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**Authority to convene a General Court
Martial: Is it delegable? - *N.A.F v Ex Wing
Commander L.D. James* examined**

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INTRODUCTION

We are concerned here with a Court Martial. Who can convene a General Court Martial? Can such a power be delegated? These two questions were answered by the Supreme Court in the recent case of *N.A.F. v. James*.¹

The purpose of this review is to examine the basis of the Supreme Court decision vis-à-vis, the decision of the Court of Appeal and the provisions of the Law. This is particularly important as a number of similar appeals are presently in the Court of Appeal and Supreme Court²

FACTS OF THE CASE

Ex-wing Commander L.D. James was tried along with eight other Air-force Officers for stealing, corrupt enrichment, unlawful possession of a pistol and disobedience to standing orders i.e. engaging in private business before a General Court Martial (G.C.M.) sitting at Ikeja.

Air Commodore F.O. Ajobena signed the Convening Order for the G.C.M. under the authority of the Chief of Air Staff (C.A.S.).

In its judgment delivered on 27th day of September 1996 and confirmed on the 21st day of October, 1996, the G.C.M. found Ex-wing Commander L.J. James guilty on all twelve counts. He was sentenced to a total of 50years imprisonment and ordered to refund a sum of ₦1,725,000.00 (One Million, Seven Hundred and Twenty

¹ [2002] 18 N.W.L.R.(pt.798) 295

² See Sections 251 (3), 257, 272 of the Constitution of the Federal Republic of Nigeria, 1999, Both the Court of Appeal and the Supreme Court only exercises appellate criminal Jurisdiction under Section 240 and 243 respectively of the 1999 Constitution.

Five Thousand Naira) with interest at the rate of 15% per annum. The G.C.M. also ordered that the properties of the Accused be auctioned.

The accused appealed to the Court of Appeal. One of the issues raised was that by virtue of Section 131 of the Armed Forces Act, 1993 (as amended), the proceedings of the G.C.M. was a nullity in view of the convening order signed by Air Commodore F. O.

Ajobena, Director of Personnel, Headquarters Nigeria Air Force (N.A.F.) purportedly acting on behalf of the Chief of Air-Staff on verbal instructions. A letter was subsequently written by the CAS to Ajobena instructing him to convene the G.C.M.

The Court of Appeal in allowing the appeal and declaring the orders made by the G.C.M. as nullities held *inter alia* that there was nothing in Section 131(2) of the Armed Forces Act, 1993 (as amended), which enables a person to whom the power to issue a convening order for G.C.M. is vested to delegate that power. In the circumstances, Air Commodore Ajobena was not a person qualified to convene a G.C.M., as he did not hold any of the offices listed in Section 131 (2) thereof. Since the convening order was null and void, the trial and conviction were equally null and void³. The Court consequently set aside the conviction and sentence.

The Nigerian Air Force (the appellant) appealed to the Supreme Court on various grounds. One of the issues raised was whether the Court of Appeal was right in holding that the G.C.M. was not properly convened and had no jurisdiction to try the accused in view of Section 131 (2), Armed Forces Act, 1993 (as amended).

The Supreme Court held on this point that by virtue of Section 131 (3) of the Armed Forces Act, 1993 (as amended), the CAS had every power to delegate his power to issue convening order for a GCM to Air Commodore Ajobena. The Court *per Onu, J.S.C.* further held as follows:

“I hold the view that the sub-section empowers appropriate superior authority to authorize a senior

³ See the Court of Appeal decision as reported in *James v. Nigeria Air Force* [2000] 13 N.W.L.R. (pt. 684) 406.

officer to order a Court martial in special circumstances. By Section 128 (1) of the Decree, an appropriate superior authority in relation to a person charged with an offence include (a) a Commanding Officer; and (b) any Officer of the rank of Brigadier or above or officer or corresponding rank or those directed to so act under whose command the person is for the time being. I am of the firm view that the CAS qualifies as an appropriate superior officer under the subsection.”⁴

In answer to the accused/respondent’s submission that the letter attached to the convening order was not a delegation of power but rather an abdication of power, the Court held that the document raised a presumption of regularity and that the delegation was proper.

REVIEW OF THE CASE

The question is was the Supreme Court right in its interpretation of Section 131 of the Armed Forces Act, 1993 (as amended)? Can the power of convening a GCM be delegated?

For an appreciation of the point, Section 131 of the Armed Forces Act, 1993 provides:

S. 131 (1): Subject to the provisions of this section, a court martial may be convened by:

- (a) The President; or
- (b) The Chief of Defence Staff; or
- (c) The Service Chiefs; or
- (d) A General Officer Commanding, a Brigadier, Colonel or Lieutenant Colonel or their Corresponding ranks having Command of a body of troops or establishments, or
- (e) An Officer for the time being acting in place of those officers.

S.131 (2)- A general Court martial may be convened by:

⁴ See page 318 Per Onu, J.S.C.

- (a) The President; or
- (b) The Chief of Defence Staff; or
- (c) The Service Chiefs; or
- (d) A general Officer Commanding or corresponding command; or
- (e) A Brigade Commander or corresponding command.

S.131 (3): The Senior Officer of a detached unit, establishment or squadron may be authorized by the appropriate superior authority to order a Court martial in *special circumstances*.⁵

It is a trite principle of interpretation of statutes that all parts of a section of a law must be read together to get the full import of it and the intention of the lawmaker.

In *Texaco Overseas (Nig.) Pet Co. v. F.B.I.R.*⁶, Uwaifo, J.C.A. (as he then was) said:

“It appears to me that the two subsection must be interpreted together. That is the surer way of ascertaining the intention of the legislator.”

The Supreme Court in construing Section 131 (3) of the Armed Forces Act stated that the CAS could properly authorize any Senior Officer of a detached unit or squadron under him to order a Court Martial. Air Commodore Ajobena was a Senior Officer being the Director of Personnel of NAF⁷.

It is my opinion that the Supreme Court was right in holding that the Court of Appeal did not think about the provisions of Section 131 (3) and that it only examined Section 131 (2) of the Act. However it is submitted that the Supreme Court itself did not construe Section 131 (3) in its entirety.

⁵ Italics mine for emphasis

⁶ [1997] 4 N.W.L.R. (pt.501) 566 at 572. See also *Salami v. Chairman, L.E. D.B.* [1989] 5 N.W.L.R. (pt. 123) 539 at 551; *A.G. Bendel v Aideyan* [1989] 4 N.W.L.R. (pt. 118) 646 at 668; *State v. Olatunji* [2003] 14 NWLR (pt.839) 138.

⁷ See page 330 *Ibid.*

For an “appropriate superior authority”⁸ to delegate its power to convene a GCM to a senior officer under Section 131 (3), it must be under “special circumstances” What would constitute “special circumstances” is not defined in the Act. Honourable Justice Onu, whilst referring to the submission of learned counsel for the appellant as to what constitutes “special circumstances” did not attempt to define it⁹. However Kalgo, J.S.C. in his concurring decision at page 331 A-B said:

“It is also my respectful view that what made the circumstances of this case special is the decision of the Chief of Air Staff to delegate his power to convene a Court Martial for the trial of his own staff”.

I submit that the above circumstance could not qualify as “special circumstance” that would enable the “appropriate superior authority” to delegate power to convene a GCM.”

Blacks Law Dictionary 6th Edition (Centennial) Edition at Page 1397 defines “Special” as “Unusual, extraordinary”.

“Extraordinary circumstance is defined at page 586 as “Factors of time, place, etc. which are not usually associated with a particular thing or event; out of the ordinary factors”.

⁸ Section 128 (1) Armed Forces Act defines appropriate superior authority as (a) a Commanding Officer, (b) any officer of the rank of a Brigadier or above or officer of corresponding rank and those directed to so act under whose command the person is for the time being. This means that the CAS is an appropriate superior authority. See page 318 *ibid.* Section 128 (2) of the Act empowers the President to make rules that will confer on the appropriate superior authority power to delegate his functions to specified officers.

⁹ See page 318 Paragraph F.

The Webster's Ninth New Collegiate Dictionary at Page 1131 defines "Special" as being "other than the usual".

Special circumstances therefore must be an unusual circumstance. The case law authority in this country is replete with what may constitute special circumstances. This is particularly so in a case of application for stay of execution. The law is that an applicant for stay of execution must show special circumstances why the application should be granted¹⁰.

In the recent case of *Olunloyo v. Adeniran*¹¹, the Supreme Court held that:

"A litigant applying for a stay of execution must thus show special or exceptional circumstances pleading eloquently the balance of justice weighing in his favour, even though what constitutes *special or exceptional circumstances vary from case to case*"¹².

The Webster Ninth New Collegiate Dictionary at page 432 defines "exceptional" as "rare" "deviating from the norm".

In a contract of service, the Supreme Court stated what would amount to "special circumstances" to warrant the court ordering specific performance in the case of *Chukwumah v. Shell Petroleum Co*¹³.

"The general law is that the Court will not grant specific performance of a contract of service. Therefore a declaration of the effect that a contract of service still subsists will rarely be made. Special circumstances will be required before a declaration is made and its making will normally be in the discretion of the court. There is a long line of cases in support of this proposition of law. — Such special circumstances have been held to arise where the contract of employment has a legal or statutory

flavour, thus putting over and above ordinary master and servant relationship"¹⁴.

In the case of *Soyanwao v. Akinyemi*¹⁵, the Court of Appeal defined special circumstance as used in Order 3 Rule 3 (4), Court of Appeal Rules as "an exceptional circumstances that is particular, peculiar and distinctive circumstances, additional to the ordinary stream of things of affairs".

Although the above are civil cases, it is clear that a special circumstance that would warrant a delegation of power to convene a GCM by an appropriate superior authority must be exceptional, extraordinary and additional to the ordinary stream of things or affairs. It is my opinion that a "special circumstance" must be such that has a sense of urgency or one over and above the normal situation, unusual and for which the appropriate superior authority would not be in a position to take a position or sign the convening order. In the case under review the CAS merely delegated orally to Air Commodore Ajobena to convene the G.C.M. He later reduced the delegation into writing. There was no evidence on record that showed any case of urgency or special circumstances warranting the delegation.

Therefore, it is my humble opinion that no special circumstance was shown in the case under review. The Supreme Court ought to have held the G.C.M. was not properly convened.

CONCLUSION

The Supreme Court in the case under review rightly decided that an appropriate authority could delegate its power of convening a GCM but it was wrong to have found in the circumstances of the case that the GCM was properly convened. This is because under Section 131 (3) of the Armed Forces Act, 1993 (as amended) "special circumstances" must be shown before delegation can be valid. No such special circumstances were established in this case.

¹⁰ See *Vaswani v. Savalakh* [1975]12 S.C. 77. [1972] NSCC 692

¹¹ [2001] 4 N.W.L.R. (pt. 734) 699 at 710 C - D

¹² Italics mine.

¹³ [1993] 4 N.W.L.R. (pt. 289) 512 at 537 F - H. This case was followed in *Isievwore v. N.E.P.A.* [2002]13 N.W.L.R. (pt. 784) 417 at 436 D - F

¹⁴ Italics mine.

¹⁵ [2001] 8 N.W.L.R. (pt. 714) 95 at 121 H.

As other cases involving military officers convicted by the GCM come before the Court of Appeal and Supreme Court, the Courts should consider this aspect limiting the power of delegation.

The prosecution before the GCM also has to discharge the burden of proof of special circumstances necessitating delegation of power to convene the GCM. Otherwise, the Courts are bound to hold that the GCM was improperly convened and all its proceedings null and void¹⁶.

¹⁶ See *Madukolu v. Nkemdilim* [1962] 2 S.C.N.L.R. 314.