

(1996) 01 AHC CK 0091
In the Allahabad High Court
Case No : C.M.W.P. No. 20174 of 1986

Luxman Giri

APPELLANT

Vs

Chief of Army Staff and Others

RESPONDENT

Date of Decision : 31-01-1996

Acts Referred:

Army Act, 1950 — Section 120, 120(2), 130, 34, 37
Army Rules, 1954 — Rule 130
Defence Service Army Regulations, 1987 — Regulation 458
Penal Code, 1860 (IPC) — Section 354

Citation : (1996) 01 AHC CK 0091

Hon'ble Judges : R.B. Mehrotra, J

Bench : Single Bench

Advocate : B.N. Rai, for the Appellant;

Final Decision : Allowed

Judgement

R.B. Mehrotra, J.—Sri Luxman Giri was enrolled in the Army in the year 1970 and was promoted to the rank of Havaldar and appointed as Company Havaldar Major in 15th Battalion Mehar Regiment. In November, 1985, the Petitioner was posted with 15th Battalion, Mehar Regiment. During this period, a complaint was filed against Sri Luxman Giri u/s 354, I.P.C. by one Sri Ragho Singh on the allegation that Sri Luxman Giri has molested his wife. However, subsequently the aforesaid Ragho Singh himself moved an application that Sri Luxman Giri had not molested his wife but accidentally due to darkness in the way, he had collided with his wife after Bara Khana and since the matter has been compromised, the complaint be dropped. On the aforesaid basis, no cognizance was taken on the complaint of Sri Ragho Singh. Both the persons' again submitted compromise during February, 1986 but the Commanding Officer did not take cognizance of such compromise. However, on the complaint of said Sri Ragho Singh, a trial by summary court martial held under the Army Act against Havaldar, Luxman Giri and the summary Court martial held Luxman Giri guilty of the charges of criminal force to a woman with an intent to outrage her modesty. The summary court martial held Sri

Luxman Giri guilty of the said charge and directed inflicting of following punishment:

(i) be reduced to rank,

(ii) to suffer rigorous imprisonment for nine months and directed that the sentence of rigorous imprisonment shall be carried but by confinement in civil prison, and

(iii) to be dismissed from service.

2. Luxman Giri has filed the present writ petition challenging the aforesaid order of the court martial.

3. I have heard Sri B. N. Rai, learned counsel for the Petitioner and Sri Shishir Kumar, learned Standing Counsel, appearing for Union of India and other Respondents.

4. An interim application moved by the Petitioner has been rejected by this Court vide order dated 7.9.93. The Respondents have filed their counter-affidavit. So far as the punishment of serving imprisonment of nine months is concerned, since there was no stay order, I presume that the Petitioner must have served the said sentence. The learned counsel for the Petitioner has at the outset challenged the aforesaid order of summary court martial on the ground of being in violation of Section 120(2) of the Army Act read with Army Rule 130 and Defence Services Regulations Para 405. The Respondents have filed a supplementary affidavit, bringing on record that in compliance with Rule 130, after recording summary of evidence, and having been found that the Petitioner has committed offence, he was tried, thereafter the complete proceeding was placed before the Commandant Officer, 15th Mehar Regiment for the purposes of recommendation of the Petitioner under trial. A reference to this effect and recommendation dated 21.11.86 by Commanding Officer are filed as Annexure S.A. 1. In reply to the aforesaid supplementary affidavit, a supplementary rejoinder affidavit has been filed wherein it has been stated that the reference, as contemplated u/s 120(2) of the Army Act read with Army Rule 130 has been completely ignored and no certificate, as contemplated u/s 120(2) read with Rule 130 has been attached with the proceeding of the summary court martial. The letter filed with the supplementary affidavit as Annexure S.C.A 1 is only an opinion of the Commanding Officer dated 21.11.36. The said opinion cannot be termed as a reference in the present context.

5. Thereafter several times the counsel for Union of India was given time to produce the record of the court martial, to establish it on record that the compliance of Section 120(2) of the Army Act read with Rule 130 of the Army Rules was made and requisite certificate was obtained before proceeding with the summary trial. The time was granted initially on 29.3.95 then on 8.9.95 and then the matter was directed to be listed on 22.9.95 peremptorily. On 22.9.95, a statement was made that the record will be definitely produced before the Court

on 20.10.1995. Despite the said assurance, the record was not produced on 20.10.95 and the judgment was reserved. On the basis of the aforesaid proceedings, I am clearly of the view that no reference was made as required u/s 120(2) of the Army Act read with Rule 130 of the Army Rules.

6. Section 69 of the Army Act only talks of civil offence. The Petitioner was admittedly punished u/s 69 of the Army Act for a civil offence. The relevant provisions are being noted below.

Section 120(2) Army Act--When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the Sections 34, 37 and 69, or any offence against the officer holding the court.

Rule 130 Army Rules.---Memorandum to be attached to proceedings. An explanatory memorandum is to be attached to the proceedings when a summary court-martial tries, without reference, an offence which should not ordinarily be so tried.

Note.--See Army Act, Section 120, and notes thereto. This explanation should invariably be attached. If the officer holding the trial loses sight of the law and tries without reference to any of the offences mentioned in Army Act, Section 130, without considering whether grave reasons for immediate action exist or not, the trial is illegal.

Regulation 458 Army Regulations.---Reference to the Judge Advocate General's Department before Trial:

In all cases for trial by General Court-Martial, and all cases under the Army Act, of indecency, fraud, theft, except ordinary theft, and civil offences except simple assaults, the charge sheet and summary of evidence, and all the exhibits will be referred by the convening officer to the Deputy UAG of the command before trial is ordered. The convening officer should also refer for advice any other cases of doubt or difficulty. In all cases the doubts or difficulties and the matters on which advice is required will be specifically stated in the applications.

7. The above provisions make it clear that the Petitioner was tried for summary court martial without making any reference to the Judge, Advocate General before trial as provided by Regulation 458 of the Regulations framed under the Army Act. Thus it is manifest that the summary court martial proceedings held against the Petitioner were violative of the safeguard provided by the Army Act and Rules and the Regulation framed thereunder.

8. In series of decisions of this Court as well as of the Apex Court, it has been held that if the Court martial proceedings have been held without complying with the mandatory rules, the entire proceedings get vitiated. A reference to some of

them is being made hereunder:

(1) Ram Pravesh Rai v. Union of India and Ors. 1988 UPLBEC 783 (DB);

(2) Ranjit Thakur Vs. Union of India (UOI) and Others, .

9. In Ex. Havaladar Ratan Singh v. Union of India and Ors. 1992 Suppl. (1) SCC 716, the precise question for consideration before the court was as to whether without there being any specified reason for immediate action, the Summary Court Martial shall not have jurisdiction to hold the trial. The relevant passage is quoted below:

The charge-sheet states that when fired upon by a group of terrorist-militants during an armed operation against them, the Appellant quitted his place without orders from his superior officer. Section 120 of the Act stated that subject to the provisions of Sub-section (2) of the Section a summary court martial may try any offence punishable under the Act. Sub-section (2) reads as follows:

120 (2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court martial or on active service a summary general court martial for the trial of the alleged offender, holding a summary court martial shall not try without such reference any offence punishable under any of the Sections 34, 37 and 69, or any offence against the officer holding the Court.

The position, thus, is that if the offence is covered by Section 34 and immediate action for the specified reasons is not warranted, the Summary Court Martial shall not have jurisdiction to hold the trial.

10. On the basis of the aforesaid decision, I am clearly of the view that there was no material placed before me on the basis of which any immediate action was called for in the matter justifying summary court martial and I am further of the view that no reference, as contemplated by Rule 130 read with Regulation 458, was made before proceeding with the summary court martial. Regulation 458 has some relevance for judging the issue. A reference to Judge, Advocate General is contemplated by the aforesaid regulation. Reference to Judge, Advocate General is contemplated as the Judge, Advocate General is supposed to examine the matter and give his opinion regarding expediency of holding a summary court martial. Summary court martial is envisaged for civil offence only in case of extreme urgency of which the Army Officers have not been left to their sole discretion. The safeguard provided under the Regulations is necessary to check the misuse of the proceedings of the court martial.

11. Accordingly, I am of the opinion that the proceedings of the court martial held against the Petitioner are without jurisdiction and are liable to be set aside. I accordingly set aside the order of the court martial dated 30.4.1986 filed as Annexure 7 to the writ petition. However, I make it clear that if the Petitioner has already served out the sentence of imprisonment, the Petitioner will not get any advantage of this judgment to that extent. Rest of the sentence, whereby the

Petitioner has been removed from service and has been dismissed from service, stands set aside by this judgment.

The writ petition is accordingly allowed.

In the circumstances of the present case, the parties will bear their own costs.