Present: Wood Renton C.J.

1915.

Application for a Writ of *Habeas Corpus* for the production of the Body of W. A. DE SILVA.

Application for a writ of habeas corpus—*Martial law.*

The Supreme Court has full power to review by the issue of writs of *habeas corpus* the legality of arrests and detentions under the ordinary naval and military law. But when "martial law" (*i.e.*, the assumption by the officers of the Crown of powers which they deem necessary for the protection of the Colony in view of the existence of what is known as an "actual state of war") is involved the functions of Municipal Courts is limited. They have the right to inquire, and the duty of inquiring into the question of fact, whether an "actual state of war" exists or not. But when once that question has been answered in the affirmative, the acts of the military authorities in the exercise of their martial law powers are no longer justiciable by the Municipal Courts.

THE facts are set out in the judgment.

A. St. V. Jayewardene (with him *Drieberg*, *Samarawickreme*, and *Canakeratne*).—There is no charge against Mr. de Silva. His detention is sought to be justified under martial law. Martial law is only necessary when there is war, or when there is an actual insurrection. The present disturbances can in no sense be termed an insurrection. They are riots. Rioting is not a sufficient ground for proclaiming martial law. Even if martial law was necessary at the start, there are no disturbances now; matters are tranquil at present. The Civil Courts have been sitting all along. Martial law

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has, therefore, ceased to exist. See *Ex parte Marais.*[1] Civil Courts can issue writs of *habeas corpus*. (*Ex parte Blake,*[2] *King v. Suddis,*[3] *In re Allan,*[4] *In re Douglas.*[5])

Anton Bertram, K.C., A.-G. (with him *Bawa, K.C., Acting S.-G.*, for the Crown).—There is war raging in Europe, and the whole Empire is in a state of war. The fact that Civil Courts are sitting is not sufficient to show that we are not in a state of war and that martial law is unnecessary. See *Ex parte Marais.*[6]

He also referred to *1 Stephen's Criminal Law 214* on martial law in Ceylon in 1848, and the Report of the Royal Commission.

The Attorney-General also stated that in the opinion of His Excellency the Governor the time had not come for withdrawing martial law.

Jayewardene, in reply.—The applicant's affidavit that all things are quiet has not been contradicted.

Not only have the Civil Courts been sitting, but the Government have appointed additional Judges to cope with the additional work. That is a strong circumstance showing that things are now quite tranquil.

He referred to *Attorney-General v. Tilonko.*[7]

June 29, 1915. Wood Renton C.J.—

This is an application under section 46 of the Courts Ordinance for a mandate in the nature of a writ of *habeas corpus*. The affidavits submitted by both sides show that the applicant, Wilmot Arthur de Silva, was arrested on June 21 and is being detained in military custody by the orders of the General Officer Commanding the Troops, who has justified the arrest and the detention on the ground that he is acting in the exercise of his powers under martial law. By virtue of a Proclamation dated August 5 last year, bringing into operation an Imperial Order in Council of October 24, 1896, all persons in this Colony are subject to military law, as if they were actually accompanying His Majesty's forces. By a later Proclamation dated June 2 in the present year His Excellency the Governor declares that the maintenance of order and the defence of life and property in the Provinces to which the Proclamation shall be made applicable have been committed to Brigadier-General Malcolm, the Officer Commanding the Troops, and that he is authorized "to take all steps of whatever nature that he may deem necessary for the purposes aforesaid." This Proclamation is in force in the Western Province, within the limits of which the applicant has been arrested. The question now arises whether he is entitled

[1] (1902) *A. C. 109.*
[2] (1814) *2 M. & S. 428.*
[3] (1801) *1 East. 306.*
[4] (1860) *8 Ellis & Ellis 328.*
[5] (1842) *3 Q. B. 825.*
[6] (1902) *A. C. 114.*
[7] (1907) *A. C., 93; 461.*

to be released from custody by the issue of a *habeas corpus*. The principles of law applicable to the determination of this question are well settled. We are concerned here with martial law in the sense not of the old law martial, which governs the discipline of an army engaged in actual, and specially upon foreign, service, or of the modern military law, but of the assumption by the officers of the Crown of powers which they deem necessary for the protection of the Colony in view of the existence of what is known as an "actual state of war." This expression is not confined to hostilities between independent Sovereign States. It is obvious that there may be domestic disturbances which present all the features of actual warfare, and which justify the same measures for the public security. The question whether an "actual state of war," as thus defined, exists or not is purely one of fact. The circumstance that the ordinary Courts are open may constitute evidence, and material evidence, against the existence of such a state of war. But it is not conclusive. It is least of all conclusive where a country is in a state of unsettlement at a time when actual acts of violence may for the moment have ceased. The authorities, when they have to deal with such circumstances as these, may well regard the keeping open of the Municipal tribunals as being itself a part of the healing process which it must be their endeavour to induce. No authority was cited to me at the argument yesterday, and I am aware of none, which prevents the continuance of the exercise of the powers compendiously described as existing under "martial law," during such a period of unsettlement as I have just referred to. On the contrary, the decision of the Privy Council in the case of *Elphinstone v. Bedreechund* [1] itself furnishes an example of the continuance of martial law powers in a district which at the time was merely disturbed, and in which the ordinary civil courts of law were for many purposes being kept open. The more recent case of *Ex parte Marais* [2] furnishes strong corroboration of the soundness of that principle. The position of the Municipal Courts in regard to Courts exercising martial law powers is clear. There is old and ample authority for the proposition that the superior courts of law have full power to review by the issue of writs of *habeas corpus* the legality of arrests and detentions under the ordinary naval and military law—see *Ex parte Blake*, [3] *King v. Suddis*, [4] *In re Allan*, [5] *In re Douglas*, [6] and *Queen v. Cuming*. [7] But when martial law in the sense with which we have to do in the present case is involved, the function of Municipal Courts is limited. They have the right to inquire, and the duty of inquiring, into the question of fact, whether an "actual state of war" exists or not. But when once that question has been answered in the affirmative, the acts of the

[1] (1831) *1 Knapp 316.*
[2] (1902) *A. C. 109.*
[3] (1814) *2 M. & S. 428.*
[4] (1801) *1 East. 306.*
[5] (1860) *3 Ellis & Ellis 328.*
[6] (1842) *3 Q. B. 825.*
[7] (1887) *19 Q. B. D. 13.*

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military authorities in the exercise of their martial law powers are no longer justiciable by the Municipal Courts. The decision of the Privy Council in *Ex parte Marais*,[1] a decision pronounced by Lord Halsbury, but concurred in by Lords McNaghten, Davey, Robertson, Shand, and Lindley, and Sir Henry—afterwards Lord—de Villiers, is an express and binding authority for that statement.

It remains only to consider the application of these principles to the facts. Mr. A. St. V. Jayewardene in his argument in support of the application said, at least in effect, that the proclamation of martial law could not be justified solely by the existence of the war in Europe. The phrase "the war in Europe" is clearly inaccurate. The war exists far beyond the limits of Europe. The whole Empire is at present at war, and its resources are being drawn upon in all directions for military purposes. Ceylon, therefore, as well as England is in an "actual state of war." But there is more. We have had placed before us in the arguments of counsel, and there are some points of which we are entitled to take judicial notice, a series of circumstances showing that the domestic disturbances, which have been the immediate occasion of the proclamation of martial law, had themselves assumed the character of warfare. There is no need for me to deal with this aspect of the case in detail. When we regard the position in which the whole Empire is placed, I should have had no hesitation in holding that the disturbances in question were of themselves sufficient to justify the action which has been taken. The Attorney-General states, from his place at the Bar, and on adequate instructions, that in the opinion of His Excellency the Governor the time has not yet come for a relaxation of martial law in the Colony. In view of all the circumstances, the utmost weight must be attached to a statement of that kind. We have on the other side merely the facts which, as I have already shown, are far from being conclusive in law, that the ordinary courts of justice are open and that actual outbreaks of violence have for the time being in a large measure ceased. There is one point only to which I have omitted to refer. The Proclamation of June 2, of course, is in no way necessary to give martial law its efficacy and validity, any more than it would constitute an ultimate justification for acts in excess of what the needs of the hour require. It is merely, what it purports in terms to be, a declaration to the whole community of the assumption by the Executive Government of powers which it already possesses. With these observations, and for the reasons that I have given, I hold that this application must be dismissed.

Application refused.

[1] (1902) *A. C. 109.*