

(2002) 09 DEL CK 0081
In the Delhi High Court
Case No : C.W.P. No. 1207 of 1978

Major Balram Ali		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 21-09-2002

Acts Referred:

Army Act, 1950 — Section 158, 160, 167, 46
Army Rules, 1954 — Rule 104, 149, 23(3), 25
Constitution of India, 1950 — Article 226, 227

Citation : (2002) 09 DEL CK 0081

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : K. Digambar Singh, for the Appellant; Jyoti Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, C.J.—The petitioner in this writ petition inter alia questions an order of the General Court Martial dated 06.01.1977; an order dated 21.02.1977 passed by the confirming authority directing the Court Martial to revive the previous decision; an order dated 28.02.1977 passed by the General Court Martial recommending the dismissal of the petitioner; an order dated 12.08.1977 issued by the Chief of Army Staff dismissing the petitioner from services; and an order dated 05.08.1978 passed by the appellate authority dismissing the appeal preferred by the petitioner herein.

2. The petitioner joined Army in the year 1956. He allegedly went through various trainings and held several responsible position. According to the petitioner, he was mala fide transferred to Battalion 4/5 GR against his desire with a new set of officers and team. The petitioner lodged a written complaint to the Colonel of the Regiment against Major Surat Singh, Major R.L. Kaul and Major R.S. Dhanoya, wherein a request was made for posting them out these officers, but no action thereupon was taken. In October, 1976, an unfortunate accident took place in the Battalion resulting into serious fracture injury of a

Rifleman. A fire also broke out in the night of 29.10.1972 causing heavy losses of property under the command of the petitioner.

On or about 30.10.1976, allegedly a farewell party was organized by the Battalion to bid farewell to three non-commissioned officers, who were to proceed on pension as per the traditions and customs of the service and the petitioner being Commanding Officer was required to attend the same. In the said party, he allegedly consumed alcoholic drinks with others and became completely drunk and was removed to his bunker.

According to the petitioner, although he was to undertake a journey to operational recede and thereafter to his annual leave, but owing to the aforementioned fire incident he could not do so.

He, on 04.11.1976, however, came to learn that in relation to an alleged incident, which occurred on 30.10.1976, one Rifleman named Jum Bahadur had lodged a complaint with wild allegations against the petitioner. The said complainant admittedly was working under the command of the petitioner. According to the petitioner, he was told by Brigadier Sahni that he was hated by the men in the Battalion. Allegedly the said observation made him unnerved and he felt more perplexed as the said Brigadier appeared to believe the said allegation.

According to the petitioner, as in the night of 30/31.10.1976 he was made to drink heavily, he did not have any recollection about any incident, which allegedly occurred in the said night. The petitioner contends that in total despair and disgust, he expressed that as despite his sincere Explanation, the Brigadier was still having a wrong opinion as regards his involvement in the alleged occurrence, as a true soldier, he would offer no Explanation and accept the allegations. He, however, allegedly struck to his stand that he was innocent and committed no fault.

Allegedly, Brigadier Sahni informed the petitioner that the area in question being a sensitive one, he cannot be allowed to continue there and he was induced to act according to his advice. The said Brigadier Sahni allegedly misrepresented that if the petitioner agrees to act according to his advice, he would be sent out of the Battalion for being posted elsewhere according to his desire.

The petitioner contends that the said Brigadier Sahni advised him as to how his Explanation should be drafted and purported to act in good faith and under such inducement he made a draft Explanation. However, the said draft was not found satisfactory by the said Brigadier and he allegedly incorporated certain another statements therein.

3. A Summary of Evidence was recorded by the Enquiry Officer, wherein also the petitioner gave a statement as desired by the said Brigadier Sahni and such statement, which was the verbatim reproduction of his draft statement, was given by the petitioner in the hope as represented by the said Brigadier Sahni,

that he would be dealt with administratively and would be transferred to some other Battalion.

However, the said statement was treated as a confessional statement in the General Court Martial proceeding, allegedly despite strong objection raised by the petitioner. A General Court Martial was convened, which was concluded on 06.01.1977, wherein the petitioner was given the following punishment :-

"a) That the petitioner be convicted and was sentenced to forfeit 1 years service for the purpose of promotion.

b) To be severely reprimanded."

4. However, the General Officer Commanding (GOC), 19th Infantry Division directed revision of the finding and sentence of the Court Martial giving directions to record a fresh finding and pass a suitable sentence as provided by law on or about 21.02.1977. It was observed :-

"6. At the time of commission of the offence the accused was the Commanding Officer of his Battalion. A Commanding Officer is to his men what a father is to his children. The men look up to their Commanding Officer with veneration. The act of a Commanding Officer in trying to use a soldier for his carnal pleasure involves moral depravity and is most reprehensible, bound as it is to have far-reaching effect on the morale of the troops of the unit. It needs no emphasis that the scandalous conduct of the accused, besides bringing the officer class and the exalted office of the Commanding Officer to disrepute in the eyes of the men, shakes the very foundation of the trust and respect of troops for their Commanding Officer.

7. The Court should bear in mind that the object of awarding punishment is the maintenance of a high standard of discipline. The proper amount of punishment to be inflicted is the least amount by which discipline can efficiently be maintained. The Court should carefully reconsider that the immoral trait endemic in the disgraceful and in the decent conduct of the accused is against the basis norms of behavior expected of an officer."

5. Upon revision, the petitioner was sentenced to dismissal from service by an order dated 28.02.1977, which was confirmed by the Chief of Army Staff by an order dated 12.08.1977. The said sentence was also promulgated on 27.08.1977 by the GOC, 19th Infantry Division.

An application for post confirmation petition was submitted by the petitioner on 21.11.1977 against the findings and sentence of the said GOC, where after the present writ petition was filed.

6. Col. Digambar Singh, the learned counsel appearing on behalf of the petitioner, inter alia would take us through the evidences of the witnesses and submit that from a perusal thereof it would appear that the witnesses have contradicted themselves. According to the learned counsel, there is no

corroborating evidence to show that the Rifleman Jum Bahadur on the said night had actually gone to the bunker of the petitioner. The learned counsel would contend that the petitioner was part of 268 Infantry Brigade and was not required to be attached to 45 Artillery Brigade for the purpose of trial.

7. Ms. Jyoti Singh, the learned counsel appearing on behalf of the respondents, on the other hand, would contend that basis facts of the matter are not disputed. The learned counsel took us through the records of the matter and submitted that in the instant case the allegations against the petitioner must be held to have been fully proved.

8. The charge against the petitioner is that on the night of 30/31.10.1976, he in his living bunker undressed himself and in a state of stark nakedness kissed No. 5444439 Rifleman Jum Bahadur and asked the said Rifleman to hold his penis.

9. The petitioner himself admitted that he was drunk heavily in the said party. The Rifleman Jum Bahadur was examined as PW - 2. He allegedly reported the conduct of the petitioner to Capt. R.S. Rathore, who also examined himself as PW - 4. Major R.S. Dhanoya upon making enquiry from the said Rifleman Jum Bahadur and Capt. R.S. Rathore reported the matter to Brigadier R.K. Sahni, who also made enquiry in details from PW - 1 and PW - 2. Brigadier R.K. Sahni also called the petitioner wherein he confessed his guilt.

It is not in dispute that for progress of the disciplinary case against the petitioner, he was attached with 45 Artillery Brigade. The petitioner, it further appears, asked his Commanding Officer to dispense with hearing of the charge in terms of Rule 25 of the Army Rules, 1954.

In the aforementioned situation, a Summary of Evidence was directed to be recorded under the orders of the Lieutenant Colonel S. Ginwala, Officiating Commander , 45 Artillery Brigade.

10. In the general Court Martial proceeding, the petitioner was charged for commission of an offence u/s 46(a) of the Army Act, 1950, which read as under :-

"46. Certain forms of disgraceful; conduct.--Any person subject to this Act who commits any of the following offences, that is to say,--

(a) is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind; or

... .. shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned."

11. In the instant case, it is not in dispute that the petitioner has made confession of his guilt. The question, as to whether such confession had been made voluntarily or at the instance of Brigadier Sahni, is essentially a question of fact. In this writ petition, the Court cannot go into the aforementioned question.

This Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot also re-appreciate the evidence. The jurisdiction of this Court, as is well known, is very limited. This Court in exercise of its jurisdiction under Article 226 of the Constitution of India inter alia may interfere with proceedings of the Court Martial only in the event it is found that such proceedings had been initiated without jurisdiction or in the decision-making process the mandatory provisions of the Army Act or the Rules framed there under have not been complied with. This Court in a given case may also exercise its jurisdiction in the even it is found that the proceedings suffer from irrationality.

12. The categorical stand of the respondents appears to be that the statement of the petitioner was recorded at the Summary of Evidence, which was given voluntarily upon giving due caution Therefore in terms of Rule 23(3) of the Army Rules and such a statement in terms of the provisions of the Army Rules could be produced by the Prosecutor at the trial. From the summing up of the Judge Advocate, it appears, the evidentiary value of oral confession had been brought to the notice of the General Court Martial. It is not in dispute that the witnesses including Brigadier R.K. Sahni had been cross-examined by the petitioner.

13. One of the contentions raised in this writ petition is that one Rifleman named Padam Bahadur had not been examined. The contention of the respondent is that the said Rifleman Padam Bahadur was not considered to be a relevant witness. It is the case of the petitioner therein that he should have been examined him as a defense witness, as such an opportunity the defense could make use of.

14. Col. Digambar Singh, the learned counsel appearing on behalf of the petitioner, submitted that in the instant case the Judge Advocate had been changed at one point of time and as such the petitioner was highly prejudiced. The learned counsel in the aforementioned connection referred to Section 167 of the Army Act.

The aforementioned Section does not deal with the situation where a Judge Advocate may have to be changed. Such a contingency is covered by Rule 104 of the Army Rules, which provides that whenever a Judge Advocate is unable to attend the court for whatever cause, the convening authority may appoint another Judge Advocate for the residue of the trial or until the Judge Advocate returns.

Keeping in view the fact that in the instant case, Judge Advocate could not attend proceedings because of the illness of his mother and as he had to go on leave, the convening authority exercised its jurisdiction in terms of the said Rule 104 of the Army Rules and as soon as the Judge Advocate returned, he has again placed in the said capacity.

Submission of the learned counsel appearing for the petitioner to the effect that the trial could have been postponed fro a few days is not a matter, which requires consideration inasmuch as it has not been shown that by reason of absence of the said Judge Advocate for some time, the petitioner in any way had

been prejudiced.

15. So far as validity of the order of revision is concerned, suffice it to point out that the same is permissible in terms of Section 160 of the Army Act. By reason of the said provision, the confirming authority is entitled to remand the case for consideration of the same to the Court Martial.

16. In Capt. Harish Uppal Vs. Union of India (UOI) and Others, , it was observed :-

"4. It was contended that in the face of such strong observations by the General Officer Commanding the Division the officers Constituting the court martial would have felt compelled to enhance the sentence and the revised sentence passed on the petitioner was not the free act of the court martial but one forced on them by the Officer Commanding and that this militates against the principle of natural justice. But it should be remembered that under the provisions of the Army Act set out earlier the confirming authority could himself mitigate or remit the punishment awarded by the court martial or commute that punishment for any lower punishment and, Therefore, when a sentence is directed to be revised by the confirming authority it necessarily means that the confirming authority considers that the punishment awarded by the Court martial is not commensurate with the offence and it should, Therefore, be revised upwards. To object to this is to object to the provisions of Section 158 itself. A direction by the confirming authority merely showing that the punishment awarded by the Court martial is not commensurate with the offence, would be certainly unexceptionable and would be in accordance with the provisions of law. Instead of baldly stating so the confirming authority in this case has given reasons as to why he considers that the punishment awarded to the petitioner was wholly inadequate."

It is also well settled that this Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot re-appreciate the evidence.

17. In Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), , it has been held :-

"22. We find the proceedings of the General Court-Martial to be quite immaculate where trial was fair and every possible opportunity was afforded to the respondent to defend his case. Rather it would appear that the respondent made all efforts to delay the proceedings of the court-martial. Thrice he sought the intervention of the High Court. Withdrawal of the defense counsel in the midst of the proceedings was perhaps also a part of his plan to delay the proceedings and to make that a ground if the respondent was ultimately convicted and sentenced. Services of qualified defending officer were made available to the respondent to defend his case, but he had rejected their services without valid reasons. He was repeatedly asked to give the names of the defending officers of his choice but he declined to do so. The court-martial had been conducted in accordance with the Act and Rules and it is difficult to find any fault in the proceedings. The Division

Bench said that the learned Single Judge minutely examined the record of the court-martial proceedings and after the came to the conclusion that the respondent was denied reasonable opportunity to defend himself. We think this was fundamental mistake committed by the High Court. It was not necessary for the High Court to minutely examine the record of the General Court-Martial as if it was sitting in appeal. We find that on merit, the High Court has not said that there was no case against the respondent to hold him guilty of the offence charged.

23. 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 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court may stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law. 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, defense 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. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence if the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment."

18. For the reasons aforementioned, we are of the opinion that it is not a fit case wherein this Court in terms of its power under Article 226 of the Constitution should exercise its discretionary jurisdiction. This writ petition is accordingly dismissed. However in the facts and circumstances of the case, there shall be no order as to costs.