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**(1963) 01 GAU CK 0010**  
**In the Gauhati High Court**

Chakra Bahadur Thapa

APPELLANT

Vs

The Commandant and Others

RESPONDENT

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**Date of Decision :** 16-01-1963

**Acts Referred:**

Constitution of India, 1950 — Article 22

**Citation :** (1964) CriLJ 486

**Hon'ble Judges :** T.N.R. Tirumalpad, J.C.

**Bench :** Single Bench

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## Judgement

T.N.R. Tirumalpad, J.C.

1. This revision arises out of the conviction of one Chakra Bahadur Thapa, a Naik in the 6th Battalion Assam Rifles, u/s 6 (b) of the Assam Rifles Act V of 1941 and out of the- sentence of 15 months" R. I. passed against him by Lt Col. Zamir Ahmed, Commandant of the said Battalion, in his capacity as first class Magistrate appointed by the Tripura Administration.

2. On 12-11-1961 an incident took place in the Assam Rifles Officers" Club at about 1 P.M. Major C. N. Madiha, Who was temporarily acting as Commandant of the Battalion, went to the Club at about 1 O'clock and saw two minor girls in the room of Naik Chakra Bahadur Thapa who was on duty at the Club. The Major appears to have questioned the said Naik about the presence of the girls in the Club premises. After that, the Major is, said to have gone to the telephone to call a friend for lunch and while he was telephoning, this Naik was alleged, to have jumped at the Major and hit him with fist on the: face) and caused profuse bleeding. Then the Major caught hold of the hand of the Naik and tried to prevent him from further violence and warned him about the consequences of his action to his superior. The Naik is then-said to have caught hold of the shirt of the officer and torn it. Then the Naik is said to have gone into the store-room and brought a sword and pointed it at the Major"s stomach, but nothing further was done with the-sword. The Major is then said to have left the Club building after going to the bath-room and washing his. face.

3. As per the Major's orders, the adjutant Captains-Roshan Lai kept the Naik in the lock up. On the same-day the adjutant drew up a crime report against the Naik. mentioning two charges under the. Assam Rifles (Amendment) Act, 1958, Section 6(b). Evidently this was a mistake-, for the Assam Rifles Act, 1941 Section 6(b). This mistake persisted; throughout the proceedings. The two charges mentioned" in the crime report were first the assault with the fist causing profuse bleeding and the tearing of the shirt: and the second the picking up of the sword from trie-Club store room and threatening to use the same. This-, crime report drawn up by the adjutant was placed before the Commandant Lt. Col. Zamir Ahmed on his return and on his assuming charge again as Cemrnahtlant of trie-Battalion on 17-11-61 and on that, he passed an order "remanded for judicial proceedings" evidently meaning.-that it was decided that judicial proceedings should be taken against the accused and that he should be remanded for the purpose. The accused continued to be kittler custody in the barracks.

4. Then a notice was given to the accused on 17-11-61 by the adjutant, for the Commandant, warning-, him that he was charged u/s 6{b) for assaulting his superior officer and that he was to give his explanation: by 21-11-61 why judicial proceedings should not be-started against him. The accused accordingly gave his: written explanation on 21-11-61. In the said explanation, he admitted assaulting Major Madiah with his fist but denied that ha brought any sword. But he stated that before he did so, Major Madiah had assaulted him with the; telephone receiver and caused him an injury and had1 grappled with him.

5. After receiving this explanation, the Commandant-framed charge u/s 6(b) of the Assam Rifles Act,. 1941 against the accused for the assault namely, the striking on the face of Major Madiah with fist and also for picking up the sword and threatening to use the same. Now the offence u/s 6(b) of the Assam Rifles Act, 1941, is a very serious offence for which the. punishment prescribed is transportation for life or imprisonment which may extend to 14 years or fine which may extend to 500 rupees. Warrant procedure had, therefore, to-be adopted for the trial. What happened in this case was that after framing the charge on 23-11-61, the Commandant started the trial on the same day and examined" two witnesses on that day and three witnesses on 24-11-61 and one witness on 25-11-61. Then he examined the accused on 25-11-61. Then he pronounced judgment o 27-11-611 by a common order in both the judicial proceeding as well as the departmental proceeding. In the-judicial proceeding, he stated that the charge of using criminal force has not only been proved but was also admitted by the accused and) that the varision of the incident given by the accused in his statement u/s 364 was clearly an afterthought and hence, he found him guilty of the. charge and it being a very serious offence affecting the discipline, he convicted and sentenced the accused to 15 months" R. I. But with regard to the charge of threatening Major Madiah with the sword, he gave the accused the benefit of the doubt as the statement of -Major Madiah was not corroborated. Then he dealt with the departmental proceedings and dismissed

the Naik from service with effect from 25-11-61. After this order was passed, the Commandant wrote to the District Magistrate to pass orders to keep the convicted person in civil jail custody for a period of 15 months.

6. This matter came to the notice of this Court on a writ petition for habeas corpus filed by the convicted person's wife. While dismissing the writ petition, this Court ordered that the papers should be called for u/s 435 Cr.PC as very serious irregularities in the conduct of the trial were pointed out in the course of the hearing of the Writ petition which did not strictly come within the purview of a Writ petition.

7. For Naik Chakra Bahadur Thapa, it was pointed out by his counsel that there has been no trial of his client in accordance with the procedure prescribed in the Criminal Procedure Code and that this has vitiated the entire trial and led to serious miscarriage of justice.

8. It was first pointed out that the Commandant had been empowered to take cognizance of the offence and hence, the very initiation of the proceedings was illegal and all the subsequent proceedings thus became vitiated. It is clear from the order of appointment of the Commandant as first class Magistrate that he was not empowered to take cognizance of any offence under Sec, 190 (1)(a), (b) or (c), Cr.PC but that he has been empowered only to enquire into or try any offence committed by a rifleman and punishable under the Assam Rifles Act or any other law for the time being in force, Thus the Commandant was certainly not empowered to take cognizance of the offence. The learned Government Advocate also accepted this position. But he drew my attention to Section 529(e) Cr.PC and argued that it was only an irregularity which did not vitiate the proceedings "": as the Commandant has evidently taken cognizance of the offence erroneously in good faith. I have to accept this argument of the Government Advocate. The Commandant evidently did not know the technicalities of the Criminal Procedure Code and did not know that when he was empowered only to enquire into and to try cases he cannot take cognizance of an offence and that the case had to be transferred to him for enquiry or trial by a Magistrate empowered to take cognizance. His good faith, I need not, therefore, be questioned. But this is not the only irregularity in the procedure.

9. The Commandant appears to have taken cognizance of the offence on the crime report submitted to him by the adjutant, Captain Roshan Lal who filed the said crime report under the orders of Major C. N. Madiah. Thus at best the crime report by the adjutant has to be treated as a complaint in writing of the facts constituting the offence and we have to take it that cognizance was, therefore, taken by the Commandant as Magistrate u/s 190(1)(a) Cr.PC the adjutant being the complainant in the case. Thus the procedure to be adopted for the trial of the case was the procedure prescribed in Chapters XVI, XVII, XVIII, XIX and XXI Cr.PC (The procedure actually adopted in this case) was not in accordance with that prescribed under any of the said Chapters, there is no provision under the Criminal Procedure Code to warn the accused about the judicial proceedings and

to get a written explanation from him as was done in the present case. I have already said that this was a case in which warrant procedure, as contained in Sections 252-257 Cr. P. C, should have been adopted for the trial. Under the said provisions when an accused is brought before the Magistrate, he cannot be called upon to plead at all until the prosecution has made out a prima facies case. The Magistrate has first to examine the prosecution witnesses and if he is satisfied from the evidence of the said witnesses that there was ground for presuming that the accused has committed the offence, then he should frame a charge and after framing the charge, he should read the charge and explain to the accused and then ask him whether he) pleaded guilty or has any defence to make. None of this procedure was gone through in the present case. Instead, the accused, was warned that a judicial proceeding will be taken and he was asked to give his explanation in writing. This is unheard of a criminal trial.

10. In his explanation, the accused had stated that he was first assaulted by Major Madiah and that his assault of Major Madiah was subsequent, thereby indicating that it was a case of self defenses. This is a serious defence plea in a criminal case and the accused should be given an opportunity to prove the said case. But, as I said, after the accused gave his explanation, on 21-11-61 charges were framed straightaway against him and he was not even asked whether he pleaded guilty or had any defence to make. Anyway, it is clear that the written explanation given by the accused was not treated as a plea of guilty. The examination of witnesses began straightaway as if it was a police case and the procedure adopted in certain respects was as provided u/s 251-A, Cr.PC But even u/s 251-A, the Magistrate after framing the charge has to question the accused if he pleaded guilty or claimed to be tried and if he claimed to be tried, he has to fix a date for the examination of the witnesses. But in the present case as soon as the charge was framed, the trial of the accused began by the examination of the witnesses. I need not go into details here. But it is enough to say that even the deposition of the witnesses was not taken down as provided u/s 356 and Section 357 Cr.PC I find that the depositions were not even signed by the magistrate as required u/s 356.

11. After the oral evidence of the prosecution witnesses was over, the magistrate no doubt took down the statement of the accused. But it was not taken down as provided u/s 342 Cr.PC in the form of questions and answers. The provision for questioning the accused by the magistrate as provided under Section 342 Cr.PC is to give an opportunity to the accused to explain the circumstances appearing in the evidence" against him. For that purpose the Magistrate must put questions to him stating the particular statements given by the prosecution witnesses against the accused and ask him what he has to answer in respect of such evidence. But the statement which we find in the record reads like his deposition of a witness. It looks as if the accused was not put any questions at all, but was allowed to make a statement as he wished. This is certainly not in conformity with Section 342 Cr.PC

12. After the examination of the accused, It was .necessary; that the magistrate should call upon him to enter upon his defence and to produce his evidence. This was all the more necessary in this case, because the accused even in his statement on the record had stated that Major Madiah had assaulted him first with the telephone receiver and caught hold of his shirt and that it was after this that he hit Major Madiah on the face with the fist twice. The accused should certainly have been asked and allowed, if he required, to lead evidence in support of such a plea which was certainly a plea of the, right of private defence. In any case, such a plea, If proved, would have gone in extenuation. But the accused was not asked to enter on his defence or to produce his defence witness.

13. I may also say here that throughout the proceedings, the accused was kept in custody in the barracks and that access was not allowed to him to any person and he Was not allowed to consult or engage a lawyer, Article 22 of the Constitution provided that no person shall be denied the right to consult and to be defended by a legal practitioner of firs choice. It Is clear that this right was denied to the accused by keeping him In custody and by holding the trial in great haste without him an opportunity to consult or engage a counsel. The accused should never have been denied the held of a counsel in his trial.

14. From the procedure adopted by this magistrate, as I have detailed above it will be, seen that the trial of this Chakra Bahadur Thapa by this magistrate has not to been in accordance with the provisions of the Criminal Procedure Code. It is enough to say that from beginning to end there has been total violation of the provisions of the Criminal Procedure Code. It is clear that this Commandant did not know the provisions of the Criminal Procedurei Code and did not know that he had to conduct the trial under the provisions of the said Code. A perusal of the record in the case clearly shows that the accused has been dealt with by this Magistrate as if he was proceeding in his capacity as Commandant of the: Battalion against one of his rifleman and not as if the accused was being tried before a Court of law. This will be clear or furor the very judgment in which, on the" evidence adduced, this Commandant had disposed of the case not only judicially but also departmental against the accused. It Is not possible to allow the conviction and sentence based on such proceedings to stand. It will amount to flagrant miscarriage of justice. I have, therefore, got to Interfere In this revision, accordingly set aside, the conviction j and sentence of Shri Chakra Bahadur Thapa by this Magistrate. But, as the offence is a serious one, It is necessary that there Should he a retrial. The case will, therefore, be sent back. The papers will be sent to the District Magistrate for being sent to an experienced magistrate for a retrial of this case against Shri Chakra Bahadur thapa In accordance with the provisions of law and hi tie light or the observations contained in this order. He may be allowed to remain on bail during trial on the same rerms as in this Court.