

(2007) 05 DEL CK 0259

In the Delhi High Court

Case No : Writ Petition (C) No. 3396 of 2005

Ex-Rifleman Kuldeep Singh

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 31-05-2007

Acts Referred:

Army Act, 1950 — Section 63
Constitution of India, 1950 — Article 226, 227, 32
Penal Code, 1860 (IPC) — Section 134, 354, 376, 448

Citation : (2008) 1 ILR Delhi 54

Hon'ble Judges : T.S. Thakur, J;S.N. Aggarwal, J

Bench : Division Bench

Advocate : N. Kinra, for the Appellant; Jyoti Singh and Mr. Aditya Chhibber, Advocates with Col. K.M. Rai, Dy. JAG., for the Respondent

Final Decision : Dismissed

Judgement

T.S. Thakur, J.—In this petition for a writ of certiorari, the petitioner calls in question an order of his dismissal from service pursuant to a Summary Court Martial. A mandamus directing the respondents to reinstate the petitioner in service with full back wages has also been prayed for. The facts giving rise to the petition may be summarized as under: On 17.4.92, the petitioner, while on active duty in Assam as a Rifleman, serving in the Jammu & Kashmir Light Infantry, was deployed to carry out recce of an ambush area as a member of a patrol sent under Ex Hav Mohan Lal. On reaching village Jhargaon, the patrol was sub-divided into three sub-patrols comprising three jawans each. The petitioner was a member of sub-patrol No. 3 under Lance Naik Karnail Singh.

2. According to the petitioner, after completing the task assigned to it, the patrolling party re-assembled and left for the Army Camp. In the afternoon, the husband of Mrs. Janki Sakia, a resident of village Jhargaon complained to the authorities that Lance Naik Karnail Singh had misbehaved with his wife during the search of the former's house. A complaint to that effect was lodged even

with the Police Station at Khairabari District Durrang, Assam on the basis whereof FIR No. 17/92 was registered u/s 376, 354, 448 and 134 of the IPC. A Court of Enquiry was immediately ordered by the Commanding Officer of the petitioner's Battalion to find out as to who out of the nine Army men was involved in the alleged incident. The Court of Enquiry did not find the petitioner guilty of the charge of rape or molestation of Smt. Sakia. Additional Summary of Evidence was then ordered to be recorded in May, 1993 in which Mrs. Janki Sakia appeared as CW-1 while Mrs. Deka, another witness appeared as CW-2. Both these witnesses clearly stated that the petitioner was not involved in the incident. The petitioner's grievance is that instead of closing the issue, the Commanding Officer altered the original charges and issued a charge sheet alleging commission of an Act Prejudicial to Good Order and Military Discipline, an offence punishable u/s 63 of the Army Acts, in that, the petitioner had allegedly made statements about the activities of the patrol before the Investigating Officer which he knew to be false. The charge framed against the petitioner may at this stage be extracted in extenso:-

The accused No. 9089898 Rifleman Kuldeep Singh, of 8 J&KLI, is charged with:-

AA Sec 63 AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE
in that he

at field on 18th April 92 repeatedly made statement which he knew to be false, to investigating officer, when asked about the activities of the patrol which was led by Hav Mohan Lal on 17 April 92 and in which he was a member.

3. A Summary Court Martial was then convened on 25th November, 1993 to try the petitioner summarily, who found the petitioner guilty and sentenced him to dismissal from service. Aggrieved, the petitioner has assailed the said conviction and sentence in the present writ petition.

4. Appearing for the petitioner, Mr. Kinra made a three-fold submission for our consideration. Firstly, he argued that the Summary Court Martial had recorded no findings; given no opinion; made no recommendations and recorded no verdict of the petitioner being guilty. The entire proceedings had, according to Mr. Kinra, commenced and concluded within a few hours on 25th November, 1993 and the sentence executed on the same day. The procedural safeguards ensuring a fair and reasonable opportunity of being heard to the accused petitioner were also, according to Mr. Kinra, observed in breach.

5. Secondly, he contended that the condition of the petitioner and his dismissal from service was perverse in as much as the conviction of the petitioner, assuming any such conviction was recorded by the Summary Court Martial, was without any evidence whatsoever to support the same. He urged that the star witnesses of the prosecution, namely, Smt. Sakia and Smt. Deka had in the course of their depositions clearly stated that the petitioner was not the one who had committed any act of indiscretion or facilitated the commission of any

offence by anyone else. Both these witnesses had failed to recognize the Army personnel who had conducted the search and allegedly misbehaved with Smt. Janki Sakia. The allegation that the petitioner had not truthfully disclosed the facts relating to the activities of the patrol party is also, according to the learned counsel, unsupported by any evidence thereby rendering the conviction of the petitioner for the charge framed against him legally unsustainable.

6. Thirdly, he argued that even assuming that there was any evidence to support the conviction and the sentence imposed upon the petitioner, yet the punishment of dismissal from service was wholly disproportionate to the gravity of the offence alleged against him. Relying upon the decision of the Supreme Court in *Ranjit Thakur Vs. Union of India (UOI) and Others*, , Mr. Kinra argued that this court could interfere with the quantum of punishment imposed upon the petitioner or at least remit the matter back to the competent authority to impose a lesser punishment.

7. On behalf of the respondents, Ms. Jyoti Singh, on the other hand, submitted that the Summary Court Martial had been properly conducted and all procedural safeguards followed with an opportunity given to the petitioner to make his statement and to cross examine the witnesses. She further submitted that there was evidence to sustain the order of conviction which the Summary Court Martial and even the appellate authority have both appreciated and relied upon while holding the petitioner guilty of the charge. She, in this regard, drew our attention to the depositions of the witnesses examined in the course of the trial and argued that there was no reason why the testimonies of the two women, one of whom happened to be the victim of the crime, and the other a witness to the entry of the patrolling party into her hut, be not accepted as truthful. She also relied upon the statement of Major Balraj Sharma according to whom the petitioner had despite repeated questioning about the activities of the patrol party refused to reveal anything except that chutney had been prepared at Village Jhargaon in a civilian's house. She urged that the statements of the defence witnesses examined by the petitioner had also supported the prosecution's case in material particulars and that the quantum of punishment imposed upon the petitioner was in no way disproportionate to the gravity of the offence proved against him.

8. We have given our anxious consideration to the submissions made at the Bar and perused the record. There is, in our opinion, no failure of justice or denial of opportunity to defend himself at the Summary Court Martial. A perusal of the record produced before us shows that petitioner had not only cross examined the witnesses produced by the prosecution, made his statement but even examined two witnesses in defence. The requisite certificates regarding the accused having been given the opportunity to cross examine the witnesses and cautioned in terms of Army Rule 23(3) have also been recorded by the officers concerned. There is, in that view, no room for us to interfere with the view taken and the punishment imposed on the petitioner by the Summary Court Martial on the

ground of any procedural irregularity or failure resulting in any miscarriage of justice. The first limb of the argument advanced by the learned counsel, therefore, fails and is hereby rejected.

9. Coming then to the second submission of Mr. Kinra, we must at the outset state that the perversity which a writ court looks for as a ground for interference is one that arises out of a finding that is wholly unsustainable by any evidence or a conclusion which no prudent person reasonably instructed in law can possibly arrive at. A writ court does not, while examining the validity of an order passed by a Summary Court Martial, sit in appeal or reappraise evidence on the basis whereof the Court Martial has recorded a finding and sentenced the accused to suffer punishment. So long as there is evidence which, if believed, can sustain the finding recorded by the Court Martial, it would not be permissible for the writ court to substitute its own finding for that of the Court Martial, even assuming that a second view is as reasonably possible as the one taken by the Court Martial. Having said so, let us briefly see the nature of evidence that was assembled at the trial against the petitioner. Civilian Witness No. 1, Smt. Janki Sakia has narrated the sequence of events that happened on 17th April, 1992. Relevant portion of the said deposition is as under:-

On 17 Apr 92 at about 1300h, I went to water the cows. Smt. Moneshwari Deka met me on my way. When I returned back, I saw three army personnel in Smt. Moneshwari Deka's house. Army personnel called me to Smt. Moneshwari Deka's house. Two of the army personnel enquired from Smt. Moneshwari Deka and me about our husbands. When we told that our husband have gone to market, one of the army personnel took Smt. Moneshwari deka towards one side and two of them asked me to come in one of the room for checking. Both the army personnel checked the bed and then asked me to remove my sari. When I refused, they removed my sari with the barrel of the rifle then army personnel asked me to remove my blouse. I again refused then they asked me to remove my peticot I refused and called Smt. Moneshwari Deka. But the army personnel pointed rifle at me and asked me to lie down on the bed. When I did so, both of them raped me and then third one also came in and he also raped me. At this stage, I cannot recognize them. I have shown the army personnel to the authorities when I was asked to identify them.

10. So also the deposition of Civilian Witness No. 2, Smt. Moneshwari Deka gives an account of what happened on that date. The relevant portion of her deposition is in the following words:-

On 17 Apr 92 at about 1300h, I was coming back after taking water from the well, when I saw some army personnel coming out of my house. When I reached my house they asked me to open the door of my house. At that time Smt Jonaki Saikia was standing at some distance from my house. When I opened the door of my house, army personnel took me to the room which was towards north and then searched by belongings. Then they took me to the room towards east and searched this room also. After searching the room which was towards the east

they came out with me. Then I heard some scream of Smt. Jonaki Saikia from the room which was towards the South. I tried to go out of house but the army personnel stopped me. Then one of them asked me to show the stacks of hay. I did as I was asked. After showing the hay stacks I again tried to go out but the army personnel again stopped me. Then I told the army personnel that I have to bring a pitcher of water for cattle and I came out of my house. When I came out of the house, I saw three army personnel coming out of my house and they went towards the north direction.

11. We may also, at the outset, refer to the deposition of Major Balraj Sharma, according to whom, he had sent a patrol on 17th April, 1992 to carry out recce of an ambush site along route Dalanghat-Bezbhageti-Jhargaon-Kuljuri and Khoirabari under the leadership of Havaladar Mohan Lal. On return, the patrol party had reported that no untoward incident had taken place. On 18th April, 1992, however, he was informed by a JCO who had been sent to the Police Station Khoirabari to get a police representative for accompanying a party which was tasked to carry out a raid that SP Mangaldai wanted to speak to him. When he went to the police station, he was informed that there was an allegation of rape committed by the patrol party in village Jhargaon. In the course of the investigation which started on the basis of that complaint, he questioned the petitioner who was also a member of the patrolling party as to what had happened, but was told that apart from the fact that chutney had been prepared at village Jhargaon in a civilian's house, nothing else had transpired.

12. The depositions of the defence witnesses examined by the petitioner also go to show that the petitioner was indeed a member of the patrol party under the leadership of Havaladar Mohan Lal. According to DW-1, Rifleman Madan Lal's testimony, he was instructed by the patrol leader to search two houses and that after the search of the first house was over, the petitioner and the witness were asked to guard another house, while Karnail Singh went inside to search the same. To the same effect is the statement of DW-2, Lance Naik Karnail Singh, according to whom Rifleman Kuldeep Singh and Rifleman Madan Lal had been deputed to guard the house from outside while he himself searched the house. The witness further states that while he was carrying out the search, Rifleman Kuldeep Singh was standing outside the house. Apart from the above evidence, the statement of the petitioner is also extremely relevant. The petitioner has in reply to a specific question as to why he did not report the facts truthfully, stated:

I was ordered and threatened by Havaladar Mohan Lal and Lance Naik Karnail Singh if I told the truth, they would not spare me even at home.

13. A careful reading of the depositions of the witnesses in conjunction with the statement which the petitioner himself made leaves no manner of doubt that the petitioner had withheld the true facts about the events that took place on 17.4.92 from the Investigating Officer despite being questioned about the same. The argument that the finding of the Summary Court Martial was without any evidence and, therefore, perverse, has not therefore, commended itself to us. Mr.

Kinra's submission that the petitioner was standing at a distance from the hut in which Lance Naik Karnail Singh had committed the disgraceful act taking undue advantage of his position and the helplessness of the woman and that the petitioner could not comprehend the misdeed being committed inside the hut, also needs to be noticed only to be rejected. It is true that the petitioner has in reply to one of the questions stated that he was standing across the parameter fence some distance away and that he did not comprehend the misdeed but it is equally true that the said assertion pales into insignificance once the petitioner justifies withholding of the true facts on account of threats which Havaldar Mohan Lal and Lance Naik Karnail Singh had allegedly given to him. We have in that view of the matter no hesitation in rejecting even the second limb of the argument advanced by Mr. Kinra.

14. That brings us to the question of proportionality of the punishment imposed upon the petitioner. In *Ranjit Thakur Vs. Union of India (UOI) and Others*, , their lordships accepted the proposition that the quantum of punishment is a matter within the jurisdiction and discretion of the Court Martial. Even so, the sentence, observed their lordships, has to suit the offence and the offender and should not appear to be vindictive or unduly harsh. The Court held that doctrine of proportionality as a part of the concept of judicial review would ensure that even on an aspect otherwise within the exclusive province of the Court Martial, the decision of the Court is not in an outrageous defiance of logic. To the same effect is the decision of the Supreme Court in *Bhagat Ram Vs. State of Himachal Pradesh and Others*, .

15. In a later decision rendered by their lordships in *Union of India and Others Vs. R.K. Sharma*, the court sounded a note of caution and restricted judicial interference only in extreme cases of perversity and irrationality. The Court noticed the earlier decision in *Ranjit Thakur's* case (*supra*) and the factual matrix in which the accused in that case was punished and observed:

On such a ridiculous charge rigorous imprisonment of one year was imposed. He was then dismissed from service, with the added disqualification of being declared unfit for any future civil employment. It was on such gross facts that this Court made the observations quoted above and held that the punishment was so strikingly disproportionate that it called for interference. The above observations are not to be taken to mean that a court can, while exercising powers under Articles 226 or 227 and/or under Article 32, interfere with the punishment because it considers the punishment to be disproportionate. 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 . (emphasis supplied)

16. In the present case, the petitioner was found guilty of having deliberately withheld information relating to an act of grave misconduct on the part of the patrol party, in that they had outraged the modesty of Smt. Janaki Sakia which fact, was well known to the petitioner but was withheld by him from his superiors

despite repeated questioning. The seriousness of the offence which the members of the patrol party had committed and the attempt on the part of the petitioner to hide the same from the authorities was, therefore, in itself a serious matter. Instead of making a clean breast of what had transpired on the fateful day, the petitioner was seen to have prevented the facts from coming to light. There is no gainsaying that the life and the honour of citizens of this country cannot be allowed to be invaded by the very same people who are supposed to protect them. A Court dealing with such invasions cannot ignore the sense of frustration and helplessness of those who suffer humiliation and exploitation at the hands of the members of the Armed Forces deployed to protect the weak and the helpless against the tyranny of the strong and the ruthless. Inasmuch as the petitioner suffered the sentence of the dismissal from service at the hands of the Summary Court Martial, the punishment cannot be said to be so outrageously disproportionate as to warrant interference by this Court. There is no merit in this petition which fails and is hereby dismissed but in the circumstances without any order as to costs.