

9/83

**ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA**

BETWEEN:

CAPTAIN KAMARUL AZMAN BIN
JAMALUDDIN Appellant

- and -

- (1) LIEUTENANT COLONEL
WAN ABDUL MAJID BIN
ABDULLAH (PRESIDENT
GENERAL COURT-MARTIAL)
- (2) MAJOR RAJA MOHAR BIN
RAJA SULAIMAN
- (3) MAJOR GOH SENG TOH
- (4) CAPTAIN FRANCIS HILARY DIAS
- (5) CAPTAIN SIM KIAN PING
(MEMBERS, GENERAL COURT-
MARTIAL) Respondents

CASE FOR THE APPELLANT

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1. This is an appeal from the Judgment dated 5th August, 1977 of the Federal Court (Suffian L.P., S.S. Gill Chief Justice Malaya, Raja Azlan Shah, Judge Federal Court) allowing the Respondents' appeal from a judgment of Justice Harun in the High Court Malaya dated 11th May, 1976.

2. This Appeal is made pursuant to an Order of the Federal Court dated 21st March, 1978 granting the Appellant herein leave to appeal to his Majesty the Yang Di-Pertuan Agong.

3. The appellant, an officer of the 3rd Royal Recce Regiment was alleged to have committed certain offences in August, 1974 with regard to some Army travelling claims.

4. He was brought before the General Court Martial on 16th February, 1976.

5. When the Court-Martial assembled, the Judge-Advocate was present and so was a person called Tuan Guru, an Islamic religious teacher employed by the armed forces.

6. The Oath was administered not by the Judge-Advocate but by the Tuan Guru.

7. At the beginning of the Court Martial proceedings, the Appellant through his Counsel objected to the jurisdiction of the Court-Martial on a ground not relevant to this appeal and the objection was overruled.

8. On the fourth day of the hearing, his Counsel discharged himself. On 1st March, 1976, when the Court Martial resumed, his new Counsel again objected to jurisdiction on other grounds one of which is relevant to this appeal, namely that the court-Martial had not been properly constituted as the members were not validly sworn in.

9. This objection was overruled and the Appellant applied by Originating Summons No. 88 of 1976 to the High Court for a Writ of Prohibition against the Court-

Martial to stay the Court-Martial from proceeding further.

10. The application prayed for the following relief:

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- (i) for an Order of Prohibition prohibiting the General Court-Martial or its President and Members from proceeding with the hearing of the Charge against the Applicant under Sections 38 and 22 (1) of the Malay Regiment Enactment (F.M.S. Cap 42)
- (ii) for the proceedings before the General Court-Martial to be stayed until after the determination of the Motion;
- (iii) for costs

11. Of the several grounds for the application, the grounds relevant to this appeal were stated in paragraph 12 (d) and (e) of the Appellant's Affidavit dated 3rd March 1976 and can be summarised as follows:

p 4. line 11.
p 5. line 14.

- (a) That there was non-compliance with Rule 28 (2) and 34 (2) of the Rules of Procedure (Army) 1956 (hereinafter referred to as "the said Rules") as the person who administered the Oath to the members of the Court-Martial was not the Judge-Advocate but an unauthorised person.
- (b) That there was a breach of Rule 51 of the said Rules as the person who administered the Oaths to the witnesses was not the person prescribed by the Rules.

p 10-12
p 11 line 29

12. On behalf of the Respondents several Affidavits were filed. The one Affidavit relevant to this appeal was by Colonel Shahrudin bin Ali the convenor of the Court-Martial dated 6th May, 1976. The relevant fact averred therein was that it was an accepted rule of practice in the Army that an Oath taken by a Muslim shall be administered by a Tuan Guru.

13. In the High Court it was further argued on behalf of the Respondents that the administration of the Oath by an unauthorised person was a mere procedural irregularity and did not vitiate the proceedings.

p 19-26

14. Justice Harun in his Judgment dated 23rd December, 1976 dealt with the various arguments as follows:

- p 26 line 37
- (a) Administering of Oath.
The learned Judge referred to the following provisions of law:
- (i) Army Act 1955 s 93 (U.K)
 - (ii) The Malay Regiment Enactment (FMS Cap 42)
 - (iii) Rules of Procedure (Army) 1956 (Malaya) Rules 28-30, 34, 51, Sixth Schedule
- (b) Custom of the Service.
The Learned Judge then dealt with the contentions of the Respondents that they were following an accepted custom of the service and held:
- p 25. line 24
- "It is said that it is an accepted practice in the Armed Forces that an Oath taken by a Muslim shall be administered by a

Tuan Guru and that this practice has been extended to non-Muslims as well and is now a custom of the service. If that be the case, then the reason for using the services of a Tuan Guru is a religious one so as to bind Muslims to their oath. This object, however, is nullified in this case because the majority of the Court and the Judge-Advocate are non-Muslims.

p 25. line 34.

In my opinion the Rules of Procedure permit the variation of the oath or affirmation according to the religious belief of the individual e.g. an oath is taken by a Muslim holding the Koran in his bare right hand. The Koran should be handed to him covered in a cloth and he shall be instructed to unwrap it: Rule 34(i)(b) Note 6(a), but does not permit any variation as to the person who shall administer the oath see Rule 28(2) "..... the oath shall be administered by him"

p 25. line 44.

I am also of the opinion that section 110 of the Malay Regiment Enactment does not authorise the delegation of the duty of the President and the Judge-Advocate to the Tuan Guru or materially alter the written Rules of Procedure by some unwritten custom of the service which cannot be justifiably applicable to all persons. The object of an oath is to bind the person making it and not the person administering it, but whether the Oath has been properly taken so as to make it binding depends entirely on the person administering it, hence the requirement that oaths shall be administered by a

Judge, Magistrate or Commissioner for Oaths and in the instant case by the President or Judge-Advocate.

(c) Illegality or Irregularity

p 26. line 10-20.

The Learned Judge rejected the argument of a mere procedural irregularity. He held that the non-Muslim members may not be bound by the Oaths as they had not been legally administered. He further held that the non-Muslim witnesses may not be inclined to tell the truth as their credit cannot be impeached legally.

p 26. line 27.

15. The Learned Judge therefore held that as the Oaths had not been administered by the proper persons the General Court-Marital was not properly constituted and hence had no jurisdiction to try the Appellant and accordingly issued the Order of Prohibition.

16. The Respondents appealed to the Federal Court.

17. In their Memorandum of Appeal they contended in essence as follows:

(a) That the Learned Judge had erred in law in not holding that the non-compliance with Rule 28 (2) of the said Rules was a mere procedural irregularity that did not render the constitution of the Court Martial invalid.

(b) That the Learned Judge erred in law in holding that "whether the oath has been properly taken so as to make it binding, depends entirely on the person administering it, hence the requirement that Oaths shall be administered by a

Judge, Magistrate or Commissioner for Oaths and, in the instant case by the President or Judge-Advocate".

p 28.
p 30. line 25.
p 30. line 27.

18. The Federal Court Judgment was delivered by Suffian L.P. He held that as soldiers are not lawyers the Court would "hesitate to insist on a strict compliance with legal technicalities by the Court-Martial". He further held that "What was important was that the Oath should be administered to every member of the Court-Martial in Order to impress on them the solemnity of the occasion and their grave responsibility". This he felt had been done.

p 30. line 35.

Finally the Learned Lord President held that while it is important that wherever possible the Oath should be administered by the Judge-Advocate if he is present, the failure by him to do so is not fatal if in fact the Oath was administered by someone else in his presence.

19. Against this judgment the Appellant has now appealed.

20. The Appellant respectfully contends as follows:

- (a) That it is a mandatory requirement under the provisions of the Army Act, 1955 (U.K.) (Extended to Malaysia by the Malay Regiment Enactment) and the Rules of Procedure (Army) 1956 that the Oath shall be administered to members of the Court-Martial by the Judge-Advocate if he is present.
- (b) That under the said Act it is a mandatory requirement that the Oath to witnesses shall be administered by the President, a

member of the Court or the Judge Advocate.

21. The reasons for the Appeal are respectfully submitted as follows:

- (a) That the Judgment of the Federal Court assails and erodes the principle of the sanctity and binding power of an Oath in legal proceedings
- (b) That the Federal Court failed to recognise that wherever a tribunal is vested with judicial functions the provisions relating to the taking of an Oath by members of the tribunal or by witnesses before that Tribunal are mandatory and cannot be overridden as merely procedural.
- (c) that the provisions of the said Act and rules thereunder are clear, unambiguous and detailed as to the mode, and manner of administering Oaths and persons authorised to do so.
- (d) That the Federal Court erred in dealing with the issues herein on the basis that as soldiers were not lawyers they could be excused from legal technicalities. This proposition has two faulty premises viz.
 - (i) The "Soldiers" in this case had available to them the legal expertise of the Judge-Advocate who was an Advocate and Solicitor of the Supreme Court of Malaya and whose duty it was to advise on all aspects of the Court Martial.

- (ii) What was involved in this case was not a legal technicality but a principle of substantive importance.

- (e) That though the Federal Court stated that what was required was to impress on the members of the Court-Martial the solemnity of the occasion and their grave responsibility, the Court failed to appreciate that such solemnity could not exist where an unauthorised person was allowed to administer the Oath.

- (f) The Federal Court erred in failing to attach any importance to the person administering the Oath by holding in essence, that what matters is the content of the Oath administered not who administers the Oath. This negates the intention of the Legislators who considered the matter important enough to specify and designate the only persons who can administer Oaths in a Court-Martial.

D.P. Vijandran
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Respondents

CASE FOR THE APPELLANT

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REF: M601/187