

(2015) 12 DEL CK 0119
In the Delhi High Court
Case No : W.P. (C) 8082/2011

Rajinder Singh Pathania

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-12-2015

Acts Referred:

Army Act, 1950 — Section 42(e), 80
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 376

Citation : (2015) 225 DLT 545

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : S.R. Kalkal, Advocate, for the Appellant; Ruchir Mishra, CGSC, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—In these proceedings under Article 226 of the Constitution of India, the penalty of 28 days' rigorous imprisonment and 14 days' pay fine, imposed by the Indian Army (on the petitioner) has been challenged.

2. The Petitioner was enrolled in the regular Army on 30th January 1999 after having been found physically and medically fit in all respects. After completing his basic military training, he was posted to 13 Punjab Regiment on 25th December 1999. Later, his posting was at the 7th Battalion of Rashtriya Rifles (Punjab) in Jammu and Kashmir as a Sepoy on 9th December 2008. The petitioner recounts the incident of Col. Vikas Verma's behavior, (the Commanding Officer of that regiment) during a visit allegedly hurling abuses on the soldiers to which he had objected. It is alleged that the said officer threatened him with severe consequences and that he subsequently instructed someone to file a complaint at the Police Station Uttarsur, Anantnag under Section 376 of the Indian Penal Code (IPC) against the petitioner for the commission of rape on his daughter. The petitioner was arrested and put in the

unit quarter guard. The case was investigated by the local police of that area but the charges were found to be incorrect.

3. Later, a tentative charge sheet was issued to the petitioner for violation of the local and regimental orders of the 7th Battalion of Rashtriya Rifles. The charge sheet stated that the petitioner was in unauthorized possession of mobile phones in the premises, which is clearly forbidden and amounts to negligence to obey any general or local orders covered under Section 42(e) of the Army Act, 1950. The Standard Operating Procedure [SOP No. 244/GS (Ops)] for guarding against breach of security information through mobile phones permitted only JCOs/NCOs to keep mobile phones with prior permission of the Commanding Officer (CO). In other words, the petitioner did not fall within the exclusion to this SOP and thus, he was charged for his negligence of this SOP, and ultimately 28 days' RI and 14 days of fine was imposed on him under Section 42(e) of the Army Act, 1950.

4. After having being imposed with this punishment, the petitioner had approached the Armed Forces Tribunal, Regional Bench, Chandigarh with O.A. No. 153 of 2010 for relief but had withdrawn his application with liberty to file a fresh application with the appropriate authority as the Armed Forces Tribunal, Regional Bench did not have jurisdiction to dispose of summarily tried matters under Section 80 of the Army Act.

5. It is argued by the learned counsel for the petitioner that before holding the petitioner guilty, no Court of Inquiry conducted any investigation nor was he allowed the opportunity to defend himself or cross examine the prosecution witnesses under Army Rule 180. Learned counsel further argues that the procedure to be followed by the Commanding Officer was not followed. The hearing of charges was conducted on 28th July 2009, in which the Commanding Officer (CO) dispensed with calling of witnesses in terms of Army Order 24/94 but completed the paper formalities with two prosecution witnesses for the sake of it. The respondents contested this position - they deny the allegations of unfair procedure and state that the witnesses attended the hearing and all applicable regulations were adhered to.

6. This Court had directed the respondents to produce the original records in support of their arguments to give a clear picture of the matter. The original records have been perused. Counsel of the Petitioner had urged that non-compliance of hearing of charge in terms of Army Rule 22 of 1954 vitiates the disciplinary proceedings. This Court notices that a plain reading of Rule 22 clearly states that in certain cases wherein the provisions of Rule 180 have been complied with, the CO may dispense with the investigation by the Court of Inquiry. It is in fact found by this Court, that calling and hearing of witnesses in terms of Rule 22(1) were dispensed with on the basis that provisions of Rule 180 were complied with at the Court of Inquiry in respect of the accused.

7. The records produced before this court nowhere reflects a Rule 180 Court of Inquiry proceeding. Interestingly, the RoE proceeding (which uses a form,

Appendix A to Army Order No. 24/94) states that "Calling and hearing of witnesses in terms of AR 22(1) have been dispensed with, since provisions of AR 180 have been complied with at the Court of Inquiry." Now, there is no record of the Court of Inquiry and which witnesses attended during the proceeding. Therefore, it is evident that the witnesses were to depose for the first time, but did not do so. Two witnesses - Maj. P.G. Naidu and Subedar Major Balwinder Singh are cited as witnesses who allegedly deposed against the petitioner. However, not a word of what they stated is recorded. The Respondents blandly state that the petitioner declined to cross-examine the witnesses. This court is of the opinion that when nothing was recorded in the first place, the question of asking the petitioner to cross-examine someone as regards something allegedly stated by him somewhere does not arise. The whole purpose of permitting cross-examination is to grant opportunity to someone to impeach the credibility of the witness or the statement made by him in the earlier course of the proceeding. There is nothing on the record as to what the two witnesses said, deposed or wrote about. Therefore, the Army's contention that the petitioner was provided with fair opportunity to cross-examine witnesses, is rejected. Furthermore, this Court finds that the names of the said witnesses seem to have been added to the record at a later stage (as is evident from the fact that some parts of the form were filled by the CO and others - including names of the witnesses, etc. - by someone else.) This is clearly observable from the use of separate pens and separate handwriting. The form recording the summary trial - which also occurred the same day - shows that the punishment and recording of guilt, was with a red pen by the CO. These discrepancies do not inspire confidence that the proceedings were held fairly or in the manner the Army argues it was. No fair opportunity of hearing was given to the petitioner.

8. The records reveal that no evidence was produced with respect to any mobile phone belonging to the petitioner or with regard to its usage. It is a matter of record that no mobile phone (article) was secured by the Respondents or produced by them ever. The vital evidence in this case would have been call records revealing the mobile phone number, call history etc, i.e. records which can provide conclusive proof of the fact that the said mobile phone is owned and used by the Petitioner. The records show that on 20th July, 2009, the Major Adjutant, for the CO of 7 Rashtriya Rifles, wrote to the Superintendent of Police, Anantnag, requesting SMS and call details for the months of May, June and July, 2009, in respect of four mobile phone numbers: 9697416502; 9697457378; 9697320446 and 9858080515. Neither the RoE nor the Summary Court proceeding (both dated 29-07-2009) nor any materials shown to the court nor any original document, reveal:

- (1) The petitioner's cell phone particulars (manufacturer, make, model etc.);
- (2) The mobile phone details of the petitioner (i.e. what was his mobile number) or anything linking any number with him;
- (3) Recovery of any SIM card;

(4) A written confession recorded in some material form by any officer during the preliminary inquiry or otherwise;

(5) The corroboration in the form of any letter by the police or the mobile service provider, showing that a particular mobile connection was that of the petitioner, or linked to him somehow.

9. This Court finds that what is on the record, shown in these proceedings, is merely the copy of what the concerned CO terms as a "casual note" allegedly written by the Petitioner. That note, besides other things, records the numerals "9697457378" and several other numbers, randomly. It also contains the sentence "the quick brown fox jumps over the lazy dog" and his name. The note by the CO, Col V.K. Verma states that the petitioner "confessed to using mobile No. 9697416502 obtained probably from one Bial Ahmed r/o Panchalthan & mobile No. 9697457378 later obtained probably from one Tariq Bhatt r/o. Uttersoo, from whom apparently Sep. Rajinder Singh Pathania also used to get his mobile Nos. recharged.... Sep. Rajinder Singh Pathania had also confessed to making regular calls to his wife Smt. Sharmila Pathania r/o. Chattar, Tehsil Nurpur, District Kangra, at mobile No. 9418883863 that was being used by her." Neither is that confession on the record, nor is there anything to show that these phones were connected to the petitioner.

10. This Court is conscious of the fact that in matters of discipline, interference in judicial review is slow and courts are circumspect. Yet if there is any principle of constant application in the legal world, it is this: proceedings which result in adverse consequences must be shown to have been fair; else, they run the risk of the decision being discarded. It can quite reasonably be conceded in favour of the Army that in disturbed or war like conditions, too rigid an insistence on rules of natural justice is not called for. However, at the other end of the spectrum, where it is not the Army's case that such conditions prevail and that it could and did conduct a preliminary inquiry and also conducted proceedings contemplated by the Act and Rules, it cannot be countenanced that the original records or the Record of Evidence (or indeed the summary court proceedings) do not contain even the barest minimum of what the witnesses said.

11. The proceedings, in the opinion of this Court-from the beginning to the conclusion-reeked of unfairness and the materials completely undermine any belief that the process was fair. The charge of possessing or using a mobile was imprecise and vague. It merely recorded that the petitioner violated an instruction and quoted the date when that instruction was issued. When (in terms of the period in question) did the petitioner violate the instruction, for what period he used the mobile phone, what exactly was the mobile phone number-of this, nothing was stated. In these state of affairs, when the RoE was conducted, detailed examination was dispensed with stating that a Rule 180 proceeding had been held. The records reflect no such thing. In the circumstances, there should have been some modicum of material to connect the petitioner with some mobile phone connection, or even SIM card. None existed;

none exists. The Court is in the dark as to what the witnesses said - either against the petitioner or in his favour.

12. In this state of vacuum it is unsafe to accept that the petitioner had readily accepted his guilt as the record suggests. To compound this, the CO's note, which is part of the official record, (prepared much later, in 2014 during the course of the present proceeding) suggests that some "confession" was recorded. There is no written confession by him. The individual who did record it, has not signed it; that confession is also not part of the RoE or the Summary Court proceeding. Likewise, as emphasized earlier, no letter by the police or the service provider as to the ownership of the mobile number (or SIM card) connects the petitioner with any call. Clearly, all these point to adoption of an unfair procedure to record the petitioner's guilt (he did not sign the plea) which culminated in imposition of a penalty upon him.

13. In the light of the above, this Court is of the opinion that the petition has to succeed. The penalty imposed in this case, i.e. 28 days' RI and 14 days' pay cut, as sustained by the appellate authorities, is hereby quashed. The petitioner shall be entitled to all consequential benefits, including pay increments and all service benefits based on continuity of service. The writ petition is allowed in the above terms. In the circumstances, the Indian Army shall bear the costs; quantified at Rs. 50,000/- to be paid to the petitioner within four weeks.