

PRIVY COUNCIL

Albert West Meads

Vs.

King

P.C.A.No.30 of 1945

(Lords Simonds,CJ. Normand Morton of Henryton, Macdermott, Sir Madhavan Nair
and Sir John Beaumont JJ.)

19.04.1948

JUDGMENT

LORD MORTON OF HENRYTON J.

1. This is an appeal, by the leave of the Federal Court of India, against the judgment of the Federal Court dated 20.11.1944, dismissing the appellant's appeal against the judgment of the High Court of Judicature at Lahore dated 24.4.1944, whereby the said High Court dismissed the appellant's petition praying for a writ in the nature of Habeas Corpus for his release from imprisonment. The appellant had been sentenced by Field General Court - Martial to be cashiered and to undergo two years' imprisonment with hard labour.

2. The appellant was, at the date of his conviction by Court - Martial, an officer of His Majesty's Forces, holding the temporary rank of Major in the Royal Engineers. He had enlisted in the United Kingdom in October, 1939, and had subsequently been commissioned and posted to India in the Royal Engineers in 1940. At the time, of the events which gave rise to his trial by Court - Martial, the appellant was attached to a unit of the Indian Engineers. He remained, however, subject to the Army Act.

3. The appellant was charged before a Field General Court - Martial at Lahore on 12.10.1948, on four charges, framed under the Army Act. The first charge, under section 17, Army Act, alleged that the appellant, on or about 22.4.1943, when concerned in the care of public property, namely, Rs. 8089 - 7 - 0, the imprest money of the Company commanded by the appellant, had fraudulently misapplied the same. The third charge, also under section 17, Army Act, alleged similarly that the appellant had fraudulently misapplied regimental property, namely, Rs. 871 - 12 - 9, being part

of the regimental funds, of the said Company. The second and fourth charges were framed under section 40, Army Act, and were alternative charges to the first and third charges, respectively, alleging neglect to the prejudice of good order and military discipline in that the appellant so negligently performed his duties as to suffer the said sums of money to be destroyed by fire.

4. It would appear from the appellant's affidavits hereafter mentioned that there was no dispute that on 22.4.1943, the appellant had in his possession the two sums of money alleged in the charges, and that subsequently he was unable to produce them. His defense, on the facts, appears to have been primarily that the whole of the money was destroyed in an accidental fire which occurred in a chest of drawers in the appellant's room on the night of 22 - 23.4.1943, owing to the overturning of a candle, while the appellant was temporarily absent from the room.

5. On 17.10.1943, the Court - Martial found the appellant guilty on the first and third charges, and not guilty on the second and fourth charges, and sentenced him to be cashiered and to undergo two years' imprisonment with hard labour. The findings and sentence were reserved by the Commander, Lahore District, who had convened the Court - Martial. They were confirmed on 23.11.1943, by the General Officer Commanding - in - Chief, Central Command. The appellant was committed to prison to serve his sentence on 30.11.1943.

6. On 20.1.1944, the appellant petitioned the High Court of Judicature at Lahore, under Sections 491 and 561A, Criminal PC (Act 5 [v] of 1898), praying that the Superintendent of the Central Jail, Lahore, should be directed to produce the appellant, and the Adjutant General in India should be directed to show cause why the appellant should not be set at liberty. By his amended petition, dated 11.2.1944, supported by two affidavits by the appellant, the appellant averred that his trial and conviction by Field General Court - Martial was illegal, on grounds which may be summarized as follows:

"(a) The alleged offence took place within the Area Command of Rawalpindi. The Court - Martial was, improperly, convened by the Commander of the Lahore District.

(b) The appellant should have been tried by a General Court - Martial, consisting of five officers, and not by a Field General Court - Martial consisting of three officers. The reasons given by the Convening Officer for convening a Field General Court - Martial were not bona fide.

(c) Under section 270, Government of India Act, 1935, the previous sanction of the Governor - General was required before proceedings could be taken. Such sanction had not been given.

(d) There was no evidence before the Court - Martial on which the appellant could have been found guilty.

(e) The trial was against the provisions of the Army Act, Rules of Evidence and Procedure and the conviction was against natural justice. In substance and in law the prisoner did not have a trial at all.

(f) It had been averred by the Prosecuting Officer before the Court - Martial, and so held by the Court - Martial, that there was no obligation on the prosecution to prove where the money went to; and that it was entirely for the appellant to substantiate his innocence."

7. The appellant's petition came before Blacker J., who referred to a Special Bench of the High Court the question whether section 270, Government of India. Act, 1935, (hereafter referred to as "the Act") is applicable to Courts - Martial held under the Army Act in respect of a British officer attached to the Indian Army. Sub - sections (1) and (2) of that section are as follows .

"270.-(1) No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma of the Governor - General in his discretion, and in the case of a person employed in connection with the affairs of a Province, the Governor of that Province in his discretion.

(2) Any civil or criminal proceedings instituted, whether before or after the coming into operation of this part of this Act, against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date shall be dismissed unless the Court is satisfied that the acts complained of were not done in good faith, and, where any such proceedings are dismissed, the costs incurred by the defendant shall in so far as they are not recoverable from the person instituting the proceedings, be charged in the case of persons employed in connection with the functions of Governor - General in Council of the affairs of Burma on the revenues of the Federation and in the case of persons employed in connection with the affairs of the Province on the revenues of that Province."

8. Sub - section (3) defines "the relevant date" and it is not disputed that 22.4.1943,

was before the relevant date. At the hearing before the Special Bench the Advocate General of India, who appeared for the Crown, conceded that proceedings before Courts - Martial were in the nature of criminal proceedings, that a Court - Martial could be properly described as a Court, and that at the relevant date the appellant was "a servant of the Crown employed in connection with the affairs of the Government of India." He contended, however, that Courts - Martial were not "criminal proceedings" in the sense in which that phrase was used in Section 270 of the Act. The Special Bench accepted this contention, taking the view that the criminal proceedings referred to in Section 270 of the Act Were proceedings in the ordinary criminal Courts, and not proceedings in special Courts which were the creation of military law.

9. The appellant's petition was accordingly referred back to Blacker J., with the answer that Section 270 of the Act is not applicable to a Court - Martial held under the Army Act in respect of a British Officer attached to the Indian Army.

10. The appellant's petition was then heard and determined by Blacker J., and judgment was given on 24.4.1944. The learned Judge said that the appellant's objection to his convictions could be divided into three groups: (1) Objections to the jurisdiction of the Court - Martial. (2) Want of the consent of the Governor - General under Section 270 of the Act. (3) Objections to the conduct of the trial, that is to say, contentions that the procedure was such as to deny him justice, and that there was no evidence on which a conviction could be based.

11. As regards the second objection, the learned Judge held that he was bound by the judgment of the Special Bench referred to above, with which he agreed. As regards the third group of objections, the learned Judge said:

"With regard to the question of procedure I have seen the record of the Court Martial, and the procedure adopted appears to me to be absolutely consistent with all principles of natural justice On the point whether there was evidence on which the conviction could be based, there was considerable argument before me regarding the powers of the High Court to inquire into this question. I have, however, been saved the labour of discussing these arguments in this judgment, as the matter has also been decided by the Special Bench, whose decision that this Court cannot inquire into the sufficiency of the evidence is not only binding on me, but is one with which I most respectfully concur. I have moreover perused the evidence on which the convictions were based, and I have found not only that there was evidence, but that it certainly could not be called insufficient.

I can find no force, therefore, in the objections in the third group."

12. The learned Judge also rejected the first group of objections, relating to the Jurisdiction of the Court - Martial, on grounds which need not be set out. Accordingly he held that there was no substance in any of the objections taken by the appellant and that the custody in which he was detained was clearly lawful. He, therefore, dismissed the petition and discharged the rule. He granted a certificate for leave to appeal to the Federal Court on the ground that the decision involved a substantial question as to the interpretation of Section 270 of the Act.

13. The appellant appealed to the Federal Court of India. In his amended petition of appeal he contended that the High Court's interpretation of Section 270 of the Act was erroneous. In a petition for leave to urge further grounds he sought leave to appeal on additional grounds, which are substantially the same as those which had been dealt with in the judgment of Blacker J. The appellant argued his case in person before the Federal Court. It appears from the judgment of that Court, and it was admitted by the appellant in arguing his case before their Lordships' Board, that in the Federal Court he only argued the question as to the true construction of Section 270 of the Act, although he was given an opportunity to raise any other matter on account of which he considered that the proceedings against him were invalid or his conviction unjustified. The Federal Court dismissed the appeal, but granted leave to appeal to His Majesty in Council.

14. Before this Board the appellant argued fully and clearly the question as to the true construction of Section 270 of the Act. He opened his argument by saying that he did not rely on the other objections to the jurisdiction of the Court - Martial which he had argued before Blacker J. He did, however, seek to raise, by an "application for permission to urge further grounds," a number of matters relating to the facts of the case and the conduct of the proceedings before the Court - Martial. Their Lordships did not think it right to allow the appellant to argue matters which he had elected not to argue before the Federal Court and on which, in consequence, that Court had given no decision. It is obvious, however, that if this application had been granted, the appellant would have been faced with a very difficult task, having regard to the observations of Blacker J., already quoted.

15. The result is that the only question now arising for decision is whether Section 270(1) of the Act applies in the present case. If the sub - section does apply, the Court - Martial which convicted the appellant had no jurisdiction to try him, since the consent of the Governor - General, was not obtained, and his conviction cannot stand.

If the sub - section does not apply, the present appeal must fail.

16. The first matter to be considered is whether proceedings before a Court Martial are "proceedings civil or criminal" in the sense in which these words are used in Section 270(1). Clearly proceedings before a Court - Martial are not "civil, proceedings," but it is conceded that they may well come within the description of "criminal proceedings" in a suitable context. Their Lordships, however, agree with the view of the Federal Court that in Section 270(1) the phrase "proceeding civil or criminal" "indicates only the; civil or criminal proceedings capable of being instituted under the ordinary law of the land" and does not include proceedings under the military law. The Courts in India gave several reasons for this view. It will be sufficient to refer to two of them, although the others are of some weight.

17. The first is based on the language of sub - S. (2) of section 270. Clearly the phrase "civil of criminal proceedings" in that sub - section must bear the same meaning as the like phrase in sub section (1), and in sub section (2) the phrase cannot be construed as extending to Courts - Martial. As the Special Bench pointed out, the provision for the dismissal of proceedings "unless the Court is satisfied that the acts complained of were not done in good faith" if applied to proceedings under the Army Act, would render it practically impossible to maintain discipline. Further, it could hardly have been intended by the legislature that, when a charge before a Court - Martial was dismissed, the costs should be recovered "from the person instituting the proceedings," nor would there appear to be any means of executing any such order for payment of costs.

18. Secondly, the necessity for speedy punishment is stressed by the preamble to the Army Act, but if Section 270(1) applies to Court Martial proceedings, the trial would inevitably be delayed. Nor does the difficulty end there, for if Section 270(1) applies to Court - Martial proceedings, it would seem that it must equally apply to proceedings before a commanding officer, in which he is empowered to award summary punishments. It is inconceivable that the legislature intended such proceedings to be delayed until the consent of the Governor - General had been obtained.

19. The appellant, conscious of the difficulties just mentioned, sought to meet them by contending that the sub - section did not apply to all proceedings under the Army Act, but only to proceedings in respect of acts on which charges under the ordinary criminal law could be based. In their Lordships' view it is quite impossible to read any

such qualification into the sub - section. They agree with the view expressed by the learned Chief Justice in the Federal Court that "there is no halfway house. Either all Court - Martial proceedings under the Army Act are criminal proceedings within Section 270(1), or no Court - Martial proceedings are. If all Court - Martial proceedings under the Army Act are "criminal proceedings"- within Section 270(1) - "there is no way to escape from the fantastic results which would follow from such a decision."

20. It is unnecessary to elaborate this matter further, as there is another reason why this appeal could not succeed, even if proceedings before a Court Martial were "criminal proceedings" within Section 270(1). That sub - section only applies to proceedings instituted against any person "in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma" before the relevant date. On 17.2.1948, the judgment of this Board was delivered in Privy Council Appeal No. 57 of 1947. 1 In that case the appellant had been charged with accepting or conspiring to accept bribes, and the following passage from the judgment is relevant in the present case :

"The Federal Court has not expressed an opinion upon the necessity of a sanction under Section 197 of the Code, but, as the High Court has expressed the view that such a sanction was in this case necessary and upon this much - vexed question the Board has heard full argument, their Lordships think it right to express their own view.

In the first place their Lordships find it impossible at least in relation to an offence of this character to distinguish between Section 270 and section 197. The words in section 270 "in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown" appear to them to have precisely the same connotation as the words in Section 197(1) "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty." It is idle to speculate why a change of language was made. But, if a temporal meaning is not given, as in their Lordships' view it clearly should not be given, to the words in section 197 "while acting, etc.," it is in their opinion impossible to differentiate between the two sections. In the consideration of Section 197 much assistance is to be derived from the judgment of the Federal Court in 1939 FCR 1592 and in particular from the careful analysis of previous authorities which is to be found in the opinion of Varadachariar J. Their Lordships, while admitting the cogency of the argument

that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials, cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act : nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination, itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office. Applying such a test to the present case, it seems clear that Gill could not justify the acts in respect of which he was charged as acts done by him by virtue of the office that he held. Without further examination of the authorities their Lordships, finding themselves in general agreement with the opinion of the Federal Court in the case cited, think it sufficient to say that in their opinion no sanction under section 197, Criminal PC was needed."

21. In the present case, it is equally clear that the appellant "could not justify the acts in respect of which he was charged," i. e., acts of fraudulently misapplying money entrusted to his care as a public servant, "as acts done by him by virtue of the office that he held." For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.