
(2009) 02 AHC CK 0107
In the Allahabad High Court
Case No : Writ Petition No. 3904 (S/S) of 1990

R.D.Sharma

APPELLANT

Vs

Union of Indiaand Others

RESPONDENT

Date of Decision : 24-02-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 279, 304A, 337

Citation : (2009) 02 AHC CK 0107

Hon'ble Judges : S.S.Chauhan, J

Final Decision : Allowed

Judgement

S.S. Chauhan, J.—The petitioner has come forward before this Court challenging the confirming order dated 2.3.1990.

2. The facts giving rise to the present petition are that the petitioner had joined the Indian Air Force in the year 1966 and at the time of incident he has rendered 23 years of service and was Junior Warrant Officer in police trade. It is stated that the petitioner has reported a matter of corruption against Fit. Lt. H.C. Prasad and his summary of evidence was in progress at Air Force Station Memaurya. On 20.8.1987 after giving statement at Memaurya, the petitioner along with some civilians and Fit. Lt. H.C. Prasad were travelling in Jonga vehicle driven by one K.C. Patel, the driver of the vehicle. The vehicle was carrying three filled gas cylinders. The vehicle met with an accident at Banthara Mohanlal Ganj Road near Village Khatola on 20.8.1987 resulting in serious injuries to passengers and death of Fit. Lt. H.C. Prasad due to explosion of gas cylinders. The petitioner also became unconscious in the said incident and on gaining sense he could anyhow reached to his parent unit with a view to report the matter, but in the meantime, he learnt that the incident has already been communicated by Air Force Station Memaurya. An F.I.R. was lodged at Police Station Banthara. The police investigated the matter and submitted a chargesheet to the Magistrate of the Court concerned under Sections 304A, 279 and 337, IPC. The respondent No. 4 thereafter got the case transferred from the Court of Magistrate to the Air Force

authorities to try the petitioner by General Court Martial. The petitioner was asked his choice of defending officer. The petitioner submitted his choice of defending officer as Fit. Lt. H.B. Mishra of Headquarters, Central Air Command, Allahabad under the direct administrative control of convening authority respondent No. 3, but the authorities did not agree to the said defending officer and later on provided Sqn Ldr. B.N.S. Chauhan as defending officer. The petitioner did not accept him as his defending officer. The respondents persisted not to provide Fit. Lt. H.B. Mishra for defending the petitioner, whereas the petitioner had repeatedly requested for Fit. Lt. H.B. Mishra by means of applications dated 2.1.1988, 7.4.1988, 28.4.1988 and 4.6.1988 as he was available at Allahabad and also willing to defend the petitioner. The petitioner preferred a statutory complaint against nonproviding of defending officer Fit. Lt. H.B. Mishra to respondent No. 3, but no action was taken in the matter. Thereafter, petitioner filed writ petition bearing No. 5770 of 1988, which was dismissed on 4.8.1988 with a direction to press this point before the General Court Martial. The said order was served before the General Court Martial and a request was also made by the petitioner, but the said request was not considered. The petitioner finding no other way, objected for the proceedings of the trial orally on 5.8.1988 and 10.8.1988, but the said objection was not taken into account. An application was submitted by the petitioner before the General Court Martial explaining his inability and claiming the defending officer of his choice, but the same was also not considered by the presiding officer. On 11.8.1988 when the Court was reassembled, the petitioner submitted his written objection for the trial by the General Court Martial. When the request of the petitioner was not considered by the authorities concerned, the petitioner submitted a fresh application on 11.8.1988 requesting them that any of the three officers listed in the said application may be provided for his defence, but even then no change was effected in the defending officer. On 12.8.1988 the petitioner submitted another application requesting to provide him any defence officer from the Indian Air Force instead of the Central Air Command, Allahabad, even then no defence officer of his choice was made available to him. The petitioner feeling aggrieved with the aforesaid arbitrary action of the General Court Martial proceeded to file writ petition bearing No. 6496 of 1988 on 16.8.1988, but no orders could be passed on the said writ petition and thereafter the General Court Martial proceeded ex parte without any defending officer. The petitioner filed a criminal revision challenging the transfer of the case from the Court of Magistrate to the Air Force, which was dismissed as being time barred. The petitioner thereafter filed third writ petition bearing No. 7969 of 1988, which was admitted on 15.10.1988 and the proceedings before the General Court Martial were stayed. The statement of 22 PWs were recorded without any defending officer before 15.10.1988 as no witness was cross-examined through the entire proceedings and so the petitioner suffered greatly. Thereafter, interim order dated 15.10.1988 passed in Writ Petition No. 7969 of 1988 was vacated on 25.4.1989, but in Writ Petition No. 6496 of 1988 the final order of the General Court Martial was stayed on 6.8.1989. However, the order dated 6.8.1989 was

vacated on 19.6.1989 with a direction that the proceedings before the Court Martial can be concluded and the case against the petitioner may be decided by the Court Martial according to law provided the petitioner is permitted to engage a legal practitioner of his choice and to be defended by him. From 19.6.1989 to 24.6.1989 no proceedings could take place and the General Court Martial reassembled on 24.6.1989 and as directed by this Court the petitioner engaged Sri T. N. Tiwari, Advocate as Counsel of his choice. Sri T. N. Tiwari could not appear before the General Court Martial due to his personal engagement up to 4.7.1989 and accordingly sought adjournment by sending an application on 23.6.1989, which was submitted before the respondents No. 4 and 5 on 24.6.1989, but the request for the adjournment was turned down and the proceedings were finally concluded on 26.6.1989 and the petitioner was taken into custody to serve out the punishment awarded by the General Court Martial. The concluded proceedings of the General Court Martial were sent to respondent No. 3 for confirmation, which were confirmed by him on 17.10.1989 and promulgated on 18.10.1989. The petitioner, who was in custody, filed a writ petition in the nature of Habeas Corpus numbering 4007 of 1989 before this Court and all the three writ petitions were dismissed on 19.9.1989 by a single Judge with certain observations, specially in para 29 of the judgment with regard to the defending officer and refusal of the adjournment requested by the Counsel so engaged for defending the petitioner. The petitioner also filed three Special Leave Petitions against the judgment of this Court, which too were dismissed. The entire proceedings went *ex parte* and no opportunity to cross-examination was given to the Counsel engaged and the proceedings were confirmed in appeal with the order dated 2.3.1990.

3. Submission of learned Counsel for the petitioner is that the trial has proceeded in utter violation of the principles of natural justice and the petitioner was not given proper opportunity to cross-examine the witnesses. He further submits that the petitioner was also deprived of his right as provided under Rule 102(2) of the Indian Air Force Rules, which casts a statutory duty on the convening officer to ascertain whether the accused person desires to have a defending officer and if he does so desire, the convening officer is required to use his best endeavours to ensure that the accused is so represented by a suitable officer. It is submitted that Fit. Lt. H.B. Mishra's name was given, but he was not allowed to appear on behalf of the petitioner and the application of the petitioner was not allowed. The said officer was posted under respondent No. 3 and was always available and was the best choice of the petitioner, but the authorities enforced their choice as against the spirit of the provisions. The petitioner of late also moved an application to provide any officer from the Indian Air Force instead of Central Air Command, Allahabad, but even that officer was not provided. As soon as the interim order dated 15.10.1988 was vacated by this Court on 19.6.1989 allowing the General Court Martial to conclude the proceedings, the petitioner engaged a Counsel, but the application for adjournment was rejected by the General Court Martial on 24.6.1989 and the proceedings were concluded on 26.6.1989, which

itself goes to indicate that the proper opportunity to defend has been denied to the petitioner. Further submission is that this Court while disposing of the three petitions by a common judgment has observed in para 29 that the confirming authority will take into consideration as to whether adjournment was refused by the Court Martial correctly or not, but the confirming officer did not apply his mind to the aforesaid observations and by casting a negative duty upon the petitioner has proceeded to confirm the proceedings. It is further stated that the order of the appellate authority is a nonspeaking order and without any reason and so the same is bad in law.

4. The Assistant Solicitor General of India appearing for the Union of India on the other hand has submitted that the proceedings were drawn in accordance with law. The petitioner has insisted for engagement of a particular officer and, therefore, his choice was not accepted by the Air Force authorities. The petitioner was given proper opportunity to defend himself, but he did not go along with his Counsel before the Court Martial and he wanted to get the case adjourned and to be taken up after 30th of June, 1989, so that a fresh Court may be reassembled as one of the members was retiring on 30.6.1989 and a de novo fresh trial may be held and with that view the adjournment was sought, which was rightly refused by the Court Martial. He further submits that the petitioner was not serious in pursuing his case and he wanted to get the case adjourned on one pretext or the other with a view to get rid of the punishment and sentence if any to be imposed upon him. The Confirming authority has applied his mind to the facts and evidence on record and thereafter came to the conclusion that the petitioner was rightly not allowed the adjournment and to be represented through a Counsel. On 24.6.1989 he has given an application that this Counsel would be available after 4.7.1989. Submission is that it was a concerted and deliberate attempt on the part of the petitioner to get the Court Martial reconvened, which was rightly denied.

5. I have heard the learned Counsel for the parties and gone through the record.

6. The foremost point which falls for consideration before this Court is as to whether proper opportunity to defend through, a legal practitioner was given or not. This Court while hearing Writ Petitions No. 6496/88, 7969/88 and 4907/88 observed that this Court vide order dated 19.6.1989 allowed the petitioner to engage a Counsel of his choice and the said controversy being set at rest. The Court Martial concluded the proceedings and has announced sentence. The fact whether Sri T.N. Tiwari could not reach and adjournment was refused by the Court Martial as alleged by the petitioner was a matter to be taken into account by Confirming Officer. For ready reference the relevant portion of the order is quoted below:

"The fact that Sri Tewari could not reach and adjournment was refused by the Court Martial, as alleged by the petitioner, is matter which may be taken into account by the Confirming Officer."

7. The aforesaid observation of this Court got the approval of the Apex Court. The confirming officer was to look into the fact as to whether the Advocate of the choice of the petitioner was allowed to be represented in the Court Martial proceedings or not. The fact remains that after the order of this Court dated 19.6.1989 the petitioner was permitted to engage a Counsel of his choice. The Court Martial was reconvened on 24.6.1989 and the petitioner moved an application on the said date that his Counsel would be available after 4.7.1989. It is stated that the said application was rejected, but nothing was told to the petitioner and the proceedings were concluded on 26.6.1989. The reason spelt out from the record is that one of the Officers of the General Court Martial was going to retire on 30.6.1989 and so a *da novo* fresh trial was to be held under law and in order to avoid that situation the trial was concluded without giving any opportunity. The fact remains that the retirement of one of the members of the General Court Martial was never communicated to the petitioner nor the petitioner was informed by any order in writing that he may bring his Counsel before 30.6.1989, if he wanted to defend himself through Counsel. The factum of filing writ petition by the said Counsel in this Court could not lead to the conclusion that he was available and he deliberately avoided to attend the Court Martial proceedings. The engagement of the Counsel could have been on various counts. The prayer for adjournment could have been rejected, but the reasonableness of the action on the part of the Court Martial does not appear to be justified in the given facts of the case as all the proceedings have gone *ex parte* without any cross-examination. 22 PWs were examined without any defending officer before 15.10.1988 and no witness was cross-examined during the said trial. It seems that the authorities were under pressure to conclude the proceedings as early as possible on account of on-going litigation before this Court as on 15.10.1988 the proceedings before the Court Martial were stayed by this Court. The interim order dated 15.10.1988 was vacated on 25.4.1989, but in Writ Petition No. 6496 of 1988 the final order being passed by the General Court Martial was stayed on 6.5.1989. Anyhow on 19.6.1989 the interim order dated 6.5.1989 was vacated with a direction that the proceedings before the Court Martial may be concluded and the case against the petitioner may be decided by the Court Martial according to law provided the petitioner is permitted to engage a legal practitioner of his choice to be defended by him. Thereafter, the Court Martial was convened on 24.6.1989. On account of various interim orders, it seems that the authorities were persuaded to conclude the proceedings with an empty formality of giving opportunity to the petitioner. The petitioner could have been informed that he can bring his Counsel on 25th, 26th or before 30.6.1989, but the conduct of the General Court Martial in concluding the proceedings within a span of two days itself goes to indicate that no opportunity as Required under law was given to the petitioner to be represented through a Counsel. It has been submitted that it was not in the knowledge of the petitioner that one of the members of the General Court Martial was retiring on 30.6.1989. This should have been informed to the petitioner and the reasons should have been indicated on the order sheet, but nothing was done. The proceedings were concluded so

hurriedly that the order dated 19.6.1989 became a casualty in the eye of law for being defended through a Counsel of his choice. Opportunity does not mean a mere formality or empty formality. It means a real opportunity to defend in accordance with law.

8. While dealing with the same question the apex in the case of Li. Col. Prithi Pal Singh Bed/v. Union of India and others, (1982) 3 SCC 140, held as under:

"..... Now, in respect of such persons belonging to the lower category it is mandatory that Rules 22,23 and 24 have to be followed and there is no escape from it except on the pain of invalidation of the enquiry. But when it comes to an officer, a person belonging to the upper bracket in the armed forces, the necessary presumption being that he is a highly educated, t knowledgeable, intelligent person, compliance with Rules 22, 23 and 24 is not obligatory but would have to be complied with if the officer so requires it.

.....It must, however, be pointed out that in a trial which is likely to result in deprivation of liberty the body which has ultimately the power to make an order which would result in deprivation of liberty, must hear the offender offering full participation and that principle cannot be diluted."

9. In another case of Pradeep Singh v. Union of India and others, (2007) 11 SCC 612, the Apex Court held as under:

"....., A Court Martial has also the same responsibility as any Court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to Court Martial in the Army Act, the Army Rules, Defence Service Regulations and other 7 Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pretrial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisd"ictional and any violation thereof does not invalidate the Court Martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated...."

10. The prosecution witnesses have not been examined and the truth of the witnesses can be tested on the strength of crossexamination. From the crossexamination the truth may come out in various aspects, but it seems that the authorities were selective from the very beginning not to provide a defending officer of the choice of the petitioner in spite of the choice given by the petitioner to provide a defending officer from the Air Force. The confirming authority only approved the note put up before him and he has not passed any separate or independent order, which is evident from the record. The note put up before the confirming officer also goes to indicate that the petitioner was permitted to engage a Counsel at his own cost and under his own arrangements. The recommending authority has only indicated that the requirement is to give an opportunity to engage a Counsel and the accused is to thank himself for that

situation if the trial has gone unattended by any defending officer/defending Counsel. Apart from this, nothing has been said. If at all it is taken to be correct that the confirming officer has applied his mind to the note put up before him, then why the petitioner was not provided opportunity to cross-examine the witnesses and why the proceedings have been concluded by the Court Martial within a span of two days and why the observations of this Court as indicated herein above in para 29 of the earlier judgment have not been given effect in their correct perspective while considering the question of opportunity to be defended by a legal practitioner. It seems that the confirming authority has not adverted himself correctly on the issue of giving opportunity to the petitioner to be defended through a Counsel. No plausible and convincing reasons are coming out from the record and the note put up before the confirming authority while considering the question as to whether opportunity was allowed as required under law correctly or not. The confirming authority has failed to take into consideration the failure of opportunity given to the petitioner to be defended through Counsel, whereas this Court while vacating the interim order has also observed to the same effect. It seems that a mere formality was carried out by the General Court Martial and the meaningful opportunity was never given to the petitioner. In these circumstances, the orders dated 22.7.1988 and 2.3.1990 cannot sustain under law and are liable to be set aside.

11. The writ petition is accordingly allowed. The orders dated 22.7.1988 and 2.3.1990, contained in Annexures 12 and 14 respectively to the writ petition, are hereby set aside and the matter is remitted to the confirming authority to reconsider the matter in the light of the observations made hereinabove and if the authority feels it proper to reconstitute the Court Martial, he may do so in his discretion.

12. There shall be no order as to costs.