

(1996) 12 GAU CK 0025
In the Gauhati High Court
Case No : Civil Rule No. 240 of 1996

M. Sankarnarayanan

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-12-1996

Acts Referred:

Army Act, 1950 — Section 108, 116, 128, 129, 130
Army Rules, 1954 — Rule 141, 141(2), 141(3), 141(4), 154
Assam Rifles Act, 1941 — Section 11
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 128, 130, 131

Citation : (1997) 2 GLR 496

Hon'ble Judges : N.G. Das, J

Bench : Single Bench

Advocate : B. Das, A. Bhatucharjee and S. Chakraborty, for the Appellant; K.N. Bhatfacharjee, Sr. C.G.S.C. and S. Bhanaeharjee, for the Respondent

Final Decision : Allowed

Judgement

N.G. Das, J.—This is an application under Article 226 of the Constitution of India by Petitioner Shri M. Sankarnarayanan for quashing the constitution of the Summary Court Martial and its order of conviction sentencing him to undergo imprisonment for six months and also its order dismissing him from the service.

2. The case of the Petitioner is that he joined Assam Rifles in the year 1976 and was at the relevant time holding the post of Electrical Finer Signal in the rank of LNK. On the night of 13th April, 1988 there was a dinner party in the Officers' Mess of Army at Agartala and the Petitioner was directed by his officer to perform the duty of operator of the generator, so that the lights might not go off. But at about 2200 hours when the members of the dinner party were parting the lights suddenly went off. The Petitioner's immediate superior Capt. Y.B. Prasad asked die Petitioner as to why he switched off the light. In his reply the Petitioner said that the generator was very much heated up and apprehension that some mishap might take place he switched off the generator. It was also stated by him

that the Chief Signal Officer. Assam Rifles instructed to use the generator only for the purpose of charging the battery and communication and not for lighting. But this act of the Petitioner enraged the officers who took part in the party and Capt. Y.B. Prasad rebuked the Petitioner in slang language. The Petitioner, however, raised his protest quite politely. But in spite of that he was arrested on that night and sent to quarter guard of the Unit.

3. It was further alleged by the Petitioner that some officers of the lower strata of the hierarchy of the Assam Rifles filed some Civil Rules in Gauhati High Court being Civil Rule Nos. 1197/87 and 1179/87 for redressing some of their grievances in respect of the service conditions. The Petitioner being a personnel of the Assam Rifles also took active part in getting their grievances redressed and thus incurred the displeasure of the superior officer. It has been stated that since the petitioner took active part in filing the cases etc. the superior officers made several attempts surreptitiously to put him in trouble and that is why on the night of 13th April, 1988 he was sent to quarter guard of the Unit without any valid reason.

4. The further case of the Petitioner is that on 15th April, 1988 while he was in the quarter guard he submitted a representation to the Chief Signal Officer Assam Rifles through proper channel with a copy thereof to the Director General of Assam Rifles narrating everything and fought for redress. But his that representation was not forwarded. On the other hand, on 15.4.88 a charge-sheet was filed against him with 3 charges which are as under -

CHARGESHEET

The accused No. S/352789 Lnk/EFS M. Sartkara Narayanan 27 Assam Rifles, is charged with:

DISOBEYING A LAWFUL COMMAND GIVEN BY HIS SUPERIOR OFFICER

IN THAT HE,

While on active service at C/O 99 APO, on 13th Apr. 89, when ordered by Capt. Y.V. Prasad, adjutant and Signal Officer, not to switch off the generator till so ordered, switched off the said generator without permission.

USING INSUBORDINATE LANGUAGE TO HIS SUPERIOR OFFICER

IN THAT HE,

While on active service at C/O 99 APO on 13 Apr. 88 when ordered by Capt. Y.V. Prasad, Adjt and Sig Officer to report to office at 0800hrs on 14 Apr. 88, raised his voice and rudely laid "I will only talk to the Commandant" or words to that effect.

DISOBEYING LAWFUL COMMAND GIVEN BY HIS SUPERIOR OFFICER

IN THAT HE,

While on active service at C/O 99 APO, on 14 Apr. 88, when ordered by No. 2700002 Sub L.M. Saxena, of the Battalion to eat his food, did not do so.

Station; C/O 99 APO Sd/-V.K. Bhalla

Dated 19 Apr. 88 Col Comdt.

5. To try the offences a Summary Court Martial was constituted and on 20th April, 1988 the Petitioner was informed that summary court martial would be held on 21.11.1988, The Petitioner pleaded not guilty to the charges, But after examination of some witnesses he was convicted for commission of the offences u/s 40(c) and 41(2) of the Army Act and sentenced thereunder to suffer R.I. for six months and in pursuance of this order of conviction he was removed to Civil Prison at Agartala and he was also dismissed from service.

6. The Petitioner, therefore, filed a Habeas Corpus Petition No. 1 of 1988 challenging the validity of the constitution of the summary court martial. That Habeas Corpus petition was however disposed of by granting bail to the Petitioner.

7. The grievance of the Petitioner is that he being a member of the Assam Rifles he cannot be convicted by a summary Court martial constituted under the Army Act, 1950. It has been stated that Section 11 of the Assam Rifles Act contemplates that members of the Assam Rifles be deemed as part of the Indian Army for the purpose of Sections 128, 130 and 131 of Criminal Procedure Code, 1898 and for no other purpose and that Section 8 of that Act envisages that a District Magistrate or a Commandant or an Assistant Commandant subject to the control of Commandant may impose punishment for minor offence. It has been specifically stated that there is no provision in the Assam Rifles Act which contemplates constitution of Court Martial. Moreover, Section 130(1) of the Army Act read with Rule 154 thereof contemplates that at the trial as soon as the court is assembled, the names of Presiding Officer and members shall be read over to the accused who shall thereupon be asked whether he objects to being tried by any officer sitting in the court. But in the instant case, this mandatory provision was not complied with. Apart from that, the Petitioner was not afforded any opportunity to cross-examine the witnesses. The Petitioner was also not given any copy of the written order even though he approached for the same.

8. The next grievance of the Petitioner is that this order of conviction was not confirmed by the appropriate authority and without observing all the formalities the Petitioner was put to the Central Jail at Agartala, the Petitioner has, therefore, prayed for quashing the entire proceeding and the order of dismissal.

9. The Respondents resisted the writ petition by filing a joint counter-affidavit wherein it admitted that a number of Assam Rifles personnel filed some writ petitions in the Gauhati High Court for removal of anomalies in their pay scales etc. But during pendency of those writ petitions the Petitioner and his colleagues started organising clandestine meetings etc. in unauthorised manner and thus violated the discipline, It has, however, been stated that the Petitioner was

charge-sheeted not for those reasons, but for violation of discipline and doing some subversive Activities.

10. It has been further contended that on the night of 13th April, 1988 the Petitioner was specifically ordered to operate the generator during the dinner party the intentionally switched off the generator disobeying the lawful command of a superior officer. Therefore, the Petitioner was sent to the Unit quarter guard and here-after he was charge-sheeted. It has been, further averred that the summary court martial was constituted as per the provisions of Army Act, 1950 which was applicable to the Assam Rifles personnel vide Government of India, Ministry of Defence notification No. SRO 318 dated 6th December, 1962. It has been contended that Petitioner's Unit was placed under the operational control of the Army and accordingly the provisions of the Army Act were applicable to him. The summary court martial, therefore tried the charges of offence according to the Army Act and Rules and the Petitioner was afforded all opportunities for his defence and the Petitioner was also heard as per the provisions contained in Army Rule 22 and the evidence was taken strictly following the procedure prescribed for trial by a summary court martial. Therefore, the allegations set-forth in the writ petition are baseless and cannot be entertained. Further, the writ petition is not maintainable as the Petitioner did not avail the opportunity of filing appeal before the appellate authority.

11. I have heard Mr. B. Das, the learned senior counsel appearing in behalf of the Petitioner and Mr. K.N. Bhattacharjee, the learned senior Central Govt. Standing Counsel appearing on behalf of the Respondent for a considerable length of time.

12. It has been contended by Mr. Das at the very outset that the entire proceedings of the court martial are vitiated as the Petitioner being a personnel of the Assam Rifles he can be tried for commission of any offence in accordance with the provisions laid down under the Assam Rifles Act, 1941 and not in accordance with the provisions Army Act, 1950. Admittedly, a summary court martial was constituted as per the provisions of the Army Act and the Petitioner was also tried for the alleged offence by that summary court martial which also found him guilty and awarded punishment as indicated above. Then is no dispute that the summary to court martial was constituted as per the provisions of Army Act, 1950.

13. Mr. K.N. Bhattacharjee, the learned senior Central Govt. Standing Counsel has, therefore, argued that at the relevant time the provisions of Assam Rifles Act, 1941 and the Rules thereof relating to discipline remained suspended in respect of the Battalion which was attached to and placed under operational control of the regular Army. In support of his contention Mr. Bhattacharjee has drawn my attention to Chapter II of Manual of Military Law Vol. II and has submitted that the provision of Section 4 clearly indicate that the Central Government may by notification, apply, with or without modifications, all or any of the provisions of Army Act to any force. On going through the provisions laid down u/s 4 of the Army Act, 1950 I find that this provision enables the Central

Government to suspended the operation of any other enactment for the tune being applicable to that force and in that case the provisions of Army Act, 1950 will apply. The notes given u/s 4 of the Army Act show that Army Act was applicable to Assam Rifles by virtue of SRO117 of 28, March 60 and 318 of with modifications 6th December, 1962 as amended by SRO 325 of 31st August 1977. It is therefore, found that Army Act was applicable to the Unit to which the Petitioner belonged as it is an admitted fact that at the relevant time the Unit of the Petitioner was placed under the operational control of the Army. Therefore, the contention of Mr. Das that Army Act was not applicable for holding the trial is not acceptable.

14. The next contention urged by Mr. Das is that the procedure of court martial laid down under Sections 128 to 131 of the Army Act, 1950 were not complied with during the trial held by the summary court martial against the Petitioner. It is contended by Mr. Das that as per the provisions laid down u/s 129 of the Army Act one of the members of the summary court martial must be a Judge Advocate, But in the present case no Judge Advocate was member of the summary court martial.

15. This contention of Mr. Das is not acceptable for the simple reason that Section 129 of the Army Act relates to general court-martial and not to summary court martial. According to Section 108 of the Army Act there are four kinds of court martial, that is to say; (a) General Courts-martial; (b) district courts-martial; (c) summary general courts-martial; and (d) summary courts-martial. Section 116 of the Army Act envisages that a summary courts-martial may be held by the commanding officer of any corps, department or detachment 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.

16. In the instant case, the summary courts martial consisted of Col. V.K. Bhaila and the proceedings of this Court martial were attended by Capt. U.S. Thappa, 27 Assam Rifles Nb Sub, C.B. Gurung, 27 Assam Rifles and Asstt. Commandant PNT Nair (friend of the accused). Therefore, it cannot be said that the provisions of Section 116 of the Army Act were not complied will.

17. But this finding cannot dispose of Anr. controversy which has been urged by Mr. Das and it is that the names of the members of the summary Courts-martial were not read over to the Petitioner. I find considerable force in the submission of learned Counsel for the Petitioner as Section 130 of the Army Act envisage that names of the Presiding Officer and the members shall be read over to the accused. Section 130 provides:

130(1) At all trials by general, district or summary general court-martial, as soon as the court is assembled, the names of the presiding officer and members shall be read over to the accused, who shall thereupon be asked whether he objects to

being tried by any officer sitting on the court.

(2) If the accused objects to any such officer, his objection, and the reply thereto of the officer objected to, shall be heard and recorded, and the remaining officers of the Court shall, in the absence of the challenged officer decide on the objection.

(3) ...

(4) ...

18. Mr. Bhattacharjee has placed before me the relevant file in which all the stages of the entire proceedings were recorded. The pages of this file have not been serially numbered. However, on counting it is found that it contains 68 pages and on perusal of this proceedings file I do not find that the Petitioner was asked whether he objects to be tried by any officer sitting on the summary court-martial. The proceedings do not indicate anywhere that at any point of time the Petitioner was asked as to whether he has objection against any of the members. But this provision being not complied with I am of the view that this lapse imparts a basic infirmity to the proceedings and militates against and detracts from the concept of a fair trial.

19. In this context the next point of criticism advanced by Mr. Das is that the quantum of punishment awarded to the Petitioner must be regarded to be disproportionate to the offence even though it is assumed that the Petitioner committed the offence by violating the order of his superior. As already stated the main charge against the Petitioner is that he switched off the generator and by this act he disobeyed the order of his superior officer. The explanation which the Petitioner has given in this regard is that as per the order of the Chief Signal Officer, Assam Rifles the generator was meant only for the purpose of charging the battery and communication and not for lighting purpose. Therefore even though the Petitioner switched on the generator for lighting purpose he noticed after some time that the generator was heated up. So, he reported the matter to his immediate superior officer and in apprehension of any mishap he switched off the generator and that was also done after the dinner was over. Neither the Chief Signal Officer has been examined nor his order has been produced before the court. It has not been specifically denied that there was such an order by the Chief Signal Officer. In support of these two points Mr. Das has placed reliance upon a decision of the Supreme Court rendered in the case of *Ranjit Thakur, Appellant v. Union of India and Ors.*, Respondents reported in AIR 1987 SC at page 2386. It has been observed by the Supreme Court that :

The act and the Rules constitute a self contained Code, specifying offences and the procedure for definition, custody and trial of offenders by the Courts Martial. The procedural safeguards contemplated in the Act must be considered in the context and corresponding to plenitude of the summary jurisdiction of the Court-Martial and the severity of the consequences that visit the person subject to that jurisdiction. The procedural safeguards should be commensurate with the sweep

of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the Status. The noncompliance of the mandate of Section 130 is an infirmity which goes to the root of the jurisdiction and without more, vitiates the proceedings.

20. Under para 9 of the aforesaid judgment Their Lordships also held as follows :

Judicial review generally speaking is not directed against a decision, but is directed against the decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous dalliance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.

21. It would be quite apparent from the above quoted observation of the Supreme Court that non-compliance of the mandate of Section ISO is an infirmity which goes to the root of the jurisdiction and vitiates the proceedings.

22. It has also been argued by Mr. Das that one of the members of the court-martial has been shown to be the friend of the Petitioner. But Petitioner denied having any friendship with him. It was, therefore, incumbent upon the Respondent to show how the Petitioner became a friend of that member. But there is nothing in record to show how the Petitioner became the friend to one of those members.

23. That apart, the deposition-sheets of the witnesses who were examined in support of the prosecution case show that the accused declined to cross-examine the prosecution witnesses and the provisions of A.R. 141 (2.) (3) and (4) were complied with. The Army Rule 141 may, therefore, be quoted as under:

141. Mode of questioning witness (1) Every question shall be put to a witness orally by the officer holding the trial by the prosecutor, by or on behalf of the accused, or by the judge-advocate and the witness will forthwith reply, unless an objection is made by the court, judge-advocate, prosecutor, or accused, in which case he shall not reply until the objection is disposed of. The witness shall address his reply to the Court.

(2) The evidence of a witness as taken down shall be read to him if he so requests before he leaves the court, and shall, if necessary be corrected. If he makes any explanation or correction, the prosecutor and accused or counsel or the defending officer may respectively examine him respecting the same.

(3) If the witness denies the correctness of any part of the evidence when the

same is read over to him, the court may instead of correcting the, evidence, record the objection made to it by the witness.

(4) If the evidence is not given in English and the witness does not understand that language, the evidence as recorded shall be interpreted to him in the language in which it was given, or in a language which he understands if he so requests before he leaves the court.

(5) Where evidence is recorded by shorthand writer, it shall not be necessary to read the evidence of the witness to him under Sub-rule (2) or (4), if, in the opinion of the court and the judge-advocates , if any (such opinion to be recorded in the proceedings), it is unnecessary so to do.

24. The provisions of Rule 141 as quoted above clearly indicates the presence of a Judge-Advocate. But, the proceedings file which has been placed before me does not indicate that a judge, Advocate was present and he and he actually listened to the questions that were put to each witness. The notes given under this rule clearly indicate that the court and Judge Advocate must carefully listen to the actual questions put by the prosecutor and by or on behalf of the accused and they must intervene before the witness replies if in their opinion any question is improper or "leading". I am, therefore, constrained to hold that even through it has been specifically mentioned at the foot of each deposition sheet the provisions of Army Rule 141(2), (3) and (4) were complied with it was actually not done. Consequently procedural safeguards contemplated in the 141 were not adhered with. The reasons assigned for non-forwarding the representation of the Petitioner to higher authority cannot, therefore, be accepted.

25. In the result, for the foregoing reasons the petition is allowed. The impugned proceedings of the summary courts-martial dated 21st April, 1988 and the consequent order and sentence are quashed. The Petitioner is entitled to and shall be reinstated with all monetary and service benefits. There will, however, be no order as to costs.