
(2009) 12 DEL CK 0228
In the Delhi High Court
Case No : LPA No. 485 of 1998

Ex. Maj. Anil Behl

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 02-12-2009

Acts Referred:

Army Rules, 1954 — Rule 51

Citation : (2009) 12 DEL CK 0228

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : A.K.D. Sayene and Asim Vachher, for the Appellant; Jyoti Singh and Amandeep Joshi, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Vide impugned judgment and order dated 25.8.1998 the writ petition filed by the appellant, challenging his conviction at a Court Martial and levy of penalty of "Cashiered From Service", has been dismissed.

2. From a perusal of the pleadings in the writ petition and the impugned judgment and order it is apparent that the appellant questioned the verdict of guilt and the sentence imposed upon him on 3 counts. It was firstly urged that the verdict of guilt is based solely and wholly on the confessional statements made by co-accused Bhagwan Singh, Jagdish Chand and Suresh Chand and hence the verdict of guilt and the sentence are contrary to law for the reason the confessions were subsequently retracted. The second contention urged was that the wife of the appellant was not permitted to be examined as a witness in defence and in view of the charges alleged against the appellant she was a relevant witness. Thus, it was urged that the appellant being prevented from examining a relevant witness, the verdict of guilt and the sentence were liable to be set aside. Lastly, it was urged that the appellant was effectively denied the services of a defence counsel.

3. All three pleas have been negated by the learned Single Judge, who, while referring to the confessional statements made by the three co-accused which were subsequently withdrawn, has inadvertently referred to an alleged confessional statement made by the appellant and thus the said finding has given birth to a 4th plea in appeal; being that, the appellant never made any confession and that the learned Single Judge has referred to an relied upon a non-existent confessional statement made by the appellant. A fifth plea has been urged in appeal, which we note has not been urged before the learned Single Judge; being that, the penalty imposed of being cashiered from service is disproportionate keeping in view the gravity of the offence.

4. Before noting the relevant facts, we may note at the outset, that at the trial of the appellant and his co-accused before the Court Martial, the authorities never relied upon any confessional statement made by the appellant. Even the learned Single Judge has not relied upon any confessional statement made by the appellant. In para 4 of the impugned decision, while noting the submission made by learned Counsel for the appellant, the learned Single Judge has referred that the submission urged was that the confessions made by the appellant and his co-accused which were retracted could not be relied upon.

5. This is the sole reference in the impugned decision to the confessional statement made by the appellant. None has been used at the trial and none has been relied upon by the learned Single Judge.

6. It is apparent that an inadvertent error, by way of a narrative of a fact, has inadvertently found its way in para 4 of the impugned decision. Noting that the said inadvertent recording of a fact in the narrative of the impugned decision is inconsequential for the reason while discussing the evidence led at the trial, the learned Single Judge has not referred to any confessional statement made by the appellant, we repel the challenge to the impugned decision on the 4th count urged in the appeal.

7. Reverting to the three submissions which were urged before the learned Single Judge, the facts which require to be noted, in brief, are that on 26.12.1988 the petitioner, on being posted with 503 ASC Battalion was required to take over charge of the stores from Subedar Bijender Singh. The appellant was required to submit a monthly stock verification by 30th December 1988; which time according to the appellant was insufficient for him to physically verify the stocks and hence on the basis of the previous certificates, acting in good faith, he signed and submitted the verification certificate pertaining to the stock lying in the store. The verification was completed on 23.1.1989 when certain surplus stocks were noted. In between, on 14.1.1989, 14 vehicles with stores were dispatched to Chushul. The petitioner claims that he had nothing to do with the misappropriation of the goods loaded in one vehicle which left his store fully loaded and the goods were siphoned off enroute.

8. Three charge sheets were served upon the appellant. Two articles of charge

were alleged against him under the first charge sheet and one article of charge each were alleged against him under the second and the third charge sheet.

9. Since the appellant has been found not guilty pertaining to the second charge sheet, the gravement of the charge under the first and third charge sheet may be noted. Under the first charge sheet the first charge alleged was that the appellant committed theft of 240 kgs. of tea and 200 gms. of milk powder valued at Rs. 15,405.60. The second article of charge was that on 26.12.1988, knowing it to be false, the appellant falsely certified that there were neither a surplus nor any deficiency in the store. Under the third charge sheet the appellant was charged with having committed theft of 1275 kgs Flour (Atta), 475 kgs Dal Chana, 475 kgs Dal Masoor, 475 kgs Dal Urad and 375 kgs Besan (Gram Flour) valued at Rs. 19,171.50.

10. The three charge sheets were served upon the appellant on 27.5.1990 along with the copy of the summary evidence recorded at the Court of Inquiry. The appellant was notified that the general Court Martial shall be convened on 2.6.1990.

11. The petitioner engaged Major Lalit Kumar as his defence officer to defend him at the General Court Martial. On 2.6.1990 Major Lalit Kumar defended the appellant when proceedings were conducted at the Court Martial. The next date notified was 4.6.1990, on which date Major Lalit Kumar did not appear and at the request of the appellant who desired to engage another counsel, the proceedings were adjourned to 21.6.1990. On said date the appellant appeared without any counsel and told that he desired Major Lalit Kumar to defend him, with further request that since Major Lalit Kumar could not appear at Leh i.e. the place where the sittings of the Court Martial were being held, the venue be changed. The request was declined and one Sh. Jaskiran Singh was appointed as the defence counsel. No proceedings were held. Sh. Jaskiran expressed his inability to defend the appellant and accordingly, at the request of the appellant, the matter was adjourned to 25.6.1990. On said date Major Lalit Kumar was present but appellant filed an application marked "Q" withdrawing his request to engage a defence counsel. The Court reassembled on 27.6.1990. Notwithstanding the request to be defended by a defence counsel being withdrawn on the previous date, Major Lalit Kumar appeared for the appellant on 27.6.1990 and raised a plea of general jurisdiction of the General Court Marital under Rule 51 of the Army Rules and examined 3 witnesses in support thereof. 2 witnesses were examined by the prosecution to rebut the plea of jurisdiction. On 30.6.1990 the plea of jurisdiction was overruled. On said date the statement of the officiating Commanding Officer was recorded. This transpired in the presence of Major Lalit Kumar. On 5.7.1990 Major Lalit Kumar sought permission to leave trial as he had to attend some personal matter. On 6.7.1990 the Court was adjourned to 13.7.1990 to enable the appellant to engage a defence counsel. On 13.7.1990 Major Lalit Kumar appeared but immediately withdrew and thus no trial could take place till 25.7.1990, on which date Capt. Ajay Gupta was appointed as the

Defending Officer for the appellant and the other co-accused as the Court had no option but to do so in view of the past conduct of Major Lalit Kumar. Thereafter, evidence was recorded and after hearing arguments, verdict was pronounced.

12. The plea of the appellant to examine his wife as a witness was turned down inasmuch as it was opined that she was not a necessary witness to be examined.

13. Pertaining to not summoning the wife of the appellant as a witness we note that reason why she was sought to be summoned as a witness as per the wishes of the appellant is the fact that 2 bank drafts each in sum of Rs. 9,900/- in the name of the wife of the appellant were recovered from the appellant and at the trial were proved to have been prepared by the Bank Manager of the Branch from where the bank drafts were got issued; namely, Sh. T. Morup. Who also proved the application submitted by the appellant for bank drafts to be prepared and as per said witness, money in cash, was deposited by the appellant.

14. Except for stating that his wife should be summoned and examined as a witness, no reason was furnished by the appellant as to what possibly could his wife depose about the two bank drafts.

15. Even before the learned Single Judge and before us in appeal, learned Counsel for the appellant could not throw any light on the relevance of examining the wife of the appellant. 16. We shall be dealing with this issue a little later while discussing the submissions urged by learned Counsel for the appellant.

17. Reverting to the evidence led at the Court Martial, we note that the prosecution examined as many as 12 witnesses. Only PW-11 and PW-12 were the witnesses relating to the confessional statements made by three co-accused i.e. Sh. Bhagwan Singh, Sh. Jagdish Chand and Sh. Suresh Chand. Angiyal PW-3, Paldhan PW-4 and Kama PW-5 as also Ram Kanwar PW-8 deposed that at the asking of the appellant goods were loaded on vehicles on 14.1.1989. Thus, these witnesses have categorically deposed that rations were transported out from the stores at the behest of the appellant. PW-3 and PW-8 have deposed that one truck halted at Old TCP Number and the goods were transferred to a civil truck.

18. With reference to the testimony of the witnesses, other than those who proved the confessional statements made by the co-accused, the learned Single Judge has held that the plea of the appellant that except the retracted confessional statements of three co-accused, there was no other evidence against the appellant is not borne out from the record of the Court Martial proceedings.

19. That apart, with reference to decision reported as Kochu Govindan Kaimal and Others Vs. Thayankoot Thekkot Lakshmi Amma and Others, , the learned Single Judge has held that as per said decision a retracted confessional statement made by an accused could be considered as a piece of evidence against a co-accused.

20. In that view of the matter, the plea of the appellant that there was no legally

admissible evidence against him has been negated. The plea of the trial being vitiated on account of the wife of the appellant not being summoned as a witness has been negated by the learned Single Judge by holding that the appellant failed to explain the relevance of her being examined.

21. Noting the facts as noted by us in paras 10 and 11 above, the finding returned by the learned Single Judge is that it is not a case where the Army Authorities have deprived the appellant, the right of fair defence by engaging a defence assistant.

22. As held by the learned Single Judge, it is settled law that exercising power under Article 226 of the Constitution of India with respect to matters pertaining to discipline in the Armed Forces, the Court cannot sit in appeal over the decisions of the Competent Authorities. The jurisdiction of the Court is limited to ensure that the procedure prescribed by law is followed by the Competent Authorities and that the fundamental right of none is affected to his prejudice and lastly there is no error apparent on the face of the record and that power has been exercised within the confines of the jurisdiction of the Competent Authority.

23. The first plea urged that save and except the confessional statements of the co-accused which were retracted, there being no other evidence, the finding of guilt returned is liable to be set aside is not sustainable for the reason as noted in para 17 above there are witnesses who have deposed against the appellant and in view of said evidence there certainly exists material on record against the appellant. In addition to the reasons given by the learned Single Judge, we may only add, that adequacy or inadequacy of material is not to be gone into by us. We may further add that there is conclusive evidence on record that the appellant had deposited cash and obtained two bank drafts in the sum of Rs. 9,900/- each in the name of his wife. The appellant failed to render any explanation as to how he came into possession of Rs. 19,800/-. Further, through the testimony of PW- 3 and PW-8 there is evidence of the involvement of the appellant in theft of the goods from the stores.

24. The plea of the appellant that non-examination of his wife has caused prejudice to him, remains a mere plea, without any explanation as to in what manner prejudice has been caused. A faint attempt was made to urge before us that since the bank drafts were in the name of the wife of the appellant, she was the best person to throw light as to how the bank drafts were prepared in her name. The said plea ignores the fact that through the testimony of T. Morup, the Bank Manager concerned, it stood proved that the appellant had deposited the cash and had filled up the requisite forms for issuance of the two bank drafts in the name of the wife of the appellant. It thus stood established that the appellant had deposited Rs. 19,800/- with the bank. It was for the appellant to explain the source of the funds utilized for preparation of the bank drafts. What light could possibly be thrown on the preparation of the drafts by the wife of the appellant. Obviously none.

25. The plea of denial of services of a defence counsel stands negated when one peruses the record of the Inquiry proceedings, which has been briefly noted by us in para 11 above. We note that the learned Single Judge has noted the same and we concur with the finding returned that no prejudice has been caused to the appellant due to any act or omission of the Court.

26. The last plea of the penalty being disproportionate to the gravity of the offence was not raised before the learned Single Judge. Be that as it may, with reference to the acts of the appellant and the misdemeanour which involves moral turpitude, it cannot be said that the penalty of "Cashier From Service" is so shocking that it can be labelled as disproportionate.

27. We find no merit in the appeal which is dismissed.

28. Considering that the appellant is without a job, we refrain from imposing cost.