1915.

[FULL BENCH.]

Present: Wood Renton C.J., Shaw J., and De Sampayo A.J.

Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial.

Writ of prohibition—Power of Supreme Court to issue writ to Court Martial—Courts Ordinance, No. 1 of 1889, ss. 4 and 46.

The Supreme Court has no power to issue a mandate in the nature of a writ of prohibition to a Court Martial.

THIS was an application under section 46 of the Courts Ordinance for the grant of a mandate in the nature of a writ of prohibition to the members of a Field General Court Martial before which Mr. Edmund Hewavitarana was being tried on charges of treason and treason-felony.

Anton Bertram, K.C., Attorney-General (with him *Bawa, K.C., Acting Solicitor-General*), took a preliminary objection to the application.

The Supreme Court has no power to issue a writ of prohibition to a Court Martial. The powers of the Supreme Court are strictly defined by the Courts Ordinance. It was held that the Supreme Court has the powers which are expressly or impliedly given to it by the Courts Ordinance, and no other, in *In re Local Board, Jaffna* [1]. Section of of the Courts Ordinance expressly enacts: " Provided that nothing herein contained shall be held to affect the jurisdiction vested in, and exercised by, any Court or Courts under or by virtue of the provisions of any Imperial Statute or of any Ordinance or Ordinances now in force, except in so far as any such provisions shall be by this Ordinance expressly repealed or modified. " The Court Martial is sitting under the authority of the Army Act and the Proclamation and Order in Council. The effect of the Proclamation and Order in Council was to put this country under military law. The Courts Ordinance, therefore, does not apply to Courts Martial, and the Supreme Court, whose powers are limited by the Ordinance, cannot therefore issue a writ of prohibition.

Section 46 of the Courts Ordinance authorizes the Supreme Court to issue a writ of prohibition to " any District Judge, Commissioner, Magistrate, or other person or tribunal. " The words " other person or tribunal " must be construed to refer to a person *ejusdem generis* with a District Judge, Commissioner, &c.

A writ of prohibition can only issue to an inferior Court. There is nothing in the Courts Ordinance to show that a Court Martial is

[1] *(1907) 1 A. C. R. 128.*

an inferior Court. The Supreme Court has power over a Court established under an Imperial Statute.

It is clear that section 46 does not give the Supreme Court the power to issue a writ of prohibition, if we consider the section as a whole. Power is given under this section to examine records of any Court, and to transfer a case from one Court to another, on the ground that some question of law unusually difficult is likely to arise, and for other reasons. These powers could not be exercised in respect of a Court Martial proceeding. It is clear that section 46 did not have Courts Martial in contemplation.

Eardley Norton (with him *Allan Drieberg*, *Samarawickreme*, and *Canekeratne*).—Section 4 of the Courts Ordinance enumerates the established permanent Courts in the Island. If the section stood without the proviso, a village tribunal, which had jurisdiction in certain matters, would have no power to hear any complaint. The proviso was thus rendered necessary to protect the jurisdiction which certain tribunals had in certain cases. What the proviso says is: "There are special tribunals which have a limited jurisdiction in certain cases. The enumeration of the different Courts in section 4 should not prevent a special tribunal (mentioned in the proviso) from trying any matter over which it has a vested jurisdiction." The words of the proviso are "to affect the jurisdiction." The applicant does not ask Your Lordships to affect the jurisdiction of a Court Martial. You can affect the jurisdiction of a Court only if the Court has a jurisdiction. A Court Martial has no jurisdiction to try a civilian shopkeeper like the applicant for treason or treason-felony. The jurisdiction of a Court Martial is not affected when it has no jurisdiction. If the argument of the other side is correct, if a village tribunal, which has only a limited jurisdiction, were to proceed to try a charge of murder, the Supreme Court cannot issue a writ of prohibition on such village tribunal, because the village tribunal is one of the special Courts mentioned in the proviso, and you cannot affect its jurisdiction.

Section 46 makes provision for a number of cases. The Supreme Court has issued mandamus on election officers and others who do not constitute a Court, but it cannot exercise its powers of transferring in such cases. Section 46 provides for any person or tribunal. A Court Martial is a tribunal, and the Supreme Court has power to issue a writ of prohibition to a Court Martial when it is proceeding to try an offence over which it has no jurisdiction. The powers of transfer can be exercised in cases where transfer is possible. The Supreme Court held in *In re De Silva*[1] that it had the power to question the validity of the detention of a person by the military. It is monstrous to think that the Supreme Court has no power to prevent wrong being done.

Cur. adv. vult.

[1] *S. C. Mins., June 29, 1915.*

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This is an application under section 46 of the Courts Ordinance for the grant of a mandate in the nature of a writ of prohibition to a Field General Court Martial before which Edmund Hewavitarana was being tried on charges of treason and treason-felony, on the ground that inasmuch as the accused was not at the time of the alleged commission of these offences on " active service " within the meaning of section 41, proviso (*a*), of the Army Act, 1881,[1] and the place at which the offence is said to have been committed was not " more than one hundred miles as measured in a straight line from any city or town in which the offender could be tried . . . . by a competent civil court," the military tribunal had no jurisdiction to entertain the charges. The Attorney-General took the preliminary objection that the Supreme Court could not issue a mandate in the nature of a writ of prohibition to a Court Martial, and after having had the advantage of hearing this question fully argued, we gave formal judgment, upholding the objection and dismissing the application, but stating that the reasons for our decision would be delivered to-day. There is no doubt but that in England prohibition lies to Naval and Military Courts Martial (see *Grant v. Gould* [2]); but the powers of the Supreme Court of this Colony depend upon the Courts Ordinance (No. 1 of 1889); see *In re Jaffna Local Board.*[3] Section 46 of that Ordinance, under which, as I have said, the present application was made, enables the Supreme Court to grant, *inter alia*, a mandate in the nature of a writ of prohibition " against any District Judge, Commissioner, Magistrate, or other person or tribunal." But that section has to be construed in the light of the other provisions contained in it, as well as of the proviso to section 4 of the same Ordinance. I will deal with the latter enactment first. It is in these terms:—

Provided that nothing herein contained shall be held to affect the jurisdiction vested in, and exercised by, any Court or Courts under or by virtue of the provisions of any Imperial Statute or of any Ordinance or Ordinances now in force, except in so far as any such provisions shall be by this Ordinance expressly repealed or modified; or the jurisdiction of any Court which may be holden within the Island under or in pursuance of any Statute in that case made and provided for the trial of offences committed on the seas, or within the jurisdiction of the Admiralty, or under any Commission issued or to be issued by the Lord High Admiral of England or the Commissioners for executing his office; or the jurisdiction of Village Tribunals, Committees, or Councils, or of any Municipal Magistrate, or of any special officer or tribunal legally constituted for any special purpose or to try any special case or class of cases.

A Court Martial is admittedly a tribunal constituted " by virtue of the provisions of an Imperial Statute," and it is equally indisputable, and undisputed, that these tribunals possess a general

[1] *44 & 45 Vict., c. 58.* [2] *(1792) 2 H. Black. 100.*

[3] *(1907) 1 A. C. R. 128.*

jurisdiction over the offences of treason and treason-felony, although there are certain cases in which that jurisdiction has been barred. It appears to me that when the proviso in question enacts that nothing contained in the Ordinance " shall be held to affect the jurisdiction vested in, and exercised by, " Courts of this character, it must be taken to contemplate the general jurisdiction of these tribunals alone. The exception created by the proviso would be rendered nugatory at once, if we were to hold that the Supreme Court has the right to go into the question whether that jurisdiction can or cannot be exercised against a particular person. I was inclined at one stage in the argument to think that the generality of the expression " other person or tribunal " in section 46 might, perhaps, be regarded as such an express modification of its scope as the proviso itself contemplates. But, on further consideration, I came to the conclusion that this point was not tenable, for the following reasons. In the first place, section 46 does not deal " expressly " with the matter at all. In the next place, the use of the word " person " in that section may find its explanation in the circumstance that a writ of mandamus, for which also the section provides, is issuable to individuals as well as to tribunals. Finally, and here I come to deal with the second of the two points above mentioned, the provisions of section 46, viewed, as they must be viewed, in their entirety, seem to me to exclude the idea that the issue of a writ of prohibition to a Court Martial could have been intended by the Legislature. Section 46 of the Courts Ordinance enables the Supreme Court to " inspect and examine the records of any Court," and, subject to the modification as regards criminal cases now embodied in section 422 of the Criminal Procedure Code, to transfer causes from one Court to another. It is obvious that powers of this description cannot be exercised in regard to Courts Martial.

Mr. Eardley Norton strongly pressed upon us the argument that, if the Attorney-General's objection were upheld, we should be powerless to interfere if a number of irresponsible persons, erroneously describing themselves as a Court Martial, purported to act as such, or if a Village Committee proceeded to entertain a charge of murder. As regards the Village Committee, the Legislature has provided a right of appeal, which in the case suggested would be promptly exercised, to the Government Agent and to the Governor in Executive Council, and the Supreme Court, as I indicated the other day in my judgment in *In re De Silva* [1], has full power by the issue of a *habeas corpus* to compel the production of any person who alleges that he has been illegally detained in custody, for the purpose of satisfying itself as to the grounds on which that detention is sought to be justified. Our judgment in this case will in no way conflict with the decision in *In re De Silva* [1]. There a *habeas corpus* was

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issued on the ground that the applicant complained that he had been illegally arrested and detained in custody by the military authorities. The General Officer Commanding the Troops submitted to this Court an affidavit justifying the arrest and the detention, on the ground that he was exercising his powers under the martial law in force in the Colony. The application was dismissed because the Court was satisfied that, in the present state of the Empire and of the Colony, the act of the military authorities was not justiciable by a municipal tribunal. If any such body of irresponsible persons, as the argument that I have been dealing with refers to, were to attempt *ex proprio motu* to constitute themselves a Court Martial and to act accordingly, the persons against whom they endeavoured to exercise jurisdiction would have little difficulty in obtaining relief by an application to this Court for *habeas corpus*.

SHAW J.—Agreed.

DE SAMPAYO A.J.—

There is no question that in England the Superior Courts of Westminster have power at common law to issue writs of prohibition to Courts Martial, and as may be gathered from the report of the leading case of *Grant v. Gould* [1], the growth of that power was due to causes and exigencies which are peculiar to the history and constitution of England. It is, I think, useful to bear this aspect of the matter in mind when determining how far the jurisdiction of the Supreme Court of Ceylon in regard to prohibition extends. This Court has no such thing as jurisdiction at common law; its entire jurisdiction is dependent on and limited by Statute. The Charter of 1833, which first created the Supreme Court, conferred power and authority to " issue mandates in the nature of writs of *mandamus, procedendo* and prohibition against any District Court " (section 36). The District Court only was mentioned here because the only subordinate Court constituted by the Charter was the District Court. By reason of the very terms of this provision it is impossible to hold that, so far as the Charter is concerned, the Supreme Court would be able to issue writs of prohibition to Courts Martial. This Charter is the foundation of our judicial system and the parent of the Administration of Justice Ordinance, 1868, and of the present Courts Ordinance, 1889, which I think must be read in the light of that Charter. By the time these Ordinances were enacted the number of courts and judicial offices had grown. Accordingly we find that section 22 of the Ordinance of 1868 empowers the Supreme Court to issue writs of prohibition " against any Judge, Commissioner, Magistrate, Justice, or other person or tribunal," and section 46 of the Courts Ordinance, 1889, with which we are

[1] (*1792*) *2 H. Black. 69.*

more particularly concerned, empowers the Supreme Court to issue such mandates "against any District Judge, Commissioner, Magistrate, or other person or tribunal." The omission of "Justice" in this latter Ordinance is accounted for by the fact that the former system of proceedings by Justices of the Peace was abolished. The argument on behalf of the applicant in this matter is that the expression "or other person or tribunal" includes Courts Martial. It is clear to my mind that it refers to persons and tribunals *ejusdem generis* with District Judges, Commissioners, and Magistrates, and that the Courts here contemplated are the Courts established in the Island (to use the words of section 5 of the former Ordinance and section 4 of the latter Ordinance) "for the ordinary administration of justice," and not Courts Martial, which exercise not an ordinary but an extraordinary jurisdiction under circumstances of paramount necessity of State. This is made more clear by the structure of the entire provision. Section 22 of the Ordinance of 1868 runs thus:—

The Supreme Court or any Judge thereof shall have full power and authority to inspect and examine the records of the original Courts to grant and issue, according to law, mandates in the nature of writs of *mandamus*, *certiorari*, *procedendo* and prohibition against any Judge, Commissioner, Magistrate, Justice, or any other person or tribunal, and to make order for the transfer of any cause, prosecution, matter or thing depending before it in its original jurisdiction from the District of Colombo, or any circuit to any other circuit . . . . . or for the transfer of any cause, suit, or action, or of any prosecution, matter or thing depending in any original Court to any other original Court, &c.

I quote the above section because it brings out the point I am dealing with more clearly; but section 46 of the Courts Ordinance, 1889, exhibits the same structural features. It will be seen that the section confers, and separate powers, but one power to do several things, which are all mentioned *uno flatu;* namely, to inspect records, issue mandates, and transfer cases. The subject-matter of this threefold power is the same, viz., the Courts established for the ordinary administration of justice. This is emphasized in section 22 of the first of these Ordinances, for it calls them "the original Courts," and these are defined in the interpretation clause. It cannot reasonably be argued, and it is not pretended, that the Supreme Court can under the general power above given inspect and examine the records of Courts Martial or transfer the prosecutions pending before them to any other Court, and if this is the case, it follows that neither does the power to issue prohibitions extend to Courts Martial. Moreover, it is inconceivable that, if such extraordinary Courts as Courts Martial were intended to be affected, they would not have been mentioned specifically by name. In the Courts Ordinance, 1889, when the Courts Martial are for any purpose contemplated, they are so specifically mentioned. For example, section 50 provides that the Supreme Court may direct: "(*a*) That

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a prisoner detained in any prison be brought before a Court Martial, or any Commissioner acting under the authority of any Commission from the Governor, for trial or to be examined touching any matter pending before such Court Martial or Commissioner respectively." It is plain that this jurisdiction is only ancillary and is intended to assist Courts Martial, and the provision in a sense negatives the idea of any power in the Supreme Court to control Courts Martial.

I have so far dealt with this matter on the assumption that, when the proviso to section 4 of the Courts Ordinance declared that " nothing herein contained shall be held to affect the jurisdiction vested in and exercised by any Court or Courts under or by virtue of the provisions of any Imperial Statute," the word " herein " referred to section 4 itself, and not to the whole Ordinance. I may, however, observe that the learned Attorney-General stated his objection, on the footing that the word " herein " meant the whole Ordinance, and no argument to the contrary was addressed to us by the learned counsel for the applicant, who in fact accepted that meaning, but contended that the proviso only declared that the Courts Martial were not to be affected by anything in the Ordinance when they had jurisdiction and not when they had not. That being so, it seems to me that section 46 relating to prohibitions must be held not to apply to Courts Martial in any respect, inasmuch as the proviso in my opinion excludes generally the Courts Martial as Courts, and not merely in respect of what may be alleged to be their rightful jurisdiction.

For these reasons I agree with the rest of the Court that the preliminary objection of the Attorney-General should be upheld and this application should be disallowed.

Disallowed.