

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Petition of Tilonko for special leave to appeal to His Majesty in Council from a judgment and sentence of a Court-Martial sitting at Pietermaritzburg, in the Colony of Natal; delivered the 2nd November 1906.*

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Present :

EARL OF HALSBURY.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ATKINSON.

SIR ARTHUR WILSON.

*[Delivered by the Earl of Halsbury.]*

THIS is an application for special leave to appeal to His Majesty in Council. It is desirable to call attention to that fact, because the learned Counsel for the Petitioner has, from time to time, used the phrase that his right to appeal cannot be refused. There is no right to appeal. This is an application for special leave to appeal, which their Lordships have no difficulty in advising His Majesty to refuse.

The foundation upon which Counsel for the Petitioner has proceeded is a totally inaccurate analogy between the proceedings of a Military Court sitting under what is called the Mutiny Act, and proceedings which are not constituted according to any system of law at all. It is by this time a very familiar observation that what is called "martial law" is no law at all. The notion that "martial law" exists by reason of the Proclamation—an expression which the learned Counsel has more than once used—is

an entire delusion. The right to administer force against force in actual war does not depend upon the Proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorize what are called "Courts" to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings of so-called "Courts-Martial," administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of Justice is quite illusory. Such acts of justice are justified by necessity, by the fact of actual war; and that they are so justified under the circumstances is a fact that it is no longer necessary to insist upon, because it has been over and over again so decided by Courts as to whose authority there can be no doubt.

But the question whether war existed or not may, of course, from time to time be a question of doubt, and if that had been the question in this case, it is possible that some of the observations of the learned Counsel with regard to the period of trial, and the course that has been pursued, might have required consideration. But no such question arises here. An Act of Parliament has been passed in Natal which in terms enacts the legality of the sentences in question, and provides that they shall be deemed to be sentences passed in the regular and ordinary course of criminal jurisdiction.

This Board has no power to review these sentences, or to enquire into the propriety or impropriety of passing such an Act of Parliament. The only thing for persons who are subject to such an Act of Parliament to do is to obey. The question in this case arises under the Natal Act of Parliament in respect of offences committed in Natal, which Act has been assented to by the Governor and, having the force of law, is binding on their Lordships. The language of the Act appears to their Lordships to be subject to no question of doubt or ambiguity at all.

Section 6 enacts that :—

“ All sentences passed by any Courts-Martial or by any Court or person administering Martial Law under the authority of the Governor or of the Commandant of Militia in Natal, or by any military officer purporting to exercise authority in that behalf, since the date of the aforesaid proclamation of 9th February, 1906, including fines and other punishments inflicted by military officers in the field, are hereby confirmed and made and declared to be lawful, and in so far as the same shall not have been already carried into effect, shall be deemed to be final sentences passed by duly and legally constituted Courts of this Colony, and no appeal shall lie in respect of same, but they shall be and remain in force and shall be carried out in the same manner as the sentences of the Courts of Law in this Colony.”

Under these circumstances their Lordships feel that it is impossible to entertain any question of appeal, and they will therefore humbly advise His Majesty to dismiss the Petition. Their Lordships are of opinion that in the circumstances of this case the Petitioner ought to pay the costs of the Petition.

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