

(2004) 07 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : OWP No's. 493, 509 and 783 of 2000 and Service Writ Petition (SWP)
No. 2408 of 2000

C.L. Naryana and Others

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 21-07-2004

Acts Referred:

Army Rules, 1954 — Rule 58, 58(2)
Constitution of India, 1950 — Article 226

Citation : (2004) 3 JKJ 127

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Advocate : Sakal Bhushan, for the Appellant; Rohit Kapoor, for the Respondent

Final Decision : Dismissed

Judgement

Permod Kohli, J.—Petitioners in all the above petitions are aggrieved of their conviction by the Summary General Court Martial for

committing Civil Offences u/s 69 of the Army Act, read with Section 325/34 of the Ranbir Penal Code for causing grievous hurt to Capt Aseem

Kapoor of 60 Field Regiment on 8th Nov 1997. All the petitioners were serving at 92 Base Army Hospital in Srinagar at the time of the alleged

commission of offence. Petitioners in OWP No. 783/2000, OWP No. 509/2000 and OWP No. 493/2000 were swerving as Naib Subedars,

whereas petitioner in OWP No. 2408/2000 was serving as Sepoi, Petitioners were allegedly involved in an incident of scuffle that resulted in

injuries to Captain Aseem Kapoor of 60 Field Regiment.

2. As per the prosecution story Captain Aseem Kapoor of 80 Regiment was performing the duties of Convoy Commander from Uri to Srinagar

and back. One of his duties was to provide safe passage to the transients. After bringing the Convoy to Srinagar he received an information from

19th Infantry Division to enquire about the details of casualties of an accident which took place on Srinagar - Jammu National Highway in which

number of personnel of 19th Inf Division were involved. When he was proceeding towards 92 Base Hospital in a Jonga driven by NK Sudesh

Kumar at about 1830 Hrs, he saw two boys walking on the left side of the pavement. One of the boys threw an object on the Jonga. Capt Aseem

Kapoor asked the driver to stop the vehicle. Both of them got down from the vehicle as they apprehended that a Grenade was thrown on the

vehicle. Since the militants were employing women and children for subversive activities even in cantonment areas, Capt Aseem Kapoor wanted to

check the details of the object thrown on the vehicle. As soon as the vehicle stopped, both the boys ran away on the same side of the road, but

they were ultimately caught. On being asked about the item which was thrown on the vehicle and about their identify they remained silent. Capt.

Aseem Kapoor gave a slap to Sri Abhay Kumar Giri, one of the boys who admitted that the other boy had thrown something on the vehicle. The

other boy was Nagesh Raja, who had also been caught but kept silent about the object thrown on the vehicle and his identity. On being firmly

asked to furnish the details of the item thrown on the vehicle and about their identity, they started weeping.

3. Capt Aseem Kapoor wanted to hand over both the boys to Batwara TCP/CMP post to ascertain more details and to hand over to their parents

after their identity was established. When the boys were being asked to get into the vehicle, one of the accused Dharam Singh asked him as to

where the boys were being taken. On this Captain disclosed his identity. Accused also disclosed his identity. Captain Aseem Kapoor asked the

accused to speak properly or take him to officer under whose command he was serving. Accused informed him that his Colonel was staying there

only and the matter could be sorted out with him. While they were moving towards Chinar Enclave, accused asked Capt Aseem Kapoor to go to

Base Hospital. Since Captain Aseem Kapoor also wanted to visit the Hospital he agreed to accompany him to the Base Hospital, which was

nearby. On the way accused asked Captain Aseem Kapoor as to why he shouted on his children and cautioned him. On reaching the Gate of MI

Room of 92 Base Hospital the accused told the persons present there that this officer has beaten the boys. The incident was reported to Captain

Gopal Singh, Duty Medical Officer, who referred the matter to Colonel Anand, who in turn instructed the accused to go to the Senior

Registrar/OC Troops. Meanwhile, they met Maj RV Giri who after listening the accused went to the office of the Senior Registrar. During this

period accused No. 1, C.L. Narayan asked Cap Aseem Kapoor as to why he has beaten his child and threatened that he would see him. Capt

Aseem Kapoor submitted his written report after gathering information of casualties from Conference Room of 92 base Hospital. He came out at

about 8 PM, It was drizzling and there was darkness. As soon as he got down from staircase, he saw accused C.L. Narayan, Dharam Singh and

O.N. Giri alongwith some persons who while abusing punched together on his head, face, abdomen and back. His belongings like Spectacles and

Cap fell on the ground. He tried to escape and ran towards the reverse direction, but some more persons emerged from staircase of Oval ground.

About 10 persons came from the side of the Unit lines also. Accused No. 4, R.R Sodhi was amongst them, who was highly agitated and was using

abusive language, and punched on Capt Aseem Kapoor and started kicking on his abdomen and back. At the same time Lt Col M.S. Bindra, who

was going out of 92 Base Hospital saw the incident and tried to save Capt Kapoor who was profusely bleeding from his nose. His clothes were

torn and blood stained. Capt Kapoor was taken in the Ambulance which was locked from inside. As soon as the Ambulance started it was

stopped by Major S. Mukherjee and Maj R.V. Giri. Lt Col M.S. Bindra explained to them the circumstances. Ultimately Captain Kapoor was

taken to Base Hospital where he was medically examined by Capt Gopal Singh, who referred him to Major S. Mukherjee, ENT Specialist, who

observed grievous hurt on the person of Cap Aseem Kapoor.

4. A Court of Inquiry was held into this incident which was followed by Summary of evidence, which was held in July, 1998 and a Summary

General Court Martial was convened which was held on 7-7-1998. All the petitioners were convicted by the Summary General Court martial.

Petitioner/ accused Dharam Singh was convicted under Sections 325/34 RPC and Section 69 of the Army Act, 1950 and sentenced to undergo

three years rigorous imprisonment and dismissal from service. Accused/ petitioner C.L. Narayan was convicted to undergo three years Rigorous imprisonment and dismissal from service; whereas accused O.N. Giri was convicted to undergo one year's rigorous imprisonment and dismissal from service, and accused R.R. Sarthi was sentenced to undergo two years' rigorous imprisonment and dismissal from service. The sentences awarded by the Summary General Court Martial were confirmed by the competent authority. Petitioners were lodged in different jails.

5. Petitioners have approached this Court challenging the conviction and sentence awarded to them as also the proceedings/ findings of the Court Martial.

6. Besides seeking quashment of the findings and sentence dated 11-8-1999 passed by the Summary General Court martial a further direction is sought for their re-instatement into service and consequential benefits.

7. Mr. Sakal Bhushan, learned counsel for the petitioners has assailed the findings of the Court martial on the grounds:-

- (i) that this is a case of 'no evidence';
- (ii) findings are perverse;
- (iii) Two of the accused namely C.L. Narayan and O.N. Giri were not present at the time of occurrence;
- (iv) That the accused have been sentenced to undergo different punishments from one year to 3 years, though allegedly involved in the same incident;
- (v) That the award of sentence is based upon arbitrariness.

8. Lengthy arguments were addressed on behalf of the petitioners. Learned counsel for the petitioner took me to evidence of the witnesses and the findings recorded by the Summary General Court Martial. The following points have been urged during the course of the arguments:-

- (a) Court of inquiry was held on 9-11-1997 i.e. one day after the occurrence and the petitioners were not named in the inquiry. Captain Aseem Kapoor did not give the names of any of the JCOs whose children he had beaten;
- (b) Captain Aseem Kapoor did not identify Dharam Singh as assailant, as admittedly he did not know the accused persons before the incident.
- (c) The incident is alleged to have taken place in pitched dark night at 8 PM on

8-11-1997 when it was drizzling. It was not feasible to recognize the assailants not previously known.

(d) There has been non-compliance of Rule 58 of the Army Rules. The incriminating circumstances appearing in the evidence against Naib

Subedar Dharam Singh were not put to him in accordance with the mandate of Rule 58 of the Army Rules. There were no incriminating

circumstances against accused O.N. Giri on account of voluntary correction made by Captain Kapoor in his statement. No specific allegation has

been made against R.R. Sarthi to bring home any guilt. There is no legal evidence of the commission of offence u/s 325 RPC Accused C.L.

Naraina had made a statement that he was busy in attending the patients on account of mass casualties from 7.30 PM to mid night alongwith other

officers. He could not have been present on the spot at the time of alleged occurrence. Similarly, accused O.N. Giri was in his house after 7.35

PM and even watched TV news at 8.30 PM in his house. He also could not have been present on spot. Accused Dharam Singh also was busy

from 7.30 PM to 8.30 in the B.T.D.

9. Mr. Sakal Bhushan has referred to case Kanan and Others Vs. State of Kerala, wherein the Apex Court observed as under:-

Where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has

been a previous T.I parade to test his powers of observations. The idea of holding T.I. parade u/s 9 is to test the veracity of the witness on the

question of capability to identify an unknown person whom the witness may have seen only once. If no T/I parade is held then it will be wholly

unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.

10. To support the contention that unless the incriminating circumstances are put to the accused the same cannot be relied upon, reliance is placed

upon cases reported as Avtar Singh v. State, : AIR 2002 SC 3343; Sharad Birdhichand Sarda Vs. State of Maharashtra, ; and S. Harnam Singh

Vs. The State (Delhi Admn.), . He has also relied upon the case Dudh Nath Pandey Vs. State of Uttar Pradesh, in support of the contention that

the High Court can exercise its power of judicial review in the event of perversity. The Apex Court in the afore-said case held as under:

Concurrence is not an insurance against the charge of perversity though a strong case has to be made out in order to support the charge that

findings of fact recorded by more than one Court are perverse, that is to say, they are such that no reasonable tribunal could have recorded them

11. To the same effect reliance is placed upon case Union of India and Others Vs. R.K. Sharma, . In this case the Apex Court held as under:

It is only in extreme cases, which on their face show perversity or irrationality that there can be judicial review. Merely on compassionate grounds

a Court should not interfere.

12. The Union of India resisted the petition on variety of grounds. It has been stated there was sufficient and cogent evidence before the Court

Martial to convict the accused persons. The conviction has been based upon legal evidence. There has been no perversity as alleged. It has further

been contended that the questions raised relate to the appreciation of evidence which is impermissible as the High Court cannot act as a Court of

appeal to re-appraise and re-appreciate the evidence recorded by the Court Martial. It is also contended by Mr. Kapoor, learned Advocate

appearing for the respondents that the identification parade is not necessary in every case. He has referred to the evidence of the prosecution

witnesses who are the persons from 92-Base Hospital and the accused persons were very well known to them even before the incident took

place. It is also argued that the plea of alibi was never raised before and during the proceedings before the Court Martial and other authorities

during the court of inquiry or summary of evidence. The same cannot be permitted to be raised in these proceedings particularly when this plea also

falls in the realm of appreciation of evidence. It is denied that there has been any violation in observance of mandate of Rule 58. The conviction

cannot be interfered with even if the entire evidence is not put to the accused persons.

13. I have heard the learned counsel for the parties and perused the entire record on the file.

14. The main contention of the learned counsel for the petitioners is that there are contradictions in the prosecution evidence. All the prosecution

witnesses have not supported the prosecution story in material particulars. Some of the contradictions have been indicated by the learned counsel.

After going through the evidence and the proceedings and hearing the detail and lengthy arguments of the learned counsel for the petitioners, I am

of the considered opinion that this Court while exercising the writ jurisdiction under Article 226 of the Constitution of India is not to sit as a Court

of appeal over the proceedings of the Summary general Court Martial. The judgments referred to by the learned counsel for the petitioners relate

to the powers of the appellate Court. To re-appraise and re-appreciate the evidence by a writ Court is impermissible, except if the findings are

without evidence. Even if two views are possible from the evidence and there is a strong possibility of taking another view than the view taken by

the Tribunal or the Court martial, the High Court cannot substitute its own opinion on the basis of the evidence, as all these matters fall within the

realm of ""appreciation of evidence"". The Apex Court in Union of India and Others Vs. Himmat Singh Chahar, held as under:

Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of naval staff and then by

the union Government then ordinarily there should be a finality to the findings arrived at by the competent Authority in the Court martial

Proceedings. It is of course true that notwithstanding the finality attached to the orders of the competent authority in the court martial proceedings

the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose

of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross

miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceedings

or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a

power of an Appellate Authority permitting the High Court to re-appreciate the evidence and in coming to a conclusion that the evidence is

sufficient for the conclusion arrived at by the Competent Authorities IN court Martial Proceedings. At any rate it cannot be higher than the

jurisdiction of the High Court exercised under Article 227 against an order of an inferior Tribunal. This being the parameter for exercise of power

of judicial review against the findings of a competent Authority in a Court Martial Proceedings and applying the same to the impugned judgment of

the High Court we have no hesitation to come to the conclusion that the High Court overstepped its jurisdiction in trying to re-appreciate the evidence of Mrs Nirmala Sharma and in coming to the conclusion that her evidence is not credible enough to give a finding of guilt of the respondent of a charge u/s 354. We have also perused the statement of Mrs. Nirmala Sharma and the conclusion becomes inescapable on the basis of the said statement of Mrs. Nirmala Sharma that the respondent has been rightly found to have committed offence u/s 354 by the Authorities in the Court Martial proceedings.

15. It is also settled proposition of law that identification parade is not always necessary. In the present case though Captain Aseem Kapoor who was the complainant had not known the accused persons prior to the date of the incident, however, there are other reliable witnesses, namely, R.V. Giri, Lt Col N.S. Bindra and S. Mukherjee, who were from the same organization namely, 92- Base Hospital and the accused persons were known to them. Their evidence is of great importance. These witnesses were present at the time of occurrence and therefore, independent of complainant's evidence, the conviction can be entailed on their evidence. The Apex Court in case Malkhanshing and Ors. v. State of Madhya Pradesh, 2003 Supreme Today (4) 394 held as under:

It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts which establish the identity of the accused persons are relevant u/s 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other

corroboration. The identification parades belong to the stage of investigation and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantiate evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact.

16. Regarding the plea of alibi admittedly no such plea was ever taken in the proceedings before the Court Martial. Even in the statement made by the accused this was not projected as a defence. It is settled position of law that plea of alibi must be taken and proved by necessary evidence.

Alibi is being raised for the first time before the writ Court. I am afraid writ Court can consider such a plea in absence of any evidence and findings

by the Court Martial. Principle to be followed for accepting the plea of alibi has been laid down by the Apex Court in case Binay Kumar Singh v.

State AIR 1977 SC 322 wherein it has been held as under:-

It is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of the presence at

the place of occurrence, normally the Court would be slow to believe any counter evidence to the effect that the accused was elsewhere when the

occurrence happened. It would be sound proportion to be laid down that, in such circumstances, the burden on the accused is heavy. Strict proof

is required for establishing the plea of alibi.

In view of above facts and legal position, I am not inclined to accept this contention of the petitioners.

17. As far as the non-compliance of Rule 58 is concerned, the said rule is quoted here-under:

58. examination of the accused and defence witnesses --

(1)(a) In every trial for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him, the court of

the Judge Advocate-

(i) May at any stage, without previously warning the accused, put such questions to him as considers necessary;

(ii) Shall, after the close of the case for the prosecution and before he is called on for his defence, question him generally on the case.

(b) No oath shall be administered to the accused when he is examined under Clause (a).

(c) The accused shall not render himself liable to punishment by refusing to answer questions referred in Clause (a) above, or by giving answer to them which he knows not to be true.

(2) After the close of the case for the prosecution, the presiding officer or the judge advocate, if any, shall explain to the accused that he may make

an un-sworn statement, orally or in writing, giving his account of the subject of the charge(s) against him or if he wishes, he may give evidence as a

witness, on oath or affirmation, in disproof of the charge (s) against him or any person charged together with him at the same trial-

Provided that-

(a) he shall not be called as a witness except on his own request in writing;

(b) his failure to give evidence shall be made the subject of any comment by any of the parties of the Court or give rise to any presumption against

himself or any person charged together with him at the same trial;

(c) if he gives evidence on oath or affirmation, he shall be examined as first witness for defence and shall be liable to be cross-examined by the

prosecutor and to be questioned by the court.

(3) The accused may then call his witnesses including, if he so desires, any witnesses as to character. If the accused intends to call witnesses as to

the facts of the case other than himself, he may make an opening address before the evidence for defence is given,

18. This rule gives power to Judge Advocate to question the accused generally in the case after the close of the case of the prosecution. Sub-rule

(2) requires the Presiding Officer and the Judge Advocate to explain the accused of his right to make an oral or written statement giving his account

of the charge against him and lead evidence to disprove the charge. This power is to be exercised before asking the accused to lead his defence.

Rule does not say that each and every part of the evidence is to be put to the accused. Only such circumstances as are considered by the Judge

Advocate necessary, are to be put to the accused to enable him to defend himself. It is admitted case that the entire evidence of the prosecution

was recorded in presence of the accused persons. They were allowed full opportunity to cross-examine the witnesses and to lead their defence

evidence. There does not seem to be any violation of Rule 58. It is not the case of the accused persons that they were deprived of their right to

cross-examine the witnesses or to lead evidence in an effective manner. No prejudice appears to have been caused to the accused persons nor

any such prejudice has been projected to by the learned counsel for the petitioners. The Apex Court in case State of Punjab Vs. Naib Din, held as

under:

The respondent failed to show that there was any failure of justice on account of the omission to put a question concerning such formal evidence

when he was examined u/s 313 of the Code. No objection was raised in the trial Court on the ground of such omission. No ground was taken up

in the appellate Court on such ground. If any appellate Court or revisional Court comes across that the trial Court had not put any question to an

accused even if it is of a vital nature, such omission alone should not result in setting aside the conviction and sentence as an inevitable

consequence. Efforts should be made to undo or correct the lapse. If it is not possible to correct it by any means the Court should then consider

the impact of the lapse on the overall aspect of the case. After keeping that particular item of evidence aside, if the remaining evidence is sufficient

to bring home the guilt of the accused, the lapse does not matter much, and can be sidelined justifiably.

19. It is lastly contended by the learned counsel for the petitioners that different punishments have been awarded to different accused persons

though they are said to be involved in the same incident. It is settled principle of law that the sentence is to be awarded on the basis of complicity of

each accused in the commission of crime. Each accused may have different role. It is for the Court to consider the same and award punishments.

No circumstance has been brought to the notice of the court to interfere in the matter of different punishments to different accused persons.

20. Keeping in view the totality of the circumstances and the detailed discussion made hereinabove, I do not find any valid ground or

circumstances for interference in the findings of the Court martial and the sentence awarded. These petitions accordingly fail and are dismissed.