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The Federal Court Decision on Military Desertion: The Demise of R vs Mahoney

By
Fadzil Mokhtar

The military offence of desertion has always been considered a serious crime, as it leads to wasteful drain on resources besides undermining morale and force effectiveness. In England, the capital punishment imposed since ancient times for desertion in time of war was only abolished in 1955, and, hitherto, the crime is punishable with imprisonment whether committed in war or in peacetime.

Likewise, desertion committed on active service and in other situations attracts a maximum imprisonment of respectively 14 years and 2 years imprisonment under Malaysia's military law, which mirrors the British Army Act 1955, and shares similarities with the service law of countries that have adopted the Anglo-Saxon legal tradition. Hence, there is not much difference between the categories of desertion denounced in such countries and those criminalised under the Malaysian Armed Forces Act 1972, the most common of which is "straight" desertion. This type of desertion is crystallised once an officer or a serviceman leaves His Majesty's Service with the intention of remaining permanently absent from his duty. Only two elements need to be proven to drive home a charge of "straight" desertion, viz., an accused has absented himself without authorisation, and he did so with the intention of remaining away permanently from military service.

Even though the aforesaid element of "intent" can hardly be proven with direct evidence, "straight" desertion is generally viewed as a straightforward case in the Malaysian Armed Forces (MAF), because it is considered well-settled, based on the authority of the 1956 British case of R vs Mahoney, that a lengthy period of absence alone, without satisfactory explanation, will entitle a court to draw an inference that an accused intended to remain absent permanently. Thus, most often, convictions have been secured with a guilty plea while cases that proceeded to trial have been few and far between, with only one reaching the Federal Court. In this case, the apex court, in September 2022, rejected the long-standing reliance on the said British case-law as a means of proving "intent to desert."

The decision of the Federal Court arose from the court-martial of Colonel Dr Faiz Azraai Bin Abd Aziz, who, while serving as an anaesthetist at the Armed Forces Tuanku Mizan Hospital, Kuala Lumpur, went absent without leave on 19 October 2016 till his arrest by the Military Police at the car park of UMRA Hospital Shah Alam on 4 May 2017. He was detained in custody at the Armed Forces Detention Centre until a magistrate, before whom he was produced on 8 May 2017, ordered his release on the ground that his production was not made within 24 hours from the time of his arrest. Immediately thereafter, Colonel Dr Faiz reported back to work in his uniform, and was placed at the General Department of the hospital. He was court-martialled three months later on a charge of leaving His Majesty's service from 19 October 2016 till 4 May 2017 with the intention to remain permanently absent, of which he was convicted and sentenced to three months imprisonment as well as dismissal with disgrace.

Failing to obtain a judicial review from the High Court and Court of Appeal, Colonel Dr Faiz appealed to the Federal Court, which ruled in his favour, and quashed the court-martial's decision, holding that it had erred in convicting the officer, as his intention of not returning to military service, which was the critical element in the charge of desertion, was not proven by the prosecution. The military court was also found to have erroneously applied the case of R v Mahoney in inferring that Colonel Dr Faiz's intention to remain away permanently was manifested by his prolonged absence, and that he would not have returned to the military but for his arrest by the Military Police. The Federal Court maintained that no such inference could be drawn, as the prosecution neither did lead evidence to establish the requisite intent nor did it put the issue of intent to the accused during his cross-examination.

The above ruling was made based on the court answering in the negative the following question of law:

> *"Can unsanctioned absence from duty for six (6) months be sufficient to satisfy the element of 'leaves His Majesty's Service' ……...with the intention of remaining 'permanently absent from his duty' as defined in section 54(2) of the Armed Forces Act 1972?"*

It is noteworthy that although the Federal Court is at odds with R vs Mahoney, in its ruling that period of absence is not sufficient to satisfy the element of "intent," its decision is not incongruous with the approach adopted in countries having identical definition of military desertion. In the United States, for instance, the principle similar to R vs Mahoney was overturned in 1957, because it could lead courts to automatically equate prolonged absence to intent of remaining permanently absent, without applying their mind to the question whether the presence of such intention had been adequately established.

Therefore, since then, duration of absence alone cannot prove an intent to remain away permanently, and an inference of such intention can only be drawn if the length of absence is accompanied with other evidence. Even so, as asserted by the Indian Supreme Court in the 1986 case of Capt Virendra Kumar vs Chief of the Army Staff, inference drawn from such facts is only prima facie, and not conclusive, evidence of intent to desert. It is, thus, open to an accused to present a satisfactory explanation or bring in evidence for dispelling the said inference.

Keeping the aforementioned in view, the Federal Court's decision does leave three issues unresolved. First, why was the fact of Colonel Dr Faiz's arrest left out of the equation, since it was the "additional evidence" that could have furnished a substantial basis for an inference of the Colonel's intent to be drawn when considered in combination with his long period of absence. Unfortunately, this issue was not posed for the court's consideration, presumably, because the

parties could have regarded that no arrest had taken place given the Magistrate's decision on the illegality of the officer's detention despite both the High Court and Court of Appeal declaring that the officer's arrest on 4 May 2017 remained valid, as it was not vitiated by his subsequent wrongful incarceration. As a result, the position of termination of absence by apprehension as a criterion for proving intent remains uncertain in Malaysia although it is accepted as an appropriate circumstance in some jurisdictions.

The second issue relates to the Colonel's argument that no intention to desert could be proven, for he had returned to duty, whether it was on 4 May 2017, when he was arrested, or voluntarily on 8 May 2017, pursuant to his release by the Magistrate. The Federal Court accepted it. But, with all due respect, this claim actually had no basis. His return to work on 8 May 2017 was not material, as the period of absence constituting the charge against him was only from 19 October 2016 till 4 May 2017. It was also far from accurate to claim that his absence was terminated by his return to duty on 4 May 2017 considering that it was his arrest by the Military Police that brought him back into military control. Further, absence terminated by apprehension could not indicate any other intention but an intent to desert.

The other issue is concerned with the ruling on the requirement for the element of intention to desert to be put to an accused when he is cross-examined whenever direct evidence is unavailable. This, implicitly, means that there can be no drawing of an inference unless an accused has been posed with questions pertaining to his intention during his cross-examination. With respect, this requirement, while clearly applicable to Colonel Dr Faiz's case, would not be met when no opportunity for cross-examination is presented like in cases where accused persons opt to remain silent or give an unsworn statement.

Nonetheless, the foregoing does not in any way suggest that Colonel Dr Faiz's case was wrongly decided. The same decision could still be reached even if the issue of "return to duty" were to be discarded and the fact of his apprehension were to be considered. This is because the reasons advanced by Colonel Dr Faiz for his absence, which were not challenged in the court-martial, would dispel the negative inference that could be drawn from his lengthy absence and the manner of its termination. These included the depression he suffered resulting from the torment imposed by his superior at his workplace, his domestic problems that led to a divorce with his wife, and the need to raise an autistic child.

Indeed, those reasons, together with the failure of the prosecution to expressly put the issue of intent to Colonel Dr Faiz during his cross examination, dealt a fatal blow to the verdict of the court-martial. Given those reasons, no court would safely infer that the Colonel was an absentee harbouring the intention to remain permanently away from his military service.

It can therefore be concluded that proving "an intent not to return" is not as simple as it might appear. This pivotal element of "straight" desertion can no longer be proven by relying on mere period of absence no matter its length. It is also less clear if termination of absence by apprehension will be of much value. What is certain, though, is that the prosecution must do more, including questioning an accused, to prove the essential element of intent. This will necessarily include ceasing the seemingly time-honoured practice in the administration of criminal justice in the MAF – the heavy reliance on R vs Mahoney.

***Fadzil Mokhtar**, a retired Malaysian Army officer, is currently a Fellow at the Centre for Defence and International Security Studies, National Defence University of Malaysia.*

National Defence University of Malaysia
Sungai Besi Camp, 57000 Kuala Lumpur
Phone: (+603) 9051 3400 ext. 4618
Fax: (+603) 9051 3031
E-mail: cdiss@upnm.edu.my