

(1999) 11 DEL CK 0059
In the Delhi High Court
Case No : C.W. NO. 3878 of 1999

Ashok Kumar (Col.)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-11-1999

Acts Referred:

Air Force Act, 1950 — Section 119, 152, 39

Citation : (2000) 2 AD 388

Hon'ble Judges : N.G. Nandi, J

Bench : Single Bench

Advocate : Mr. Narender Kaushik, for the Appellant; Mr. Rakesh Prasad, for the Respondent

Judgement

N.G. Nandi, J.—In this writ petition under Article 226 of the Constitution of India, the petitioner - an Air force personnel has been praying for a relief of quashing the District Court Martial order dated 18.5.1999 and also quashing the charge-sheet dated 23.3.1999.

2. It is the say of the petitioner that he was enrolled as an Airman in the trade of MET/Assistant. On 30.3.1997, the petitioner was posted to BC & LU Air force. Lucknow and was working as Meteorologist at the relevant time; that the petitioner was required to file a redress of grievance application against MWD K.K. Singh u/s 26 of the Air force Act (hereinafter referred to as "the Act"); that pursuant to the redress of grievance the petitioner was issued a Movement Order to proceed to 17 Wing Gorakhpur for temporary duty with a view to punish the petitioner, though he was not due as per the turn to proceed on temporary duty as per the roster maintained in the office; that on oral plea of redressal of this grievance, the petitioner was threatened with dire consequences; that due to this extraordinary mental stress and strain the petitioner lost his mental balance and was under treatment by CGHS Dr. C.P. Gupta at Delhi; that the petitioner remained under treatment for sleeplessness and insomnia. After two months' treatment, the petitioner reported to his duties on 16.12.1997 and the same is

later confirmed by respondent's medical authority and kept in hospital from 3.2.1998 to 21.2.1998. This was due to harassment and ragging by respondent No. 7, that there is total non-compliance with Rule 24 of the Air force Rules, 1969 (hereinafter referred to as "the Rules") and principle of natural justice; that no copy of charge-sheet was given to the petitioner (it was only read out to the petitioner). No statement is taken in presence of the petitioner and was not given adequate time to defend his case; that medical certificate was not looked into by the Commanding Officer and the same procedure was followed in the summary of evidence; that respondent No. 4 declared the petitioner of unsound mind and required to be checked by a psychiatric. Even then the petitioner was directed to perform his normal and routine duties; that all of a sudden, respondents 6 and 7 called the petitioner and send him to Psychiatric Ward Command Hospital. Lucknow by respondent No. 4: that the petitioner was declared medically fit. The petitioner was put on charge by respondent No. 7; that chargesheet dated 16.12.1997 was kept pending for oblique reasons and was put on charge for 4 days from 21.1.98 to 27.1.98 though the petitioner's leave application remained with the Adjutant for one day's leave in addition to 3 days' holidays, who advised the petitioner to go on leave as petitioner's leave was sanctioned. The petitioner was again put on charge on 19.4.98. The petitioner was taken into custody on 1.4.1999 and kept into confinement. The petitioner prayed for time for preparing his defense. He was hardly given three hours to search a lawyer in Allahabad. The preliminary objections were filed before the District Court Martial (DCM). The DCM passed the order dated 18.5.1999 to suffer rigorous imprisonment of 1 1/2 years with dismissal from service.

The order dated 18.5.1999 passed by DCM has been mainly challenged on the ground of jurisdiction of DCM to try the petitioner for the offences charged, procedural irregularity and non-observance/violation of rules and the disproportionality of sentence in relation of the offence.

3. Learned counsel for the petitioner, relying on Section 39 of the Act contended that the DCM has no jurisdiction, court martial proceedings are vocative of Rule 39 and Rule 43(2). Section 39 of the Act deals with absence without leave. It provides that any person who commits any of the following offences -

- (a) absents himself without leave; or
- (b) without sufficient cause overstays leave granted to him; or
- (c) being on leave of absence and having received information from proper authority that any unit or detachment, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay ; or
- (d) without sufficient cause fails to appear at the time fixed, at the parade or place appointed for exercise or duty; or
- (e) when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or

(f) when in camp or elsewhere, is found beyond any limits fixed or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or

(g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there;

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned.

Section 119 of the Act deals with the powers of the District Court Martial. It provides that the District Court Martial shall have power to try any person subject to this Act, other than an officer or warrant officer for any offence made punishable therein, and to pass any sentence authorised by this Act other than a sentence of death, transportation, or imprisonment for a term exceeding two years. It is not disputed that the petitioner was tried by the DCM.

It is submitted by learned counsel for the respondent that as per Section 119 of the Act, the DCM can impose imprisonment for a term not exceeding two years. Section 82 of the Act provides that subject to the provisions of Section 84, a Commanding Officer of such other officer as is, with the consent of the Central Government, specified by (the Chief of Air Staff) may, in the prescribed manner proceed against a person subject to this Act otherwise than an officer or warrant officer who is charged with the offence under the Act. The latter part of the Section deals with the punishment, which can be prescribed to the extent provided therein. Thus, it will be seen from the above that the DCM has the power to convene the Court Master and even the Commanding Officer can try for unauthorised absence.

Considering the provisions contained in Section 39 and Section 119, reproduced above, it does not appear that the DCM lacks jurisdiction for imposing a sentence of less than three years, as in the instant case the sentence imposed by the DCM is 1 1/2 years.

4. Rule 39 provides that an accused person for whose trial a court martial has been ordered to assemble shall be afforded proper opportunity of preparing his defense, and shall be allowed free communication, with his witnesses, and with any friend or legal adviser whom he may wish to consult.

It is suggested from the record that the petitioner was given sufficient opportunity to cross-examine the prosecution witnesses at the time of charge trial under Rule 24 AFR and during the charge trial due consideration was given to the certificate issued by the CGHS; that after hearing the charge under Rule 24, the evidence was ordered to be reduced to writing. The summary of evidence in this case was ordered on 16.12.1997 and was concluded on 17.3.1999 and the petitioner asked Sqn. Ldr. Atul Mohan to be his defense witness in March 1998. When summary of evidence was about to be over. However, Sqn. Ldr. Atul Mohan

was examined as the defense witness in the proceedings of the DCM. On petitioner's own say he was allowed only 3-4 hours' time to engage the lawyer. All what Rule 39 requires that proper opportunity should be provided to the accused to prepare his defense. Apart from the time granted for engaging the lawyer as stated by the petitioner, it is not his say as far as the preparation of his defense and the examination of the witnesses, he was not given reasonable opportunity. From the material on record, it can not be said that there was no compliance with Rule 39 and for that matter with the principle of natural justice.

5. It has been the submission by learned counsel for the petitioner that Rule 22 to Rule 25 and Section 152 have been violated inasmuch as the petitioner was taken in Air force Custody on 1.4.1999 and the DCM concluded the court martial on 18.5.1999. Rule 22 deals with manner and extent of custody pending the trial or confirmation of the court martial proceedings. Sub-Rule (2) provides that the detention in Air force custody beyond a total period of 60 days whether continuously or in broken periods of a person subject to the Act, who is not on active service and for whose trial a court martial has not assembled shall require the sanction of the Chief of the Air Staff or any other officer duly authorised with the approval of the Central Government by the Chief of the Air Staff in that behalf.

In the instant case the petitioner on the date of his detention i.e. on 1.4.1999, was on active service. Thus, under Rule 22, the competent authority is empowered to take into custody any person who has been ordered into Air force custody. As far as Rule 22(2) is concerned, the same has been observed/complied with inasmuch as the petitioner was taken in custody on 1.4.1999 as revealed from the material on record that the court martial assembled on 1.4.1999 itself and the trial concluded on 18.5.1999 and the confirmation on 5.7.1999 meaning the time taken for confirmation, as revealed from the record is from 18.5.1999 to 5.7.1999 i.e. within 47 days.

6. As far as the period from 1.4.1999 to 18.5.1999 is concerned, the same can not be regarded unauthorised detention/confinement nor the petitioner would be entitled to the set off against the period of sentence imposed by the DCM on 18.5.1999. In the case of Union of India and others Vs. Andnd Singh Bisht, it has been held that the benefit of set off of detention undergone during investigation, enquiry or trial against the sentence of imprisonment would not be available to persons tried and convicted by the Security Force Court under B.S.F. Act. In other words, the provision of Section 482 Criminal Procedure Code is not applicable to the convicts by the security force court under B.S.F. Act. There is no provision analogous to Section 482 Cr. P.C. in the Air force Act and, Therefore, the petitioner would not be entitled to any set off of period of pre-trial detention since the detention from 1.4.1999 to 18.5.1999 is 49 days.

It is sufficiently suggested from the record that the trial was conducted in presence of the accused and the accused had not only full opportunity to cross-examine the witnesses against him but has cross-examined them and has also

examined defense witness Sqn. Ldr. Atul Mohan in his defense. This would suggest the compliance with Rule 24.

In the case of Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, it has been held that in trial of an officer by Court Martial, compliance of Rules 22, 23 and 24 is not necessary unless there is request from the officer and the rules are not violate of Article 21 of the Constitution.

In the case of Major G.S. Sodhi Vs. Union of India and Major G.S. Sodhi Vs. Union of India (UOI), , while considering Section 191 of the Army Act and Rule 23 framed thereunder, it has been held by the Supreme Court that the additional summary of evidence means additional recording of summary of evidence and it is necessarily concomitant of summary of evidence and special provision permitting recording of additional summary of evidence is not necessary and that the proceedings in the General Court Martial not vitiated by minor irregularity in complying with Rules 22 to 25.

7. As pointed out earlier, the petitioner has not been able to point out that there is any non-compliance with the provisions of Rule 22 and 24. It need hardly be said that the mere procedural defects, unless those were vital and substantial, can not affect the trial. In the case of Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), , relying on the decision in the case of Prithi Pal Singh Bedi Vs. Union of India (supra), it has been observed that unless the procedural defects are shown to be vital and substantial the same can not affect the trial. In the instant case, the petitioner has participated in the trial, cross-examined the witnesses and also led defense evidence.

8. One of the arguments advanced on behalf of the Petitioner is that the sentence imposed on the petitioner is highly disproportionate. In this regard, reliance has been placed on the decision in the case of Ranjit Thakur Vs. Union of India (UOI) and Others, wherein it is held by the Supreme Court that the order imposing sentence disproportionate to the gravity of the offence charged, can be interfered with by the courts in writ jurisdiction under Articles 136 and 226 of the Constitution of India. In the latter judgment in the case of Union of India Vs. G. Ganayutham, the decision in the case of Ranjit Thakur Vs. Union of India and Others (supra) has been referred to and it has been held that the reasonableness and rationality of the sentence are the grounds for judicial review and the principle of proportionality can also be invoked while the court is examining whether the restrictions on the fundamental freedom imposed by the statute are under the constitutional limits.

In a still latter judgment in the case of State of Karnataka and Others Vs. H. Nagaraj, referring to the decision in the case of Union of India Vs. G. Ganayutham (supra) the Supreme Court, considered the question of invoking the principles of proportionality of the sentence and held that the principle can be invoked "only in cases where the punishment is totally irrational in the sense that it was in outrageous defiance of logic or moral standards". There can be no

disagreement with the principle of law enunciated in all the above cases by the Supreme Court. In the instant case, looking to the seriousness of the charge, I do not regard the sentence imposed on the petitioner on the misconduct alleged and proved to be in any manner disproportionate so as to shock the judicial conscious of the court.

Referring to the decision in the case of Vidya Parkash Vs. Union of India (UOI) and Others, learned counsel for the petitioner has submitted that the dismissal from service for unauthorised absence from duty for the 6th time is disproportionate and illegal. In the case of Vidya Parkash Vs. Union of India and Others (supra) the petitioner before the Supreme Court was from Army Service and dealt with for unauthorised absence from duty for the 5th time and, the penalty of dismissal from Army Service was held neither disproportionate nor illegal.

9. In the instant case the petitioner has incurred six red ink entries in his service record. As regard the allegations about respondent No. 7 bearing grudge or mala fide against the petitioner. I do not think there is any material on record which would call for any interference by this court. I do not find any substance in this regard.

10. Thus, it will be seen from the above that the petitioner has not been able to point out the violation of provisions contained in Air force Act as well as the Rules framed there under and the principles of natural justice also appears to have been complied with inasmuch as the petitioner has reasonable opportunity of preparing his defense and he also participated in the court martial proceedings, cross-examined the prosecution witnesses and also adduced evidence in his defense as revealed from the record.

11. In view of the above, I am of the view that no interference is called for under Article 226 of the Constitution of India in the impugned order and the petition is, Therefore, liable to be dismissed. Order accordingly.