
(2010) 01 AHC CK 0129
In the Allahabad High Court
Case No : T.A. No. 48 of 2009

Raj Kumar No.3000802 Sepoy/Chef (U)	APPELLANT
Vs	
Union of India and others	RESPONDENT

Date of Decision : 21-01-2010

Acts Referred:

Army Act, 1950 — Section 116(1), 120(3), 122
Army Rules, 1954 — Rule 116(4)

Citation : (2010) 01 AHC CK 0129

Hon'ble Judges : Janardan Sahai, J and P.R.Gangadharan, J

Final Decision : Partly Allowed

Judgement

Janardan Sahai, Member (J).

1. This application has been received by transfer from the High Court of Allahabad, Lucknow Bench. The petition is directed against an order of conviction and sentence of one year rigorous imprisonment and dismissal from service awarded to the petitioner who was a Sepoy/Cook. The punishment was awarded by a Summary Court Martial on 11.1.2007 by the Commander, Administrative Battalion, Rajput Regimental Centre, Fatehgarh. The facts giving rise to the application may be stated briefly as follows :

2. A chargesheet was issued to the petitioner under section 39(b) of the Army Act for the charge that he while at Field on 21.8.2002 having been granted leave of absence from 8.8.2002 to 20.8.2002 to proceed home, failed without sufficient cause to rejoin duty on expiry of said leave, till he surrendered voluntarily at the Rajput Regimental Centre on 14.12.2006 at 12.00 hours of his own accord. It appears that 16 Rajput was deployed at Kiran Sector, Jammu and Kashmir where the petitioner was on active service. In the proceedings under Army Rule 22 one witness, namely, CHM Ran Singh was orally examined. Thereafter the Summary of Evidence was recorded and in the Summary of Evidence three witnesses were examined i.e. Prosecution Witness I Ram Deo Singh who stated that the petitioner surrendered himself on 14.12.2006 at 12.00 hours whereupon the

witness reported the matter to Major P. Basu, Adjutant. Prosecution Witness 2 CHM Ran Singh proved the surrender of the petitioner. Prosecution Witness 3 is Hav/Clerk Raja Kumar. He was employed as Depot Company Clerk, Rajput Regimental Centre, Fatehgarh. He stated that Ran Singh handed over the surrender certificate of the petitioner. He also produced Court of Enquiry and IAFD918 (Declaration of deserter). The petitioner gave his own statement to the effect that his uncle had broken his leg in an accident; his grandfather is blind and partially deaf and his father is no more and being the eldest in the family he did not rejoin the unit primarily to look after his family. One defence witness Sepoy Sanjeev Kumar was also examined. He stated that the petitioner Raj Kumar belongs to the same district and his house is very near to the house of the witness and he had over stayed leave due to family problems. A Summary Court Martial was convened by the Commanding Officer of the Administrative Battalion Rajput Regimental Centre, Fatehgarh. The petitioner pleaded "guilty" and was awarded punishment of dismissal from service and rigorous imprisonment for one year against which the petitioner filed the Writ Petition which has been transferred to this Tribunal.

3. We have heard Shri P.N. Chaturvedi learned Counsel for the petitioner and Shri Dinesh Kumar Pandey learned Central Government Counsel.

4. The learned Counsel for the petitioner made the following submissions on merits:

(i) that the Commanding Officer, Administrative Battalion, Rajput Regimental Centre, Fatehgarh had no jurisdiction to try the petitioner who belonged to another Unit 16 Rajput Regiment

(ii) That the trial was barred by limitation under section 122 of the Army Act.

(iii) That Rules 22,115 and 116(4) of the Army Rules were not complied with.

(iv) That Subedar Om Prakash who was detailed as friend of the accused was illiterate and was not competent to defend the petitioner.

(v) That as the procedure provided in the aforesaid Rules was not complied with there is a violation of Article 14 of the Constitution of India.

5. We have considered each of the submissions made by the learned Counsel. It is not in dispute that the petitioner was posted in the 16 Battalion Rajput Regiment and it was after his surrender at Rajput Regimental Centre Fatehgarh that he was attached to that centre. The question is whether the Commanding Officer of the Rajput Regimental Centre to which the petitioner was attached could try the petitioner. The Counsel for the petitioner submitted that it is only for the offence of desertion that an exception has been made in para 381 of the Regulations for the Army and in the circumstances mentioned therein an accused can be tried by a Commanding Officer of another unit. The learned Counsel for the petitioner relied upon the provisions of sections 116 and 120 of the Army Act and note 5 of section 116 and notes 4 and 5 of section 120 and Para 381 of the

Regulations for the Army. Before dealing with the submissions it would be apt to quote the provisions of sections 116(1) and 120 (3) of the Army Act which are relevant for the discussion:

"116. Summary CourtMartial.(1) A summary CourtMartial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court."

"120. Power of summary courtmartial. (3) A summary CourtMartial may try any person subject to this Act and under the command of the officer holding the Court, except an officer, junior commissioned officer or warrant officer."

6. What these sections provide is that a summary CourtMartial can be held by the Commanding Officer of the "corps, department or detachment" and that the accused must be in the position of being under the command of the officer holding the Court. There is nothing in these sections which may prohibit a summary CourtMartial being held by the Commanding Officer of the unit to which the accused may have been attached after the commission of the offence or after he surrenders. If the accused can be legally attached to another unit the commanding officer of that unit would become his commanding officer and if that commanding officer holds the trial the accused would be under his command within the meaning of subsection (3) of section 120. The question really is whether the petitioner could have been legally and validly attached to a different unit. Note 5 of section 116 and Notes 4 and 5 of section 120 and Regulation 381 have been relied upon by the petitioner's Counsel in support of his contention that it is only for the trial of an offence of desertion that an accused can be attached to a different unit. Regulation 381 and the aforesaid Notes are quoted below: "381. Trial of Deserters. Under normal circumstances trial by summary Court Martial for desertion will be held by the CO of the unit of the deserter. However, when a deserter or an absentee from a unit shown in column one of the table below surrenders to, or is taken over by, the unit shown opposite in column two and is properly attached to and taken on the strength of the latter unit he may, provided evidence, particularly evidence of identification, is available with the latter unit, be tried by summary CourtMartial by the OC of that unit when the unit shown in column one is serving in high altitude area or overseas or engaged in counterinsurgency operation or active hostilities or Andaman and Nicobar Islands.

In no circumstances will a man be tried by summary CourtMartial held by a CO other than the CO of the unit to which the man properly belongs; a unit to which the man may be attached subsequent to commission of the offence by him will also be a unit to which the man properly belongs.

Column one Column two

Armoured Corps Regiment Armoured Corps Centre and School

A Unit of Artillery Regimental Centre concerned

A Unit of Engineers Headquarters Engineers Group, concerned.

A Unit of Signals Signal Training Centre, Jabalpur

Infantry Battalion Regimental Centre concerned

Gorkha rifle battalion Gorkha Regimental Centre concerned

ASC Unit ASC Centre concerned

RV Corps RVC Centre

Any other Unit Centre on which based

This rule is not intended to limit the power of any convening officer, who at his discretion may order trial by General, Summary General, or District Court Martial at any place, if such a course appears desirable in the interest of discipline.

7. Note 5 of section 116 and Notes 4 and 5 of section 120 are quoted below:

Note 5 of section 116:

"5. See Regs. Army para 381 for the circumstances under which a CO of a different unit may hold the trial by SCM of a person subject to AA."

Notes 4 and 5 of section 120 : "4. Under the command of the officer holding the CourtAn officer holding the Court, i.e., the CO of a unit cannot try a NCO or a sepoy by SCM unless such person is under his command, e.g. belongs to that unit on the date of trial. The only two exceptions to this rule are, in the case of trial of deserters or absentees without leave and in case where such a person is a patient in a hospital Regs. Army Paras 381 and 443 refer." "5. A NCO or a sepoy cannot be attached to another unit for the purpose of his trial by SCM except as provided in Regs. Army para 381" 8. Note 5 of section 116 begins with the word "See" apparently with the purpose of drawing attention to para 381 of the Regulations for the Army, Para 381 provides that under normal circumstances an offence of desertion will be tried by the CO of the unit of the deserter. It also provides that in certain circumstances such as where the unit is deployed in high altitude area of active hostilities or overseas or engaged in counterinsurgency operation a deserter or an absentee can be tried by the CO of a different unit. The 2nd paragraph of Regulation 381 prohibits Summary Court Martial trial by a CO of a unit other than the CO of the unit to which the man properly belongs. It then goes on to clarify that the unit to which the man may be attached subsequent to the commission of the offence will also be a unit to which he properly belongs. Thus the absolute prohibition in the second para of the Regulation debarring the CO of a unit to which the man does not properly belong to try the offence of desertion is relaxed by the clarification that the unit to which he may be attached subsequent to the commission of the offence is also the unit to which he properly belongs. For offences other than of desertion and relating to absence Note 5 of section 120 however provides an absolute bar to an NCO or sepoy being attached to another unit for the purposes of trial of the offence by

summary Court Martial. This is clear from the language of Note 5 which uses the expression except as provided in Regs Army para 381". In view of this Note an offence other than that covered under Regulation 381 cannot be tried by the Commanding Officer of another unit because a bar has been set up by Note 5 of section 120 against attaching the accused to any other unit. In the decisions relied upon by the petitioner's Counsel in support of his contention that an accused cannot be attached to another unit for the purpose of trial except for the offence of desertion strong reliance has been placed upon Note 5. Other Notes referred to above have also been referred to along with Notes 5 of section 120 in some of these decisions but the other notes are not directly on the subject covered by Note 5 of section 120. Learned Central Government Counsel has placed before us the copy of the Notification dated 28.8.2001 of the Government of India, Ministry of Defence deleting existing Note 5 of section 120 of the Army Act. This Notification is quoted below :

"No. B/80328/JAG/1965/2001D(AS)

Government of India

Ministry of Defence

New Delhi

the 28 Aug, 2001

The Chief of the Army Staff Subject: AMENDMENT TO THE NOTES TO THE ARMY ACT, 1950 IN THE MANUAL OF MILITARY LAW, 1983

I am directed to convey approval of the Government of India to the Note 22 of section 90 and the deletion of Note 5 to section 120 of the Army Act, 1950 in the Manual Military Law, 1983 as under :

(a) the existing Note 22 to Army Act section 90 be substituted under :

"92. Clause (i) (a) All personnel subject to the Army Act are legally and morally bound to maintain their wives and children whether or not a harmonious relationship exists. This subsection empowers the competent authority to order deduction from pay and allowances of an officer for maintenance of his wife and children. The grant of maintenance allowance under the Army Act is independent of the provisions of section 125 of Code of Criminal Procedure and section 24 of the Hindu Marriage Act, 1955.

(b) This subsection also prevents any financial hardship being caused to the destitute wife and children by the provisions of section 28 under which pay and allowances of a person subject to the Army Act cannot be attached to satisfaction of any decree of a Civil Court. In other words, if in a suit for maintenance or payment of alimony, a Civil Court grants a decree in favour of his wife and/or children, the amount decreed can be deducted from the pay and allowances of the person and paid to the concerned individuals under the executive orders of the Central Government or the prescribed officer made under this section. Such

Court proceedings do not ipso facto debar the Army authorities from processing and granting maintenance allowances under the provisions of the Army Act but if a Court order to the same effect is passed, it should be given due consideration while dealing with the question of alteration in allowance, (c) the existing Note 5 to Army Act section 120 be deleted. 2. The above amendments shall come into effect from the date of issue of these orders.

Yours faithfully, Sd/

(S.I. Barodia) Desk Officer (AC)"

9. In view of the deletion of Note 5 of section 120 the bar of attaching an accused to another unit for purposes of trial by SCM has been removed. There is thus no bar to attachment of an accused to another unit. If the accused can be legally attached to another unit there would be no hurdle created by section 116 or Note 5 to section 116 in the accused being tried by the Commanding Officer of that unit because all that section 116 requires is that the accused must be tried by the Commanding Officer of "any corps, department or detachment of the regular army"; The Commanding Officer or the unit to which the accused has been attached would be covered under that description. The definition of Commanding Officer in section 3(v) read with Regulation 9 of the Regulation for the Army includes within it the Commanding Officer of a unit to which the soldier may be attached. Note 4 of section 120 also does not provide anything to the contrary. What

Note 4 requires is that the accused must be under the command of the officer holding the Court. The requirement appears to be that on the date of the trial the accused belongs to the unit the commanding officer of which is holding the trial.

10. Shri P.N. Chaturvedi submitted that the Central Government has no power to delete the aforesaid provision. In support of his contention he relied upon the decision Union of India v. Charanjeet Singh Gill., Mil LJ 2000 9C1 =(2000) S SCC 741, We do not find anything in that decision that may lend support to his contention. It is also to be noted that in a General or District Court Martial Rule 39(2)(d) of the Army Rules disqualifies the Commanding Officer of the accused or of the corps to which the accused belongs, to be a member. The disqualifications are contained in rule 39(2) Clauses (a) to (e). The disqualifications covered under each of these Clauses are of a nature in which bias can be imputed to the member. It is difficult to conceive that an accused would be prejudiced if he is attached to another unit and tried by the Commanding Officer of that unit. In such circumstances deletion of Note 5 to section 120 cannot be assailed as being arbitrary or violative of Article 14 of the Constitution of India. In support of his contention that attachment to a different unit is prohibited strong reliance has been placed by the petitioner's Counsel upon the following decisions :

(i) Mahipal Singh v. Union of India ant others, 1994 (8) SLR 434.

(ii) Hav (MP) Hanuman Singh v. Union of India and others, Mil U 1999 All 37.

(iii) Ex Lance Nail Vishwa Priya Singh and others v. Union of India and others., 147 (2008)DLT 2002(08).

11. No doubt it has been held in these cases that Summary Court Martial can be held only by the Commanding Officer of the Unit of the accused but the cases appear to be distinguishable. In Mahipal Singh's case the accused had not been attached to the unit the Head Quarters Recruitment Zone Jabalpur the Commanding Officer of which had tried him. The case of the accused was that he had merely been sent on temporary duty from his unit 27 AR Defence Regiment to which he belonged. To rebut this fact the respondents relied upon executive instructions dated May 22, 1985. In para 8 of his judgment the learned Single Judge in Mahipal Singh's case while considering this question held that the plea was taken by the Regiment belatedly and that the circular was issued to tide over a particular situation. Note 5 it was observed has statutory force and in support of this view reliance was placed upon H.C. Sarin v. Union of India., AIR 1976 SC 1686, In Sarin's case the note to Rule 1730 of the Railway Establishment Code the effect of which was under consideration was held to be a part of the Rule itself and not a mere executive instruction. In Union of India v. Charanjit Singh Gill and others, 2000 Mil LJ (SC) 1, the Supreme Court considered the question about the status of the Notes appended to the Army Act. In that case the effect of Note 2 to Rule 102 of the Army Rules was directly involved for consideration. It was held in para 23 by their Lordships of the Supreme Court that the Note cannot be held to have the effect of a Rule or Regulation. The learned Judges then observed "It appears that the "Notes" have been issued by the Authorities of the Armed Forces for the guidance of the officers connected with the implementation of the provisions of the Act and the Rules and not with the object of supplementing or superseding the statutory Rules by administrative instruction". The view taken by the Delhi High Court in Mahipal Singh's case about the status of the Notes to the Army Act as having statutory effect is therefore no longer good law in view of Charanjit Singh's decision. The case is also distinguishable on facts. The accused had been served several chargesheets in supersession and the Delhi High Court took the view that although the accused had earlier been given a chargesheet under section 69 of the Army Act but in the subsequent chargesheet on the basis of which the Summary Court Martial impugned in that case was held the charge was modified to one under section 63 so as to bring the accused to be tried in Summary Court Martial proceedings in which save in certain circumstances an offence under section 69 cannot be tried without reference by a higher authority whereas an offence under section 63 can be tried without such reference in view of the provisions of Sub section (3) of section 120. It was also found by the Delhi High Court that there were several other persons against whom no Summary Court Martial was held and they were dealt with by administrative action. In Hav. Hanuman Singh's case the ground upon which the trial was held to be vitiated by the Allahabad High Court was that there was a breach of section 120

subsection 2 of the Army Act and that there was an absence of circumstances indicating the existence of any grave reason or immediate action justifying the holding of a Summary Court Martial. Subsection (2) of section 120 provides that when there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a District Court Martial or on active service a Summary General Court Martial for the trial of the alleged offender, an officer holding a Summary Court Martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69 or any offence against the officer holding the Court. The Court relied upon Note 5 of section 120 (deleted) for holding that except for the offence of desertion the accused could not be attached to a different unit. In the 3rd case Ex. LN Vishva Priya Singh decided by a Division Bench of the Delhi High Court the conviction awarded by the Summary Court Martial was set aside on the ground that the Court Martial was not convened, constituted and completed by the CO of the Unit to which the accused belonged. Strong reliance was placed upon Note 5 of section 120 which has been deleted. Moreover not all the decisions of the Delhi High Court upon the subject strike the same note. In Union of India v. S.K. Sharma, 2003 (103) DLT 783, a similar argument that an accused could not except for an offence of desertion be attached to another unit for trial by the Commanding Officer of that unit was repelled by a Division Bench of the Delhi High Court. The decision was explained by the Division Bench in Ex LN Vishva Priya as being one on its own facts. The Allahabad High Court in Raj Kumar v. Union of India, 2008 Mil LJ 10 relying upon its previous decision in Hav. Clerk Dharam Singh v. U.O.I., 1996 (1) UPLBEC 335, has taken a different view. On facts too the case of Vishva Priya is distinguishable. None of the offences for which the accused were charged in the bunch of cases decided with Vishva Priya's case was an offence of desertion or of an absentee. Note 4 to section 120 refers to Regulations 381 and 443 for the exceptions to the rule that an accused cannot be tried by a Commanding of a different unit and the exceptions are trial of deserters or absentees without leave and a hospitalized patient. In the present case the petitioner has been charged under section 39(b) for over stayal of leave which implies unauthorized absence after expiry of the leave period. Both absence without leave and over stayal of leave are offences under section 39 which bears the heading "Absence without leave".

12. The fact that the petitioner was taken on the strength of the Rajput Regimental Centre, Fatehgarh has been admitted by the petitioner in para 8 of the petition. No specific averment has been made in the petition that the attachment was in breach of Regulation 381 or that of the Notes 5 of section 116 or Notes 4 and 5 of section 120 so that the factual aspect whether the circumstances for attachment of the petitioner to another unit was justified could be rebutted in the Counter Affidavit. The plea was taken and that too not very clearly for the first time in the Rejoinder Affidavit. In none of these cases which have been cited had the petitioner pleaded "Guilty". In the present case the petitioner has pleaded "Guilty". It has not been shown, what prejudice has been

caused to the petitioner by the trial held by Commanding Officer of the Rajput Regimental Centre, Fatehgarh. In these circumstances and in view of the what we have said about the status of the Notes to the Army Act we do not find any merit in Mr. Chaturvedi's contention that the trial was without jurisdiction.

13. The next submission of Mr. Chaturvedi is that the trial is barred by section 122 of the Army Act. That provision reads as under:

"122. Period of limitation for trial.(1) Except as provided by subsection (2), no trial by Court Martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years and such period shall commence,

(a) on the date of the offence; or

(b) where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or

(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.

(2) the provision of sub section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offence mentioned in section 37.

(3) In the computation of the period of time mentioned in subsection (1), any time spent by such person as a prisoner of war, or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded.

(4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army."

14. It is pointed out by the petitioner's Counsel that the petitioner was granted Casual Leave from 8.8.2002 to 20.8.2002 and over stayal began from 21.8.2002 and that the period of three years limitation would commence from 21.8.2002 whereas the trial commenced on 11.1.2007 after a period of four and half years from the date of commission of the offence. The Central Government Counsel on the other hand contended that though the over stayal constituting the offence commenced from 21.8.2002 the offence was repeated on every date the over stayal continued till the petitioner surrendered on 14.12.2006 and therefore, the trial is not barred by section 122 of the Army Act. In *A.S. Dhillon v. Union of India*, 2007 SLR 278, a Division Bench of the Punjab and Haryana High Court has considered the subject and has quoted the instructions issued by

the Adjutant General's Branch Army Head Quarters. In paragraph 13 of the instructions quoted in the judgment "continuing offence" has been defined in the following words :

"13. Continuing offences. If an act or omission on part of the accused constituting an offence continues from day to day, a fresh offence is committed on every day on which the act or omission continues. Accordingly, a fresh period of limitation begins to run at every moment of the time during which the offence continues."

On page 286 of the Reports the Punjab and Haryana High Court summed up its conclusions. In para 16(vi) of the judgment it has been held that in case of continuing offences, a fresh period of limitation begins to run every moment of time during which the offence continues.

15. In our opinion the offence of over stayal of leave is a continuing offence and was continuing on every date of over stayal and the trial was therefore not barred by limitation. Moreover, an order has been passed by the reviewing authority under section 163 of the Army Act substituting the finding of the Court Martial and confining the punishment given to the petitioner to be in respect of the over stayal for three years before commencement of the trial.

16. Shri P.N. Chaturvedi submits that the reviewing officer could not exercise powers to substitute that finding. We do not find any merit in the contention of the petitioner that the Reviewing Officer could not have substituted a different finding in view of the facts. However, we have already taken the view that the offence was a continuing one and commenced from the date of over stayal till the date of surrendering and the trial was therefore not barred by limitation provided under section 122.

17. The Learned Counsel for the petitioner submitted that Rules 22, 115(2) and 116(4) of the Army Rules have not been complied with. He relied upon *Prithi Pal Singh v. Union of India*, AIR 1982 SC 1413, and other decisions in support of his contention that the provisions of Rule 22 are mandatory. As regards Army Rule 22 it was submitted that only one witness namely Ran Singh was orally examined who did not throw any light on the culpability of the petitioner and there was therefore no legal basis for the Commanding Officer to direct recording Summary of Evidence under Rule 23. Ran Singh's statement was also recorded in the Summary of Evidence. He has stated that the accused surrendered on 14.12.2006. Two other witnesses were also examined. In this case it is not in dispute that leave was granted from 8.8.2002 till 20.8.2002. Ran Singh was examined to prove that the accused surrendered on 14.12.2006. It is therefore not correct to say that there was no material. Moreover the petitioner has pleaded "guilty" in the Court Martial and even if there was irregularity in the pre trial proceedings including breach of Rule 22 the trial would not be vitiated. It has not been demonstrated that any prejudice has been caused to the petitioner. In this connection it is apt to refer to Rule 149 of the Army Rules which provides

that no proceedings of Summary Court Martial shall be vitiated unless it appears that any injustice has been done to the offender. The rule has been applied in various decisions of the Court. In *Major K. Husain v. Union of India and others*, 1998 (1) SCC 537, it was held that in absence of breach of any mandatory provision and in the absence of prejudice any illegality in the procedure would not vitiate the proceedings. The petitioner has not taken objection in the Summary Court Martial proceedings about any irregularity in the pre trial procedure. The Learned Counsel for the petitioner relied upon the decision of *Union of India v. Dev Singh*. Mil LJ 2003 SC 146, In that case the decision of *Major A. Husain's* case was distinguished on the ground that in *Major A. Hitssain's* case no objection was taken regarding the noncompliance of pre trial provisions before the Summary Court Martial whereas in *Dev Singh* case the plea was taken. In the present case no objection about non compliance of pre trial provisions was taken in the Summary Court Martial and therefore on facts *Major A. Hussain's* case and not *Dev Singh's* case is applicable. Rule 22 of the Army Rules requires that at the time of evidence the petitioner should be present. That the oral evidence of *Ran Singh* was made in the presence of the petitioner has not been denied. The Change was heard in the presence of the petitioner who was given opportunity to cross examine the witnesses. Rule 22 was thus complied with.

18. It was submitted by *Shri P.N. Chaturvedi* that Rule 115(2) of the Army Rules was not complied with in that it was the duty of the Commanding Officer to have informed the petitioner about the effect of the plea of "Guilty" and that there were circumstances in which the Commanding Officer ought to have converted the plea of guilty into "NonGuilty". In support of his contention Learned Counsel for the petitioner relied upon two decisions of the Rajasthan High Court namely *Devi lal Sahn v. Union of India and other*, 2009 (2) SCT 152, and *Union of India v. Ex. Lance Naik Bega Ram*. Mil LJ 2007 Rai 231, In *Devi lal Sahu* case the accused was being tried under the Border Security Force Act. In that case noncompliance of Rule 142(2) of the BSF Rules was alleged which apparently is *pari materia* with Rule 115 (2) of the Army Rules. It was held by the Rajasthan High Court that the signature of the accused are to be taken against the plea of "Guilty". In *Bega Ram* case the same view has been taken. The decision of the Rajasthan High Court in these cases is distinguishable. It has not been disputed in the present case by the learned Counsel for the petitioner that the petitioner has put his signatures against the plea of "guilty". In fact from the photocopy of the proceedings which are annexed to the petition it appears that the signature of the petitioner are present against the plea of "guilty". In the petition there is no plea that the petitioner has not put his signatures against the plea of "guilty". The Central Government Counsel relied upon the decision of *M. Krishtmmoorthy v. Union of India*, Mil LJ 2002 Mad. 182, in support of his contention that the requirement of Rule 115(2) was complied with in view of the certificate given in the Summary Court Martial proceedings by the Commanding Officer that the accused understands the plea of "guilty" and the general effect of the plea and

about the difference in procedure. The learned Central Government Counsel drew our attention to page 22 of the paper book in which the certificate required under the rule has been given. The certificate is in terms of Rule 115(2). For these reasons we are not inclined to accept the contention of the Learned Counsel for the petitioner that Rule 115(2) was not complied with.

19. It is next contended that Rule 116(4) has not been complied with in that there were circumstances in which the Commanding Officer ought to have converted the plea of "guilty" into "NonGuilty" in view of the statements in the Summary of Evidence and the defence case. The contention of the petitioner's Counsel is that in his statement the petitioner has indicated the circumstances for not reporting for duty after expiry of the leave and that there is no evidence to connect the petitioner with culpability for the offence of over stayal on leave. We however find that even in the Writ Petition the fact that the petitioner had over stayed leave from 21.8.2002 to 14.12.2006 has not been disputed. The petitioner's case as disclosed in the Summary of Evidence as also in the Writ Petition is that his uncle had met with an accident and that the petitioner had also to look after certain family problems and he could not thereafter join duty. The glaring fact is that the over stayal of leave is for a period of more than four years. Even the defence witness examined by the petitioner in the Summary of Evidence stated that the petitioner could not join duty on account of domestic problem. The explanation given by the petitioner for unauthorized absence for such a long period is neither believable nor sufficient. It is to be noted that the petitioner was posted in the field area Jammu & Kashmir and was on active service and he avoided joining the unit for a period of about four years. The petitioner had also pleaded "Guilty". In the circumstances we do not find any merit in the petitioner's contention. The undisputed fact is that the petitioner did not report for duty after expiry of leave period. The petitioner had over stayed leave and was, absent for more than four years. In these circumstances the petitioner had pleaded guilty. In our opinion the contention that in the circumstances the Commanding Officer ought to have converted the plea of "guilty" into "notguilty" has no merit.

20. It was then contended that the friend of the accused was thrust upon the petitioner and that sub Om Prakash who was appointed as friend of the accused was illiterate and he did not advise the petitioner rightly. Annexure CA3 of the Counter Affidavit is the copy of the letter given by the petitioner to the Commanding Officer in which he himself requested for Om Prakash being made friend of the accused. We therefore do not find any merit in the contention of the petitioner's Counsel that Om Prakash was thrust upon the petitioner.

In our opinion no infirmity in the procedure adopted by the Summary Court Martial have been demonstrated. The conviction recorded in the Summary Court Martial is on the basis of the plea of "guilty" and is not vitiated by any error.

21. Lastly Learned Counsel for the petitioner submitted that in any case the sentence awarded to the petitioner is excessive. The petitioner has been awarded

sentence of dismissal from service and rigorous imprisonment for one year. It has, been brought to our notice that the petitioner was undergoing sentence during the pendency of the. Writ Petition and an order dated 14.9.2007 was passed by the High Court for the suspension of the sentence and release of the petitioner. Learned Central Government Counsel concedes that petitioner has spent seven months and 27 days in imprisonment. The maximum sentence provided for an officer under section 29(b) is three years imprisonment. In view of section 71 read readwith section 73 of the Army Act the sentence of imprisonment can be combined with other punishments. In Ismail Khan v. GOC, Mil LJ 2004 MP 55, a sentence of dismissal from service together with two months RI was not found to be disproportionate for an offence of absence from duty for 98 days where the accused had earlier also been absent on two occasion for 34 and 39 days. In the proceedings before the sentence the Commanding, Officer holding the Summary Court Martial is required to give a Summary of the Entries in the defaulter sheet. It appears that there is no entry against the petitioner in the last 12 months and there is a remark that his general character apart from the trial was very good. The petitioner has on one occasion earlier been punished for the offence of over stayal. The aggravating factor is that the offence was committed when the petitioner was posted in the Kiran Sector in Jammu & Kashmir on active service. The fact that the period of over stayal of leave was for more than four years cannot also be lost sight of. Considering the totality of the circumstances and the fact that the petitioner has already spent more than seven months imprisonment the ends of justice would be met by reducing the sentence of imprisonment to what he has already undergone. The rest conviction and findings of the Summary Court Martial are affirmed. The contention of the learned Central Government Counsel is that the sentence cannot be reduced as the quantum of punishment awarded is in the discretion of the Court Martial and the scope in judicial review is limited. It is well settled that the punishment can be reduced even in a Writ Petition if it is shockingly disproportionate to the gravity of the charge. We are conscious of the fact that now an appeal is provided against conviction and sentence awarded by Court Martial.

22. The application is therefore partly allowed. The conviction of the applicant and sentence of dismissal from service is maintained but the sentence of one year rigorous imprisonment is reduced to that already undergone by the petitioner.