
(2007) 10 GAU CK 0044
In the Gauhati High Court

Kayamuddin Siddiquei

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-10-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 277
Criminal Procedure Code, 1973 (CrPC) — Section 303

Citation : (2008) 4 GLT 670

Hon'ble Judges : A.P. Subba, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.P. Subba, J.—By filing this writ petition under Article 226 of the Constitution of India, the petitioner an Ex. No. 164259 M Rfn/GD of 16 Assam Rifles seeks to challenge the order dated 19.7.2005 passed by the Army Court-martial convicting the petitioner and sentencing him to R.I. for six years and also dismissing him from service.

2. Briefly stated the facts are as follows: The petitioner, a rifleman, serving in 13 Assam Rifles availed of leave from 2nd June 2003 to 24th July 2003 and proceeded to Deoria, his home town in connection with his marriage. One Mr. Masood Alam whom he met when he was at Deoria asked him to procure a weapon from his place of duty for which he promised to pay Rs. One lakh. Similarly, one Md. Haroon whom he met at Gauhati when he was on his way back to resume his duty asked him to procure a weapon offering to pay him one lakh along with one Enfield motor cycle. The said Mr. Haroon also chalked out a detailed plan for the petitioner for stealing the weapon and amunition. Following up this plan the petitioner again applied for leave w.e.f. 9th Aug, 2003 to 28th Aug, 2003 and got the same sanctioned. After the leave was sanctioned he left the Unit on 8th Aug., 2003, and reached Mariani Railway Station where he got his warrant exchanged for Deoria. Then leaving his luggage in a hotel, he returned to his company in a civil vehicle at night on 9th Aug 2003 and sneaked

into the Coy lines after changing into combat dress. At about 2300 hrs when he was trying to make off with two AK 47 Rifles and some ammunition he was spotted by the sentry on duty. Upon this he rushed back and entered No. 1 Platoon Barrack and took his seat on an empty cot from where the petitioner was apprehended by Rifleman/General Duty R. Singh and others.

3. A General Court-martial (GCM) was accordingly convened under the Army Act, 1950 (for short the Act) to try the petitioner, on the following two charges

In that he,

at field, on 9th August 2003, committed theft in respect of following rifles, magazines and ammunition, value as shown against each, the property of the Government:

(a) Two AK 47 Rifles with following particulars:

(i) Butt No. 42 & Regd. No. TU-1160 --Value Rs. 5,535/- (ii) Butt No. 66 & Regd. No. ALF-2622 --Value Rs. 5,535/- (b) Five Magazines of AK 47 --Value Rs. 2,500/- (c) 120 rounds of AK 47 Rifle ammunition -- Value Rs. 3,514/- of Lot No. 322/97.

In that he,

at field, on 15th October 2003, when under close arrest in the Unit Quarter Guard escaped there from.

4. The petitioner pleaded guilty to both the charges and as he was found guilty of charges on his own plea he was sentenced to be dismissed from service and to undergo R.I. for 8 years. On appeal preferred by the petitioner the sentence of R.I. for 8 years was reduced to 6 years. However, the sentence of dismissal from service was maintained. Aggrieved by the order of conviction and sentence the petitioner has filed the present writ petition for setting aside and quashing this order in question.

5. I have heard Mr. R. Jha, the learned Counsel for the petitioner as well as Mr. S.C. Shyam, the learned CGC representing the respondents.

6. It was the submission of Mr. Jha that the charges were not properly explained and the petitioner was compelled to plead guilty to the charges under duress. He was not provided advocate of his choice which prejudiced his defence. As such, the conviction of the petitioner was without any fair trial. Therefore the impugned orders passed by the Army Court-martial and the confirming authority were liable to be set aside and quashed as being untenable in law. Per contra, Mr. S.C. Shyam, the learned CGC submitted that no pressure of any kind was brought to bear upon the petitioner to admit the guilt. According to him the charges were duly explained to the petitioner in the language which he understood and it was after he fully understood the charges that he pleaded guilty. The Court-martial accepted the plea of guilty duly complying with the procedure laid down in Rule 52 of the Army Rules 1954. The petitioner stood by

his plea of guilty even when the summary/additional summary of evidence was read out to him. It was thus on his own plea of guilt that the petitioner was found guilty and convicted and sentenced. Thus the whole proceeding having been held as per law the contention that the trial was biased and unfair is baseless and liable to be rejected.

7. It would appear from the above that the main ground taken by the learned Counsel for the petitioner relates to non-compliance with the relevant provisions of the Army Act 1950 as well as the provisions of the Army Rules 1954.

8. Rule 52 of the Army Rules 1954 which provides for a detailed procedure to be followed for recording plea of "Guilty" or "Not Guilty" reads as follows:

52. General Plea of "Guilty" or "Not Guilty"-

(1) If no special plea to general jurisdiction of the court is offered, or if such plea being offered, is overruled, or is dealt with by a special decision under Sub-rule (4) of Rule 51, the accused person's plea "Guilty" or "Not Guilty" (or if he refuses to plea, or does not plead intelligibly either one or the other a plea of "Not Guilty") shall be recorded in each charge.

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the Court; but before it is recorded, the presiding officer or judge-advocate, on behalf of the court, shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence the accused ought to plead "Not Guilty."

[(2A) Where an accused pleads "Guilty", such plea and the factum of compliance of Sub-rule (2) of this rule, shall be recorded by the court in the following manner:

Before recording the plea of "Guilty" of the accused, the court explained to the accused the meaning of the charge(s) to which he had pleaded "Guilty" and ascertained the accused had understood the nature of the charge(s) to which he had pleaded "Guilty". The Court also informed the accused the general effect of the plea and the difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charge(s) and the effect of his plea of "Guilty", accepts and records the same. The provisions of Rule 52(2) are thus complied with.]

3. Where an accused person pleads "Guilty" to the first of two or more charges laid in the alternative, the prosecutor may, after Sub-rule (2) has been complied with by the court and before the accused is arraigned on the alternative charge of charges, withdraw such alternative charge or charges without requiring the accused to plead thereto and a record to that effect shall be made upon the proceedings of the court.

4. A plea of "Guilty" shall not be accepted in cases where the accused is liable, if convicted to be sentenced to death, and where such plea is offered, a plea of "Not Guilty" shall be recorded and the trial shall proceed accordingly.

9. According to the learned CGC the provisions of the above Rule were read over and explained to the petitioner by the Judge Advocate. In addition, he was also informed that he may make a statement in mitigation of punishment in terms of Clause (4) of the above Rule after the summary of the evidence had been read over at the trial. It was also stated that ample opportunity was given to the petitioner to make a statement in the summary of evidence in presence of independent witness. However the petitioners declined to make any statement.

10. In order to ascertain as to whether the above submission is borne out by the materials on record I have perused the General Court-martial proceedings annexed to the writ petition and marked as Annexure-I. The certificate of compliance of the provision of Rule 52 read as follows:

The provisions of Army Rule 52 (2) have been explained by the Court. The charges are explained to the accused once again in the language he understands and on being asked the accused informs the court that he has understood the charges. The accused was also told about the difference in procedure on plea of guilty, in that, he may be convicted and found guilty of the charges solely on the basis of his plea of guilty without recording any evidence in support of charges after the Summary of Evidence is read over. No prosecution witnesses will be examined in support charges and he also will not be afforded an opportunity to lead any evidence through defence witnesses regarding the facts of the charges. He may be sentenced after taking into consideration the statement in mitigation, if same is submitted by him.

The accused informs the court that he has understood the law and procedure that will be followed in the case of guilty. He further informs the court that having given due thought he had decided to maintain his plea of guilty to the charges. He also submits before the court that he has offered the unconditional and unqualified pleas of guilty to the charges voluntarily and he has not been tutored, pressurized or induced by anybody, high or low, to do so. He requested that he may please be found guilty of the charges accordingly.

Before recording the plea of guilty offered by the accused, the court explained to the accused the meaning of the charge to which he has pleaded guilty and ascertained that the accused has understood the nature of the charges to which he has pleaded guilty. The court also informed the accused the general effect of the plea and difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charges and the effect of his plea of "Guilty" accepts and records the same.

Provisions of Army Rule 52(2) and (2A) are thus complied with in letter and spirit.

11. A bare perusal of the above certificate, which is not disputed, goes to show

that the charges were explained to the petitioner in the language which he could understand. After the charge was explained, the petitioner informed the Court that he understood the charge and having so understood he had decided to maintain his plea of guilty voluntarily without any pressure or inducement. After this the Court explained the meaning of the charge to the petitioner and accepted the plea of "Guilty" after duly satisfying that he has understood the nature of the charge to which he had pleaded guilty.

12. It is manifest from the above that there is no departure from the procedure prescribed for trial of delinquents under the Army Act and the Army Rules. The proceedings before the Court-martial appear to be in conformity with the prescribed procedure. Keeping this fact in view as well as the parameters of High Courts power of judicial review in respect of Court-martial proceedings it is not necessary to observe that there is hardly any scope of interference by this Court in the matter. In *Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827)*, , the Apex Court has held that though Court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the Court-martial is not subject to the superintendence of the High Court under Article 227. Highlighting the special place a Court-martial occupies the Court observed as follows:

It has been rightly said that court-martial remains to a significant degree, a specialized part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused....

The Court further held:

....If a court-martial has been properly convened and there is no challenge to its composition and proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands?.

Similarly in *Union of India and Others Vs. Himmat Singh Chahar*, , the Apex Court held as follows:

....The High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural

justice which vitiated the entire proceedings or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a power of an appellate authority permitting the High Court to reappreciate the evidence and incoming to a conclusion that the evidence is insufficient for the conclusion arrived at by the competent authorities in court-martial proceedings. At any rate it cannot be higher than the jurisdiction of the High Court exercised under Article 277 against an order of an inferior tribunal.

(Emphasis supplied)

In the Union of India (UOI) Vs. Sardar Bahadur, the Apex Court had held as follows:

Where there are relevant materials which support the conclusion that the officer is guilty, it is not the function of the High Court to arrive at an independent finding. It has been held that if an enquiry has been properly held the question of adequacy or reliability of evidence cannot be canvassed before the High Court.

(Emphasis supplied)

13. It would thus be clear from the above that the High Court's power of judicial review in respect of court-martial proceedings is limited. It is confined to finding out whether there is any infraction of any provision of the Act providing the procedure and whether there has been any violation of the principles of natural justice vitiating the proceedings etc. In the present case neither the composition of the court-martial is under challenge nor are the proceedings not in conformity with the prescribed procedure.

14. The position of law as highlighted above makes it more than clear that the scope of interference is quite narrow and limited. However before coming to the final conclusion it would be appropriate to deal with few other points raised by Mr. R. Jha, the learned defence counsel.

15. One of the points canvassed with vehemence was that the charges were not properly explained to him and he was made to plead guilty before he could understand the charge, and the plea was not recorded in the words used by the accused. This according to the learned Counsel vitiates the whole trial. So far as the question of properly explaining the charge to the accused is concerned the certificate of compliance of provisions of Rule 52 already reproduced above leave no manner of doubt that charge was explained to him in the language which he understood and the fact that he understood the charge was also confirmed. While rejecting a similar argument advanced by the learned Counsel on behalf of the accused a learned Single Bench of this Court in Gulab Chandra v. Union of India WP(C) No. 9(K) of 7002 decided on

7.3.2005 observed as follows:

The plea taken by the petitioner that the gravity of the charge was not explained

to him and the consequence of pleading guilty was not satisfactorily explained to him is belied by the records of the summary court-martial proceedings. When the said facts were expressly recorded in the proceedings of the Court-martial, even though such recording may have been in the prescribed format, this Court must respect the same to be correct.

The learned bench further observed as follows:

Even otherwise, the assertions made by the petitioner and the denial thereof by the respondent would give rise to disputed question of fact as to what had really transpired in the court-martial proceeding in which event also the court would not be able to determine the issue raised in favour of the writ petitioner, the present being a proceeding under Article 226 of the Constitution.

16. The above observation, with which I find myself in complete agreement, reflects the correct position of law and applies with equal force to the facts of the present case.

17. As regards the next question relating to non-recording of the plea in the words used by the accused, the learned Counsel placed reliance on the following observation made by a Division Bench of this Court in *Sadacharan K. and Ors. v. Union of India and Ors.* reported in (1992) GLR 445. The observation occurring in para 8 of the judgment is as follows:

8. Pleading of "guilty" means an admission of an accused having committed the offence with which he is charged. u/s 115(2), the plea of guilty shall be recorded as the finding of the Court. The use of expression "does not plead intelligibly" in Rule 115(1) indicates that the plea must be clear and unambiguous. Whether the plea is clear and unambiguous, or, whether the accused pleads or does not plead intelligibly, will depend on the words used by the accused. A mere entering or recording the word "guilty" may mean Court's own conclusion or interpretation. Therefore, the clause "if the accused pleads guilty, the plea shall be recorded as the finding of the Court" means that the Court shall record the plea in the words used by the accused, or, the Court shall record the plea as nearly as possible in the words used by the accused. Such a recording will enable the party seeking justice to know as well as the higher authority or the confirming authority to determine whether the plea recorded really amounts to an admission of guilt.

18. On a plain reading of the above observation I find it difficult to see how the ratio laid down in the case supports the contention urged by the learned Counsel. All that the learned Bench has observed while elucidating the clause "if the accused pleads guilty the plea shall be recorded as the finding of the Court" is that the Court shall record the plea in the words used by the accused, or the Court shall record the plea as nearly as possible in the words used by the accused. This shows that there are two alternatives available to the Court. While the first alternative is that the plea shall be recorded in the words used by the accused, the second alternative is that the plea shall be recorded as nearly as possible in the words used by the accused. The use of the disjunctive word "or"

in between the two "alternatives" shows that the Court can, depending on the circumstances of each case opt for and adopt either of the two alternatives while recording plea of "guilty".

19. The next decision relied on by the learned Counsel in this regard is the decision rendered by the Apex Court in Mahant Kaushalya Das Vs. State of Madras, . The observation relied is as follows:

...The requirement of the section is not a mere empty formality but is a matter of substance intended to secure proper administration of justice. It is important that the terms of the section are strictly complied with because the right of appeal of the accused depends upon the circumstance whether he pleaded guilty or not and it is for this reason that the legislature requires that the exact words used by the accused in his plea of guilty should as nearly as possible be recorded in his own language in order to prevent any mistake or misapprehension....

20. The submission made by the learned Counsel is that as per the above observation it is obligatory on the part of the Court to record the plea of the accused in the very words used by the accused. I however find it difficult to agree with the learned Counsel that the above decision can be taken as an authority for the proposition that plea of the accused must invariably be recorded in the words of the accused. The use of the words "as nearly as possible" in the context of recording the plea makes it amply clear that it is not the requirement of law that plea of guilty of the accused is always required to be recorded in the "exact words" used in the language used by the accused. Even otherwise, the above observation has been made in the context of proceedings of a criminal court under CrPC while in the present case the proceedings relates to court-martial and as per the observation made by the Apex Court in Union of India and are not to be compared with the proceedings of criminal court under CrPC. In view of the legal position as highlighted above it must be held that the contention urged by the learned Counsel is without merit and the same must be rejected.

21. Now coming to the question of legal assistance provided to the accused, the contention of the learned Counsel is that the accused was not provided advocate of his choice. It was contended that no defence counsel/defending officer of his choice was given to the petitioner. The petitioner had asked for a civil advocate Shri R. Jha. This was not considered by the Court-martial. On the recommendation of the court-martial, the petitioner was asked to select one of the three (3) names as his Defending Officer of his Choice and the petitioner selected the names of one amongst the three, i.e. either (i) Maj. Vishal Sharma of 16th Assam Rifles, (ii) Major Mayank Pathania of 16th Assam Rifles or (iii) Maj. Aran Nain of 30th Assam Rifles. The Convening Authority rejected all these three names for no valid and reasonable grounds and appointed Maj. Rajesh Gurung against the wish of the petitioner. The convening authority also failed to give any written notice with respect of the non-availability of Defending Officer of the petitioner/accused to the Court-martial and the said notice of non-availability of

the officer of his choice shall be attached to the proceedings of the Court-martial as enshrined in the enacted provisions of law. This has violated Rule 33 of the Army Rule 1954, Rule 95, 95(2) of the Army Rules, 1954 as also Section 303 of the Code of Criminal Procedure, 1973.

22. The learned CGC in reply to the above clarified that even though there is no provision to provide a defence Assistant, the petitioner was provided a defending officer and friend of the accused under Army Rule 95. It was contended that owing to exigencies of service, the person requested for by the petitioner as defending officer was unavailable and in his place another suitable officer was deputed. It was also contended that if no suitable officer is available to represent the accused in the trial, the convening authority under the provision contained in Rule 95(2) may inform the court by a writ ten notice. This was however not done since a suitable defending officer was available and detailed.

23. It is not the case of the petitioner that he was not provided with any defending officer and the fact that he was provided another defending officer in place of the one chosen by him due to exigencies of service seems to be in conformity with relevant rules. In this view of the matter there seems to be no room for any grievance that there was noncompliance with provision of the Army Rule.

24. In the circumstance of the case, I am of the considered view that no case for interference by this Court is made out. Accordingly, it must be held that there is no merit in the writ petition.

25. In the result, the writ petition is dismissed

26. No costs.