

(1995) 03 GAU CK 0008
In the Gauhati High Court
Case No : Civil Rule No. 355 of 1989

Corporal Sharma, A.K.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 20-03-1995

Acts Referred:

Air Force Act, 1950 — Section 138, 161(1), 161(2), 71, 72
Air Force Rules, 1969 — Rule 121(2), 24, 24(1), 24(2), 24(3)
Army Act, 1950 — Section 52
Army Rules, 1954 — Rule 22, 23, 24, 25
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 428, 475, 5
Evidence Act, 1872 — Section 45
Penal Code, 1860 (IPC) — Section 107, 109, 120, 323, 325

Citation : (1995) 3 GLR 18

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : T.C. Khetri, K.K. Bhatra and I.A. Ansari, for the Appellant; R.P. Kakati, Addl. Central Govt. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

J.N. Sarma, J.—This application under Article 226 of the Constitution of India has been filed praying the following reliefs:

- i) To quash the proceedings of the District Court Martial finding the Petitioner guilty and to set aside the sentence.
- ii) To release the Petitioner giving him all benefits of service.

2. The brief facts of the case are as follows:

That on 31.8.88 the alleged occurrence took place at 20.25 hours in front of Anuradha Studio at 11 Wing Air Force in which Corporal K.K. Gupta, Engine Fitter, Moftu was injured - Petitioner and CPL Vijay Kumar taken into military custody. On 2.9.88 the Petitioner marched to his Commanding Officer and charge

of using force unto the victim CPL. K.K. Gupta by beating him with a stick and thereby causing grievous injury to him was heard in the presence of the Petitioner (Charge u/s 325 of the I.P. Code). The Charge against the Petitioner is at Annexure-A Page 27 to the writ application and there was further order to keep him in close arrest till further order as evidence exists that he would temper with evidence through intimidation/threats/violence against witnesses. Thereafter on 12.9.88, new charge framed by the Commanding Officer without hearing the charge in the presence of the Petitioner and directing for evidence to be recorded/reduced in writing on the said new charge of abatement of offence of grievous hurt u/s 109 r/w 325 of the I.P. Code stating that the Petitioner intentionally asked CPL Vijay Kumar and one Vinod Kumar to hit CPL K.K. Gupta and as a consequence they hit with stick at Sri Gupta causing grievous injury unto him. Be it mentioned that on 2.9.88 CPL Vijay Kumar was separately produced before the Commanding Officer and the charge of use of force by him and hitting at K.K. Gupta by stick and causing him grievous hurt was also heard separately in his presence as it was done in the case of the Petitioner thus charging both the Petitioner and Vijay Kumar separately and independently for the same injury and as such on second thought the Commanding Officer appears to have changed the charge without hearing the new charge in the presence of the Petitioner as required by Air Force Rule 24. On 26.10.88, order convening District Court Martial and charge-sheet against the Petitioner issued. On 27.10.88, order convening a separate District Court Martial against the CPL Vijay Kumar for the same charge of causing grievous hurt to CPL K.K. Gupta as done in the case of the Petitioner. Thus both the Petitioner and CPL Vijay Kumar charged separately and independently of each other without stating any collaboration between them for causing grievous injury to CPL K.K. Gupta and put to trial by two separate District Court Martials as above stated. Thereafter, on 28.10.88, DCM proceedings started and defence counsel sought adjournment until 1.11.88 for raising special plea under Air Force Rule 59. On 1.11.88 petition filed before DCM raising plea to the general jurisdiction of the Court under Air Force Rule 59 which is Exhibit "H" of 11 Wing AF produced as Defence witness in support of the plea. He produced the charge-sheet containing the charge heard by the CO in presence of the Petitioner. This charge sheet was marked as Exhibit J and is the same as Annexure A to the writ application at page 27 thereof. (The charge-sheet in DCM proceedings is at pp. 108 thereof). The Defence Counsel while making submissions referred to the cases of Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, and the decision of this Hon''ble Court in Civil Rule No. 372 of 1982 : Nb! Sub-Baleswar Ram and Ors. v. CO 855 (now 7004) Combined Workshop EME and Ors. - Charge sheet read over the Petitioner during trial Exhibit B-2 (at page 4 of the proceeding) is the same as Exhibit J at page 108 of proceedings -Charge sheet at page 109 of the proceedings which is Exhibit K was also produced by the witness to show that evidence as a matter of fact was reduced into writing in respect of this charge-sheet and not in respect of the charge that was heard i.e. as per charge-sheet marked Exhibit J at page 108 of the proceedings. The witness further says that

charge contained in Exhibit K was not heard by the accused. Prosecution also produced one witness namely the Sqn. Ldr. CM Nair, who reduced evidence into writing i.e. who prepared the SOE and he admitted during cross-examination that he prepared then SOE on the basis of charge - sheet Exhibit K of the proceedings. Thereafter, the Defence counsel gave a written address to the DCM containing his submissions as to the plea of bar of General jurisdiction raised under Air Force Rule 59. This written address is Exhibit 1 to the proceedings, at pp. 110-142. Thereafter on 2.11.88 the prosecution gave reply to the Defence Address. Reply in writing is Exhibit "M" of the proceedings at pp. 143-145. Judge-Advocate in his advice to the DCM pp. 146-156 (at page 153) categorically states that the convening authority has directed the CO to alter the form of the charge from what was given in Exhibit K, to the charge as per Exhibit "B2. The judge advocate then referred to the three charge sheets i.e. Annexures A, B and F i.e. Exhibits J, K and B2 of the proceedings. The Judge-Advocate also discussed the judgment of the Hon"ble High Court in Civil Rule No. 372/82 as also the Apex Court decision in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, referred to above and also stated that the decision/s of the Apex Court as also of this Hon"ble Court are binding on the DCM, but even then he stated that the Court judgments are to be applied looking to the facts and circumstances of the case. The DCM rejected the plea and decided to proceed with trial. Immediately, thereupon plea of bar under Air Force Rule 61 as per Exhibit "O" at page 159 of the proceedings stating that the charge heard in compliance with Air Force Rule 24 in the presence of the Petitioner stood dismissed in as much as the Commanding Officer thought it fit not to proceed with the charge and dropped it and instead handed down a new charge of abatement on which SOE was ordered to be prepared. The present charge that is the charge on which the Petitioner was sought to be tried having already been dropped, it should be held to have been dismissed under Air Force Rule 24(2). The trial was thus barred by law, and the Judge Advocate in his advice in writing (Exhibit "Q" of the proceedings pp. 160-165 at page) categorically observed - "Now if after examining Exhibit "J" you gentleman come to the conclusion that the CO wished to dismiss the charge you will be fully justified in allowing the plea of the accused. If on the other hand you come to the conclusion that the CO did not wish to dismiss the charge you may over-rule the plea.

On 3.11.88 advice of Judge Advocate as referred to above given to DCM and the DCM over-ruled the plea and proceeded with the trial. However, before proceeding to trial, the DCM did the proceeding on plea of not guilty without recording as to if the Petitioner guilty or not guilty to the charge on which he was sought to be arraigned for trial (Refer to proceedings from page 10 to 23). At page 10 it appears the charge was read and the accused was asked as to if he was guilty or not and in reply the Defence raised first the plea to general jurisdiction under Air Force Rule 59 and thereafter the plea in bar of trial under Air Force Rule 61 and after over-ruling of these pleas, at no occasion the DCM asked the accused as to if he was guilty or not guilty and without recording any

plea in this respect, the trial proceeded by a written address of the Prosecutor (Exhibit "R" to proceedings at pp. 166). Three prosecution witnesses were examined thereupon. They are the victim CPL K.K. Gupta and two Ors. said to be accompanying turn on the spot namely A.C. Deshmukh and A.K. Srivastava. All these witnesses say that it was CPL Vijay Kumar who hit the victim by a stick on his head and shoulder. They have stated that thereafter the Petitioner shouted "Maro sale ko" and all started beating CPL Gupta with wooden sticks and fists. However, none of the witnesses did utter as to who hit the victim by wooden stick or fist on which part of the body nor did any of the witnesses said that they did hit at the victim with common intention of causing hurt/injury. On 5.11.88 Fourth witness Group Captain LK Varma who was functioning at relevant time as SMO examined to state that he first examined the victim as Medical Officer in the presence of DMO and to prove the discharge slip - Exhibit "S" at page 167 of the proceedings which shows that the victim was hospitalised at 155 Base Hospital from 31.8.88 to 24.9.88. On 10.11.88 fifth witness Sqn. Ldr. D.K. Khanna, DMO and sixth witness Capt. Dipankar Das. MO I/C Surgical Ward of 155 Base Hospital examined (Testimony of sixth witness remain-ing incomplete). On 12.11.88 the sixth witness was cross-examined and re-examined and discharged. Prosecutor thereafter informed that he did not want to examine three witnesses whose evidence was reduced into writing in SOE offering them for cross-examination. Accordingly, seventh witness Sri B.C. Bharali cross-examined. The Prosecutor thereupon requested for permitting him to examine Lt. Col. Mahajan (his evidence was not reduced to writing in SOE) stating that he had already given notice about it to the defence counsel. On 14.11.88, eighth witness -Lt. Col. AN Mahajan AMC of 155 Base Hospital - he stated that he was working as classified specialist in surgery in the Hospital. The Prosecutor requested the DCM to declare the witness as expert witness the defence counsel did not object and Judge Advocate having explained the provisions of Section 45 of the Indian Evidence. Act in this respect and the DCM allowed the submission of the Prosecutor. On 15.11.88 eighth witness Lt. Col. Mahajan examined, proved the case sheet Exhibit "U" at pages 169-172 of the proceedings as to the injury (head injury) and treatment. Prosecution was thus closed. The DCM then asked the Petitioner to make his statement and the accused in writing (Exhibit "V" to proceeding at page 173) made the statement that he was falsely implicated. When further asked, the Petitioner said that he would produce defence witnesses as to facts and First defence witness CPL Ramkishan examined and on his having deposed against what he did at the stage of SOE, he was declared hostile and Defence Counsel prayed for putting questions to the witness as in cross-examination. The prayer was allowed when the court re-assembled next day. On 16.11.88 defence prayer as above allowed and witness further examined to state that what he stated at the stage of SOE was not correct and that what he was stating before the DCM was correct and that notwithstanding whatever he stated during SOE on 6.9.88, it was true that PW Srivastava had given him the three names of the assailants including the Petitioner, CPL Vijay Kumar and AC Vinod Kumar. Be it stated that in SOE the witness had categorically stated that PW

Srivastava had not mentioned the names of any of the assailants and the witness admitted to have stated so at SOE. Prosecution refused to cross-examine. Thereafter AC Vinod Kumar and CPL Vijay Kumar were examined as Second and Third defence witnesses respectively. The Third defence witness proved his charge-sheets putting him on trial for the same injury for which the Petitioner was tried. This was exhibited as Exhibits "X" and "Y" as also Exhibit "Z" at pp.176, 177 and 178 respectively (Exhibit "X" being the first charge-sheet showing charge heard as per Air Force Rule 24, Exhibit "Y" being charge-sheet handed over at the time of preparation of SOE and Exhibit "Z" being the charge-sheet handed over to the witness for the purpose of trial. Thereafter on 17.11.88, the defence witness is further cross-examined, re-examined and examined by the Court and Defence evidence is closed. Prosecutor then submitted a petition dated 17.11.88 (marked as Exhibit "AA" at page 179 of proceedings) requesting for producing two more prosecution witnesses to rebut the evidence of DWs 2 and 3 Defence counsel submitted reply in writing which is marked as Exhibit "BB" (at page 180-187). The Judge Advocate in his advice referred to provisions of Air Force Rule 121(2) in this connection and summarised the conditions present for exercising power to call such witnesses only as a special case. The Court over-ruled the plea of the Prosecutor. On 24.11.88 the defence counsel submitted typed closing address, which is marked as Annexure "CC (at pages 188 -300 of the proceedings). The Prosecutor handed down his typed closing address, marked as Exhibit "DD" at page 301-330). On 25.11.88 the Judge Advocate hands in typed summing up-marked Exhibit "EE" at pages 331-378: in paragraph 108 of his summing up at Page 378, he categorically observed:

I may once again caution you that the court should consider the guilt of the accused for the acts alleged to have been done by himself alone and not for such acts which are alleged against other assailants. This is especially so because the accused has not been charged additionally u/s 34 or 120 IPC. This is reiterated to clear the mind of the court as this aspect had been argued at length by the defence. As to the evidence of hitting and beating, the Judge Advocate summarised the testimonies of prosecution witnesses from paragraph 41 to 44 (Eye witnesses PWs 1 to 3) and paragraph 52 to 60 (expert witnesses (PWs 4, 5, 6 and 8) and defence witnesses (DWs 1, 2 and 3) from paragraph 45 to 50. In paragraph 107, the Judge Advocate also cautioned the DCM as to the benefit of doubt to be given to the Petitioner and that the findings should be based only on the record.

The court came to special finding as to guilt which is at page 97 of the proceedings to the effect that the Petitioner was not guilty of voluntarily causing grievous hurt punishable u/s 325 of the Indian Penal Code, but was guilty of voluntarily causing hurt punishable u/s 323 of the Indian Penal Code and it was pronounced. The court pronounced sentences of reduction to ranks, dismissal and R.I. for six months. Petitioner submitted repr u/s 161(1) of the AF Act. Findings and sentences confirmed by Air Marshal MM Sinha, Air Officer

Commanding-in-Chief, Eastern Air Command, IAF., R.I. of one month was remitted. On 3.1.89, sentence promulgated and the Petitioner sent to District Jail, Tezpur. Be it mentioned that the Petitioner happened to be in Military custody for 86 days including 27 days pending trial as on the 25.11.88 and was released on bail after the filing of the writ petition under orders of this Hon''ble Court. On 18.1.89 Anr. representation was submitted to the Chief of Air Staff u/s 161(2) AF Act, and in the month of March, 1989 this writ petition has been filed.

3. I have heard Shri T.C. Khetri, Learned Advocate for the Petitioner and Shri R.P. Kakati, Learned Addl. Central Govt. Standing Counsel for the Respondents, An affidavit-in-opposition has been filed on behalf of the Respondents and records also have been produced before me.

4. The main thrust in the affidavit-in-opposition is inter alia as follows:

- i) that there was no violation of Rule 24 of the Air Force Rules.
- ii) The charges were framed as per Rule 34 to Rule 38 on the basis of the summary of the evidence recorded in the presence of the accused.
- iii) That there was nothing different in the charges at various stages of disciplinary action.
- iv) The plea of the Petitioner to the jurisdiction of District Court Martial and this plea under Rule 61 about the bar of the trial have been rightly rejected.
- v) That there was no violation of Rule 66 of the Air Force Rules.
- vi) That the benefits of Code of Criminal Procedure Section 5, 428 and 475 is not available to persons convicted and sentenced by the Court Martial under the Air Force Act.

5. Before proceeding further, let us have a look at the provisions of the Act and the Rules. Section 71 of the Air Force Act, 1950 provides as follows:

71. Civil Offences - Subject to the provisions of Section 72, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say:-

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned and

(b) in any other case, he shall be liable to suffer any punishment other than whipping assigned for the offence by any law in force in India, or imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

6. Rule 24 of the Air Force Rules, 1969 provides for disposal of the charge or adjournment for taking down the summary of evidence. Rule 24(1) provides that the charge shall be heard in the presence of the accused and the accused shall have full liberty to cross-examine a witness against him and to call any witnesses and make any statement in his defence. Rule 24(2) provides that the Commanding Officer shall dismiss the charge brought before him if in his opinion the evidence does not show that some findings under the Act have been committed and may do so if in his discretion he thinks that the charge ought not to be proceeded with. Rule 24(3) provides that at the conclusion of the hearing of a charge if the Commanding Officer is of the opinion that the charge to be proceeded with, he shall without necessary delay either dispose of the case summarily or adjourn the case for the purpose of having the evidence reduced it to writing. Rule 24(4) provides for the recording of the evidence. Rule 24(5) provides for the cross-examination of the witnesses and recording the same in writing. Rule 24(6) provides that the evidence of such witnesses shall be handed over and shall be signed by the witnesses. Rule 24(7) provides that the recording of the evidence shall be in English language. Rule 24(8) provides for obtaining written statement of the evidence of the witnesses. Rule 24(9) provides for summoning of witnesses. Rule 71 of the aforesaid Rule, provides for, for record and announcement of finding. Rule 71(4)(5) and (8) are quoted below:

71(4) Where the court is of opinion as regards any charge that the facts which it finds to be proved in evidence differ materially from the facts alleged, in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in the charge, and that the difference is not so material as to have prejudiced the accused in his defence, it may, instead of a finding of "not guilty", record a special finding.

71(5) The special finding may find the accused guilty on a charge subject to the statement of exceptions or variations specified therein.

71(8) In any case where the court is empowered by Section 138 to find the accused guilty of an offence other than that charged, or guilty of committing an offence in circumstances involving a less degree of punishment or where it could after hearing the evidence have made a special finding of guilty subject to exceptions, or variations in accordance with Sub-rules (4) and (5), it may if it is satisfied of the justice of such course, and if the concurrence of the convening officer is signified by the prosecutor, accept and record a plea of guilty of such other offence as having been committed, in circumstances involving such less degree of punishment, or of the offence charged subject to such exceptions or variations.

7. The whole thrust of arguments of Shri Khetri, Learned Advocate for the Petitioner are as follows:

i) That by Annexure "A" the charge was that he used criminal force to Crpl. Gupta and he hit with stick and caused head injury. That charge is dated 2.9.88

and that charge having been framed, the Commanding Officer ordered for evidence to be reduced in writing but before adducing the evidence in writing on 12.9.88, the Commanding Officer framed a new charge and that new charge is as follows:

Committing a civil offence that is to say abatement within the meaning of Indian Penal Code of an offence of voluntarily causing grievous hurt committed in consequence of such abatement, punishable u/s 109 of the Indian Penal Code read with Section 325 of the said code.

in that he,

at 11 Wing, Air Force at about 2025 hrs.

on 31 Aug 88 intentionally asked

624123 Cop Vijay Kumar IAF/P and

679143 AC Vinod Kumar AF/Fit to hit

644824 CPL Gupta KK Eng/Fit with stick.

It is argued by Shri Khetri that before framing this new charge, the Petitioner was not heard as required by Rule 24 and ordered for recording of evidence and it is argued that this is violative of Rule 24 of the Rules.

ii) that Anr. person one Bijoy Kumar was also produced with regard to the same incident on the same date on 2.9.88 and after completion of the summary evidence 2 separate District Court Martials were convened, one to try the Petitioner and other to try the Bijoy Kumar and that vitiated the trial

iii) That Judge Advocate did not properly appreciate the law laid down by the Supreme Court reported in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others,

8. Let us take up 1982 SC 1413 (Supra). In paragraph 36 of the judgment the Supreme Court quoted the Rules 22, 23, 24, and 25 of the Army Rules, which are same with the present set of Rules. The Supreme Court in this case pointed out inter alia as follows:

Rule 22 to 24 are mandatory in respect of every person subject to the Act other than the Officer.

9. The Supreme Court further pointed out that in respect of such persons belonging to the lower category it is mandatory that Rule 22, 23 and 24 have to be followed and there is no scope (sic) from it except on the pain of invalidation of the inquiry. The Supreme Court also further pointed out that in a trial which is likely to result in deprivation of liberty one must hear the offender offering full participation and that principle cannot be diluted,

10. In 1990 Supreme Court Page 65, Union of India and Ors. v. Naik Subedar

Baleshwar Ram and Ors.. the Supreme Court partly reversed the judgment of this Court holding that though the allegation at the stage of enquiry under Rule 22 was described as prejudicial to good order and military discipline but subsequently he was charged for theft punishable u/s 52(a) of the Army Act. The Supreme Court pointed out that the basic facts said to constitute that allegations were nothing else than removal of the foodstuff which constituted the charge of theft. It was therefore, held that no prejudice has been caused and it was further held that the inquiry under Rule 22 and the trial before General Court Martial were over the self same facts.

11. Now let us see whether as contended in the affidavit-in-opposition, the inquiry which was under Rule 24 earlier and the subsequent charge framed without complying with Rule 24 are on the basis of the same set of facts. The first charge as indicated above was using criminal forces by hitting with stick and causing head injury. The second charge was abatement and the next was voluntarily causing grievous hurt committed in consequence of such abatement.

12. Abatement is defined in Section 107 of the I.P.C. When an offence is committed and every persons take part in the commission of it, each person may contribute in a manner described itself from the Ors. to the doing of the criminal Act. An act may be done by the hand of one person while Anr. is present or he is close at hand ready to offer help or the actual doer may be guilty or may be acting under the order of an absent person and besides this participator there may be other persons who contribute to the last direction in active participation of it. It is proper to mark the nature and degree of participation which is essential to criminal liability. Abatement is separate and distinct offence provided the thing which is abated is an offence. So, the earlier charge of hitting him with stick and causing head injury and subsequent charge of abatement as mentioned above are distinct and separate charges and it must be held that the Petitioner was prejudiced for not complying with the Rule 24 of the aforesaid Rules. It cannot be accepted as contended by Shri Kakati, Learned Advocate for the Central Govt. Standing Counsel that there was nothing itself in the charge earlier brought and the subsequent charge as distinct and separate which was tried before the court Of Martial. It will be evident from Annexure-I that the charge subsequently framed was that the Petitioner intention-ally asked Bijoy Kumar and Binod Kumar to hit Corpl. Gupta with stick. Further, it is also seen that in the court Martial trying Bijoy Kumar, there was an allegation that it was he (Bijoy Kumar) who has caused grievous hurt to Corpl. Gupta and the same was the charge against the Petitioner also. So, the authority was not sure/did not know who were the persons who hit Corpl. Gupta and on this count also the trial of both the persons by two different courts appears to be prejudicial. Further, it was found that there was only one injury on the head of Gupta. So, the question will be who caused injury whether Bijoy Kumar, Binod Kumar or the present Petitioner.

13. In Ranjit Thakur Vs. Union of India (UOI) and Others, the Supreme Court in

paragraph 5 of the judgment has pointed out as follows:

The procedural safeguards contemplated in the Act must be considered in the context of an (sic, and) corresponding to the plentitude of the summary jurisdiction of the Court-Martial and the severity of the consequences that visit the person subject to that jurisdiction. The procedural safeguards should be commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the Statute. The oft quoted words of Frankfurter, J. in *Vitarelli v. Seaton* 359 US 535 are again worth recalling:

...if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed....This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

The history of liberty" said the same learned Judge "has largely been the history of observance of procedural safeguards." (1942) 318 US 332

14. In that view of the matter, I hold that there was violation of the procedural safeguards with regard to the Petitioner and accordingly, this application is allowed. The proceeding of the District Court Martial culminating into the findings of the guilt and sentence passed thereupon and the confirmation thereof by the authority shall stand quashed. The Petitioner shall be entitled to the service benefits during the period for which he was out of service including reinstatement in his service and back wages.

The writ application is accordingly allowed.