WIMALASIRI
v.
DALUWATTE & OTHERS

COURT OF APPEAL
J. A. N. DE SILVA, J. (P/CA)
CA NO. 1012/98
COURT MARTIAL NO.
CA/LEG/CM/367/(53)
OCTOBER 13, 2000
JANUARY 08, 2001

Army Act, No. 17 of 1949 – s. 56, s. 79 (c) and s. 107 – Constitution Article 140 – Court Martial – Jurisdiction – Plea in Bar of trial – Regulations 60, 80 – Statutory right of petitioning the Commanding Officer.

The petitioner, a Captain in the Army was charge-sheeted for suggesting to a Lance Corporal that he take part in homosexual activities. The petitioner was tried by a General Court Martial and convicted.

It was contended that –

(1) the prosecution got an additional summary of evidence recorded and thereafter called another witness to corroborate the evidence of the complainant.

(2) that, the charge did not give the specific date on which the offence was committed.

The respondent contended that, as per the Army regulations, he should have exercised his statutory right of petitioning the Commanding Officer with regard to his conviction and sentence.

Held:

(1) If the petitioner intends to challenge the jurisdiction of the Court Martial to try him, he could have in terms of Regulation 62 offered a plea in bar of trial at the time he offered his general plea of guilty. The petitioner without offering a plea had participated and had thereby submitted himself to the jurisdiction of the Court Martial. By his conduct he had waived his right to object to the jurisdiction of the Court Martial and this waiver disentitles him from obtaining relief by way of a Writ of *Certiorari.*

(2) Regulation 80 permits the calling of a witness whose statement is not contained in the summary of evidence, given to the accused. The witness was called after giving notice to the accused.

(3) Though the complainant had not given the specific date on which the offence was committed, it appears from the evidence that the offence was committed on 21. 04. 1995, the day the Kathimurkulam camp was attacked.

(4) The petitioner ought to have exercised his statutory rights under Regulation 153 by petitioning the Commanding Officer with regard to his conviction and sentence. No valid reason has been tendered for not exercising this right.

APPLICATION for a Writ of *Certiorari.*

Cases referred to :

1. *Jayaweera v. Asst. Commissioner of Agrarian Services* – 1996 2 SLR 70.
2. *Yahonis Singho* – 67 CLW 50.

U. D. M. Abeysekera for petitioner.

Buwanaka Aluvihare, SSC for respondents.

Cur. adv. vult.

May 30, 2001

J. A. N. DE SILVA, J. (P/CA)

This is an application for a Writ of *Certiorari* to quash the proceedings, findings and the order of a General Court Martial which tried the petitioner for an offence punishable under section 107 of the Army Act, No. 17 of 1949 (cap. 357). 1

At the time material to the charge upon which the petitioner was tried he held the rank of Captain in the 5th Volunteer Battalion of the Gajaba Regiment, and he was serving at the Damminna Camp as the adjutant of the 8th Battalion, Sri Lanka National Guard. By charge-sheet dated 30. 11. 1997 the following charge was framed against him: 10

"That whilst you were serving at the Damminna Camp as the adjutant of the 8th Battalion, Sri Lanka National Guard, between 1st February, 1995 and 31st May, 1995, in a scandalous manner by suggesting to S/8Q00869 Lance Corporal Shantha Vidana VC that he take part in homosexual relations with you which is

unbecoming the character of an officer and a gentleman and did thereby commit an offence punishable under section 107 of the Army Act, No. 17 of 1949 (cap 357) of the Legislative enactment of Sri Lanka.

On the order of the Commander of the Army, the petitioner was tried by a General Court Martial which assembled for the first time on 20. 02. 1998. The petitioner in his petition has averred that there was a patent lack of competence of the Court Martial for commencing proceedings after the lapse of three years from the date of the offence. The petitioner's challenge to the jurisdiction of the Court Martial is based on the provisions of section 56 of the Army Act which enacts that: "Any person subject to military law shall not be tried by the Court Martial where three years have elapsed after the commission of the offence . . .".

According to the charge framed against the petitioner the offence had been committed between 01. 02. 1995 and 31. 05. 1995. When the Court Martial commenced its proceedings on 20. 02. 1997 three years have not elapsed from the last terminal date given in the charge, i.e. 31. 05. 1995. Therefore, on the day the Court Martial commenced its proceedings the charge, on the fact of it, did not indicate that three years have elapsed from the date of the commission of the offence and as such there was no patent lack of jurisdiction (or competence).

However, if the petitioner intended to challenge the jurisdiction of the Court Martial to try him, he could have, in terms of Regulation 62 of the General Court Martial Regulations of 1950, offered a plea in bar of trial at the time he offered his general plea of not guilty. When a plea in bar of trial is tendered the Court Martial is required to record the plea and receive evidence offered and hear the addresses made on behalf of the accused and the prosecutor and decide whether the plea has been proved.

The petitioner without offering a plea in bar of trial had participated in the proceedings and thereby had submitted himself to the jurisdiction of the Court Martial. By his conduct he had waived his right to object to the jurisdiction of the Court Martial and this waiver disentitles him from obtaining relief by way of a Writ of *Certiorari*, *Jayaweera v. Assistant Commissioner of Agrarian Services.*[1]

One of the main complaints of the petitioner is that in the course of the trial the prosecution had got an additional summary of evidence recorded and thereafter called one Corporal Perera to corroborate the evidence of the complainant Shantha Vidana. Corporal Perera's name had transpired when the complainant when asked whether he told anyone about the improper suggestion made by the petitioner the complainant had stated that he told Corporal Perera about it. The complainant had given an explanation about his failure to mention Perera's name in his first statement. It was in this setting that during the adjournment an additional summary of evidence was recorded and Corporal Perera was summoned as a witness. It was contended on behalf of the petitioner that once proceedings of the Court Martial commenced, there is no provision to have an additional summary of evidence recorded.

It was pointed out by the respondents that Regulation 80 of the Army Court Martial Regulations permits the calling of a witness whose statement is not contained in the summary of evidence given to the accused. In terms of the regulation before the witness is called an abstract of the proposed evidence must be furnished to the accused. The prosecution has complied with this requirement in the instant case. The witness was called after giving notice to the accused. I do not see any illegality or unfairness in this procedure.

The petitioner has contended that since the charge framed against him did not give the specific date on which the offence was committed and that even the complainant in his evidence did not give the date on which the offence was committed the charge was bad in law. It is true that the complainant had not given the specific date on which the offence was committed. However, it appears from the evidence the offence was commited in the Kathimurikulam camp was attacked and that this attack had taken place on 21. 04. 1995.

It was contended on behalf of the accused that his defence of *alibi* was not properly placed before Court by the Judge-Advocate-General in that he failed to advise the Court on the three positions (as laid down in *Yahonis Singho*)[2] to be considered in evaluating as *alibi* defence. The complainant was cross-examined on the basis that on the day Kathimurikulam Camp was attacked the petitioner, throughout the night remained in the radio room with other officers.

The complainant, however, had said that throughout the night the petitioner did not remain in the radio room.

When the petitioner gave evidence he had not stated that during the whole night he remained at the radio room. A defence witness had testified to the fact that the petitioner was in the radio room during the whole night. The decision of the Court indicates that the Court accepted the evidence of the complainant and did not accept the defence witnesses evidence. It does not appear that there was any reason for the complainant to falsely implicate the petitioner who was a higher officer.

When the evidence placed before the Court Martial is considered, it does not appear that, on the evidence available, the decision of the Court is unsupportable or perverse. There is also no serious procedural error resulting in a miscarriage of justice.

The 2nd respondent in paragraph 13 of his objections has stated that as per the legal right afforded to the petitioner by Regulation 153 of the Army Court Martial Regulations he did not petition to the commanding officer of the Army with regard to his conviction and sentence and that the petitioner had not given any valid reason for not having exercised his statutory right. In answer to that averment the petitioner in his counter affidavit has stated that Regulation 153 applies where Court Martial acts *intra vires* and not when it acts *ultra vires*. Here the petitioner appears to have taken upon himself the task of deciding whether the Court Martial acted *intra vires* or not. If he was of opinion that the Court Martial lacked jurisdiction and that its proceedings were *ultra vires* the powers conferred on the Court Martial he should have, at the very inception, offered a plea in bar of trial. As was pointed out earlier he had not done this. Therefore, the reason adduced by the petitioner for not exercising his statutory right is not acceptable.

In all the circumstances of this case it is my considered opinion that the petitioner had not made out a case for the relief he has prayed for. Accordingly, this application is dismissed without costs.

Application dismissed.