shall be guided by the advice of the trial Judge-Advocate on all points of law. Where, however, the Court does

not accept the advice on a point of law, it shall be the duty of the president to cause the fact to be set out in the record of the proceedings together with the Court's reasons for rejecting the advice". 380

The rule set out above clearly indicates that the Court need not necessarily accept the directions of the Judge-Advocate on points of law. It is open to the Court to take, on points of law, a view different from that of the trial Judge-Advocate. In such a case the Court has only to give reasons for not accepting the advice of the Judge-Advocate.

But, the trial Judge-Advocate had given a firm direction to the Court Martial that it was completely bound by the directions of the Judge-advocate on points of the law. The Judge-Advocate had omitted, perhaps, inadvertently, to explain to the Court that it could depart from 390 the directions of the Judge-Advocate on points of the law – subject to a duty to give reasons for such non-acceptance.

But, then the question arises as to whether the Judge-Advocate's direction that the Court Martial was bound to follow the Judge-Advocate's directions on law could be treated as an error of law for the Navy Order No. 0513 is not law. Navy Order was not promulgated by Parliament. Nor has it been formulated under a statute. So that disregarding the rule in the Navy Order No. 0513 cannot be considered to be disregarding the law. It is only acting in violation of a law that is tantamount to an error of law. And, it is only when an inferior tribunal 400 or other administrative body had committed an error of law that a Court of review can intervene and quash the decision of that body by means of an order of *Certiorari.* At the stage of preparation of this judgment, when this question occurred to me, after the argument in Court was closed, I had the opportunity to read an Indian treatise on *Administrative Law by* Jain and Jain (4th edition page 537) where it is stated thus: "A Court may not intervene when a body disregards

not a mandatory provision of law, but executive instructions or directions which have no force of law". However, in the circumstances, this direction can amount to an error of law for it is, in a way, a direction to the Court to disregard the law. In terms of the rule in the Navy Order No. 0513 reproduced above, it was open to the members of the Court to take a correct view of the law, uninhibited by the directions on the law given by the Judge-Advocate. *In other words, the rule in the Navy Order No. 0513 merely reaffirms the general principle that everybody is entitled to take a correct view of the law and act accordingly. The direction of the Judge-Advocate is wrong in law since it has taken away that general right given, be it noted, by the law or rather the duty imposed by law upon anybody who decides anything to take that decision according to a correct view of the law.* For instance, in this case itself, there was a strong theoretical possibility that the evidence of Dissanayake would have been admitted by the members of the Court, under section 33 of the Evidence Ordinance, had the Judge-advocate not given the direction complained of, ie that the Court had no choice but to act in obedience to the directions given by the Judge-advocate on points of law which direction, too, constitutes a mainfest error of law.

For the aforesaid reasons, I do hereby grant an order of *Certiorari* quashing the conviction of the two petitioners and the sentence passed on them by the Court Martial.

Application allowed.