

**(1985) 05 DEL CK 0068**

**In the Delhi High Court**

M.R. Saini

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

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**Date of Decision :** 22-05-1985

**Acts Referred:**

**Citation :** (1985) CriLJ 1263

**Hon'ble Judges :** J.D. Jain, J

**Bench :** Single Bench

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## **Judgement**

J.D. Jain, J.—The undisputed facts of the case are that the petitioner was serving as a" Captain (substantive) in 17th Sikh Regiment of Indian Army and he was posted at Ferozepur Cantt. He was tried by a General Court-martial (for short the "GCM") on a charge u/s 3(i)(c) of the Official Secrets Act, 1923 (hereinafter referred to as "the Act") on the allegation that he had committed a civil offence between July 1981 and Aug. 1981 for a purpose prejudicial to the safety or interest of the State by communicating secret information relating to the affairs of the State to one Harinder Singh Walia and the said information might be directly or indirectly useful to the enemy. He was found guilty of the said offence by the GCM and sentenced to rigorous imprisonment for 14 years and dismissal from service on 26th Aug. 1982. However, under orders from the General Officer Commanding XI Corps (for short "the GOC), the sentence awarded to him earlier was revised by the GCM on 30th Sept., 1982 to one of cashiering and rigorous imprisonment for 14 years. The finding of the GCM was eventually confirmed by the Chief of the Army Staff on or about 15th March, 1983. However, the Chief of the Army Staff reduced the sentence of rigorous imprisonment from 14 years to 10 years.

2. The petitioner has challenged the legality and validity of the sentence awarded to him in this writ petition under Article 226 of the Constitution of India. The principal ground of attack is that-the Central Government has issued a Regulation No. 471 of Regulations for the Army which provides that the finding and sentence of a General Court Martial which awards a punishment of dismissal

or above to an officer can only be confirmed by the Chief of the Army Staff. This regulation, according to him, reserves the power of confirmation in a case like the present only to the Chief of the Army Staff in supersession of the warrant issued by the Central Government under Sections 154 and 156 of the Army Act and as such the GOC was not competent to order revision of the sentence originally awarded by the GCM to him on 26th Aug. 1982. In other words, the revised sentence passed by the GCM (GOC?) pursuant to the said order was bad in law and as such its confirmation subsequently by the Chief of the Army Staff too was illegal and invalid.

3. For proper appreciation of the argument " advanced on behalf of the petitioner, it would be pertinent to notice certain relevant provisions of the Army Act and the Rules made there under. Section 153 of the Army Act lays down that no finding or sentence of a general, district or summary general, court-martial shall be valid except so far as it may be confirmed as provided by the said Act. Thus, the finding and sentence awarded by the GCM, to be valid and legal, has to be confirmed by the appropriate authority. Section 154 of the Army Act provides that the findings and sentences of general court martial may be confirmed by the Central Government, or by any officer empowered in this behalf by warrant of the Central Government. Section 156 of the Army Act, however, empowers the Central Government to incorporate in the warrant issued u/s 154 such instructions, reservations or conditions as the authority issuing it may think fit. It is common ground between the parties that the finding and sentence given by the GCM was referred to the GOC for confirmation pursuant to warrant issued in Form A-3 by the Central Government in this behalf. The said warrant was issued by the Central Government as far back as July, 1950 pursuant to the provisions of the Army Act and it was addressed to "the officer not being under the rank of a Field Officer Commanding XI Corps". The said warrant contains the following restrictions and reservations on the power of the confirming authority:

Provided always that if by the sentence of any General Court-Martial a person subject to Military Law has been sentenced to suffer death, you shall in such case, and also in the case of any other General Court-Martial hi which you shall think fit so to do, withhold confirmation and transmit the proceedings to Superior Authority.

And for so doing, this shall be, as well to you as to all others whom it may concern, a sufficient warrant.

4. It is thus manifest that the warrant specifically reserves the power of confirmation in the case of sentence of death to the officer superior to the GOC. However, he is competent to confirm all other sentences awarded by GCM unless, of course, he thinks it fit to withhold confirmation and hi that event he is to transmit the proceedings to superior authority. Since the sentence awarded to the petitioner in the instant case was less than the sentence of death the GOC was certainly competent to exercise the power of confirmation with regard to the same. Section 160 of the Army Act deals (with) revision of finding or sentence. It

lays down that:

(1) Any finding or sentence of a court-martial which requires confirmation may be once revised by order of the confirming directed by the confirming authority, may take additional evidence.

(2) The Court, on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent.

5. On a plain reading of this provision it becomes abundantly clear that as a confirming authority the GOC could order revision of the finding or sentence given by the GCM and on such a direction being made the GCM was bound to reconsider the finding or sentence. Of course, it was open to the GCM to revise or re-affirm the finding or sentence after reconsideration of the same. Rule 68 of the Army Rules expressly states that:

Where the finding is sent back for revision u/s 160, the Court shall reassemble in open Court, the revision order shall be read, and if the court is directed to take fresh evidence, such evidence shall also be taken in open court. The court shall then deliberate on its finding in closed Court.

It further provides that:

Where the finding is sent back for revision and the Court does not adhere to its former finding, it shall revoke the finding and sentence, and record the new finding, and if such new finding involves a sentence, pass sentence afresh.

Where the sentence alone is sent back for revision the Court shall not revise the finding.

6. Obviously the object of revision will generally be to cure defects in the finding or sentence or both and if the sentence originally awarded by the Court is wholly illegal, the Court of revision may award any legal sentence.

7. It would also be necessary here to notice some more provisions of the Army Act and the Rules. Section 71 of the said Act provides for various types of punishments which may be awarded by court-martial. These include (a) death; (b) transportation for life; (c) imprisonment, either rigorous or simple, for any period not exceeding fourteen years; (d) cashiering, in the case of officer; and (e) dismissal from the service. Section 74 lays down that "an officer shall be sentenced to be cashiered before he- is awarded any of the punishments specified in clauses (a) to (c) of Section 71.". Obviously this provision is mandatory in nature and the sentence of cashiering must precede the sentence of death, imprisonment for life or imprisonment. In other words, the sentence of dismissal and imprisonment awarded to an officer is no sentence at all being unknown to Army Law. As stated above, the sentence awarded by the GCM to the petitioner was one of dismissal from service and rigorous imprisonment for fourteen years. It was obviously repugnant to the provisions of Section 74

inasmuch as before sentence of imprisonment could be imposed the GCM had to award the sentence of cashiering but that was not done. Therefore, the confirming authority had no option but to direct revision of the same so as to bring the sentence in conformity with the provisions of the Act. Needless to say that cashiering is the more ignominious form of dismissal as normally an officer who has been cashiered cannot hold an appointment under the Government whereas in the case of dismissal the concerned officer may be permitted to join Government service by the authorities concerned.

8. The submission made by the learned Counsel for the petitioner precisely is that while the sentence of dismissal awarded by the GCM to the petitioner was perfectly valid and legal, the sentence of imprisonment for 14 years was bad in law being repugnant to the specific provision contained in Section 74 of the Army Act and it was incumbent upon the GCM to award a sentence of cashiering before any sentence of imprisonment could be imposed. Thus, according to him, the petitioner has been seriously prejudiced on account of revision of the sentence pursuant to the direction made by the GOC who was not competent to make an order for revision in view of Regulation 471 of "Regulations for the Army" which were issued in the year 1962 i.e. subsequent to the warrant A-3. The said regulation as amended subsequently provides that:

471. Confirmation of Court Martial Proceedings.-

The powers of officers to confirm the proceedings of a General Court Martial or Summary General Court Martial are restricted as under:

(a) The proceedings of a General Court Martial or Summary General Court Martial where any of the sentences specified under column I below is passed will be reserved for confirmation by the authority specified opposite under column II below:

|                              | I                   | II      |
|------------------------------|---------------------|---------|
| -----<br>-----<br>Government | (i) Death sentences | Central |

(ii) Sentences passed on Chief of the officers of dismissal or Army Staff. higher in the scale of punishments set out in S. 71 of the Army Act. ....

9. Undoubtedly, the aforesaid regulation requires that the sentence passed on officers of dismissal or higher must be reserved for confirmation by the Chief of the Army Staff. However, as stated above, under warrant A-3 (ibid) the Field Officer Commanding the XI Corps is competent to confirm any sentence other than death. Of course, he has a discretion, if he thinks fit so to do, to withhold confirmation in the case of any sentence awarded by the GCM and transmit the proceedings to superior authority. Hence, the crucial question which falls for determination is whether the change introduced by Regulation 471 will have the effect of superseding the specific power conferred by the Central Government vide warrant A-3 upon the Field Officer Commanding the XI Corps. On a

consideration of the relevant provisions of law and certain well accepted principles of law which I shall presently discuss, my answer to this question is in the negative.

10. Section 191 of the Army Act empowers the Central Government to make rules for the purpose of carrying into effect the provisions of the said Act. Sub-section (2) thereof enumerates certain matters for which the rules made by the Central Government may provide. These matters, inter alia, include the confirmation, revision and annulment of and objections against the findings and sentences of Court Martial, (see Clause (h)). Accordingly the Central Government has made the Army Rules 1954 in pursuance of the said Section and as observed earlier, rules 68 & 70 specifically deal with confirmation and revision of finding/sentence. Rule 71 further lays down that until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have, been confirmed until they have been promulgated. Thus the Army Rules specifically bear on this aspect of the matter. However, the contention of the learned Counsel for the petitioner is that regulations can be framed by the Central Government u/s 192 of the Army Act which provides that the Central Government may make regulations for all or any of the purposes of the said Act other than those specified in Section 191. He has urged that Regulation 471 does not in any manner impinge upon these rules inasmuch as they are silent with regard to the officers who are competent to act as confirming authorities. Thus, his line of argument is that Regulation 471 is binding on the authorities even though he was frank enough to concede that the Regulations being non-statutory "are in the nature of administrative instructions only. It is not disputed that these Regulations have not been framed by the Central Government in exercise of the power vesting in it u/s 192 of the Army Act.

11. I have bestowed my careful thought and consideration to the argument advanced by the learned Counsel for the petitioner but I am unable to subscribe to the same. It is for two obvious reasons. Firstly, the words "other than those specified in Section 191" appearing in Section 192 clearly exclude from its ambit those matters which are specifically covered by Sub-section (2) of Section 191. It is, Therefore, highly doubtful that any regulation can be made by the Central Government with respect to the confirmation, revision and annulment of the findings and sentences of Courts Martial which specifically find place in Sub-section (2) of Section 191. The prohibition contained in Section 192 is total and absolute and it cannot be construed as implying that if the rules made by the Central Government with regard to the confirmation and revision of the findings and sentences by Courts Martial are silent in certain respects it will be open to the Central Government to make good the deficiency by making regulations in respect thereof. That apart, Section 193 of the Army Act provides that all Rules and Regulations made under the said Act shall be published in the official gazette and on such publication shall have effect as if enacted by the said Act. The learned Counsel for the petitioner has frankly and candidly conceded that the Regulations have not been published in the official gazette as required by Section

193. However, his contention is that although the Regulations are non-statutory in character, they are still binding on the concerned officers. It is no doubt true that the executive power of the Central Government extends to all those matters in respect of which it is competent to legislate and generally speaking till statutory rules are made in respect of any matter the Government can issue administrative instructions regarding the principles to be followed by the officers concerned in carrying out the policy of the Government. However, it is equally well settled that the Government cannot amend or supersede a statutory provision by administrative instructions. I am, Therefore, of the considered view that in view of the total prohibition incorporated in Section 192 itself against resort to Regulations in respect of matters specifically covered by Sub-section (2) of Section 191 the Government cannot deal with the subject by issuing regulations. Even otherwise the Regulations being non-statutory in character cannot have any binding force. Thus, they must necessarily be looked upon as merely directory in nature having been issued to serve as guidelines to the concerned officers for exercising their discretionary power under the provisions of the Army Act and the Rules. In other words, The regulations cannot have the effect of altering or varying or in any manner affecting the statutory provisions whether embodied in the Act or in the Rules.

12. The second and perhaps the more cogent reason for the view I have taken is that there is well established principle that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, (see *Taylor v. Taylor* (1875) 1 Ch D 426 AIR 1936 253 (Privy Council) and *State of Uttar Pradesh Vs. Singhara Singh and Others*, . In the last mentioned case the Supreme Court explained the basis of the rule as under (para 8):

The rule adopted in *Taylor v. Taylor* (1875) 1 Ch D 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method hi which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted."

13. This principle, in my view, will be attracted squarely to the instant case having regard to the nature of provisions embodied in Sections 154 and 156. Both these provisions have to be read conjointly inasmuch as Section 156 qualifies Section 154, in that the authorisation by the Central Govt. to an officer to confirm the findings and sentences awarded by the GCM may be restricted or reserved or made subject to conditions as the authority issuing the warrant may deem fit. Since the only mode of carrying out the intendment of Section 156 is to incorporate the restriction or the limitation or the condition or reservation of the power conferred on an officer in the warrant itself, it is not open to the Govt. to superimpose in any other manner any further condition or limitation on the power of the concerned officer so conferred by the warrant itself. Imposition of

any further condition or curtailment of power by the Government by resorting to administrative instructions/ execute instructions would, Therefore, be repugnant to and violative of a statutory provision. It is highly doubtful that erosion of a mandatory provision like Section 156 can be permitted by an indirect and dubious method. Thus, the only object of issuing Regulation 471 would apparently be to guide the exercise of discretion which vests in the Field Officer Commanding XI Corps under warrant issued in Form A-3. It bears repetition that apart from the cases in which a person subject to military law has been sentenced to death, the Field Officer Commanding XI Corps has the discretion either to confirm the findings and "sentence or to withhold confirmation if he deems fit so to do and transmit the proceedings to superior authority. Obviously it is only with a view to guide the exercise of discretion by him that Regulation 471 has been made. It does not divest him of the power which vests in him under the warrant A-3. Surely it does not create any right in favor of the person subject to military law nor does it impose any legal obligation on the GOC to invariably transmit a case like the present to superior authority for confirmation. Indeed, the very front page of the book "defense Services Regulations" carries a note of caution that the information given in the book is not to be communicated, either directly or indirectly, to the press or to any person not holding an official position in the service of the Government of India. Thus, these Regulations are meant to regulate the inner working of the department of defense, Government of India, and the officers attached to it. Hence, the order for revision of sentence made by the GOC does not suffer from any jurisdiction infirmity.

14. There is yet another aspect of the matter. u/s 158, a confirming authority may, when confirming the sentence of a court-martial, mitigate or remit the punishment thereby awarded, or commute that punishment for any punishment or punishments lower in the scale laid down in S. VI, Admittedly, in view of the explicit provision of Section 153 even after revision the sentence passed by the Court-martial would have to be confirmed. That is why after the revision of sentence in the instant case the proceedings were sent to the Chief of the Army Staff for confirmation. While confirming the finding of the GCM he reduced the sentence from rigorous imprisonment for 14 years to rigorous imprisonment for 10 years. As for the sentence of cashiering he could not possibly modify or alter it in view of the mandatory provisions of Section 74 of the Army Act unless, of course, he thought it fit to remit or mitigate the whole of sentence of imprisonment. It has, however, to be borne in mind that the punishment awarded should be appropriate and commensurate with the nature and gravity of the offence. Further, it must be adequate for the maintenance of the high standard of discipline in the Armed Forces. Hence, looked at the matter from this angle too, confirmation of the sentence as awarded by the GCM on revision cannot, by any stretch of reasoning, be said to suffer from any legal flaw or infirmity. That besides, the Court Martial is not bound to enhance the sentence when a revision thereof is directed by the confirming authority, so, it was open to the petitioner to challenge the validity of the order of revision by the GOC before

the GCM itself and the latter could well reaffirm its original order in spite of the direction given by the confirming authority. In that event the confirming authority could do nothing because it can exercise its power of directing revision only once and that power had already been exhausted. Not having availed of that opportunity it is too late in the day for the petitioner to ask for quashing the order of revision and the revised sentence pursuant thereto in this writ petition. Reference in this context may be made with advantage to Capt. Harish Uppal Vs. Union of India (UOI) and Others, .

15. The petitioner has also pointed out certain irregularities/illegalities committed by the GCM in the course of trial. For instance, one of his grievances is that the investigation of the case started on an FIR recorded on 16th Oct. 1981 being FIR No. 707 at Police Station Sadar, Ferozpur and during the course of the investigation two persons, namely, Bhoor Singh and Harinder Paul Singh Walia were arrested by the police. Maj. Dhakra, who was then working in the Intelligence Directorate of the Army at Ferozpur was also associated in the investigation. Mr. Walia was examined as a prosecution witness at the trial before the GCM. However, he turned hostile. So, adverting to his statement the petitioner applied to the GCM for supplying him copies of the various witnesses recorded by the police u/s 161 of the Criminal P.C. He also asked for a copy of the aforesaid FIR. However, his application was turned down. The stand of the respondent is that the factum of investigation by the police is not within their knowledge nor has it any relevance to the case in hand. It is further asserted by the respondent that the contentions raised in various paras of the petition in respect of this matter are based on mere conjectures and surmises. They deny that the petitioner had requested for a copy of the FIR and assert that the charge against the accused was framed on the basis of evidence embodied in the summary of evidence which alone could form the basis of proceedings against any person subject to the Army Law.

16. The petitioner has also alluded to the direction given by the Judge Advocate to the Court Martial during the course of trial in order to highlight that he mis-directed the Court Martial. Further, according to him, the military authorities had no power to investigate under provisions of the Criminal P.C. and only the police authorities were competent to investigate the case and submit a charge-sheet. u/s 173 of the Criminal P.C. He has also complained that the previous statement of Shri Walia recorded in the shape of a manuscript written by him (marked "XN") was wrongly admitted in evidence as substantive piece of evidence. Similarly manuscript statement of Shri Walia marked "X" recorded at the summary of evidence was wrongly received and treated as substantive evidence. All these allegations are vehemently denied by the respondent. It is, Therefore, not the domain of this Court to embark upon a detailed examination of the record of the GCM as if it were hearing an appeal. It is well settled that every irregularity or non-observance of the rules can by no means be regarded as affecting the jurisdiction of the Court to proceed with the trial. It must be such as vitiates the trial and ultimate conviction of the accused. Whenever a judicial tribunal is

empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal. So, the mere fact that the conclusion of the Court Martial is wrong in law or in fact would be no ground for this Court to interfere with its finding. As observed by a Full Bench of this Court in *S. Sundarajan Vs. Union of India and Others*, :

Subject to the locus standi of the person moving the petition, a writ of certiorari or a direction or order under Article 226 of the Constitution may perhaps be issued for the purpose of examining the record and proceedings of a duly constituted court martial having jurisdiction over the person and also over the subject matter of the charge provided other conditions, such as error of law apparent on the face of the record or violation of principles of natural justice, are satisfied. No final opinion need, however, be expressed on that point in the present case. But I am not at all prepared to hold that such a writ or order can ever be issued for examining mere errors of procedure.

17. Their Lordships further held that interference is possible only where the irregularity or the illegality affects the jurisdiction of the Court Martial or the confirming authority, (see also in this connection *Ram Murti Wadhwa Vs. Union of India and Others*, . In view of this settled law it is not permissible to this Court to go minutely into the details of the procedural propriety or legality. To do so would be to convert the high prerogative writ jurisdiction into a jurisdiction of appellate review. Therefore, is that this petition is devoid of any merit. It is accordingly dismissed.