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Judgment Book

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M91 OF 1993

BEFORE: THE HON. MR. JUSTICE RATTRAY, CHIEF JUSTICE (AG.)
THE HON. MR. JUSTICE BINGHAM
THE HON. MR. JUSTICE PANTON

IN THE MATTER of an Application by Private Ian Hugh Clarke for leave to apply for an order of Certiorari.

Arthur G. Kitchin instructed by Messrs. H.G. Bartholomew & Company for Applicant

Lennox Campbell instructed by Director of State Proceedings for Respondent.

HEARD: 26th September, 1994.

RATTRAY, C.J. (AG.)

On the 26th September we refused this application for an Order of Certiorari by Private Ian Hugh Clarke to quash the Order of the Chief of Staff of the Jamaica Defence Force that the applicant be discharged from the Jamaica Defence Force as from the 30th of April, 1993.

The applicant a private soldier in the Jamaica Defence Force at the relevant time was serving in the First Battalion of the Jamaica Regiment. On or about the 17th of July, 1992 whilst at Lathbury Barracks, Up Park Camp, he claims to have accidentally discharged a round from his rifle into the roof of the said Barracks. Consequent on this he was charged with the offence of "negligent discharge" and taken before his Commanding Officer, Lieutenant Colonel L.H. Graham, who conducted a hearing in respect of the charge. He pleaded guilty to the charge and was sentenced to serve forty-two days at the Red Fence Detention Centre without pay. Subsequently, after the serving of his sentence he read of his discharge from the Jamaica Defence Force in the JDF Part I Orders

Serial 185. He made Application in Suit M94 of 1992 for an Order of Certiorari to quash his Order of discharge and on the 16th February, 1993, the Full Court of the Supreme Court issued the Order for which he had applied. He had not been afforded a hearing in relation to the decision.

On the 23rd of April, 1993, he was summoned before the Chief of Staff, Commodore P.L. Brady and given a hearing, which resulted in his discharge from the Jamaica Defence Force as of the 30th of April. This was recorded in Part I Orders Serial No. 75 dated 28th April, 1993. It is this Order which he now seeks to have quashed by the issue of an Order of Certiorari by this Court.

Counsel for the applicant, Mr. Arthur Kitchin, launched a double barrelled attack on the Order discharging Private Clarke from the Jamaica Defence Force. Firstly, he submitted that the Order was unlawful as being in breach of the Defence Act and the Regulations made thereunder. Secondly, he maintained that the applicant having pleaded guilty and served his sentence, the purported discharge was in breach of the well established principle that a person should not be punished twice for the same offence - in other words, the rule against double jeopardy.

Section 22 (3) of the Defence Act provides -

> "Except in pursuance of the sentence of a Court Martial a soldier of the Regular Force shall not be discharged unless his discharge has been authorised by Order of the competent military authorities."

The competent military authority in respect of a charge of "Misconduct" is the Chief of Staff (see Regulation 6(2) and the Second Schedule Part II of the Defence Regular Force Enlistment and Services Regulations 1962 (referred to hereafter as "the Regulations".))

An Affidavit of the Chief of Staff discloses inter alia that the application for the soldier's discharge was made

by his Commanding Officer on the ground of misconduct. The Regulations are made by the Defence Board under the Provisions of section 212 of the Defence Act which empowers the Defence Board to make Regulations governing a wide area including -

> "providing for matters required by this Act to be prescribed"

and under sub-section (a) -

> "the enlistment of persons into and the discharge of persons from the regular force . . . ."

Regulation 4 refers to the First Schedule as a form of Notice Paper given to persons wishing to enlist in the Jamaica Defence Force. Paragraph 12 thereof, which falls under the heading General Conditions of Engagement, reads as follows:

> "You may be discharged at any time during your engagement by Order of a competent military authority as a result of the irregularities concerning your enlistment, for misconduct, for unfitness on medical grounds or for the benefit of the public service."

Furthermore, by section 137(1) of the Defence Act, the Defence Board is empowered to make rules of procedure -

> "with respect to the investigation and trial of and awarding of punishment for offences cognisable by court martial, Commanding Officers and appropriate superior authorities . . . ."

The authority of a Commanding Officer to proceed and deal summarily with a charge against a private soldier is provided by section 85(3) of the Defence Act and the punishment awarded by Lieutenant Colonel Graham is authorised under section 85(3)(b)(i).

With respect to the discharge of the soldier, section 27 of the Defence Act provides -

> "A soldier of the regular force may be discharged by the competent military authority at any time during the currency of any term of engagement upon such grounds as may be prescribed."

Under Part Two of the Second Schedule of the Regulations and by authority of section 6(2) of the Regulations, the Chief

of Staff is the competent military authority "for the purpose of authorising the discharge of a soldier" for reasons of misconduct.

Thus we have the Regulations providing for misconduct being a ground for discharge, and the Chief of Staff being the competent military authority being prescribed by the Defence Board by virtue of the authority given to the Board to make these Regulations by section 27 and section 212 of the Defence Act.

In view of the statutory authority to which I have referred, we found the submission of Counsel for the applicant challenging the order for discharge as being unlawful or in breach of the Defence Act to be without merit.

We, therefore, had to consider whether the Order for discharge was a punishment meted out by the Chief of Staff for an offence for which the applicant was already tried and sentenced.

The general principles against what is generally called "double jeopardy" are reflected in section 20, sub-section 8 of the Constitution of Jamaica as follows:

> "(8) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he would have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence:
>
> Provided that nothing in any law shall be held to be inconsistent with or in contravention of this subsection by reason only that it authorises any court to try a member of a Defence Force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under service law; but any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under service law."

Thus a soldier may be tried and sentenced under service law and still be tried for the same criminal offence by the Courts but the Court shall, which is mandatory - "take into account the punishment awarded him under service law."

The relevant question however, in this application, is whether the discharge of the applicant was by virtue of a sentence imposed by the Chief of Staff, in other words, a separate punishment to that awarded by the commanding officer.

Under the Defence Act the discharge of a soldier may take place in different circumstances some of them completely detached from a consideration of any offence. As was stated by the Chief of Staff in his affidavit, the administrative instructions for procedures in relation to discharges of soldiers are contained in Jamaica Defence Force Standing Orders. The reasons for discharge in this document range from "inefficiency" to conviction in a Civil Court, and includes under the head of "misconduct" a soldier "who has been sentenced by Court Martial by his Commanding Officer to a period of detention of forty-two days or longer." Instruction 4(2) states:

> "The application for discharge is to be accompanied by the soldiers conduct sheets together with copies of civilian convictions, if any, It is to be submitted immediately after the offence or series of offences have been dealt with."

The question to be decided is whether the discharge by the Chief of Staff in these circumstances is a sentence or punishment in respect of an offence for which sentence and punishment has already been imposed.

The decision to discharge the soldier is not another sentence, but a determination that he is not a fit and proper person to remain in the Jamaica Defence Force. Whereas, a Court Martial is empowered as part of the sentencing function after a hearing to impose on any soldier a sentence of "discharge with ignominy from Her Majesty's Service" (see section 78(1) of the

Defence Act); neither the Commanding Officer nor the Chief of Staff as the competent military authority is authorised on the hearing of a charge to order the discharge of the soldier. Indeed, the charge in respect of this soldier was heard by his commanding officer. The Chief of Staff in deciding whether to discharge him or not was not hearing a charge.

The proceedings leading to the discharge are separate and apart from the original charge, conviction under which is only relevant at a later stage as an element affecting the decision-making in a separate enquiry as to whether a soldier is a fit person to remain in the Jamaica Defence Force or should be discharged.

For these reasons we concluded that Mr. Kitchin's submissions were not well founded. We, therefore, refused the application for an Order of Certiorari and awarded costs to the respondent.

Although no submissions were made to us by either party on the question of the Court's jurisdiction in relation to the decisions of military authorities, we consider it appropriate to take the opportunity in this Judgment to indicate our views particularly as the previous application for an Order of Certiorari in Suit M94 of 1992 had been granted by a Full Court. In Council of Civil Service Workers and Others v. Minister of the Civil Service 1984 3 All England Report 935 it was made clear that the question whether a decision or action was necessitated by the requirements of national security was non-justiciable. (Lord Fraser at page 942 Lord Scarman at page 949) More directly, however, as is stated in Judicial Review of Administrative Action by S.A. DeSmith (4th Edition page 146) -

> "Special considerations apply where procedural errors have been committed by authorities administering military discipline. The Courts have always shown a marked aversion from seeming to interfere with the proceedings of military authorities except where the civil rights of an individual have been infringed ...."

There is abundant authority of respectable vintage and sufficient consistency to support this proposition.

In re Mansergh (1861) 1 B & S page 400 at page 406 - Cockburn C.J. stated:

> "I quite agree that where the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction this Court ought to interfere to protect those civil rights, example, where the rights of life, liberty or property are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort, and the only matter involved was the military status of the applicant - a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign."

Mansergh was an application to the Queen's Bench for an Order of Certiorari to bring up the judgment of a Court Martial that it should be quashed on the grounds of lack of jurisdiction of the particular Court Martial which tried the applicant and dismissed him from the Army.

In R. v Army Council ex parte Ravenscroft [1917] LTR page 306 - the applicant for Mandamus, Colonel Ravenscroft complained that regulations made under the Army Council Act 1888 in respect of the procedure for the holding of a court of Enquiry and the giving of notice to him had not been complied with, and obtained a rule nisi for a Mandamus directed to the Army Council commanding them to cause a Court of Enquiry to reassemble to hear and determine his case according to law.

In discharging the rule nisi, Lord Reading, C.J. stated at page 307 -

> "I have no doubt that this Court as a Civil Court has no power to intervene in matters which concern military conduct and purely military law affecting the rules and regulations prescribed for the guidance of officers or their military discipline. I am entirely in accord with what Willes, J

said in the case of Dawkins v. Lord Rokeby (4F &F 806) - these are his words -

> "It is clear that with respect to those matters placed within the jurisdiction of the military forces so far as soldiers are concerned military men must determine them . . . . with respect to persons who enter into the military state who take Her Majesty's pay and who are content to act under her commission, although they do not cease to be citizens in respect of responsibility, yet they do by a compact which is intelligible and which requires only this statement of it to recommend it to the consideration of anyone of commonsense becomes subject to military discipline . . . . they are subject to a test of law different to that administered in Civil Courts."

In Secretary of State for War ex parte Martyn [1949] 1 AER page 242 the motion was for Certiorari to quash the decision of a District Court Martial on the ground that the Court was not properly convened. In refusing the application Lord Goddard C.J. stated at page 243 -

> "It is now suggested that we ought to bring up the Order of this Court Martial and quash it on the ground that the Court had no jurisdiction to try the applicant. Once it is conceded, as it has been in this case, that he was a soldier, a Court Martial has jurisdiction to try him. If the Court Martial in the present case has not observed the proper rules of procedure, that is a matter for the convening officer, and, if necessary, the Judge Advocate General to deal with it, but it is not a matter for this Court, which can only interfere with military courts on matters of military law in so far as the civil rights of the soldier or other person with whom the deal may be affected. This application really amounts to asking us to decide that the members of the Court Martial were wrong in holding that they had been convened in accordance with the Rules of Procedure, but that is purely a matter of military law and procedure and not one to interfere with which this Court has any jurisdiction."

In the application before us we are asked for an Order which would establish the status of the applicant as still being a soldier in the Jamaica Defence Force. His civil rights are in no way affected.

Although regrettably, we have not had the benefit of argument on this point and we dismissed the application for the good and sufficient reasons already stated, had we been alerted and submissions made, we are of the opinion that we would have been justified in dismissing the application for the additional reason which we have now addressed.

BINGHAM, J.

I agree.

PANTON, J.

I agree with the reasons expressed by the learned Chief Justice (Acting), and have nothing to add.