INDRANANDA DE SILVA
v.
LT. GEN. WAIDYARATNE AND OTHERS

SUPREME COURT
FERNANDO, J.
AMERASINGHE, J. AND
WADUGODAPITIYA, J.
S.C. APPEAL NO. 19/97
COURT OF APPEAL NO. 863/93
GENERAL COURT MARTIAL
L/C. 90882
OCTOBER 16TH, 1997, NOVEMBER 26TH, 1997.

Writ of certiorari – Court Martial – Offences under the Army Act – Conviction based on illegal evidence – Natural Justice.

The appellant, a Lance Corporal attached to the Sri Lanka Military Police Corps was convicted before a General Court Martial of certain offences under the Army Act. A confession made by the appellant during the preliminary investigations which the prosecution offered in evidence was rejected by the Court after a *voir dire* inquiry. Thereafter, the prosecution led in evidence a statement from the dock purporting to have been made by the appellant during the inquiry against him for recording a summary of evidence. That statement was received in evidence despite objection as to its voluntariness and without a *voir dire* inquiry. The confession which was rejected and the "Statement from the dock" were identical in length and content. The main complaint of the appellant was that the proceedings had against him before the General Court Martial were procedurally defective and contrary to natural justice.

Held:

It was apparent that what was recorded at the inquiry for recording a summary of evidence was not any statement which the appellant in fact made from the dock, but the confession which he is alleged to have made earlier and which was rightly rejected at the trial. The self same confession was later admitted disguised as a "Statement from the dock" without testing its voluntariness. As such, it was not lawfully admitted in evidence by the Court. The other evidence was insufficient to sustain the charges against the appellant; and he is, therefore, entitled to a writ of certiorari quashing his conviction.

APPEAL against the judgment of the Court of Appeal.

Ranjan Mendis with *Sarath Weerasinghe, Mrs. Lakshmi Mendis, K. A. Manamperi, Bernard Peterson* and *J. A. Wickremanayake* for the appellant.

W. P. G. Dep, DSG with *N. Pulle* SC for the respondents.

Cur. adv. vult.

December 16, 1997.

WADUGODAPITIYA, J.

The appellant, a Lance Corporal, who joined the Sri Lanka Military Police Corps in 1987, was functioning in the capacity of photographer of his unit, when on 14. 3. 90, he was taken into custody on the orders of the Commanding Officer of the Military Police, Lt. Col. B. I. S. Dissanayake, as he was suspected of being involved in subversive activity with the Janatha Vimukthi Peramuna (JVP).

In the course of investigations into the activities of a JVP leader named Saman Piyasiri Fernando, the Criminal Investigations Department recovered several photographs of the Military Police Headquarters at Narahenpita and of Army Headquarters at Panagoda, and also a sketch of the Headquarters of the Military Police at Narahenpita, from a JVP activist named Muthu Banda. The handwriting on the sketch consisted of several English words and five words in the Sinhala language. The appellant's Commanding Officer had said he could identify the handwriting of the five Sinhala words as that of the appellant as he was familiar with the handwriting of the appellant. The Commanding Officer had further said that the photographs which were recovered, came from the photographic laboratory of the Military Police Headquarters.

The Army commenced a preliminary investigation, conducted by Lt. Kumarasena, in the course of which the appellant made a detailed confession running into about thirty pages in length to the said Lt. Kumarasena. In that he admitted his involvement with the JVP and their activities; that he had passed military intelligence to the JVP; that he had prepared a sketch of the Headquarters of the Military Police; that he had also taken photographs of the Military Police Headquarters and of the Army Headquarters at Panagoda immediately after the JVP attacked it, and that he had given the sketch and the

photographs to a JVP leader named Dushan. Inasmuch as this confession was made to Lt. Kumarasena, an officer superior in rank to the appellant, (who was a Lance Corporal), the former was competent to record such confession.

At the conclusion of the said investigation, the appellant was transferred to the Detention Camp at Panagoda. Seven months later, he was produced before Major D. D. Abeywickrema for the purpose of holding an inquiry against the appellant and recording a summary of evidence in terms of Regulation 48 (2) (c) of the Army Disciplinary Regulations. In the course of this inquiry the appellant made a statement from the dock. I must here mention the fact that this statement from the dock made before Major Abeywickrema turned out to be identical with the confession which the appellant had made to Lt. Karunasena during the preliminary investigation seven months earlier. At the request of this court, learned Deputy Solicitor-General carefully compared the two documents, viz, the confession made to Lt. Karunasena and the statement from the dock made before Major Abeywickrema, and conceded that the two documents were identical, both in length and content.

Thereafter, on 20. 9. 91, the 6th respondent made order that the appellant be tried before a General Court Martial upon two charges (vide charge sheet marked XP1). viz, that he –

(i) whilst serving in the Military Police Headquarters, Narahenpita, did treacherously hold correspondence with or give intelligence to subversives (enemy) by giving them a sketch of the layout of the said Military Police Headquarters, together with information relating to the Armoury of the said Military Police Headquarters, and also details of the strength and locations of the several sentries at the said Military Police Headquarters, and did thereby commit an offence punishable under section 95 of the Army Act, No. 17 of 1949, and

(ii) whilst serving in the said Military Police Headquarters, Narahenpita, during the period from about 1. 1. 89 to about 13. 3. 90, did consort with subversive elements (enemy) resulting in conduct prejudicial to military discipline, and did thereby commit an offence punishable under section 129 (1) of the Army Act, No. 17 of 1949.

The trial lasted from 11.11.91 to 23. 6. 93 before a tribunal of three Army officers, of whom the 2nd respondent was the President and the 3rd and 4th respondents, the other members. The 5th respondent functioned as Judge Advocate. This Military Court found the appellant guilty on both counts and sentenced him to 15 years imprisonment.

Thereupon the appellant, in terms of the Army Act, forwarded an application for revision to the President of Sri Lanka, praying that his conviction be quashed, but received no reply thereto.

It was thereafter that the appellant resorted to the Court of Appeal seeking a Writ of Certiorari to quash his conviction and sentence, and also seeking a Writ of Mandamus to direct the Commissioner of Prisons (8th respondent) to release him from custody.

The Court of Appeal by its judgment dated 5. 6. 96 (XP10) refused to issue the Writs prayed for and dismissed the appellant's application. The present appeal is against that judgment.

Special leave to appeal was granted by this Court on the following questions of law :-

1. "Is there a statutory prohibition that imposes, in terms of section 129 (2) of the Army Act, No. 17 of 1949, which enjoins the 6th respondent-respondent above-named from preferring the charge sheet XP1 which contains charges under section 95 (c) in joinder with section 129 (1) of the Army Act?" and,

2. "Is the admission of the confessional statement of the appellant allegedly recorded by Major Abeywickrema, without an inquiry into the question whether it was voluntary or not, an illegality?"

I will now consider the second question first.

The main complaint of the appellant is that the proceedings had against him before the General Court Martial were procedurally defective and therefore bad in law. He adds that the conduct of the proceedings was contrary to natural justice and to the rules of evidence and criminal procedure.

It transpired that at the appellant's trial before the General Court Martial, Lt. Karunasena was called by the prosecution to lead in evidence the thirty-page confession made by the appellant. Upon objection being taken by the defence, a *voir dire* inquiry was held, after which the objection was upheld and the Court unanimously rejected the confession as not having been made voluntarily. No complaint is made about that. The confession made to Lt. Karunasena was thus rightly shut out.

Thereafter, however, despite objection to its voluntariness, the prosecution was allowed to call Major Abeywickrema to lead in evidence the appellant's statement from the dock made when he recorded the summary of evidence. No *voir dire* inquiry was held as to the voluntariness of this statement, but it was admitted in evidence through Major Abeywickrema on the ground that it was really, only a statement from the dock made by the appellant at his inquiry where a summary of evidence was recorded, and was therefore not a confession properly so called. In the course of the oral argument before us, learned Counsel for the appellant submitted that this statement from the dock made by the appellant and now admitted in evidence, was identical to the already rejected thirty-page confession recorded by Lt. Karunasena. That confession was not available, and the hearing was adjourned to enable Counsel to look into the matter. When Court resumed, it was conceded by learned Deputy Solicitor-General after careful comparison, that both the confession (recorded by Lt. Karunasena) and statement from the dock (recorded by Major Abeywickrema) were identical in length and in content. It was common ground that at the time the appellant made his statement from the dock he had neither a copy of this confession nor any document with which to refresh his memory. It is clear beyond any reasonable doubt that what was recorded was not any statement he made from the dock, but his alleged confession.

The resulting position then was, that although the Court shut out the confession after a *voir dire* inquiry, it admitted in evidence the latter statement from the dock, in the teeth of objection by the defence, without testing its voluntariness in any way. Thus, the selfsame confession which had failed the test of voluntariness and was rightly shut out earlier, was now admitted in evidence disguised as a "statement from the dock." There is no question that such confession, howsoever camouflaged, should ever have found its way into the body of evidence at a later stage of the same trial through a different

witness and, as it now turns out, this piece of evidence so admitted, happened to be the only substantial evidence in the possession of the prosecution, without which the case against the appellant would most certainly have failed.

It was contended, however, by learned Deputy Solicitor-General who appeared for the respondents that the statement from the dock recorded by Major Abeywickrema in pursuance of Regulation 48 (2) (c) of the Army Disciplinary Regulations, was voluntarily made by the appellant inasmuch as it was recorded after the appellant was cautioned, and after he was told that he was not obliged to say anything unless he wanted to do so, but that whatever he said would be taken down in writing and put in evidence at his trial. He argued that therefore a statement from the dock was something quite different and distinct from a confession made to an officer in authority, and would therefore not require a *voir dire* inquiry to ascertain whether it was made voluntarily or not. The appellant he said could not later complain that the statement was not voluntarily made by him for the reason that he had the opportunity of remaining silent if he so wished, and of refraining from making the said statement from the dock. In other words, since the appellant voluntarily made a statement from the dock in pursuance of the statutory provisions aforementioned, such statement was admissible without more ado, since by its very nature it is deemed to have been made voluntarily, and so, could lawfully be made use of as evidence at the trial. Learned D.S.G further contended that when the appellant opted to make a statement from the dock in terms of the aforementioned Regulation 48 (2) (c), all that Major Abeywickrema did was to merely record the statement just as a Magistrate would have done at a non-summary inquiry. Therefore such a statement from the dock carried no taint of coercion of any sort was, by its very nature, to be presumed to have been made voluntarily.

I would certainly agree with these submissions, if the statement from the dock was in fact what it was held out to be. But, it was; not; for, what the statement from the dock turned out to be was a verbatim repetition of the thirty-page confession made by the appellant to Lt. Karunasena, which was earlier rejected by the selfsame Court after a *voir dire* inquiry, as not having been voluntarily made. It is inconceivable by any stretch of the imagination that this appellant or anyone else, for that matter, could ever have made a statement from

the dock repeating word for word what he is alleged to have spelled out in detail in a lengthy thirty-page confession seven months earlier. In any event, there is not even a suggestion that the appellant referred to any document when he made the statement from the dock. It does not need much imagination to conclude that, when the appellant told Major Abeywickrema that he was prepared to make a statement from the dock, what Major Abeywickrema in fact did, was to simply introduce the earlier thirty-page confession into the summary of evidence as being the appellant's statement from the dock.

I therefore cannot agree with learned D.S.G that the appellant's statement from the dock had been correctly and lawfully admitted in evidence by the Court.

If this so called "statement from the dock" is thus shut out and not admitted in evidence, the question that arises is, whether there is any other independent credible evidence left to support the charges levelled against the appellant.

Learned Deputy Solicitor-General was helpful in itemizing what remained of the evidence against the appellant which I set out below.

(i) Certain photographs of the Military Police Camp and the Panagoda Army Camp marked P2A1 to L1 were produced by the prosecution. According to witness Lt. Col. Dissanayake, the appellant's Commanding Officer, these photographs were from the Military Police Laboratory. Suspicion therefore fell on the appellant because he was one of the photographers attached to the Military Police Unit and it was his job to take photographs when directed to do so. There was however, no evidence in any way connecting the appellant with the photographs P2A1 to L1. Thus, the evidence regarding the photographs was of no evidentiary value as far as the charges went, for, the prosecution failed to prove either that they were taken by the appellant or that the appellant gave them to the JVP activists as alleged.

(ii) The sketch marked P1 constituted the other possible evidence against the appellant. This sketch which was a rough freehand drawing, which sought to depict the Military Police Headquarters at Narahenpita. It was recovered from a JVP leader named

Muthu Banda and it was alleged that the appellant drew the sketch and handed it to a JVP leader named Dushan (through whom it reached Muthu Banda). According to witness, Lt. Col. Dissanayake, the appellant's Commanding Officer, the handwriting of the five Sinhala words on the sketch (P1) was that of the appellant. Witness said he was shown the sketch P1 by the C.I.D and on examining it by looking at it, he was able to identify the appellant's handwriting as he was familiar with it; the appellant being a functionary under him. On several occasions the appellant had submitted vouchers to the witness for authorisation of money claims and had also submitted several leave chits for authorization of leave of absence. However, none of the appellant's vouchers or leave chits was produced at the trial.

Although this type of identification of handwriting is made relevant by section 47 of the Evidence Ordinance, it remains a mere expression of opinion of a non-expert. Further, there were only five short words written in Sinhala on the sketch P1, and it would be highly questionable whether a non-expert could, by merely looking at them, say they were written by the appellant. As I said before, none of the vouchers or leave chits actually written by the appellant was produced. If this was done, the Tribunal would have had the opportunity of making a comparison, and thereafter arriving at a conclusion. In any event, the handwriting of some of the words appears to be quite different to the others. I therefore do not think that the mere opinion of a layman, though admissible under section 47 of the Evidence Ordinance, would carry any evidentiary weight.

(iii) Instead of obtaining the assistance of the Examiner of Questioned Document (EQD), Lt. Col. Dissanayake sent the sketch (P1) and the photographs to Captain Siyambalapitiya for further examination. This witness, Capt. Siyambalapitiya, did not hold himself out to be an expert on handwriting, and indeed was not. Instead, he too claimed to be familiar with the appellant's handwriting, and it was this familiarity, coupled with a comparison of the appellant's handwriting with some of his (the appellant's) note books, and with specimen handwriting obtained from the appellant that led witness Siyambalapitiya to

conclude that the five Sinhala words in the sketch P1 were written by the appellant. Here too, it must be observed that this type of comparison and consequent tendering of opinions by laymen, in respect of charges as serious as those faced by the appellant (the first of which carried the possible penalty of death), is, to say the least, extremely dangerous.

I must here make the observation that when a recognised expert, viz, the Examiner of Questioned Documents (EQD), whose competence in the field of examining handwriting is acknowledged, was readily available, it is inexplicable why this task of examining the sketch P1 was entrusted instead, to unqualified persons.

I must also make mention of the fact that even where the EQD himself expresses an opinion on handwriting, the Court must itself come to its own conclusion independently of that of the EQD. It can thereafter decide whether the EQD's opinion is credible, before accepting and acting upon it. In the instant case too, the Court itself ought to have examined the sketch (P1); made the necessary comparisons, and then formed its own opinion as to the handwriting on P1 independently of the opinion of the witnesses. On the contrary, what appears to have happened in the instant case, is that the Court never did give its mind to that question and never did satisfy itself independently of the opinion expressed by the lay witnesses. It was unsafe to act on the mere *ipse dixit* of the witnesses in a situation such as this. Such action has resulted in the court accepting as true the evidence of these two witnesses that the sketch P1 was in fact the handiwork of the appellant. This I find is wholly unacceptable and therefore, this evidence must be rejected as being, at the lowest, unsafe to be acted upon.

Thus it is clear that all the items of evidence thus enumerated are of no evidentiary value and would not in any way support the case for the prosecution. The resultant position is that once the confessionary "statement from the dock" is excluded, there is no material whatsoever that the prosecution is left with that would warrant the conviction of the appellant. The conviction of the appellant on both counts cannot therefore be sustained and must necessarily fail. Thus there is no room for the provisions of section 167 of the Evidence Ordinance to be called in aid by the prosecution.

All that is left now is to consider the judgment of the Court of Appeal. For the reasons set out above, it is not possible to agree with the conclusion arrived at by the Court of Appeal when it states that the confession of the appellant was admitted after *voir dire* inquiry. This was not so. I also cannot agree with the learned Judge of the Court of Appeal when he says at page 6 of his judgment, that "there was ample evidence before the Court Martial to find the petitioner guilty of the charge of passing a sketch of the Military Police Headquarters to the subversives". On the contrary there is, in fact, no evidence at all that the appellant did any such thing. The learned Judge also seems to have accepted the evidence of Lt. Col. Dissanayake when he says, at page 3 of his judgment, "Lt. Col. Dissanayake, the Commanding Officer of the petitioner had identified the handwriting of the petitioner on the documents recovered. There was evidence to prove the photographs originated from the photographic laboratory of the Military Police".

The identification of handwriting by this witness, as discussed earlier, is not worthy of consideration and further, even if the photographs did come from the Military Police laboratory, there is no evidence at all to connect the photographs with this appellant.

Although the learned Judge accepts the evidence of Lt. Col. Dissanayake he does not even advert to the evidence of Capt. Siyambalapitiya. Neither does he advert to the most important item of evidence in this case, viz, the improper admission in evidence of the appellant's confessionary "statement from the dock". This is in spite of the fact that the learned Judge makes mention of the fact that it has been brought to the notice of Court as ground No. 4 of the grounds of appeal (vide page 4 of the Judgment of the Court of Appeal) in the following way: "(4) The failure to examine the voluntariness of the confessionary statement made by the petitioner to Major Abeywickrama".

As discussed in detail above this confessionary statement from the dock must be rejected, and once that is done, there is no other evidence left to sustain the two charges.

In the circumstances, it is not necessary for me to decide the first question regarding joinder of charges.

For the above reasons I would allow the appeal, and direct that a Writ of Certiorari do issue quashing the conviction of the appellant.

I also make order directing the 8th respondent to release the appellant from custody forthwith.

A sum of Rs. 15,000 will be paid to the appellant as his costs by the State.

FERNANDO, J. – I agree.

AMERASINGHE, J. – I agree.

Appeal allowed.

Writ of Certiorari issued.