

**(2007) 04 DEL CK 0013**

**In the Delhi High Court**

**Case No :** Writ Petition (C) No. 2787 of 2001

Ex. Squadron Leader S. Mukherjee

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

**Date of Decision :** 20-04-2007

**Acts Referred:**

Air Force Act, 1950 — Section 39, 73

Air Force Pension Regulations, 1961 — Regulation 754

Constitution of India, 1950 — Article 226, 227

**Citation :** (2007) 142 DLT 623

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

**Bench :** Division Bench

**Advocate :** Sunil Kumar and Shree Prakash Singh, for the Appellant; Anil Nag, for the Respondent

**Final Decision :** Dismissed

## Judgement

T.S. Thakur, J.—In *Ranjit Thakur Vs. Union of India (UOI) and Others*, , the Supreme Court evolved the doctrine of proportionality as a possible ground for judicial review of a decision leading to imposition of a punishment. The court held that while judicial review is, generally speaking, directed against the decision making process more than the decision itself and the choice and quantum of punishment is within the jurisdiction and discretion of a court martial, the sentence must suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be disproportionate to the offence so as to shock the conscience of the court and amount in itself to proof of bias against the offender. The Court would, Therefore, interfere in a case where the sentence, is in outrageous defiance of logic or could be termed as irrational or perverse. That view was reiterated though with a note of caution by the Supreme Court in *Union of India and Others Vs. R.K. Sharma*, . The court martial had, in that case, held an officer guilty of the charges and dismissed him from service as a measure of punishment. The said order was challenged in a writ petition before the High Court who set aside the punishment order and sent the matter back to the court

martial for awarding a lesser punishment having regard to the nature and the degree of offence established against the officer. In a further appeal before the Supreme Court, their lordships held that the awarding of sentence is within the powers of the court martial and that while exercising powers under Articles 226 and 227 of the Constitution, a writ court cannot interfere with the punishment merely because it considers the same to be disproportionate. It is only in extreme cases which on their own face show perversity or irrationality that the court can, in exercise of its power of judicial review, interfere. Interference on a compassionate ground was, according to their lordships, wholly misplaced. To the same effect is the decision of the Supreme Court Union of India and Ors. v. Datta Linga Toshatwas (2005) 13 SCC 709 where desertion of a person serving in the armed forces was held to be a serious matter and dismissal from service held to be a justified disciplinary action in no way disproportionate to the misconduct alleged.

2. The legal position thus stands fairly well settled. While the quantum of punishment is a matter that is not immune from judicial review, a writ court could not ordinarily interfere with the same unless the punishment can be said to be so outrageously disproportionate to the gravity of the offence that it may be termed as perverse or irrational. What has to be borne in mind is that a writ court does not sit in appeal over the decision of a subordinate authority. The mere fact that the court would, if placed in the position of the authority, levied a lesser punishment would not Therefore be a ground sufficient to justify interference.

3. The question that falls for determination in the present writ petition is not whether the punishment is adequate. The question is whether the punishment is so grossly disproportionate as to constitute a perversity or irrationality of a kind that no prudent person would accept. That is the legal backdrop in which the petitioner's challenge to the order of dismissal from service shall have to be examined in the instant case.

4. The petitioner was at the relevant point of time working as a Squadron Leader in the Indian Air Force and posted at Air Force Station, Palam, New Delhi. He was tried by a General Court Martial for a charge of absenting without leave from 26th September, 1994 till 12th October, 1994. The fact that the petitioner had remained absent during this period was not in question. The petitioner's defense was that he was forced to do so by certain unavoidable reasons and mitigating circumstances. That defense did not find favor with the general court martial who held him guilty and sentenced him to dismissal from service. The petitioner's challenge to that order is primarily founded on the contention that the punishment is wholly disproportionate to the gravity of the offence committed by him and that the sentence is discretionary inasmuch as in similar other cases, the delinquent officers were let off with a lesser punishment.

5. Section 39 of the Air Force Act, 1950 inter alia provides that no person subject to the said Act who absents himself without leave or who outstays leave

granted to him without sufficient cause shall on conviction by a court martial be liable to suffer imprisonment for a term which may extend to 3 years or such other punishment as is mentioned in this Act. Section 73 of the Act sets out the punishment awardable by a court martial. These punishments range between severe reprimand to death sentence and include dismissal from service. Regulation 754 of the Air Force Regulations inter alia provides that sentence must necessarily vary according to the requirements of discipline but in the ordinary circumstances and for the first offence, the sentence should be light. Relying upon the said regulation, it was argued on behalf of the petitioner that the sentence of dismissal from service was excessively harsh and disproportionate to the gravity of the offence committed by the petitioner. It was urged that the petitioner had been forced to leave for Jabalpur without seeking leave on account of the illness of his father who was an old diabetic patient with multiple complications and that the said reason was a mitigating circumstance to justify a lesser punishment. It was argued that in similar other cases, the court martials had, for unauthorised absence from duty, imposed much lesser punishment upon officers which clearly meant that the discretion vested in the court martial had not been properly exercised in the case of the petitioner.

6. On behalf of the respondents, it was, on the other hand, submitted by Mr. Nag that there was no justification for the petitioner to have absented himself without leave and that the argument that he had to do so in order to take care of his ailing father was unsupported by any averment to that effect in the statement made before the general court martial or the closing address given on behalf of the petitioner. There was no evidence that there was any serious complication arising from the illness of his father resulting in any threat to his life or calling for hospitalization which could possibly justify his leaving the station without leave. The plea that the petitioner had to leave for Jabalpur to take care of his father was thus an afterthought, wholly unsupported by any material. It was also submitted that the statutory petitions filed by the petitioner have been examined and disposed of by the authorities after proper application of mind and that the challenge to the order passed by the competent authority in that regard was wholly misplaced.

7. The maximum punishment which Section 39 of the Air Force Act provides for an offence of absence without leave is imprisonment for a period of 3 years. The court martial has not in the instant case imposed the said punishment. It has on the contrary dismissed the petitioner from service which is one of the awardable punishments u/s 73 of the Act. There is, in that sense, no error of jurisdiction in the order passed by the court martial especially when absence without leave is something which was never in dispute before it. All that the petitioner urged was mitigating circumstances justifying the said absence and calling for a lesser punishment. The question then is whether the punishment of dismissal is indeed so outrageously disproportionate to the gravity of the offence that this Court would consider the same to be perverse or irrational to call for interference. Absence from duty, there is no gainsaid, may arise from a variety of

circumstances. The petitioner's Explanation in the instant case was that he absented from duty without leave because his father was sick. There is no doubt an averment to that effect in the statement made before the court martial as also in the closing address and in the writ petition. What is, however, absent is any averment to the effect that there was any emergency on account of the condition of the patient turning serious calling for the petitioner's impulsive action of leaving the station without applying for leave. There is no assertion in the statement made before the court martial even to the effect that the father of the petitioner had developed any complication resulting in his hospitalization. There is no assertion leave alone any evidence to prove any such admission in the hospital. Similarly, there is no evidence regarding the petitioner's father having been treated for any such complication by any doctor in Jabalpur. There is total lack of evidence even on the question whether the petitioner at all went to Jabalpur to attend to his father. Suffice it to say that in the absence of any satisfactory proof to the effect that the petitioner had left the station because of any sudden deterioration in the condition of his father's health, his conduct of absenting without leave could not be said to be pardonable by taking a lenient view in the matter. As observed by the Supreme Court in Datta Linga's case (supra), desertion is a serious matter in a disciplined armed forces. The authorities can and are indeed expected to ensure discipline by taking suitable measures to prevent recurrence of such instances where officers leave station on no more than a mere pretext. If the petitioner was unable to satisfy the court martial about the genuineness of the cause leading to his unauthorized absence, he could not ask for a lenient view being taken in the matter of punishment to be imposed upon him. The punishment imposed by the court martial, in any event, cannot be said to be so outrageously disproportionate as to shock the conscience of this Court or constitute a perversity or irrationality of a kind that would call for interference. The first limb of the challenge to the order passed by the court martial, Therefore, fails and is accordingly rejected.

8. Equally untenable is the alternate submission made on behalf of the petitioner that the punishment imposed upon him is discriminatory inasmuch similar other offenders have been let off with lighter punishment. As to what punishment may be justified in a given case would depend upon the facts and circumstances of that case and the Explanation offered by the delinquent officer. Just because the absence in another case was for a period comparable to or longer than the period for which the petitioner was absent would not constitute a similarity calling for a similar punishment. What is more important is the Explanation offered by the officer who has been punished for that alone is going to eventually determine whether the punishment has to be light or severe. There are no facts on record relevant to the cases about which the petitioner has made a mention in the petition. The circumstances in which the delinquent officers had absented or deserted in those cases and the Explanation offered by them are not available nor has any effort been made by the petitioner to establish a similarity between the factual matrix of his case and the cases relied upon by him. In that view, it is

difficult to match the colours of the cases already decided with the present case or compare the punishments to find out whether there is any discrimination. The quantum of punishment is, in any event, a matter on which it is difficult for any authority to maintain precise consistency. It depends on a variety of factors including the subjective satisfaction of the punishing authority.

9. That brings us to the last and the only other submission that the petition filed by the petitioner has not been disposed of by a reasoned order even though there was a direction to the respondent from this Court to do so. The record produced by Mr. Nag however shows that the various aspects which the petitioner had raised in his petition were looked into by the authorities concerned and a final decision taken on the same. So long as the contemporaneous record discloses due and proper application of mind by the competent authority, the very fact that the order by which the authority communicating the dismissal of the writ petition did not extensively set out the reasons that weighed with it shall not affect the legality of the disposal.

10. In the result, this petition fails and is hereby dismissed but in the circumstances without any order as to costs.