

(2002) 11 DEL CK 0024
In the Delhi High Court
Case No : C.W. 2282 of 2001

Ex. Rect. Lachhman

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 13-11-2002

Acts Referred:

Army Act, 1950 — Section 120(3), 39, 80
Army Rules, 1954 — Rule 115, 115(2), 115(2A), 129, 180

Citation : (2003) 1 SLJ 237

Hon'ble Judges : Jiwan Dass Kapoor, J; B.A. Khan, J

Bench : Division Bench

Advocate : V.P. Sharma, for the Appellant; Abhijat, for the Respondent

Final Decision : Allowed

Judgement

J.D. Kapoor, J.—Under the garb of discipline, the disciplined force cannot be allowed to lose its human face. If young recruits to such a Force are dismissed or removed at the drop of hat on the whimsicality of the governing or commanding authority, it is likely to produce a negative effect and shudder the young aspirants from joining Armed Forces particularly the Army even if they have will to serve the nation. Even otherwise the unemployment scenario of this country is so deplorable and dismal that even the highly educated persons are begging for lowly jobs. Though this aspect cannot be lost sight of while dealing with disciplinary action against the delinquent particularly when action is culminated into removal from service yet discipline cannot be sacrificed at the altar of humanitarian considerations.

2. Here is a young boy who was enrolled in Army at an age of 21 years as a recruit but was dismissed from service after being convicted by summary court martial after six months of his service. The facts leading to his dismissal are in short as under:-

3. Petitioner who was enrolled in the month of December, 1998 as a recruit

received information sometime on 10.6.1999 from his father that the marriage of his brother was fixed on 14.6.1999 and to that effect invitation and registered letter written by his father was handed over to B.H.M. Havaladar Santosh Kumar for grant of casual leave for attending the marriage. On 10.6.1999 itself, the petitioner reported to Nb. Subedar Ram Parvesh Sharma for suitable action for the grant of his leave. He reported the matter to Major R.K. Singh, Bty Commander and written request was made in the request book. The grant of leave was duly sanctioned by the Bty Commander for being put up before the Commanding Officer. It is averred that the petitioner being only young recruit was not fully aware of Army Rules regarding grant of leave and started his journey for his home for attending marriage of his brother under the impression that his leave has been sanctioned in view of sanctioned granted by Bty Commander in the request book. He was under the impression that Bty Commander was the final sanctioning authority and thus on completion of his leave reported back on 27.6.1999 on his own.

4. The moment he reported to the Unit, he was put under close arrest and a charge sheet was published on 29.6.1999 u/s 39(a) of the Army Act i.e. absents without leave. The charge reads as under:-

"Army Act Section 39(a) ABSENTING HIMSELF WITHOUT LEAVE

in that he, at Nasik Road absented himself without leave from Unit Lines at 0330 hr on 13 Jun 99 until he rejoined voluntarily at 1600 hr on 27 Jun 99 at Arty Centre, Nasik Road Camp.

(Total period of absence: 15 days)."

5. On 6.7.1999, Major R.K. Saxena recorded the Summary of Evidence against the petitioner in which only one witness namely Nb Sub. Ram Pravesh Sharma was examined. The relevant part of his statement is as under:-

"2. I was performing the duties of offg. SJCO from 23 May to 23 Jun 99. On 10 Jun 99 Rect/TA Lachhman report for leave came to me through offg. BHM Hav Santosh Kumar. He informed me that Rect/TA Lachhman brothers marriage is on 14 Jun and he showed me invitation card and a registered letter written by his father. I reported the matter to Maj R.K. Singh offg. Bty Cdr. His name was written in the request book. Request Book duly sanctioned by Bty Cdr was put up to Commanding Officer through Trg Sub Maj. Commanding Officer did not sanction and accordingly I informed Rect/TA Lachhman on 11 Jun Rect/TA Lachhman requested for an interview with Bty Cdr and Commanding Officer. He was taken to Bty Cdr Lt Col VI George and then to Trg SM for further interview with CO."

6. The summary court martial proceedings culminated into order of dismissal dated 17.7.1999. However, the petitioner made a statutory appeal under the Army Act against the order of dismissal. The dismissal was modified to discharge order. The relevant reason for modification in the sentence by the Appellate

Authority is as under:-

"3. On humanitarian grounds, I remit the sentence of dismissal awarded by the Court and direct that the petitioner shall be deemed to have been discharged with effect from the date his dismissal took effect."

7. It is contended by learned counsel for the petitioner that before recording of summary of Evidence the provisions of Rule 22 of the Army Rule 1954 i.e. statement of all witnesses should be taken by the Commanding Officer in the presence of delinquent, were not adhered to and similarly he was also not given an opportunity to cross-examine the witnesses as he was put under close arrest and was not allowed to talk to anyone. He also alleges that on 17.7.1999, he was marched before the Commanding Officer and was directed to sign some papers which he did before the Court and at no stage he was provided any opportunity to take help of legal practitioner in spite of the fact that trial was of criminal nature. Further that the petitioner never admitted his guilt nor did he plead guilty to the charge. Next that though the petitioner was served with a charge sheet u/s 39(a) of the Army Act, 1950, but was not given any opportunity to take help of a legal practitioner as the trial was of criminal nature. This lapse itself vitiates the trial. In this regard, learned counsel has drawn support from *Somappa hanumanthappa Choudhary v. State of Karnataka* 1986 Cri.L.J. 1201 wherein it was held that the service of the prayed legal practitioner should always be provided to a person facing criminal charge as there is no reason to deny such a help. Lastly that the offence allegedly being service in nature, it was mandatory for the Commanding Officer to take sanction from the competent authority to hold the trial. Non-adherence to this renders the proceedings null and void.

8. The allegations of the petitioner have been squarely denied by the respondents. According to the respondents in or around May, 1999, Operation Vijay was commenced and owing to the commencement of the said operation the leave of all ranks of the Army Personnel was restricted to extreme compassionate cases only and this aspect had been explained and made clear to all ranks of personnel at various for as like daily roll calls as well as the CO's Sainik Sammelan in June, 1999. It is admitted that Bty. Commander had only recommended the leave of the petitioner for the final approval of the Commanding Officer but in the light of Operation Vijay the leave of the petitioner was declined by the Commanding Officer and the plea that he was under the impression that leave had been sanctioned by Bty. Commander is an after thought as the petitioner had been categorically informed that his leave had not been sanctioned nor was any leave certificate, which is mandatory, was obtained by him and Therefore the plea of ignorance about Army Rules is untenable.

9. The allegations of having been put under close arrest and not allowed to even talk to anyone have been denied as according to respondents, the petitioner continued attending his regular classes even after he had rejoined after being absent without leave. Neither did the petitioner choose to cross-examine witnesses in spite of opportunity given nor did he made any statement in his

defense nor did he examine any witnesses in his defense. It is contended with vehemence that the provisions of Rule 22 were fully complied with as not only petitioner was brought before the Commanding Officer but charges were also heard in his presence and explained in the presence of witnesses. Witnesses also deposed in the presence of the petitioner but the petitioner inspired by opportunity declined to cross-examine them. So much so he even did not make statement in his defense. To falsify the petitioner, the respondents averred that in fact the petitioner pleaded guilty to the charge and Therefore chose not to make any statement with reference to the said charge or in mitigation of the punishment.

10. As regards the non-providing of legal practitioner, respondents' understanding is that petitioner was not entitled to be represented through a counsel and was provided, as per statutory provisions, "friend of the Accused" to advise him as to the procedure for the summary court martial in terms of Rule 129 of the Rules. Further, the petitioner being a recruit was governed by the Army Act and was Therefore liable to be tried by summary court martial.

11. Rule 22 of the Army Rule 1954 enjoins upon the Commanding Officer to hear charge in presence of the accused who also enjoys the liberty to cross-examine witnesses and to call his defense witnesses and make his statement. He can, however, dispense with these requirements while hearing a charge which arises as a result of investigation by the court of enquiry wherein provisions of Rule 180 stand complied with. Rule 22 provides as under:-

22. Hearing of Charge:- (1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him and to call such witness and make such statement as may be necessary for his defense:

Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of Rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in Sub-rule (1).

(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed and may do so if, he is satisfied that the charge ought not to be proceeded with:

(3) After compliance of Sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time-

(a) dispose of the case u/s 80 in accordance with the manner and form in Appendix III: or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a

summary court-martial:

Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender unless-

(a) the offence is one which he can try by a summary court-martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

(4) Where the evidence taken in accordance with Sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge(s) on the basis of the evidence so taken as well as the investigation of the original charge."

12. As is apparent from the perusal of Rule 22 there are following requirements and stage of investigation of charge and trial by court martial:

i) Every charge is to be heard by the Commanding Officer in the presence of the accused.

ii) The accused will have full liberty to cross-examine any witness against him.

iii) The accused will also have option to call such witness and make such statement as may be necessary for his defense.

The aforesaid procedures can be dispensed with if the charge against the accused arises as a result of investigation by a court of inquiry and wherein provisions of Rule 180 have to be complied with.

iv) The Commanding Officer can dismiss a charge if there is no evidence to start it. In case, the Commanding Officer is of the opinion that charge is to be proceeded with, he shall dispose of the case u/s 80 or refer the case to the proper superior military authority or adjourn the same for recording in writing. If the accused is below the rank of warrant officer, he shall order his trial by summary court-martial. The order of trial by summary court martial has to be proceeded with without a reference to the officer empowered to convene a district court-martial.

13. The record of the proceedings shows that the plea of guilty has not been entered into by the accused nor has it been recorded as per Rule 115 inasmuch neither it has been recorded as finding of court nor was the accused informed about the general effect of plea of guilt nor about the difference in procedure which is involved in plea of guilt nor did he advise the petitioner to withdraw the plea if it appeared from the summary of evidence that the accused ought to plead not guilty nor is the factum of compliance of Sub-rule (2) has been recorded by the Commanding Officer in the manner prescribed in Sub-rule 2(A).

Thus the stand of the respondents that the petitioner had entered into the plea of guilt stands on highly feeble foundation. As a matter of fact, the testimony of sole star witness Ram Pravesh Sharma speaks for itself. Nb. Subedar Ram Pravesh Sharma has stated that on 10.6.1999, the petitioner reported for leave to him through Havaladar Santosh Kumar who informed him that petitioner's brother marriage was to take place on 14.6.1999 and also showed him the invitation card and registered letter written by his father and on this, he reported the matter to Major R.K. Singh, Offg. Bty Cdr. So much so his name was written in the request book which was duly sanctioned by Bty Cdr. Once the plea of guilty fails, the finding and sentence of SCM also collapses to warrant setting aside of the impugned order of discharge.

14. Lastly the contention of learned counsel for the petitioner that petitioner was not attested in the Army i.e. he was not confirmed and was a recruit only and could not be subjected to summary court martial, we find no force in this as Section 120(3) of the Army Act, 1950 provides that a summary court-martial may try any person subject to this Act and under the command of the officer holding the court, except an officer, junior commissioned officer or warrant officer. The petitioner was a person subject to Army Act and was working under the command of Commanding Officer holding the court and Therefore there was nothing wrong or erroneous to have subjected the petitioner to summary court martial.

15. Last but not the least the sentence awarded both by the Commanding Officer as well as by the Appellate Authority appears disproportionate to us in the facts and circumstances of the case. Because we find that it was not a case of over stay or unauthorised absence. It was a case of petitioner having proceeded on leave that too on the recommendation of immediate officer which could be treated to imply sanction by the competent authority. He was a young recruit of 20 years. For such a charge and explained of the petitioner and the circumstances under which he proceeded and returned on the expiry of leave, he ought not have been deprived of his livelihood.

16. Foregoing reasons persuade us to allow the petition. Order dated 17.7.1999 as well as order dated 9.8.2000 are set aside in the peculiar facts and circumstances of the case. Petitioner is ordered to be reinstated in service without back wages and subject to his medical fitness for retention in military service.