

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

CAPTAIN KAMARUL AZMAN BIN JAMALUDDIN Appellant

- AND -

- 10 (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 RESPONDENTS

RECORD

20 1. This is an Appeal by the Appellant, Captain Kamarul
Azman bin Jamaluddin from an Order of the Federal Court
of Malaysia (Suffian, Lord President; Gill CCJ Malaysia; p.27
and Raja Azlam Shah F.J.) allowing an appeal by the
Respondents from a Judgment of the Honourable Mr.
Justice Harun Hashim who had issued an Order of p.18
Prohibition on the grounds that the Court Martial
appointed to try the Appellant had not been properly
constituted and had therefore acted without jurisdiction.

30 2. The material facts are not in dispute. On 16th
February 1976 a General Court Martial was convened to
try the Appellant on three charges under the Malay
Regiment Enactment (F.M.S. Cap.42). The oath was
administered to the President and each member of the
Court and to the Judge Advocate. It was administered
in the prescribed form and manner at the prescribed time
in the presence of both the President and the Judge
Advocate but it was administered by the Tuan Guru who
was the full-time salaried Islamic religious teacher
employed by the Armed Forces and attached to the
Appellant's unit and was not administered by the Judge
Advocate. Counsel for the Appellant was present and
took no objection; but on the fourth day of trial after
40 four witnesses had been examined Counsel discharged
himself. When the trial resumed on 1st March 1976 new
Counsel who appeared for the Appellant applied to reopen
the plea of jurisdiction inter alia on the grounds the
subject of this Appeal and on 3rd March 1976 obtained
leave to apply for an Order of Prohibition.

3. The sole issue which arises on this Appeal is

whether, having regard to the fact that the oath was administered to the President and members of the Court by a person other than the Judge Advocate, the Court Martial was properly constituted and had jurisdiction to try the Appellant.

4. The relevant statutes, rules and orders are as follows:

Malay Regiment Enactment, section 44(A)(i)

"The provisions of the Army Act, 1955, of the United Kingdom specified in the first column of the Third Schedule to this enactment, shall, subject to the modifications set out in the corresponding part of the second column of the said Schedule, be applicable to courts martial convened under the provisions of section 44 of this enactment;

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Provided always that the President and members of such last-mentioned courts martial shall be officers commissioned under the provisions of this enactment or of the Federation Regiment Ordinance, 1952, or of the Military Forces Ordinance, 1952 or officers commissioned by the Yang di-Pertuan Agong or officers of any Commonwealth force seconded for service with the Federation Armed Forces."

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The Army Act, 1955

Section 85(1).

"A General Court Martial should have power to try any person subject to military law for any offence which under this Act is triable by Court Martial, and to award for any such offence any punishment authorised by this Act for that offence."

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87(1) A General Court Martial shall consist of the President and not less than four other officers.

(2) Save as hereinafter provided, an officer shall not be appointed member of a General Court Martial unless he belongs to Her Majesty's Military Forces, is subject to military law and has held a commission in any of Her Majesty's Naval, Military or Air Forces for a period of not less than three years or for a period amounting in the aggregate to not less than three years.

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(3) Not less than four of the members of a General Court Martial shall be of a rank not below that of Captain.

(4) The President of a General Court Martial shall be appointed by order of the Convening Officer and shall not be under the rank of Field Officer unless in the opinion of the Convening Officer a field officer having suitable qualifications is not, with due regard to the Public Services, available, and in any event, the President of a General Court Martial shall not be

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under the rank of Captain.

(5) The members of a General Court Martial; other than President, shall be appointed by order of the Convening Officer or in such other manner as may be prescribed.

(6) An officer under the rank of Captain shall not be a member of a General Court Martial for the trial of an officer above that rank."

10 Section 93(1) (As extended by the Malay Regiment Enactments) provides:

(1) An oath shall be administered to every member of a Court Martial and to any person in attendance on a Court Martial as Judge Advocate, officer under instruction, shorthand writer or interpreter.

(2) Every witness before a Court Martial shall be examined under oath;
.....

20 (3) An oath required to be administered under this section shall be in the prescribed form and shall be administered at the prescribed time by the prescribed person and in the prescribed manner."

Rules of Procedure (Army) 1956

Rule 28(1).

Immediately after Rule 27 has been complied with, an oath shall be administered to the President and each member of the Court in accordance with Rule 34 and in the presence of the accused.

30 (2) If there is a Judge Advocate, the oath shall be administered by him to the President first and afterwards to each member of the Court. If there is no Judge Advocate, the oath shall be first administered by the President to the members of the Court and then to the President by any member of the Court already sworn.

29. After the Court have been sworn, an oath shall be administered to the Judge Advocate (if any) in accordance with Rule 34 and in the presence of the accused.

40 34.(1) An oath which is required to be administered under these Rules shall be administered in the appropriate form and in the manner set out in the Schedule to these Rules;

Provided that:-

- (a) If any person desires to swear with up-lifted hand
- (b) The opening words of the oath may be varied

to such words and the oath may be administered in such manner as the person taking the oath declares to be binding on his conscience in accordance with his religious beliefs.

(2) Subject to Rule 28(2) every oath shall be administered at a Court Martial by the President, a member of the Court or the Judge Advocate.

Malay Regiment enacts under section 110:

"Any power or jurisdiction given to, and any act or thing to be done by, to, or before any person holding any military office may be exercised by, or be done by, to, or before any other person for the time being authorised in that behalf according to the custom of the Service, or according to rules made under section 52 of this Enactment."

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5. Before the High Court upon Originating Summons Harun Hashim J. held that because the oaths taken by the President and members of the Court Martial had not been administered by the proper person, namely by the Judge Advocate pursuant to RP 28(2) it had not been administered "by the prescribed person" as required by section 93(3) of the Army Act 1955 and therefore the General Court Martial was not properly constituted and had no jurisdiction to try the Appellant; and accordingly the Learned Judge issued an Order of Prohibition.

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p.28

6. Upon appeal to the Federal Court Suffian L.P. giving the Judgment of the Court allowed the Appeal on the ground that non-compliance with the Rules of Procedure did not deprive the General Court Martial of jurisdiction. He held that all the members of the Court Martial were duly qualified to be members; that the oath had been administered to every one of them in the prescribed form at the prescribed time in the prescribed manner. The complaint was that it had not been administered by the prescribed person, namely the Judge Advocate, but he had been present and the oath had been administered by the Tuan Guru at the direction of the President. The Lord President held that non-compliance with this Rule did not render the Court improperly constituted and without jurisdiction. Soldiers, he held, were not lawyers and the Federal Court should hesitate to insist on legal technicalities by Courts Martial in the same way as with Magistrates and Presidents of Sessions Courts. What was important was that the oath should be administered to every member of the Court Martial in order to impress upon them the solemnity of the occasion and their grave responsibility. This had been done. The failure by the Judge Advocate to administer the oath personally, though to be avoided, was not fatal if in fact that oath had been administered by someone else in his presence. Accordingly the Appeal should be allowed.

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7. The Respondents submit as a preliminary point that the present case is not one which the Judicial Committee, which does not sit as a Revising Court of Criminal Appeal, ought to entertain. The fact that there has been an error of procedure will not suffice. There has been nothing in the present case which has caused any substantial injustice or deprivation of the substance of

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a fair trial. Muhammad Nawaz v. The King-Emperor
1940 L.R. 68.A.126.

10 8. The Respondents submit that the Court Martial in
question was correctly convened and constituted pursuant
to section 44 of the Malay Regiment Enactment and section
87 of the Army Act. A technical breach in one limited
respect of a Rule of Procedure, namely Rule 28(A), does
not deprive the Court of jurisdiction. As held in R. v.
Secretary of State for War ex parte Martyn 1942 1 A.E.R
242 "Once it is conceded that (the Appellant) was a
soldier a Court Martial had 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, but it is not a matter
for this Court, which can only interfere with Military
Courts and matters of military law in so far as the
civil rights of the soldier or other person with whom
they deal may be affected." A similar refusal to grant
20 an order of mandamus for non-observance of Rules of
Procedure arose in R. v. Army Council ex parte
Ravenscroft 1917 2 K.B.504 and before the Federal Court
of Malaysia in Peter Chong & Ors. v. Colonel Adam &
Others (Federal Court Civil Appeal No.139 of 1976).

9. Further, the Respondents submit that the defect in
procedure did not render the oath itself non-binding.
As held by the Federal Court, the position is clearly
distinguishable from one in which no oath has been
administered at all.

30 WHEREFORE the Respondents submit that the Appeal
should be dismissed for the following, among other

R E A S O N S

- 40 (a) BECAUSE the decision of the Federal Court was right
and ought to be upheld.
- (b) BECAUSE the circumstances of the case disclose no
substantial injustice to the Appellant or
deprivation of the substance of a fair trial.
- (c) BECAUSE the Court Martial was properly convened
and constituted and its jurisdiction is not
affected in the circumstances by the breach of
RP 28(2).

NICHOLAS LYELL

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

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(MEMBERS, GENERAL COURT-
MARTIAL) Respondents

CASE FOR THE RESPONDENTS

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