

FLAVIANO T. CONCEPCION, PETITIONER, VS. BRIGADIER GENERAL RAFAEL JALANDONI, ACTING CHIEF OF STAFF, PHILIPPINE ARMY, RESPONDENT.

G. R. No. L-148. December 20, 1945

Ponente: JARANILLA, J.

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JARANILLA, J.:

The above-entitled cause is before us by virtue of a petition filed by Flaviano T. Concepcion praying that Brigadier General Rafael Jalandoni, Acting Chief of Staff of the Philippine Army, be ordered to desist from trying the petitioner for a violation of section 48 of Commonwealth Act No. 1, otherwise known as the National Defense Act. The petitioner alleges that article 2 of the Articles of War (Commonwealth Act No. 408) does not cover him because it provides among others:

"ART. 2. Persons subject to Military Law.—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law' or 'persons subject to military law,' whenever used in these articles:

"(a) All officers, members of the Nurse Corps and soldiers belonging to the Regular Force of the Philippine Army; all reservists, from the dates of their call to active duty and while on such active duty; all trainees undergoing military instructions; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same * * *."

Petitioner further alleges that the general court-martial has no jurisdiction over his person, for "he has never been enlisted in nor mustered into the Philippine Army which was incorporated into the USAFFE and that he is still a civilian up to the present time."

Answering the allegations of the petition, the respondent states among other things:

- That petitioner Flaviano T. Concepcion, a reservist in the Philippine Army, is charged before the general court-martial, Philippine Army Headquarters, with having violated the 97th Article of War, containing the following specification: "In that Flaviano T. Concepcion, being a reservist in the Philippine Army, and having received a call for active duty, did, at Manila, Philippines, on or about the later part of October, 1941, fail to report for active duty as directed by the Chief of Staff, Philippine Army, conduct punishable under section 48 of the National Defense Act";

- That on May 20, 1945, one Juana Videra of 1177 Antonio Rivera, Tondo, Manila, in a letter addressed to the Adjutant General, Philippine Army, stated that she was the mother of one Crisanto V. Sabio, who enlisted as a private in the S2d Infantry Regiment, Philippine Army, and who died of dysentery in the prisoners' camp in O'Donnell, Tarlac, on May 10, 1942, and so she requested that necessary action be taken against the herein petitioner, Flaviano T. Concepcion, who had induced her aforesaid son to enlist, in lieu of himself, for the reason that said petitioner did not want to go to the front when he was called to duty by the headquarters; and that as a

result of said letter of Juana Videra the matter was investigated and Flaviano T. Concepcion was charged with a violation of said section 48 of the National Defense Act.

At the hearing of this case the petitioner was represented by Major Antonio M. Sanchez of the Philippine Army and the respondent by Colonel Luis P. Torres, Judge Advocate General of the Philippine Army.

The main contentions of counsel for the petitioner, in his oral argument and in his written memorandum, are:

- That the court-martial which was created by order of the Chief of Staff of the Philippine Army, in accordance with Commonwealth Act No. 408, known as the Articles of War, for the purpose of trying the case of the petitioner, does not have jurisdiction over him, because the jurisdiction of the general court-martial is confined, according to article 12 of the same Act, "to try any person subject to military law for any crime or offense made punishable by those articles, and any other person who by the law of war is subject to trial by military tribunals * * *";
- That the phrase "have power to try any person subject to military law" under article 2 of the Articles of War (Commonwealth Act No. 408) has reference to "all reservists, from the dates of their call to active duty and while on such active duty * * *" and therefore the following elements must be present before said court-martial can have jurisdiction to try the herein petitioner, viz.: (a) a person must be a reservist, (b) he must have been called to active duty and (c) while on such active duty;
- That the absence of any of the above-mentioned elements deprives the court-martial of jurisdiction over the person of the petitioner, because the law uses the word "and" and not the word "or" between the words "duty" and "while," and therefore the natural meaning of the word "and" is to join concomitant phrases, which means that all phrases joined by that word "and" must coexist and become part and parcel of the whole; and that this clearly indicates the intention of the legislature to include only reservists called to active duty and duly incorporated in that active service, excluding the reservists called to active duty who failed to be in that active service;
- That if the herein petitioner should be tried by the present general court-martial organized by the respondent herein it would be tantamount to giving the respondent the power to legislate and to prescribe rules of law—a prerogative belonging exclusively to the legislature;
- That the National Defense Act was passed and approved on December 21, 1935, and three years later, or on September 14, 1938, the same legislature passed the Articles of War (Commonwealth Act No. 408), prescribing in section 3 of said Act that "all laws and parts of laws in so far as they are inconsistent with said Act are hereby repealed," and in view thereof the court-martial that is trying the petitioner is not the same court-martial that should take cognizance of any violation of said section 48 of the National Defense Act.

After giving mature consideration to all the allegations and arguments of both counsel, we find that the petitioner has clearly violated section 48 of Commonwealth Act No. 1, known as the National Defense Act, by not reporting for active duty training as required by said section 48, which provides that "any reservist who fails to report for active duty training as directed by the Chief of Staff shall be punished as the court-martial may direct." It is admitted that the petitioner is a reservist and as such is subject to call for active duty training as provided by law and that he failed to answer said call, although he insists that the third element, "while on such active duty," is lacking in order that he may be considered as a "person subject to military law."

The main question at issue may be reduced solely as to whether or not the general court-martial has jurisdiction to try the petitioner for a violation of the 97th Article of War, which provides:

"ART. 97. General article.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline and all conduct of a nature to bring discredit upon the military service

shall be taken cognizance of by a general or special or summary court-martial according to the nature and degree of the offense, and punished at the discretion of such court."

The provisions of article 2 (a) of the Articles of War that "all reservists, from the dates of their call to active duty and while on such active duty * * * and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same * * *" are amply sufficient to include the petitioner and to have him considered as a "person subject to military law." The said proviso means and should be interpreted to mean that from the moment a reservist is called to active duty or a person is lawfully called to duty or for training he becomes subject to military law until he is reverted to inactive status. Thus, from the time he is called to active duty as above stated and fails to answer the said call, he is amenable to prosecution as a "person subject to military law," and his case is cognizable and triable by the court-martial convened in accordance with the provisions of the Articles of War. Such reservist or person lawfully called to duty does not have to be "on such active duty" or "and while on such active duty" before he can be considered as included in the phrase "person subject to military law," because how could he be "on such active duty" or "while on such active duty," when he failed to answer the lawful call for the purpose?

In the United States the law governing the militia service or employment of the militia in the public service is similar to that under which the petitioner was called to duty as a reservist in the Philippine Army. The provisions of the Articles of War governing the armies of the United States, in section 2 thereof, are similar to those of section 2 of Commonwealth Act No. 408, known as the Articles of War, and the phrase therein "any person subject to military law" construed by the United States courts, in applying the provisions of the National Militia Law, to the effect that persons called to duty or service who fail to answer said call are amenable to prosecution for violation of the militia law, and such cases are cognizable by the general court-martial. Thus in the case of McCall's (1863) 5 Phila. (Pa.), 259; 20 Leg. Int. (Pa.), 108, 292; 15 Fed. Cas., No. 8669, it was held that "a state militia man disobeying an order to attend a rendezvous, duly called under an Act of Congress, is subject to military discipline."

The following rulings have also been laid down in various cases decided by the United States courts:

"Under section 2 of Selective Draft Act, May 18, 1917, c. 15, 40 Stat., 77, and this section (art. 2), one certified into military service under that Act was, from date he was certified, subject to military law, and to punishment as deserter on account of his refusal to obey summons." (Franke vs. Murray [Mo. 1918] 248 F., 865; 160 C. C. A., 623.)

"Under section 2 of Selective Service Act (40 Stat., 77), declaring all persons drafted into the service to be subject to the laws governing regular army, and this section (art. 2), making persons lawfully called to duty or for training in the militia service subject to military law (subd. [a]), a person ordered by the district draftboard to entrain for an encampment for induction into the militia service is subject to military law, and to punishment by a military court. of desertion." (Ex parte Thieret [C. C. A., Ohio, 1920]; 268 P., 472.)

"A drafted man, ordered to report for military service under Selective Service Act, but remaining in hiding until after the draft boards were abolished, may be tried by court-martial for desertion without a preliminary investigation before the draft board, as such investigation under a presidential order was a mere procedural step, the abolition of which does the drafted man no harm." (United States vs. Lehman [D. C. Ed., 1920]; 265 F., 852.)

"Under this section (art. 2) and Supplemental Rules and Regulations No. 1 Aug. 1, 1917, § 3, providing that a person drafted shall be in the military service from the date specified in the notice mailed to him by the Adjutant General, requiring him to report for service by a date specified, a draftee to whom such notice was in fact mailed was subject to military law from the date so specified, whether or not he received the notice." (United States vs. Rice [D. C. Texas, 1922]; 281 F., 326.)

It is evident from the above-quoted decisions that persons who were called to active duty or service but could not be on such active duty or service because they failed to become under that category by not answering the call can be legally tried by the military court or court-martial, as they are considered "persons subject to military law" from the time they were called to active duty—a situation similar to that of the petitioner herein.

According to the extended argument of counsel for the petitioner, the legislature should have enacted another proviso to fill up the gap or lack of provision in the National Defense Act, for the latter in its section 48 above quoted mentions simply the court-martial- to try violators of same but does not provide for the organization of the said court- martial, and the respondent cannot legislate on the matter. Commonwealth Act No. 408, known as the Articles of War, which provides for the organization of the general court- martial that shall have jurisdiction to try cases involving almost all kinds of violation of military law (article 97), was subsequently enacted on September 14, 1988, after the passage of the National Defense Act on December 21, 1935. We can therefore safely presume that the enactment of the pertinent provisions included in the Articles of War (Commonwealth Act No. 408) regarding the organization of the general court-martial for the purpose of trying violations of the National Defense Act, specifically section 48 thereof, violated by the petitioner in October 1941, was enacted by the legislature precisely to provide a remedy which is wanting in said National Defense Act.

As to the further contention of counsel for the petitioner that section 3 of Commonwealth Act No. 408 (Articles of War) repealed section 48 of the National Defense Act because of inconsistency in their provisions, we are of the opinion that said contention is not well founded, for we find no such inconsistency between the two Acts with reference to the case of the herein petitioner.

In view of all the foregoing considerations, we are of the opinion and so hold that the petitioner may be tried by the general court-martial under the 97th Article of War in view of his conduct in violation of section 48 of the National Defense Act, and that the petition is clearly without merit and therefore it is hereby denied, without costs. So ordered.

Moran, C. J., Ozaeta, Paras, Feria, De Joya, Pablo, Perfecto, Bengzon, and Briones, JJ., concur.

MORAN, C. J.:

I certify that Mr. Justice Emilio Hilado voted for the denial of the petition.

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