

CHANDRASENA
v
COMMANDER OF THE SRI LANKA ARMY
AND OTHERS

COURT OF APPEAL
MARSOOF, J.(P/CA) AND
SRI SKANDARAJAH, J.
C.A.NO. 957/98
AUGUST 25, 2003 AND
JANUARY 26, 2004

Army Act, sections 46(1), 49(1), 55(1) 56 and 102 – Court Martial – Regulation 62 – Time limit – Trying of an accused – Navy Act, No. 34 of 1950, section 26 – Code of Criminal Procedure – Comparison – Commencement of a trial – When ? – Interpretation.

The petitioner, a Major in the Sri Lanka Army sought to quash an order of the Court Martial overruling the preliminary objections challenging the jurisdiction of the Court Martial and the final order made by the Court Martial. It was contended that the Court Martial has no jurisdiction to hear and determine the offence, as the purported offence has got prescribed/time barred by virtue of section 56 of the Army Act, since more than 3 years had elapsed between the commission of the purported offence and the trial.

It was contended by the respondent that a Court Martial commences upon it been convened.

Held:

- i) Section 56 of the Army Act and Regulation 62 bars a trial if three years have elapsed between the commission of an offence and the beginning of the trial.
- ii) When one compares the Regulations with the Code of Criminal Procedure Act one can come to the conclusion that the commencement of the trial in a Court Martial is also by arraignment of the accused.
- iii) The offences were committed on 20.8.94 and between 25.12.94 and 14.1.95. The plea in bar of the trial was raised on 22.5.98, before the arraignment of the petitioner. At the time of making this plea three years have elapsed from the date of the offence. The prosecution is time barred.

"Trial" means the proceeding which commences when the case is called with the Magistrate on the Bench, the accused in the Dock and the representative of the prosecution and defence, if the accused is defended, present in Court for the hearing of the case.

APPLICATION for a writ of *certiorari*

Cases referred to:

1. *Duryadhan v Sitaram* – (1979) AIR All 1 at 8 - 9
2. *Hari Vishdu Kamathu v (Election) Tribunal Jabalpur* – (1958) Jab. LJ 1 at p.10; 1958 AIR 168.
3. *Dagdu Govindest v Punga Vadu* – Want 38, Bom. LR 1189 at 1191 (1937) ARI Hom. 55
4. *Lanston v Northern Publishing Co.* – (1922) 63 SCR 482
5. *Hack v London Provident Building Society* – (1983) 23 Ch. Division 103

Kalinga Indatissa for petitioner.

Arjuna Obeysekera, State Counsel for 1st to 9th respondents.

Cur.adv.vult

September 01, 2004

SRISKANDARAJAH, J.

The petitioner is a Major in the Sri Lanka Army and functioned in that capacity in the 2nd Commando Regiment of the Sri Lanka Army. He has sought a mandate in the nature of a writ of *certiorari* to quash an order of the Court Martial made on 26th June 1998, overruling the preliminary objection of the petitioner challenging the jurisdiction of the Court Martial.

He also has sought a writ of *certiorari* to quash the final order of the Court Martial made on 17th September 1998 and a writ of pp prohibition preventing the 1st respondent from making an order confirming the final order of the Court Martial made on 17th September 1998.

The 1st respondent is the Convening Officer of the aforesaid Court Martial and the Commander of the Sri Lanka Army. The 2nd respondent is the President of the Court Martial and the 3rd to the

01

10

5th respondents are members of the said Court Martial. The 6th respondent is an officer under instructions of the said Court Martial. The 7th respondent is the Judge Advocate General of the said Court Martial.

The 8th respondent is a Colonel and was the Commanding Officer of the 2nd Commando Regiment and the complainant of the allegation which was the subject matter of the Court Martial. 20

1A respondent was added to this application as he is the successor to the first respondent after the retirement of the 1st respondent on 16th December 1998.

The petitioner submitted that the Court Martial has no jurisdiction to hear and determine this offence on the ground that the purported offence has got prescribed or time-barred by virtue of section 56 of the Army Act, since more than three years had elapsed between the commission of the purported offence and the trial.

The petitioner has taken this objection as a preliminary objection before the Court Martial as provided by Regulation 62(2) of the Court Martial (General and District) Regulations, which states *inter alia* that at the commencement of the trial the accused may offer a plea in bar of the trial, where the time elapsed between the commission of the offence and the beginning of the trial exceeded three years. The Court Martial after considering the submissions of both parties on this preliminary objection made order rejecting the preliminary objection on 26.06.1998 on the basis that the Court Martial convened to try the accused was assembled on 14th August 1997 which is within a period of 3 years and proceeded with the trial. The petitioner did not challenge this order at that time but continuously participated in the trial until the final order was made. The petitioner in this application while challenging the final order made by the Court Martial, challenged the order made by the Court Martial on the preliminary objection on the basis that the said order is manifestly erroneous, *ultra vires*, illegal and wrongful. 30 40

Section 56 of the Army Act provides:

“Where three years have elapsed after the commission of any offence by any person subject to military law, he shall not be tried by a Court Martial for an offence unless it is the offence of mutiny, desertion or fraudulent enlistment.” 50

The petitioner submitted that the words used in section 56 of the Army Act are "he shall not be tried". Therefore the question is as to which point of time is deemed that the trying of an accused would commence. It is submitted that an analysis of the corresponding provision of the Navy Act would throw light on the interpretation of section 56 of the Army Act.

Section 26 of the Navy Act, No. 34 of 1950 reads as follows:

"No person subject to Naval Law, unless he is an officer who has avoided apprehension fled from justice shall be tried or punished by a Court Martial or by a naval officer exercising judicial powers under this Act for any offence committed by that person unless the trial takes place within a period of three years from the commission of the offence or where that person has been absent from Sri Lanka during such period within one year after his return to Sri Lanka."

60

The petitioner submitted that in the aforesaid circumstances the intention of those who drafted this legislation was to ensure that the trial of the accused commences within three years of the date of commission of the alleged offence. He submitted that his trial commenced on 22.5.1998 over 3 years and 9 months after the commission of the purported offence. According to the petitioner the trial of an accused commences at the time of reading the charge sheet to the accused. He submitted that section 55(1) of the Army Act supports this position as it specifically states that every member of a Court Martial shall take the prescribed oath/affirmation before the commencement of the trial. He also submitted that the Regulations of Court Martial also support the position that the trial proper does not commence until the oath is taken by all the members of the Court Martial and the charge is read to the accused. The petitioner submitted that at this Court Martial the president, the members of the Court Martial and the rest of the personnel took their prescribed oaths only on 26.06.1998 after the objection of the petitioner was overruled.

70

80

The respondent's counsel argued that a Court Martial is convened for the purpose of trying an accused, and that therefore the

first sitting of the Court Martial on 14.8.1997 could be considered to be the commencement of the trial.

The respondent's counsel submitted that section 56 of the Army Act does not require the Court Martial to commence leading of evidence or reading of the charge sheet to the accused within the three year period of limitation set out therein. He submitted the word "tried" contained in section 56 cannot be given, and should not be given, such a restrictive interpretation. He further submitted that a trial in any criminal proceedings is preceded by the institution of proceedings, and that once the proceedings are instituted the accused is to be "tried" for that offence by the relevant court. Similarly a Court Martial commences upon it being convened in terms of section 46(1) of the Army Act. Convening of the Court Martial is the first step in the trial process and with the convening of the Court Martial the accused is to be "tried" for that offence. 90 100

The respondent's counsel in support of his contention relied on some Indian authorities; in *Duryadhan v Sitaram*⁽¹⁾, it has been held that the trial of an election petition commences on the reference of the petition to the Tribunal. In *Hari Vishdu Kamathu v (Election) Tribunal Jabalpur*,⁽²⁾ the following view was expressed; the word "trial" in section 90(1) of the Representation of the People Act, 1951 covers the entire period from the first presentation of the election petition by the tribunal to its disposal. These authorities deal with the election petition and election tribunal proceedings. 110

The counsel for the respondent also submitted an Indian authority in relation to a criminal case *Dagdu Govindest v Punga Vadu, Want*⁽³⁾, the Court observed; "trial" has been understood to mean the proceedings which commences when the case is called with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and defence, if the accused be defended, present in Court for the hearing of the case. The trial covers the whole of the proceeding in a warrant case.

The question that has to be determined by this court is on what date the trial against the petitioner commenced in the Court Martial and whether this date is later than three years from the date of offence on which the petitioner was charged. 120

Section 56 of the Army Act has to be read with Regulation 62 of the Court Martial (General and District) Regulations which provided for the procedure and the time in which the objection for bar of trial has to be taken. Regulation 62 provides;

62. The accused at the time he offers his general plea of "guilty" or "not guilty" to a charge for an offence may offer a plea in bar or trial on the ground that -

130

(a)

(b)

(c) the time which elapsed between the commission of the offence and the beginning of the trial was more than three years.....

From the above provision it is apparent that section 56 of the Army Act and the Regulation 62 bar a trial if three years have elapsed between the commission of the offence and the beginning of the trial.

The commanding officer's powers in regard to an accused person is specified in section 49(1) of the Army Act. This section empowers the commanding officer to investigate the charge and to decide whether to proceed with the charge or to dismiss the charge. If he in his discretion decides that the charge should be proceeded with he shall take steps for the trial of the person by a Court Martial or where that person is an officer of a rank below that of the Lieutenant-Colonel or is a warrant officer, refer the case to be dealt with summarily by the Commander of the Army or by such officer not below the rank of Colonel or where the person is a soldier other than a warrant officer deal with the case summarily.

140

150

In this instant case the 1st respondent was the commanding officer at the relevant time. He after investigation has decided to proceed with the charges against the petitioner. As the petitioner had refused to undergo a summary trial he recommended that a Court Martial be appointed to hear the charges against the petitioner. By a convening order dated 4th August 1997 he convened a General

Court Martial to assemble on the 14th August 1997 for the purposes of trying the petitioner by General Court Martial. This convening order and the charge sheet which are marked as P12 (a) & (b) as well as R12 were transmitted on 6.8.1997 to the Sri Lanka High Commission in the United Kingdom to be forwarded to the petitioner as the petitioner was taking treatment in the United Kingdom at that time. From the letters of the High Commissioner marked R13, R14 & R16 the 1st Secretary of the High Commission has personally called over at the residence of the petitioner in the United Kingdom to hand deliver the aforesaid documents and the petitioner had declined to accept the same. According to the charge sheet the petitioner was charged with two offences – one is conduct prejudicial to good order and military discipline” an offence under section 102(1) of the Army Act committed between 25th December 1994 and the 14th January 1995. On the first charge the trial against the petitioner should have commenced not later than 25th December 1997.

It appears on 14th August 1997 the date on which the assembly of the Court Martial was fixed, the petitioner was absent and the case was postponed and it was postponed on several other occasions.

On 22nd May 1998 when the Court Martial assembled the petitioner was present and a plea of bar of trial was raised.

The respondents relied on some Indian authorities in election cases to show that the trial in an election petition before an election tribunal commence at the time of the petition is referred to the Tribunal. It is not prudent to construct a word in a statute which is of criminal in nature in co parison with an election statute. *Duff J. in Lanston v Northern Publishing Co.*⁽⁴⁾ relying on *Sir George Jessel in Hack v London Provident Building Society*⁽⁵⁾ observed that it is always dangerous to construe the words of one statute by reference to the interpretation which has been placed upon words bearing a general similarity to them in another statute dealing with a different subject matter.

But it is an accepted principle in construction of a statute or a word in a statute to refer to a statute in *pari material* as a means of explaining the statute or a similar word used in the statute. The

Court Martial (General and District) Regulations contains Regulations under fifteen different heads. Regulation 17(2) provides that the president shall be responsible for the trial being conducted in proper order in accordance with the Army Act and in a manner befitting a court of justice. These Regulations have laid down the procedure of trial of an accused person in relation to charges framed against him and it has specifically provided that the trial should be conducted similar to a court of law; hence the word trial used in the Regulations could be interpreted with the aid of the Code of Criminal Procedure Act as this Act and the Regulations could be considered as statute in *pari material*. The Code of Criminal Procedure Act has laid down provisions containing the powers of a criminal court, information to the Magistrate and Police, arrest investigation and for the institution of proceedings, trial, judgment and sentence among other relevant matters. It provides for a trial in the Magistrate's Court, trial in the High Court before a jury and a trial in the High Court without a jury.

The trial of cases where a Magistrate's Court has power to try summarily is provided under Chapter XVII of the Code of Criminal Procedure Act. Under section 182 of the said Act the Magistrate shall frame a charge against the accused and he shall read such charge to the accused and ask him if he has any cause to show why he should not be convicted. The accused could plead guilty to the charge and if he had pleaded not guilty the magistrate shall ask him whether he is ready for trial and if the accused replies that he is ready for trial the court shall proceed to try the case in a manner provided in the said Act. If the accused replies that he is ready then the trial has to be postponed to another day. The commencement of the trial in a Magistrate, Court is by reading the charge to the accused and not by instituting the proceedings in a Magistrate's Court under section 136 of the Code of Criminal Procedure Act. Similarly the proceedings in a High Court is instituted by filing an indictment in the High Court. The commencement of trial by the judge of the High Court without a jury is provided in section 196. The caption of this section says the "commencement of trial" This section reads as follows "when the Court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked

whether he is guilty or not guilty of the offence charged". The commencement of trial before a High Court by Jury is provided in section 204 of the said Act. The caption of this section also reads as "the commencement of trial" and the side note of this section reads as "arraignment of accused" and the wording of this section is similar to section 196.

Therefore it is apparent from the provisions of the Code of Criminal Procedure Act that a trial commences in a criminal court by the arraignment of the accused. The Regulations providing for the procedure for Court Martial also has several parts under different heads such as responsibilities of officers convening Court Martial, preparation for defence by accused, assembly of the Court Martial and its responsibilities, challenge, swearing of Court & Judge Advocate, arraignment, finding and sentence, etc. Regulation 48, reads as follows: "After the members of the Court and other persons are sworn, the accused shall be charged for the commission of the offence he is purported to have committed. The charge shall be read to him, and he will be required to plead separately to each charge as soon as it has been read to him." Regulation 49 provides that the trial upon several charge sheets shall be taken in such order as the convening officer directs. When one compares these Regulations with the Code of Criminal Procedure Act, one can come to the conclusion that the commencement of the trial in a Court Martial is also by arraignment of the accused. The criminal case *Dagdu Govindest v Punga Vadu, Want (supra)* cited by Respondent's counsel also support this position. In this case the court observed; "Trial" has been understood to mean **the proceeding which commences** when the case is called **with the Magistrate on the Bench, the accused in the dock** and the representatives of the prosecution and defence, if the accused be defended, present in Court **for the hearing of the case**. The trial covers the whole of the proceeding in a warrant case (emphasis is mine).

In the instant case the plea in bar of the trial was raised on 22.5.1998 before the arraignment of the petitioner. The offence in the charges framed against petitioner marked P12b and P13 were committed on 20.8.1994 and between 25.12.1994 & 14.1.1995 respectively. At the time of making this plea three years has

elapsed from the date of offence. Therefore the prosecution of the 270
petitioner in relation to the charges framed against him marked
P12b and P13 is time barred. Hence this court quashes the order
made by the Court Martial on 26.6.1998 marked P15. In view of this
order, the final order made after trial by the Court Martial has also
to be quashed.

The Court allows this application as prayed for in prayer (b) and
(c) of the petition without costs.

MARSOOF, J. (P/CA) – I agree.

Application allowed.