
(1988) 08 DEL CK 0005

In the Delhi High Court

Case No : Criminal Writ Appeal No. 445 of 1987

Kanhiya Lal Pathak

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 10-08-1988

Acts Referred:

Citation : (1988) 15 DRJ 405(2)

Hon'ble Judges : M.K. Chawla, J;Charanjit Talwar, J

Bench : Division Bench

Advocate : Chandra Gupta, Sat Pal and Rekha Agarwal, for the Appellant;

Judgement

Charanjit Talwar, J.

(1) By this petition, the petitioner Ex. Naik Kanhiya Lal Pathak, challenges the conviction awarded to him by Summary Court Martial vide order dated 15th April, 1986. The petitioner at the relevant time was a non-commissioned officer holding the rank of a Naik. He was charged for an offence u/s 40(a) of the Army Act (hereinafter called the Act). The charge framed by his Commanding Officer Lt. Colonel M.C. Sebastian on 1st April, 1986 reads as follows :-

"USINGCRIMINAL Force To His Superior Officer in that he. Army Act Section 40(a) at filed on 06 April 1986, at about 1030 hrs, caught the collar, pushed and hit with his right hand IC-25372W Major Ravi Gupta, Officer Commanding of his unit,"

(2) The petitioner admitted his guilt and made the following statement before his Commanding Officer who was holding the Summary Court Martial:

"I admit my guilt. I shall never commit such a mistake again. I am prepared to apologies to my Oc, Maj. Gupta and I shall give in writing that as long as I remain in the army, such a mistake will not be repeated. I request you to consider my case sympathetically, keeping in view the fact of my children and my family."

(3) The Summary Court Martial after considering the previous convictions awarded to the petitioner herein (the statement giving full particulars of previous convictions) is on page 46 of the writ petition awarded the following punishments:-

"(A)to be reduced to the ranks ; (b) to be dismissed from service."

The sentence was promulgated on the same date, i.e., 15th April, 1986 at 12.30 P.M.

(4) The only ground urged before us by Mr. Gupta, learned counsel for the petitioner is that the procedural safeguard as provided u/s 130 of the Army Act not having been complied with, the proceedings of the Summary Court Martial are vitiated and thus liable to be set aside. In support of his contention, Mr. Gupta relies on a judgment of the Supreme Court *Ranjit Thakur Vs. Union of India (UOI) and Others*, . In the said case, the appellant who was a Signal Man in the Signal Regiment of the Army was tried by a Summary Court Martial. His Commanding Officer (i.e. respondent No. 4 in the said case) was presiding over the Court. After some witnesses on behalf of the prosecution had been examined, the appellant admitted his guilt. He was dismissed from service and also a sentence of rigorous imprisonment for one year was awarded. One of the please raised before the Supreme Court was :

"(A)(I)The proceedings of the Court Martial are vitiated by non-compliance with the mandate of Section 130(1) of the Act in that the Summary Court Martial did not afford to the appellant an opportunity to challenge its constitution as required by that section."

(5) After noticing the provision of Section 130 of the Act, it was observed that the proceedings did not indicate that the appellant was asked whether he objected to be tried by any officer, sitting at the Court Martial. The Court held, "We are afraid, the non-compliance of the mandate of Section 130 is an infirmity which goes to the root of the jurisdiction and without more, vitiates the proceedings."

(6) Mr. Gupta submits that in the present case also, the proceedings of the Court Martial do not indicate that the petitioner was ever asked whether he objected to be tried by Lt. Col. Sebastian. The factual position is admitted. Mr. Satpal, learned counsel for the State, however, submits that Army Act (sic) Section 130 is not applicable to Summary Court Martial. He submits that the said provision is applicable to three types of Court Martial i.e. General Court Martial, District Court Martial and Summary General Court Martial. The fourth type of Court Martial i.e. the Summary Court Martial can be held only by the Commanding Officer and he alone has to constitute the Court within the purview of Section 116 of the Act. The said section reads as follows :-

"116.Summary Court Martial. (1) a Summary Court Martial may be held by the Commanding Officer of any Court, Department or attachment of the regular

army, and he shall alone constitute the Court ; (2) The proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either and who shall not as such be sworn or affirmed."

(7) The argument is that the Summary Court Martial is a single member court. The other two persons who are required as per the Sub-section (2) to attend are not even to be sworn or affirmed. They merely witness the proceedings but do not take part in it.

(8) In view of the clear enunciation by the Supreme Court that provisions of Section 130 of the Act are applicable to a Summary Court Martial, it is not open to us to analyze or to give any finding on the submission made by Mr. Sat Pal. Following the law laid by their Lordships in the said decision, we set aside the impugned order dated 15th April, 1986, Rule is made absolute. However, no order as to costs.