
(1997) 05 J&K CK 0007
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 258 of 1984

Kartar Chand Kotwal, No.9079304 Rfn.	APPELLANT
Vs	
Commanding Officer, 3 JAK LI C/o 56 A.P.O.& ethers	RESPONDENT

Date of Decision : 16-05-1997

Acts Referred:

Arms Act, 1959 — Section 38

Citation : (1997) KashLJ 193 : (1997) SriLJ 311

Hon'ble Judges : B.A.Khan, J

Bench : Single Bench

Judgement

1. Petitioner was enrolled in the army on 21.11.1972 and was later deployed on Sikkim Border. He claims that he had some running feud with

Sub. Sat Paul who had told him that no clearance certificate was required for his proceeding on leave. According to him, he received a telegram

that his wife was seriously ill and he consequently applied for leave to the Commanding Officer for two months which, he asserts, was sanctioned.

He thereafter approached for the clearance certificate but was informed by Sub. Sat Paul that it was not required. While he was availing of the

leave, he was arrested and brought to the unit on 7.1.1979 at Chandi mandir. He was thereafter let free and allowed to participate in exercise for

two months and was dismissed from service in March 1979 without being tried by the court martial and was eventually send home on 13.3.1979

after having put in 7 years service. He alleges that no formal order of dismissal was passed by the respondents nor was any court martial held.

2. In the reply filed by the respondents it is submitted that the petitioner's cause suffered from unexplained delay and laces and the allegations made

by him against Sub. Sat Paul were untenable as he had failed to impaled him as

a party respondent. It is stated that the petitioner had brought his family in the station on 25.4.1977 without prior approval of the competent authority. He thereafter overstayed his leave for 13 days from August 15 to 27, 1978 for which he was charge sheeted under sec. 39(b) of the Army Act and sentenced to 28 days rigorous imprisonment. He finally deserted his service on 5.1.1979 and remained absent till he was apprehended by the police on 17.1.1979 and kept in military custody till 12.3.1979. He was thereafter tried by the summary court Martial on 13.3.1979 under sec. 38(1) of the Army Act for deserting the service, being a habitual offender. It is also alleged that the petitioner failed to cross examine sub. Sat Paul Hav. Anayat Ullah and CHM K P Singh, who were prosecution witnesses in the summary of evidence. The summary court martial was conducted in conformity with the provisions of the Army Act and Capt J S verma was detailed as "friend of the accused". The petitioner pleaded guilty to the charge voluntarily and the punishment was awarded commensurate with the offence committed by him.

3. Petitioner's counsel, Mr. Qazi, sought to draw distinction between "case of absence from duty" and one of 'desertion'. According to him, petitioner had at best remained absent from duty without leave and that he should not have been treated to be a deserter and punished under sec.

38 of the act. According to him, respondents were under a duty to first follow procedure under Sec. 106 of the act and to hold a court martial to find out whether he had remained absent from duty without leave with the intention to surrender his service. He also contended that the punishment given to the petitioner was disproportionate and violative of Sec. 72. He placed reliance on Virinder Kumar's Case (AIR 1986 SC 1063, AIR 1992 SC 417 and 1991 KLJ513).

4. On his own showing, petitioner was sent home in March 1979 and he was filed this petition in 1984 after 4/5 years. There is no explanation for the delay in filing the petition. That apart, he appears to have concealed the fact of being tried by the summary court martial were conducted in breach of any provisions of the Army Act of the rules framed thereunder.

5. In the circumstances there is no reason to disbelieve the version of the respondents who have taken pains to project his nontoo happy service graph which shows that he was punished for absence from duty earlier also and

that he was tried by the court martial in accordance with the relevant provisions of the Army Act and the rules framed there under and was provided ample opportunity to confront the witnesses during the summary of evidence and was even provided "the next friend".

6. In this context Mr. Qazi's ingenious attempt to draw a distinction between the "absent from duty without leave" and "desertion" represents a desperate last minute attempt to resort to legal hair splitting and to set at naught the petitioner's dismissal from service. The Army Act makes 'desertion' and 'aid in desertion' offence under Sec. 38. Sec.39. deals with the offence of absence without leave and sec.106 prescribed the procedure to be followed when a person without leave is to be deemed to be a deserter.

7. The expressions "desertion" or "deserted" are not defined in the Army Act. But, para 418 of the Artillery Records Instructions, 1981, make a distinction between "desertion" and "absence without leave". It provides.

A person is guilty of offence of absence without leave when he is voluntarily absent without authority from the place where he knows, or ought to know, that his duty requires him to be. If, when he absented himself, he intended either to quit the service altogether or to avoid some particular duty for which he would be required, he is guilty of desertion".

8. It needs hardly to be emphasized that "desertion" is different from "absent without leave". The desertion or the attempt to desert in the service implies an intention on the part of the individual concerned to surrender his service and not to return to it to avoid some important military duty like the service in a forward area or service in aid of civil authority etc. A person may be a deserter and yet may report back for duty. It all depends upon whether he had left his post at the relevant time with an intention to never return again, though on a second thought, he may so return.

9. Black's Law Dictionary also by and large convey the same connotation of the expression "desertion" in the following terms:

In a member of the armed forces who

(1) Without authority goes or remains absent from his unit, organization or place of duty with intent to remain away there from permanently; or

(2) Quits the unit or organisation or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) Without being regularly separated from one of the armed forces enlists or accepts the appointment in the same or another one of the armed

forces without fully disclosing the fact that he has not been regularly separated or enters in foreign army service; is guilty of desertion.

10. It was for the respondents to adjudge whether the petitioner's case fell within one category or the other and it is their province alone to take a

prima facie view whether a case of absence from duty without leave, tantamount to desertion and whether such absence was intended to be away

from duty permanently. Therefore, when respondents had proceeded against the petitioner on the ground that he was a 'deserter', it was not for

this court to take a contrary view or to substitute its own opinion in the given circumstances. This is not to suggest that the power of judicial review

is not available to examine cases which may be suffering from want of jurisdiction or from an error apparent on the face of the record. But, so long

as the army authorities, on some basis, treat aft army man to be a 'deserter' taking in regard his past conduct etc., it is not for the courts to

substitute the view and to take it upon itself the role of separating the grain from the chaff. Nor is it obligatory for the army authorities to hold a

court of inquiry and to comply with the provisions of sec. 106 of the Act where the authority treats the individual as a 'deserter and not as ""deemed

deserter

11. Applying all this to the present cause and taking in regard the petitioner's service antecedents, it is not possible to hold that he was wrongly

treated a 'deserter¹ or that he was disproportionately punished. Nor can the summary court martial proceedings be faulted in the absence of any

worthwhile challenge to these by the petitioner.

12. Therefore, all things Considered, I do not deem it necessary to go through the record of the summary court martial and dismiss this petition

otherwise.