

(1998) 08 DEL CK 0016
In the Delhi High Court
Case No : C.W.P. No. 2155 of 1993

Major Anil Behl No. 31411A (Ex.)	Vs	APPELLANT
Union of India and Others		RESPONDENT

Date of Decision : 25-08-1998

Acts Referred:

Citation : (1998) 08 DEL CK 0016

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Ms. Swaran Mahajan and Mr. S.K. Kohli, for the Appellant; Mr. Rakesh Tikku, for the Respondent

Judgement

Dr. M.K. Sharma, J.—This writ petition is directed against the verdicts of the General Court Martial dated 8.11.1990 and 28.11.1990 holding the petitioner guilty of the charges contained in charge sheets No. 1 & 3 and also for setting aside and quashing the sentence of cashiering passed by the General Court Martial on 28.11.1990 and executed on 22.4.1991. According to the petitioner the verdicts of the General Court Martial in respect of charge sheets No. 1 & 3 are illegal, null and void and Therefore, the sentence passed by the General Court Martial is also illegal and void.

2. The petitioner was commissioned in the Indian Army on 21.12.1975. The Petitioner was promoted to the rank of Substantive Major on 21.12.1986. The petitioner joined 503 ASC Battalion on posting from Agra on 4th December, 1988. On 26.12.1988 the petitioner took over charge as of 10 Compo Platoon from Subedar Brijender Singh, who was to proceed on annual leave on the same day. On 15.1.1989 the petitioner proceeded on casual leave from 17.1.1989 till 21.1.1989 and left the station to Leh for onward journey. However, on 19.1.1989 a Court of Enquiry was Ordered against the petitioner and accordingly the petitioner was called to the Headquarters 114 Inf. Nde. to give his statement in the said Court of Enquiry. The petitioner gave his statement to the Presiding Officer in the Court of inquiry on 27.11.1989. Since the Court of Enquiry

continued to hold its sittings the petitioner was attached to 20 Jat Regiment.

On 27.5.1990 copies of summary evidence were served on the petitioner. On the same day the petitioner was also served with three charge sheets. In the first charge-sheet 2 charges were leveled against the petitioner. The first charge therein related to committing theft of property belonging to the Government. In the said charge it was alleged that the petitioner Along with few others named therein committed theft in respect of tea and milk powder weighing 240 Kgs. each of the total value of Rs. 15,405.60. The second charge related to a certificate signed by him knowingly the contents of the same to be false statement. In the said charge it was alleged that the petitioner when being Officer Commanding of No.10 Company Platoon rendered a monthly certificate to 503 Bn. that there were no surpluses/deficiencies in respect of supply/POL items held on charge of his Company Platoon while knowing the said statement to be false. There was a second charge sheet relating to committing theft of property belonging to the Government. However, since the petitioner was acquitted in respect of the aforesaid charge it is not necessary to reiterate the contents of the said charge. The third and the last charge sheet served on the petitioner contained only one charge which also related to committing theft of property belonging to the Government. It was alleged that between 14th and 15th January, 1989 the petitioner Along with others named therein committed theft in respect of 5 items total valuing Rs.19,971.15. Immediately after receiving the aforesaid charge-sheet the petitioner sought for leave to prepare defense or hire the services of a counsel. On 2.6.1990 General Court Martial commenced, which was held at Field at Leh, Ladakh. The petitioner was tried jointly with six other persons. By the verdict of the General Court Martial the petitions was not found guilty in respect of the second charge sheet but he was found guilty of the charges contained in charge sheets No. 1 & 3 and was sentenced for cashiering by the order of the General Court Martial dated 28.11.1990. Being aggrieved by the aforesaid orders the present writ petition has been filed by the petitioner seeking for the aforesaid reliefs.

3. The power of superintendence of the High Court in matters pertaining to Armed forces is excluded under Article 227 of the Constitution and accordingly, the court has a very limited jurisdiction in such cases and could exercise powers only under Article 226 of the Constitution of India as is held by the Supreme Court in the case of Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), . In S.N. Mukherjee Vs. Union of India, , it was held that the Jurisdiction of the Court in matters pertaining to discipline in armed forces is limited and interference with the orders can only be made if there is a violation of fundamental right, a jurisdictional error or an error apparent on the face of the record. Clause (4) of Article 227 of the Constitution of India explicitly excludes the power of superintendence of the High Court over any Court or Tribunal constituted by or under any law relating to the armed forces. It is said that such courts and tribunals are courts of honour and their business is to find the truth and they are instrumentalities through which the President maintains discipline in

the armed forces. Although they are called "Courts" but are necessarily administrative in character and are subjected to limited judicial review. It was reiterated by Supreme Court again and again that the High Court cannot exercise power of superintendence over the verdict and order passed by the General Court Martial but could exercise powers only under Article 226 for issuance of a writ of certiorari when it is proved and established that the said Court Martial is not duly or properly constituted or convened or it has no jurisdiction over the party or the subject matter of the charge or there is an error of law apparent on the face of the record or the principles of natural justice were violated so as to result in miscarriage of justice. The High Court has also power to intervene if there be any violation of any fundamental rights. The aforesaid principles were laid down in the decision of the Supreme Court in Capt. Harish Uppal Vs. Union of India (UOI) and Others, and subsequently reiterated in various decisions of the Supreme Court, the latest of which being brought to my notice is Major A. Hussain's case (supra).

4. There is no dispute with regard to the aforesaid proposition of law. Ms. Swaran Mahajan, learned counsel appearing for the petitioner however, contended that there was no evidence before the General Court Martial implicating the petitioner with the charges except for retracted confessions of the petitioner and other accused persons which were also not placed as evidence in the proceedings of the General Court Martial, and thus the findings recorded by the General Court Martial holding the petitioner guilty in respect of charge sheet No. 1 & 3 are perverse and illegal and are liable to be set aside. Counsel for the petitioner further submitted that there was violation of the principles of natural justice in conducting the General Court Martial against the petitioner inasmuch as no opportunity was given to the petitioner for engagement of a defense officer/counsel of his choice. It was submitted that the person who was provided as a defense officer/counsel to the petitioner by the respondents did not enjoy the confidence of the petitioner and Therefore, the petitioner sought for withdrawal of the said person as his defense officer/counsel, which was allowed and thereafter the petitioner was deprived of the opportunity of engaging a defense counsel/officer of his choice. Counsel for the petitioner also submitted that the respondents denied to the petitioner reasonable opportunity to defend himself in the aforesaid proceedings by not allowing him to examine material witnesses in the proceedings and that material witness who, if would have been examined, could have proved and established the falsity of the prosecution case and thus there was violation of the principles of natural justice. Counsel also submitted that the respondents committed infraction of the rules governing conduct of General Court Martial and as such the findings and sentence are liable to be set aside and quashed. She also submitted that material illegality has been committed by the General Court Martial in framing the charge against the petitioner and Therefore, the entire court martial proceedings are liable to be quashed.

5. Mr. Tikku appearing for the respondents however, submitted that the

submissions of the learned counsel for the petitioner have no merit at all when the same are examined in the light of the court martial proceedings. He submitted that apart from the confessional statement of the petitioner and some other accused there was other evidence on record which proved and established the charges leveled against the petitioner. He also submitted that all reasonable opportunities including an opportunity to engage a defense officer/counsel of his choice was given to the petitioner. He also placed on record the proceedings of the General Court Martial and there from made an endeavor to show that several opportunities were given to the petitioner for engagement of a defense counsel/defense officer of his choice and in fact appointed such persons to defend the petitioner and Therefore, the allegation made against the respondents on the aforesaid score is untenable and misplaced. He also submitted that all other allegations made by the counsel appearing for the petitioner against the procedure followed by the General Court Martial in conducting the aforesaid proceedings and coming to the finding are baseless when examined in the context of the records available.

6. In the light of the aforesaid rival submission of the counsel appearing for the parties let me scrutinise the merits of the submissions of the learned counsel appearing for the petitioner.

7. In order to probe the allegation of the counsel for the petitioner that there is not iota of evidence on record to implicate the petitioner with the offences alleged in the charge-sheets except for the retracted confessional statement made by the petitioner. I have looked into the records of the General Court Martial proceedings which was placed before me by the counsel appearing for the respondents. Rule regarding reliance on a retracted confessional statement is that a confession which is retracted at the trial if proved to be voluntarily made could be looked into and acted upon provided here is other corroborating evidence on record. In Kochu Govindan Kaimal and Others Vs. Thayankoot Thekkot Lakshmi Amma and Others, . The Supreme Court said that the Evidence Act nowhere provides that if the confession is retracted it cannot be taken into consideration against the co-accused or the confessing accused and accordingly there is no bar for the court to take into consideration a retracted confession. Therefore, rule or prudence requires that a retracted confession could be acted upon where there is corroboration by other evidence. It does not, however, mean that each and every circumstances mentioned in the confession must be separately and independently corroborated. The said retracted confessions of the co-accused were exhibited in the General Court Martial proceedings. Accused Bhagwan Singh, Jagdish Chand and Suresh Chand have made confessional statements but retracted the same. The said retracted confessional statement have been exhibited in the court martial. All the three have named the petitioner stating that it is on his orders that some rations were loaded in the vehicle which were taken out and transferred to a civil truck. PW 3 - Shri Angiyal, PW 4 - Shri Paldhan and PW 5 - Shri Karma have stated that they were told by Ram Kanwar (PW 8) to wait outside the gate of 10 Comp. P1. after the sunset as certain

rations were to be disposed of illegally. PW3 has categorically stated that he was told by PW8 that some rations were to go out on orders of the petitioner. They have stated that a vehicle containing milk powder tins and tea chests was taken out which they also boarded and the truck proceeded further and halted at Old TCP No. where the said goods were transferred to a civil truck. These witnesses have given a full description as to how the rations were removed and also stated that the goods were removed at the orders of the petitioner. Shri T. Morup, the Bank Manager was also examined and he deposed that on 12.1.1989 he received two applications from the petitioner for two drafts of Rs. 9,900/- each which are proved as exhibits. Office copy of the Bank drafts issued to the petitioner for the aforesaid amount have also been exhibited. PW 11 and 12 have been produced to prove that confessional statements were voluntary in nature. It is true that some of the witnesses have been declared hostile and they were cross-examined by the prosecution. Stock verification certificate has been produced in evidence which indicated that there was no surpluses/deficiencies. The said certificate was signed by the petitioner. But there is evidence on record to show that there was in fact surpluses particularly the statement of PW 8. Thus it is apparent that apart from the evidence in the nature of retracted confessional statements of co-accused there are other direct and circumstantial evidence appearing on record against the petitioner. On the basis of such evidence the petitioner was found guilty by the General Court Martial.

8. Counsel for the petitioner also submitted that the petitioner desired to examine his wife who was a material witness. But she was not allowed to stay Along with the petitioner by the respondents and denied her the opportunity to depose. In my considered opinion the said submission is also baseless as the petitioner has failed to show as to how his wife was a material witness in respect of the charges drawn against him.

9. On the other hand the prosecution has been able to prove and establish that two bank drafts worth Rs. 9,900/- each were prepared on 12.1.1989 in the name of the wife of the petitioner. The Bank Manager deposed as a witness to the aforesaid effect. The petitioner did not cross-examine the said witness when the said bank officer deposed before the Court Martial nor did he contact the office copies of the bank drafts placed on record by the said Manager while giving his statement. The said bank drafts appear to be only one of the incriminating circumstances against the petitioner which when read Along with the other evidence on record sufficiently prove the charges in the first charge sheet and the third charge sheet. The petitioner also issued a certificate when he was the officer Commanding of 10 Comp. P1. on 26.12.1988 stating that there were no surplus/deficiencies held in rations/POL. The said certificate however, appears to be false as it was well within his knowledge that large amount of surpluses existed in these items and it was stated by Havaladar Bhagwan Singh that he apprised the petitioner that there was large scale rations surplus in the necessary groups held by him. Havaladar Ram Kanwar had deposed that on 24.1.1989 when the stock taking of items was done large scale surpluses were found there. In the

light of the aforesaid evidence on record the certificate given by the petitioner on 26.12.1988 was found to be false by the General Court Martial and there cannot be any two opinions on the aforesaid findings. In my considered opinion, there is sufficient evidence on record to implicate the petitioner with the offences alleged and the said evidence sufficiently prove and establish the charges against the petitioner.

10. This court exercising jurisdiction only under Article 226 cannot reappreciate the evidence adduced before the Court Martial like an ordinary criminal court and scrutinise each part thereof to see whether the charges leveled against the petitioner are proved or not. Even if it is found that there is some evidence on record which implicates the petitioner with the offence alleged in the charges, this court will have no jurisdiction to sit in appeal upon the verdict and sentence of the Court Martial. In a writ petition filed against the proceedings of the General Court Martial the court cannot act like an ordinary criminal court and sit in appeal against the findings recorded by the trial court. Since the counsel for the petitioner as also the counsel appearing for the respondent referred to some of the records of the Court Martial proceedings. I have looked into the said proceedings to satisfy myself with regard to validity and merit of the submissions of the petitioner that there is no evidence at all on record to implicate the petitioner with the offence alleged in the charges except for the retracted confession. The statements of the witnesses made before the General Court Martial which was also considered by the General Court Martial while giving its verdict do prove and establish that it cannot be said that there is no other evidence at all except the retracted confession to fasten liability on the petitioner with regard to the offence alleged against him. In my considered opinion, Therefore, there is no merit in this submission of the learned counsel for the petitioner, which stands rejected.

11. The next submission was with regard to infraction of the rules governing Court Martial and also violation of the principles of natural justice in refusing to make available to the petitioner defense officer/counsel of his choice. In order to test the validity of the aforesaid submission of the learned counsel I also scrutinised the records, on perusal thereof I find that after commencement of the General Court Martial Major Lalit Kumar was engaged as the defense officer of the petitioner. On 2.6.1990 the said defense officer was present and represented the petitioner in the Court Martial proceedings. On 4.6.1990 Major Lalit Kumar could not be present as he proceeded out of station to attend a personal matter and accordingly the petitioner sought time for engaging a counsel. The Court Martial allowed the request of the petitioner in his favor and adjourned the proceedings up to 21.6.1990. However, Major Lalit Kumar still was not present on 21.6.1990. The petitioner stated that venue of the trial should be changed as no advocate was agreeable to come to Leh. He also stated that Major Lalit Kumar is willing to work as defense counsel he would not engage any other counsel. The prosecution, however, appointed Shri Jas Kiran Singh to represent the petitioner as his defense counsel but the petitioner did not accept him and Sri Jas Kiran

also expressed his inability to defend all the accused persons and accordingly the Convening Authority gave further time to enable the petitioner to get the services of Major Lalit Kumar. On 25.6.1990, Major Lalit Kumar was present in Court. However, on that day the petitioner filed an application which is marked Ex.Q dated 26.2.1990 withdrawing the request for engagement of a defense counsel. The Court re-assembled on 27.6.1990 and Major Lalit Kumar who was the defense officer of the petitioner was present in court. On that date the petitioner raised a plea of general jurisdiction of the General Court Martial under Army Rule 51 and got three witnesses examined in support of the aforesaid plea through Major Lalit Kumar. The prosecution examined two witnesses to disprove the aforesaid plea of jurisdiction and the said witnesses were cross-examined by the petitioner through his defending officer. The Court however, by order of 30.6.1990 overruled the aforesaid plea and desired that evidence be produced in support of the charges brought against the petitioner. On that date the statement of the Officiating Commanding Officer was recorded and Additional Defending Officer was present. On 5.7.1990 Major Lalit Kumar sought permission to leave trial location for attending to a personal matter. From the proceedings of different dates till then it transpires that all the accused persons including the petitioner were asking for adjournment on the ground of engagement of a defense counsel of their own choice. On 6.7.1990, the Court was adjourned to 13.7.1990 to enable the accused to engage defense counsel of their choice. On 13.7.1990 Major Lalit Kumar appeared for the petitioner, but, immediately withdrew from the trial and, Therefore, no trial could take place till 25.7.1990 when Capt. Ajay Gupta, a Defending Officer was appointed for the petitioner as no choice of Defending Officer was given by the petitioner after Major Lalit Kumar left. It is thus seen that although the Court Martial assembled on 2.6.1990 and was adjourned time to time to enable the petitioner, to have a defense counsel of his choice, no effective progress at all was made till 25.7.1990. On 30.7.1990 PW3 and PW 4 were examined and thereafter PW 5, PW 6 & PW 7 were examined up to 4.8.1990. On 3.10.1990 the petitioner made written submissions seeking adjournment of Court Martial till receipt of money from the Provident Fund which he had applied. The petitioner also prayed for declaring cross-examination of prosecution witnesses as void. The aforesaid request of the petitioner was legally examined and the said plea was rejected in view of the fact that full opportunities were given and availed of by the petitioner. Thereafter statements of PWs 8, 9, 10, 11 & 12 were recorded but the petitioner declined to cross-examine the said witnesses. It may be stated herein that during the trial the petitioner also raised a plea of no case which was considered by the General Court Martial and the said plea was over-ruled.

12. In respect of the third charge sheet altogether & witnesses were examined on behalf of the prosecution but the petitioner declined to cross-examine any one of the said witnesses.

13. Counsel for the petitioner, in support of her submission that there was infraction of the rules governing Court Martial, brought to my notice the

provisions of Rules 95, 76 & 77 of the Army Rules. Rule 76 lays down the responsibility of Presiding Officer for a trial being conducted in proper order. It is provided that it is the duty of the Presiding Officer to see that justice is administered, that the accused has a fair trial and that he does not suffer any disadvantage in consequence of his position as a person under trial, or of his ignorance, or of his incapacity to examine or cross-examine witnesses or otherwise.

Rule 77, on the other hand also provides the duty of the Prosecutor in a General Court Martial. It is provided that a Prosecutor is an officer whose duty, it is to see that justice is done and not a partisan intent on securing a conviction independently of the case.

My attention was also drawn to the provisions of Rule 95 of the Rules which provides that at any General Court Martial an accused may be represented by any officer subject to the Act who shall be called "the defending officer" or assisted by any person whose services he may be able to procure and who shall be called "the friend of the accused". It is further provided that it shall be the duty of the Convening Officer to ascertain whether an accused person desires to have a defending officer assigned to represent him at his trial and, if he does so desire, the convening officer shall use his best endeavours to ensure that the accused shall be so represented by a suitable officer.

14. The proceedings of the General Court Martial which were placed before me prove and establish that the Convening Officer made arrangement for appointment of a defense Officer/defense Counsel to represent the petitioner in the trial. In fact the defending officer of his choice was also appointed, who later on withdrew from the proceedings whereupon the Convening Officer also appointed another officer in his place to conduct the trial on behalf of the petitioner. The petitioner refused assistance from the said officer and even thereafter another officer namely - Capt. Ajay Gupta was appointed as a Defending Officer. Thus it cannot be said that there was violation of the aforesaid provisions relied upon by the counsel for the petitioner nor can it be said that there was violation of the principles of natural justice in conducting the General Court Martial Proceedings and Therefore, this ground also appears to be baseless and without any merit.

15. The aforesaid facts as disclosed from the records of the General Court Martial prove and establish that opportunities were given to the petitioner to avail of the help of defense officer/counsel and he had in fact at the initial stage availed of such opportunities and was helped by such defense counsel. Subsequently, he withdrew his request and when specifically asked for engagement of defense counsel, he had stated that he would prefer to remain un-defended as submitted to the General Court Martial by his letter dated 4.8.1990. In the case of Major Gen. Inderjit Kumar Vs. Union of India; reported in AIR 1997 SC 2085, it was held by the Supreme Court that violation of principles of natural justice could not be complained of when an officer does not engage a defending officer in spite of

several opportunities being given. In my considered opinion, the ratio of the aforesaid decision of fully applicable to the facts of the present case, in view of the similarity of the facts of the present case with that of the case decided by the Supreme Court. This submission of the learned counsel for the petitioner also Therefore, is without any merit and is accordingly dismissed.

16. In view of the aforesaid discussion, in my considered opinion, there is no merit in this writ petition and the same is accordingly, dismissed. However, in the facts and circumstances of the case I do not impose any costs.