

(1983) 04 J&K CK 0010
In the Jammu And Kashmir High Court

Bhagwan Singh	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 07-04-1983

Acts Referred:

Army Act, 1950 — Section 109, 39, 52

Citation : (1983) CriLJ 1368

Hon'ble Judges : Iqbal Kishen Kotwal, J; Ghulam Mohd. Mir, J

Bench : Division Bench

Judgement

I.K. Kotwal, J.

1 Through the medium of this writ petition, the petitioner seeks to challenge an order of a General Court Martial, for short G.C.M. convicting him

under Sections 39(a) and 52(a) of the Army Act and sentencing him to three years rigorous imprisonment, besides dismissal from service. Briefly

put, the facts of this case are as follows:

2. The petitioner's case is that he is an illiterate person, who can only write his name and army number in Roman English. He was enrolled in

Indian Army in the year 1971 as a Mechanical Transport Driver.' In May 1976, he was falsely implicated in a theft case pertaining to an army

vehicle. He was taken into custody and under duress, compulsion and torture, made to sign some letters, statements and other documents by the

Officer Commanding 133 Signal Regiment, respondent No. 4 herein, and two others, namely, Adjutant Quarter Master and M. T. O. of the Unit.

Summary of evidence was recorded in his absence, but the statement that he had made during its recording, was not, however, reduced to writing.

On 21-1-1977, respondent No. 4 charge-sheeted him under Sections 39(a) and

52(a) of the Army Act and the Assistant Adjutant and Quarter

Master General of 6 Mountain Division, contrary to the provisions of Section 109 of the Army Act and Rule 197-A of the Army Rules, hereinafter

to be referred to as the Rules, convened a G. C. M. to try him for the aforesaid offences. Before the commencement of his trial, he was not

allowed to prepare his defence nor was he told as to what were the charges against him. He objected to his trial by the members, of the G. C. M.

on the ground that they were personally interested in favour of the prosecution, but his objection was not even recorded by the G. C. M. On 10-3-

1977, he was convicted and sentenced by the G. C. M. besides being his missed from service on the basis of disconfessional statement alone,

even though he had Qualified this confession by saying further that the same was being made by him against truth in the hope of being pardoned

and retained in service. Before convicting him, the G. C. M. did not comply with the provisions of Rule 52,. This order was confirmed by the GOC

6 Mountain Division, respondent No: 3 herein, on 31-3-1977 and the petitioner was committed to civil prison on 1-4-1977 to serve the sentence.

He was not permitted to be defended either by a defending officer, or by a counsel of his choice. In this background he seeks to challenge his

aforesaid conviction and sentence on the grounds; firstly, that the finding of guilty recorded by the G. C. M. is based upon no evidence and is

visions of Rule 52: secondly, that the G. C. M. was not properly constituted thirdly, that the summary of evidence was recorded against the

mandate of Rules 23 and 24; fourthly that he was not allowed to prepare his defence not was he warned of his intended trial: fifthly, that he was not

allowed to be defended by a defending officer or by a counsel of his choice: and sixthly. that the sentence was disproportionate to the gravity of the

offences.

2. The case of the respondent on the other hand is that the petitioner along-with Signalman Jibit Kumar Gosh had stolen an array vehicle from the

premises of HQ 133 Signal Regiment and had after its theft abandoned it at Bombay, but not before removing several parts from it. He had also

sold those parts in open market. Summary of evidence was recorded in his presence by his Commanding Officer, respondent No. 5 herein who

was competent to do so. The petitioner had refused to make any statement at

the summary of evidence. Respondent No. 4 was competent to charge-sheet him and the G. C. M. was constituted by GOC 6 Mountain (Division ?) respondent No. 3 herein, and not by Assistant Adjutant and Quarter Master General, who had"" merely issued that order for and on behalf of respondent No. 3. He was supplied with a copy of the summary of evidence, and was also served with the charge-sheet before being sent up for trial. Services of a defending officer were also made available to him. and he was convicted without recording any evidence because at the very outset of the trial', he had voluntarily pleaded guilty tÂ° all the charges against him. Before convicting and sentencing him, provisions of Rule 52(2) were fully complied with. None of the members of the G. C. M. was biased against the petitioner, nor had he objected to be tried by any one or more of them, despite a specific question being put to him in that behalf. Before he had pleaded guilty to the charges, the same were explained to him in the language which he could understand, and the G. C. M. had convicted him after being fully satisfied that he had understood the charges against him. No promise was at all held out to him, nor was he ever induced to plead guilty to the charges.

3. Statements of prosecution witnesses, recorded during the course of preparing of summary of evidence, the record clearly reveals, were recorded in presence of the petitioner, who was also given an opportunity to cross-examine them, but he declined to do so. He was also given an opportunity to make his own statement with a warning that the same could be used against him at the trial. He had declined to make any statement.

This clearly shows that Rules 22 and 23 were fully complied with.

4. Even so, his conviction and sentence, in our opinion, cannot be sustained. It is common ground that the petitioner was convicted on the solitary basis of his confessional statement made by him before the G. C. M. His contention is that before acting upon his confession, the G. C. M. was bound to follow the provisions of R 52, which it did not follow at all. The respondents in reply to this averment say:

Page 3 of the General Court Martial proceedings shows that the accused having pleaded guilty to the charge, the provisions of Army Rule 52(2) were complied with which means that the Court had ascertained that the accused understood the nature and meaning of the charges to which he

had pleaded guilty and explained to him the general effect of the plea of guilty and the difference in the procedure which would be made on a plea

of guilty as contained in Army Rule 52(2). Hence there is no merit in the argument, advanced in para 15.

5. Rule 52, in so far as it is relevant for the present discussion, may be extracted:

52 General plea of "guilty" or "not guilty". _

(1) If no special plea to the general jurisdiction of the court is offered, or if such plea being offered, is overruled, or is dealt with by a special

decision under Sub-rule (4) of Rule 51, the accused person's plea - "Guilty" or "Not guilty (or if he refused to plead, or does not plead intelligibly

either one or the other, a plea of "Not guilty") shall be recorded on each charge.

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the court; but, before it is recorded, the presiding officer or

judge-advocate, on behalf of the court, shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty, and.

shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference

in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence that

the accused ought to plead "Not guilty."

6. This rule, as its language clearly warrants, is mandatory in character. Consequently, absence of its devout observance on the part of the Court

Martial, vitiates the trial of the accused. Under this Rule, before proceeding to record his plea of guilty, the Presiding Officer of the Court Martial.

or the Judge-advocate on its behalf, as the case may be. has to explain the charge to the accused and reach his own satisfaction that he has

understood it. He must also tell him that he can be convicted on the basis of his plea of guilty without recording any other evidence, for, that is the

implication of the expression "difference in procedure" occurring in R 52.

7. Even after the plea of guilty has been recorded, the Rule further enjoins upon him to go through the summary of evidence and advise the accused

to withdraw the plea, if from the summary of evidence it transpires that the accused ought not to have pleaded guilty to the charge. How, in what

manner, and to what extent this Rule was complied with, is on the respondents' own pleading, to be found out by going through page 3 of the file

of the G.C.M. proceedings. This page is reproduced in extenso as below:

The Presiding officer, Members and the Judge-Advocate are duly affirmed/sworn.

CHARGE SHEET

'B-2' The charge sheet is signed by the Judge-Advocate, marked 'B-2' and annexed to the proceedings.

The accused is arraigned upon the first and the second charge in the above mentioned charge-sheet.

Q. 2 Question to the accused: -- Are you 'Guilty' 'Not

Guilty of the first

charge against you.

which you have

heard read ?

A. 2 Answer by the accused. --Guilty.

Q. 3 Question to the accused: --Are you 'Guilty or

Not Guilty'

of the second charge

against you, which

you have

heard read ?

A 3 Answer by the accused. -- Guilty.

The accused person having pleaded 'Guilty' to the charges the provisions of Army Rule 52(2) are complied with.

8. This document does not show as to whether or not the charges were explained to the petitioner, who is not at all conversant with English, the

languages in which they were framed. It also does not show as to whether or not the Judge-advocate had satisfied himself that the petitioner had

understood the charges before pleading guilty to them. It does not show that he had informed the petitioner that he could be convicted on the basis

of his plea of guilty without recording any other evidence. Nor does it transpire from the said document that he had gone through the summary of

evidence to arrive at the conclusion as to whether or not the petitioner required to be advised to withdraw his confession. On the other hand, the

certificate appended to the aforesaid confession reveals 1hat the Judge-advocate assumed automatic compliance of Rule 52(2), on the petitioner's pleading guilty to the charges. He, in our opinion, clearly slipped into an error. Rule 52 enjoined upon him a compliance with its mandatory provision, not only in letter, but also in spirit, and this compliance ought to have been reflected in the document itself, or elsewhere in the recorded proceedings of the G. C. M. Incidentally, it is reflected nowhere, except to some extent in the reply affidavit of the respondents, which admittedly has neither been sworn by the concerned Judge-advocate, nor be the Presiding Officer of the concerned G.C.M. not for that matter, by any of its members. The conclusion is. therefore, inevitable that since there has been no compliance with Rule 52. the trial of the petitioner stands vitiated.

9. In the result, we allow the writ petition and quash the orders of the petitioner's convictional and sentence passed by the G. C. M. and confirmed by the Central Government.