

(1983) 04 J&K CK 0008
In the Jammu And Kashmir High Court

Mulkh Raj	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 07-04-1983

Acts Referred:

Army Act, 1950 — Section 109, 125, 130, 164, 191
Constitution of India, 1950 — Article 13, 19, 21, 22, 33
Official Secrets Act, 1923 — Section 13, 3, 4

Citation : (1983) CriLJ 1794

Hon'ble Judges : I.K. Kotwal, J;G.M. Mir, J

Bench : Division Bench

Judgement

I.K. Kotwal, J.—By virtue of this writ petition, the petitioner seeks to challenge an order of a General Court Martial, for short G. C. M,

convicting him u/s 3(1)(c) of the Official Secrets Act, 1923, for short Official Secrets Act, read with Section 69 of the Army Act and sentencing

him to eight years' rigorous imprisonment besides dismissal from service.

2. Briefly put, the petitioner's case is that on 9-12-1977 he was placed under arrest by the Commanding Officer, 57 Field Regiment. While in

military custody, he was tortured by Maj. S.S. Jolly, Maj Malhotra and a few other army and staff officers of the Commanding Officer, 6th

Battalion of the Jat Regiment, respondent No. 5 herein, and forced to sign confessional statements and other blank papers. Summary of evidence

was recorded at his back and he was not given any opportunity to either cross-examine the prosecution witnesses, or to examine his own

witnesses in defence. This was contrary to Rules 22, 23 and 180 of the Army Rules hereinafter to be referred to as the Rules. Respondent No. 5

thereafter charge-sheeted the petitioner u/s 3(1)(c) of the Official Secrets Act,

read with Section 69 of the Army Act and sent him up for trial without complying with the provisions of Rules 33 and 34, by not affording him an opportunity to prepare his defence and by not administering a warning to him of his intended trial by a G. C. M., which was convened by him contrary to the provisions of Section 109, of the Army Act. Before the commencement of his trial, he had not only objected to his being tried by the members of the G. C. M. who were biased against him, but had also objected, to the constitution of the G. C. M. itself. His objection was, however, overruled contrary to Section 130 of the Army Act. He was not permitted to engage a counsel of his choice and nor was a Defending Officer of his choice appointed to assist him. He was convicted without recording any evidence, merely on the basis of the statements of the prosecution witnesses contained in the summary of evidence. On his being committed to civil prison to serve the sentence, he was not supplied a copy of the G. C. M. proceedings and other necessary material to enable him to seek a review of the sentence imposed upon him, as also to file the present writ petition. Rule 147-A, under which exemption to supply the aforesaid material was claimed by the Central Government is violative of Articles 21 and 22 of the Constitution, Even Section 164(2) of the Army Act, which does not envisage a right of personal hearing or hearing through a counsel in a convict is ultra vires the Constitution and opposed to the principles of natural justice. Even otherwise also, the G.C.M. did not have the jurisdiction to try him for the said offence; firstly, because it was not a civil offence as defined by Section 3(ii) of the Army Act, and secondly, because the G. C. M. could not have tried the petitioner in the absence of a proper complaint in terms of Section 13(3) of the Official Secrets Act; and thirdly, because the decision in regard to the forum of his trial was contrary to Section 125 of the Army Act, as well as the Criminal Court and Court Martial (Adjustment of Jurisdiction) Rules, 1953. Even otherwise also, the trial was vitiated on the ground of infraction of the rules of natural justice.

3. The case of the respondents, however, is that the petitioner was not arrested maliciously or due to any enmity towards him, but he was arrested for his involvement in espionage activities against his own country. Summary of evidence was recorded in his presence, and he was afforded

adequate opportunity to cross-examine the prosecution witnesses and to produce his own witnesses in defence. The G. C. M. was convened not by respondent No. 5, but by the General Officer Commanding, 16 Corps, respondent No. 4 herein, who was fully authorised to do so u/s 109 of the Army Act. Rules 22 and 23 were fully complied with, inasmuch as, he was supplied copies of the summary of the evidence, the charge-sheet and all other relevant documents, and was also warned of his intended trial. All the formalities of his trial were fulfilled. The charge was read over and explained to him, to which, he had after fully understanding it pleaded guilty. No evidence was, therefore, required to be recorded to found his conviction, because under Rule 52 his conviction had to be based upon his confession, made by him before the G. C. M. itself/Before recording his conviction, the provisions of Rule 52 were fully complied with. Even after his conviction, the petitioner had unequivocally confessed to his guilt and pleaded for a lenient view. He was represented by a Defending Officer during the course of his trial. He had never asked for a counsel of his choice to conduct his defence. The Central Government in exercise of its powers under Rule 147-A had claimed privilege on the ground that supplying copies of the proceedings of the G. C. M. would be against the interests of the security of the State. Still, the petitioner was permitted to inspect the said record through his legal adviser. Neither the provisions of Rule 147-A nor those of Section 164(2) are ultra vires of the Constitution, or otherwise opposed to the rules of natural justice. The offence for which the petitioner was tried, is a civil offence within the meaning of Section 3(ii), and no complaint u/s 13(3) was necessary to empower the G. C. M. to try him for the said offence. The decision taken by respondent No. 4 that the petitioner shall be tried by a court martial was perfectly legal and justified which did not contravene any provision of law.

4. The statement on affidavit of the respondents that Rules 22 and 23 were fully complied with, which it may also be mentioned here, has not been controverted by the petitioner by filing a rejoinder affidavit, is amply corroborated by the record of the G. C. M. The witnesses examined during the course of preparation of summary of evidence were examined in the presence of the petitioner, who was given an opportunity to cross-examine

them, but he failed to exercise this right. The record also reveals that he was warned of his trial and was told that any statement that he may make

during the recording of summary of evidence could be used against him at the trial. In spite of all that, he volunteered to make a statement and

admitted having confessed to the guilt before major S. C. Jolly and Major Malhotra. It is, therefore, manifest that Rules 22, 23, 33 and 34 were

fully complied with. Since no Court of inquiry was held in his case no occasion arose to comply with the provisions of Rule 180.

5. His other contention that the G. C. M. was convened by respondent No. 5 and that he had objected to his being tried by its members are also

without any substance. The G. C. M. was not convened by respondent No. 5, the Commanding Officer 6th Battalion of the Jat Regiment, but it

was convened by the General Officer Commanding 16 Corps. There is no dispute that the latter had been authorised by the Chief of the Army

Staff to convene the court martial. The petitioner before the commencement of his trial, had been put a specific question as to whether he objected

to be tried by the Presiding Officer of the G. C. M., or by any of its members whose names had been read, before him, but he had replied that he

had no such objection. This is not only borne out from the counter-affidavit of the respondents, but also from the record of the G. C. M.

6. Admittedly, no criminal court had simultaneously taken cognizance of the offence to give rise to any conflict of jurisdiction between it and a court

martial. Respondent No. 4 having plenary powers u/s 125 of the Army Act to have the petitioner tried by a G. C. M. and the Criminal Court and

Court Martial (Adjustment of Jurisdiction) Rules, 1952 not being at all applicable to the case, no fault can be found with its trial by a court martial.

7. There also appears to be no truth in the petitioner's contentions that his conviction and sentence was based upon no evidence at all, and nor had

he voluntarily confessed to his guilt. The plea in reply raised by the respondents, however, is that no evidence was required to be recorded

because the petitioner had voluntarily confessed to his guilt before the G. C. M., as such, his conviction in terms of Rule 52, could have been

founded upon his confession alone. This plea of the respondents also finds support from the record of the G. C. M. which reveals that the

petitioner at the very outset had admitted all the charges against him and had clearly confessed to his guilt. Sub-rule (2) of Rule 52 which alone is

relevant for the present discussion, reads as under:

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the Court, but, before it is recorded, the presiding officer or

judge-advocate, on behalf of the court, shall ascertain that the accused understands the nature of the charge to which he has pleaded, guilty, and

shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference

in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence that

the accused ought to plead "Not guilty".

8. This Rule provides that the plea of guilty shall be recorded by a court martial as a finding of the Court, meaning thereby that a confession made

by an accused person before a court martial shall form basis of his conviction without recording any further evidence "to prove the charge against

him. This Rule no doubt provides that before doing so, the Presiding Officer or the Judge Advocate, as the case may be, shall have to explain the

charge to the accused and be satisfied that he has understood it, and to advise him to withdraw the confession even after it has been recorded,

where he finds on going through the summary of evidence that he ought not to have made a confession. But, in the present case no grievance is

made in the writ petition of non-compliance with this sub-rule to any extent and in any manner whatsoever. In the absence of any such grievance,

we have no option but to accept unreservedly the statement on affidavit of the respondents that the provisions of Sub-rule (2) of Rule 52 were fully

complied with before recording the conviction of the petitioner.

9. In *Sewa Ram Nagial Vs. Union of India (UOI) and Others*, we have already taken the view that an offence under the Official Secrets Act does

not cease to be a civil offence as defined by Section 3(ii) of the Army Act, merely because a First Class Magistrate in terms of Sub-section (1) of

Section 13 of the Official Secrets Act has to be specially empowered by the appropriate Government to try an offence under the said Act. In that

case, we have held that any such special authorisation of the Magistrate merely supplements his ordinary powers under the Criminal P.C. but surely

it does not supplant them. Despite such a special power, he remains a court of ordinary criminal justice within the meaning of Clause (viii) of

Section 3 of the Army Act. In that case, we have further held that filing of a complaint in terms of Sub-section (3) of Section 13 of the Official

Secrets Act does not partake of the substantive offence under the Act, but it is a matter that squarely falls in the realm of procedure to be followed

in the trial of the offence per judgment in Writ Petition No. 7/78 is, therefore, a complete answer to the contentions raised in this case that neither

the offence u/s 3(1) (c) of the Official Secrets Act read with Section 69 of the Army Act is a civil offence as defined by Section 3(ii) of the Army

Act, and nor could the G. C. M. have tried the petitioner for the same without a proper complaint in terms of, Sub-section (3) of Section 13 of the

Official Secrets Act.

10. Then comes the last contention raised in regard to the constitutional validity of Rule 147-A; and Section 164 of the Army Act. These

provisions, for the sake of convenience, are reproduced as below:

147-A. Copy of the proceedings not to be given in certain cases --
Notwithstanding anything contained in Rule 147, if the Central Government

certifies that it is against the interests of the security of the State or friendly relations with foreign States to supply a copy of the proceedings or any

part thereof under the said rule, he shall not be furnished such copy:

Provided that if the Central Government is satisfied that the person demanding the copy is desirous of submitting a petition in accordance with the

Act or instituting any action in a court of law in relation to the finding or sentence, it shall permit inspection of the proceedings to such person or his

legal adviser, if any, on the following conditions, namely:

(a) the inspection shall be made at such times and such places as the Central Government or any authority authorised by it may direct, and

(b) the person allowed to inspect the proceedings shall, before such inspection, furnish --

(i) an undertaking, in writing, that he shall not make copies of the proceedings or any part thereof and that the information or documents contained

in such proceedings shall not be used by him, for any purpose whatsoever other than for the purpose of submitting a petition in accordance with the

Act or instituting an action in a court of law in relation to the said finding or sentence, and

(ii) a certificate that he is aware that he may render himself liable to prosecution

under Sections 3 and 4 of the Official Secrets Act, 1923(19 of

1923) if he commits any acts specified in the said section in relation to the documents or information contained in the said proceedings.

164. Remedy against order, finding or sentence of court-martial. " (1) Any person subject to this Act who considers himself aggrieved by any

order passed by any court-martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such court-

martial and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety

of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any court-martial which has been confirmed, may

present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who

confirmed, such finding or sentence, and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such

order thereon as it or he thinks fit.

11. The challenge to their constitutional validity is based upon the infringement of Articles 21 and 22 of the Constitution, So far as Article 22 is

concerned, it is not attracted at all to the facts and circumstances of the present case because the petitioner has been arrested and detained in

custody not under any law providing for preventive detention and nor before the commencement of any investigation, enquiry, or trial against him.

He has been committed to civil prison to serve the sentence imposed upon him by a court of competent jurisdiction. So far as Article 21 is

concerned, neither Rule 147-A, nor Section 164 contravene its provisions as well. This Article merely provides that no person shall be deprived of

his life or personal liberty except according to procedure established by law. Making a representation to the confirming authority by an accused

against his conviction recorded by a court-martial, or seeking a review of his conviction after its confirmation by the competent authority in terms of

Sub-sections (1) and (2) of Section 164 no doubt relate to his personal liberty, nevertheless, it cannot still be contended that providing him the

copies of the record of the G. C. M, in terms of Rule 147-A, or failure to give him

a personal hearing u/s 164, tantamounts to depriving his

personal liberty except according to procedure established by law. Section 164 is undoubtedly a provision of the Army Act and, therefore a law.

Likewise, Rule 147-A has been framed by the Central Government in exercise of its powers u/s 191 of the Army Act. The same is also law. Law

as defined by Clause (3) of Article 13 of the Constitution for the purpose of Part III, includes any Ordinance, order, bye-law, rule, regulations,

notification, custom or usage having in the territory of India the force of law. Even so, the problem posed is not completely solved, for, in Mrs.

Maneka Gandhi Vs. Union of India (UOI) and Another, it has been held that the law envisaged by Article 21 must be a valid law. And a law,

before it can be said to be a valid, law, must be just, fair and reasonable. The next question which I thus falls for determination is whether Rule

147-A and Section 164 provides for a procedure that it just, fair and reasonable.

12. Once we read Rule 147-A and Section 164 along with the rules providing for the procedure in the trial of an offence by a court-martial, the

answer to this question, in our opinion, has to be in the affirmative. Rule 37 provides that the officer before convening a court-martial shall satisfy

himself as to whether the offence is such as is an offence under the Army Act. Under Rule 39 he is required to determine the eligibility of each

member of the court-martial who is to serve on it. After the court-martial is convened, the order convening the same and the names, of its Presiding

Officer and other members, in terms of Rule 44 shall have to be read before the accused and the latter asked as to whether he has any objection to

his being tried by any of its members. In case he objects and the objection is well-founded, any such member in regard to whom he has raised the

objection, shall have to be replaced. Rule 48 provides that the charge or charges upon which the accused is arraigned, shall be read and if

necessary translated to him, and he shall be asked to plead guilty or not guilty separately to each charge. Under Rule 49, he may object to the

charge on the ground that it does not disclose an offence under the Army Act, or is not otherwise in accordance with the Rules. Such objection

shall be considered by the court-martial and allowed or disallowed on its merits. Another opportunity to challenge the jurisdiction of the court-

martial to try him is given to an accused under Rule 51. Rule 52 no doubt says

that where he has pleaded guilty to the charge, it will not be necessary to record any evidence to find him guilty. But, this Rule further enjoins upon the Presiding Officer or Judge Advocate of the court-martial to again -explain to the accused the charge to which he may plead guilty or not guilty and also to satisfy himself that he has understood the same. Not only that, he has to tell him further that if he pleads guilty, he shall be convicted on his confession alone, without recording any other evidence. This is what, in our opinion, is implied, by the expression ""difference in procedure"" occurring in the Rule. Even after he has pleaded guilty to it, this rule enjoins upon him to advise the accused to withdraw his plea of guilty, where he finds that the plea of guilty is not sustainable on the evidence contained in the summary of. evidence. Rule 53 gives him a further right to raise a plea of bar on the additional grounds mentioned in the Rule. In case the accused, has withdrawn his plea of guilty in terms of Sub-rules (2) and (4) of Rule 52, the prosecution will be obliged to prove his guilt by producing its evidence. Even after the close of the prosecution evidence, Rule 57 again gives a right to the accused to urge that no offence has been made out from the evidence recorded. The court-martial, if satisfied, that the plea is well founded, has no option but to record a finding of not guilty.

13. The accused is then required to make a statement, oral or in writing, explaining the evidence, if any, produced by the prosecution against him, and may examine any person whom he wants to produce in defence, including a witness to his character. Where the accused has produced defence evidence, he shall make a final address first, but, where he has led no defence evidence, the prosecutor shall make a final address first.

After the prosecutor and the defence have addressed the court, the Judge Advocate shall sum up the evidence and advice the court upon the law relating to the case, as provided by Rule 60. These addresses along with the entire evidence brought on the record shall be considered by the court-martial in terms of Rule 61 in a close session, and a finding of guilty or not guilty shall be recorded by it under Rule 62 thereafter. It is thus manifest that the accused who has been convicted is fully aware of what happens during the course of his trial. Statements of witnesses are recorded in his presence. He is allowed to cross-examine them. A Defending

Officer, and, if he so likes, a counsel of his choice, is there to conduct his defence. He is given a right to address the court when the evidence in the case comes to a close. It cannot, therefore, be said that by not providing a complete copy of the court-martial proceedings to him, he is prejudiced in either making a representation against his conviction by the court-martial, or in seeking a review of his conviction and sentence that has also been confirmed by the competent authority. The entire record is before the confirming or reviewing authority, which has to pass an order after going through it. The accused is given a right to make a written representation, both against his confirmation and against the review of his conviction. It cannot therefore, be said that the procedure provided either by Rule 147-A or Section 164 is not fair, just and reasonable much less, when the accused, in terms of Rule 147-A has a right to inspect the record of the court-martial without preparing its copies. Refusal on the part of the Central Government to provide him the copies of the proceedings of the court-martial with a view to protecting the interest of the security of the State, cannot be said to be arbitrary, unjust, unfair or unreasonable.

14. That apart, Section 164, assuming that it takes away any fundamental right of the accused, is still beyond the pale of challenge in view of

Article 33 of the Constitution which says that the Parliament may by making a law restrict or even abrogate the fundamental rights conferred by the

Constitution in their application to the members of the Armed Forces. As held by their Lordships in *Ram Sarup Vs. The Union of India (UOI)* and

Another, taking away this right is not restricted, to Section 21 of the Army Act, but every provision in the Army Act which abridges or abrogates

any fundamental right of the members of the Armed Forces, is covered by Article 33 of the Constitution, which can take protection under its cover,

against any challenge thrown to its constitutional validity. Their Lordships' observations in the aforesaid case, which are reproduced hereunder, will

make the point abundantly clear:

The learned Attorney-General has urged that the entire Act has been enacted by Parliament and if any of the provisions of the Act is not consistent

with the provisions of any of the articles in Part III of the Constitution it must be taken that to the extent of the inconsistency Parliament had,

modified the fundamental rights under those articles in their application to the person subject to that Act. Any such provision in the Act is as much

law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect

the fundamental rights under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament

has thereby in the exercise of its power under Article 33 of the Constitution made the requisite modification to effect the respective rights.

Section 21 merely confers an additional power to modify rights conferred by Article 19(1)(a) and (c) by Rules and such rules may set out the limits

of restriction. But the specific provision does not derogate from the generality of power conferred by Article 33. Therefore, it is not possible to

accept the submission that the law prescribing procedure for trial of offences by court-martial must satisfy the requirement of Article 21 because to

the extent the procedure is prescribed by law if it stands in derogation of Article 21, to that extent Article 21 in its application to the Armed Forces

is modified by enactment of the procedure in the Army Act itself.

15. We are, therefore, clearly of the opinion that constitutional validity of Rule 147-A and Section 164 is not open to challenge.

16. We find no merit in this writ petition, which we dismiss accordingly.

G.M. Mir, J.

17. I agree.