

(1980) 09 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 55 of 1977

Sansar Chand

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-09-1980

Acts Referred:

Army Act, 1950 — Section 129, 131(1)
Army Rules, 1954 — Rule 102, 105, 105(8), 39, 46
Constitution of India, 1950 — Article 226

Citation : (1980) 9 ILR HP 441

Hon'ble Judges : V.D. Misra, C.J;H.S. Thakur, J

Bench : Division Bench

Advocate : Chhabil Dass, K.D. Sood and N.N. Gupta, for the Appellant; Kamlesh Sharma, for the Respondent

Final Decision : Allowed

Judgement

V.D. Misra, C.J.—The Petitioner was a Major in the army. He was court martialled and dismissed from service. He now challenges the very constitution of the Court Martial and contends that it was a coram non judice.

2. The Petitioner took over the command of 983 Transport Company in January, 1971, from the then officiating Officer Commanding Capt. Ved Viyas. On 29th July, 1972, the Petitioner proceeded on one month's annual leave and came to Simla. After rejoining, he was assigned a temporary duty at Simla. The Petitioner fell sick and was on sick leave upto 10th December, 1972. When the Petitioner rejoined he was attached to another unit for the purpose of recording Summary of Evidence for the two charges made against him. These charges were: (i) improper use of jeep No. ZB-40326; and (ii) improper use of one 3 ton vehicle No. ZD-59838.

3. Summary of Evidence was accordingly recorded on 17th December, 1972. Lt. Col. K.M. Upadhyaya, Officer Commanding, while forwarding the Summary of Evidence (Annexure P.A.), observed, inter alia, thus:

It was further observed by the Officer recording S of E that all the witnesses had come with prepared statements and merely dictated from the same. In this connection it is submitted that in spite of your signal No. 1608 of 17 December, 1972, H.Q.C.A.S.C.I Corp did not make arrangement for attachment of all witnesses to this regiment as directed by you in your signal referred above. These instances goes to show that some interested party has tutored the witnesses against the accused. In fairness to the accused, it is recommended that all the witnesses should be attached with some unit at SAMBA so that neither the prosecution nor the defence sides have any access to them. Moreover expeditious finalization of the case should be done to avoid further manipulations by either side.

X X X X X X X (4) Finally I would like to submit that the case should be disposed of as early as possible. My reasons are as follows:

(a) The accused has committed the offence for which he deserved the punishment.

(b) The case has given me feeling that there are some interested parties who wants to fix this officer.

(c) Based on the evidence recorded a G.C.M. may not really be necessary as a summary disposal by Corp Comdr would probably meet the end of justice.

(Emphasis supplied).

4. However, another Summary of Evidence was initiated on 17th January, 1973. The charges remained the same. On 29th December, 1973, the Petitioner was directed to be court martialled. A General Court Martial (G.C.M.) was convened. Major N.R. Ajwani (Respondent No. 9), was appointed as Judge-Advocate. Six charges were framed against the Petitioner. The trial started on 3rd January, 1974. On 23rd February, 1974, the court adjourned sine die after examining 12 witnesses. The court reassembled on 14th March, 1974. Now the Judge-Advocate was Major K.P. Singh (Respondent No. 10) who replaced Major Ajwani. Thereafter the trial was concluded on 24th August, 1974. The Court held the Petitioner guilty on five charges only. The sentence awarded was "To be dismissed from the service" which was later duly confirmed.

5. During the trial the Petitioner came across a letter (Annexure P.K.) written by Judge-Advocate Major Ajwani and addressed to Capt. Ved Vyas (Respondent No. 11). A copy of this letter was brought to the notice of the Court Martial. It was contended that Judge-Advocate Major Ajwani was biased and prejudiced against the Petitioner, and that he had also influenced the present Judge-Advocate Major Singh. The Judge -Advocate Major Singh objected to the letter being placed before the Court Martial and the Presiding Officer of the Court Martial accepted the advice and refused to consider the letter. The Petitioner was, however, assured that it would be sent to the convening authority. The Petitioner being not satisfied, sent a copy of the letter to the G.O.C.-in-C, Western Command, with a

copy to the Chief of the Army Staff. Office of the Chief of the Army Staff assured the Petitioner that his petition had been forwarded to Army Headquarters for consideration before confirmation of the proceedings, findings and sentence of the Court Martial. The Chief of the Army Staff got the matter investigated but the investigations were completed in the month of August, 1975, while in the meantime the proceedings of the Court Martial were confirmed by the Chief of the Army Staff on 24th March, 1975. As a result of the investigation the Judge-Advocate Major Ajwani was given "Severe Displeasure" for his "unprofessional conduct" and for failing to uphold the high standard expected of the officer of Judge-Adv. General Department.

6. The Petitioner contends that Capt. Ved Viyas was responsible for creating false cases against him, tutoring the witnesses, getting fresh summary of evidence recorded and doing his best to get the Petitioner convicted and punished somehow. He joined Major Ajwani and Lt. Pardhe in his nefarious scheme. The Petitioner further contends that Major Ajwani was not only biased against him and went to the extent of committing unprofessional conduct, he even influenced the successor Judge-Advocate Major Singh. The result, according to the Petitioner, was that the summing up by Major Singh was not fair which resulted in miscarriage of justice.

7. The Union of India and other answering Respondents do not generally dispute the facts. However, they contend that Major Ajwani was not biased as is alleged by the Petitioner. It is submitted that the letter in question written by Major Ajwani contained his views when he was no longer concerned with this case and, therefore, the Petitioner has not suffered any prejudice. It is denied that the summing up by Major Singh was unfair or that there has been any miscarriage of justice.

8. May be noticed straightway that neither Major Ajwani nor Major K.P. Singh, Capt. Ved Viyas and Lt. Pardhe, who are Respondents in this case, have cared to put in their affidavits despite the fact that the Petitioner had made serious allegations of mala fides against them. It is now well settled that whenever allegations of mala fides are made against any Respondent personally then it is the duty of the latter to reply on affidavits. The failure of the Respondents to deny and explain the allegations made against them leaves no other course for us except to accept them.

9. Before we deal with, the letter in question and the other allegations made by the Petitioner, we would like to refer to the relevant provisions of the law relating to the constitution of the General Court Martial.

10. Rule 39 of the Army Rules lays down the disqualifications of an officer to serve as General or District Court Martial. The relevant part of this rule is as follows:

?39. XX XX XX (2) An officer is disqualified for serving on a general or district court-martial if he-

XX XX XX (e) has a personal interest in the case.

Rule 102 says:

"An officer who is disqualified for sitting on a court-martial shall be disqualified for acting as a judge-advocate at that court-martial.

11. Rule 105 lays down the powers and duties of a Judge-Advocate. It is in the following terms:

105. Powers and duties of judge-advocate.-

The powers and duties of a judge-advocate are as follows:

(1) The prosecutor and the accused, respectively, are, at all times after the judge-advocate is named to act on the court, entitled to his opinion on any question of law relative to the charge or trial, whether he is in or out of court, subject, when he is in court, to the permission of the court.

(2) At a court-martial, he represents the Judge-Advocate-General.

(3) He is responsible for informing the court of any informality or irregularity in the proceedings. Whether consulted or not, he shall inform the convening officer and the court of any informality or defect in the charge, or in the constitution of the court, and shall give his advice on any matter before the court.

(4) Any information or advice given to the court, on any matter before the court shall, if he or the court desires it, be entered in the proceedings.

(5) At the conclusion of the case, he shall sum up the evidence and give his opinion upon the legal bearing of the case, before the court proceeds to deliberate upon its finding.

(6) The court, in following the opinion of the judge-advocate on a legal point, may record that it has decided in consequence of that opinion.

(7) The judge-advocate has, equally with the presiding officer, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such, or of his ignorance or incapacity to examine or cross-examine witnesses or otherwise, and may, for that purpose, with the permission of the court, call witnesses and put questions to witnesses, which appear to him necessary or desirable to elicit the truth.

(8) In fulfilling his duties, the judge-advocate must be careful to maintain an entirely impartial position.

12. Rule 60 provides for the summing up by the Judge-Advocate. It states:

(1) The judge-advocate (if any) shall sum up in open court the evidence and advise the court upon the law relating to the case.

(2) After the summing up of the judge-advocate, no other address shall be

allowed.

13. The main contention of the Petitioner in respect of the alleged bias of Major Ajwani is based on the letter annexure "P.K.", which he wrote to Capt. Ved Viyas. It will be advantageous to reproduce the letter in full.

Dear Ved,

I am extremely sorry to learn about the sad demise of your brother-in-law. Col. Anand wrote about it. I could not write earlier as I was terrible busy with local law course as Instructor and badminton tournaments, office work-heavy and a bit of touring. Yes, tell me how the hell is this damn case of Sansar? I believe prosecution continued upto 8-9 April also. And how many witnesses did Sansar Chand produce to seal his fate. And what is the outcome? Let me know. How was your and Pardhe's statement and cross-examination? I believe no action has been taken against Awasthi for misconduct about Ram Krishan's statement and having misguided the Court. If I were there, he would have had it. He is lucky. Yes what was the outcome. Write in details. How is your family? Pardhe also has not written nor has Maj. K.P. Singh written. He must have been very busy. Did you ever meet Rameshwar Sharma after 1 left? Has Pardhe gone for his YO's course? Inform him that 945 Tpt Coy is here. 1 have not yet been allotted any house. 1 keep on shifting from one house to another. I am staying in 3rd House and we would be shifting to 4th house in the end of this month.

Do please write to me. Yes, do you remember my thing, which you promised to provide for winter. Do remember it. Do reply soon and let me know if I can do anything here.

Tell Pardhe to write to me. With lots of love.

Yours affly.

Sd/- Nirmal.

14. This letter obviously shows that Major Ajwani was not only terribly interested in the outcome of this case but was anxious that Sansar Chand should be punished. For him, Sansar Chand was to produce witnesses "to finally seal his fate". He was also anxious to know the outcome of the statements of Capt. Ved Viyas and Pardhe. Both were prosecution witnesses. Capt. Ved Viyas had an important role to play. He was admittedly the person who was in one sense instrumental in ensuring about the witnesses. It was Capt. Ved Viyas who was producing witnesses when the Summary of Evidence was recorded. Lt. Col. Upadhyaya, who forwarded the Summary of Evidence, had got the feeling "that there are some interested parties who wanted to fix this officer". He had noticed that the officer recording Summary of Evidence had observed that "all the witnesses had come with prepared statements and merely dictated from the same". It maybe borne in mind that Capt. Ved Viyas was the person from whom the Petitioner had taken the charge and had given back the charge to him when he proceeded on leave. It may at this stage be also noticed that specific

allegation was made by the Petitioner that Capt. Ved Viyas was biased. It was alleged that after taking over the command from Capt. Ved Viyas, the Petitioner had, amongst others, transferred one Sub. Durga Singh who was alleged to be in league with Capt. Ved Viyas and for whom the latter made representation against the transfer. This is what the Petitioner alleges:

"The Petitioner when came to know that one Sub. Durga Singh was in league with Capt. Ved Viyas, the Petitioner had to get him posted out, a fact which Capt. Ved Viyas resented and also represented to the Petitioner not to post out aforesaid Sub. Durga Singh but without success.

15. Another allegation made against Capt. Ved Viyas is as follows:

"(6) However another Summary of Evidence was initiated on 06 January, 1973 on representation of Capt. Ved Viyas. The tentative charges were same as stated in para 5 above. Not satisfied with the tutored witnesses Capt. Ved Viyas represented four time to the higher authorities for recording additional Summary of Evidence and the additional evidence was again recorded at 140 AD Regt. on 18 January, 1973, 13 Feb. 73, 28 Feb. 73 and 03 March 73 and each time the witnesses improved their story.

16. In para 7 of the petition the Petitioner refers to the letters of Officers Commanding 140 A.D. Regt. These letters are Annexures "PB" and "PC. In letter Annexure "PB" it is stated, inter alia, in paras 3 and 6 of the letters:

3. From the additional statements it becomes self evident that Capt. Ved Viyas has full knowledge of the Coca Cola deals and that he had deliberately kept the evidence suppressed during his earlier statements.

X X X X 6. I still maintain the view that Capt. Sansar Chand is guilty of the misuse of transport. It is however pointed that Capt. Ved Viyas the present Offg. O.C. of the Coy. is unduly influencing the witnesses and the possibility of fabrication of evidence by him cannot be ruled out.

17. In Annexure "PC" dated 15th March, 1973, the Officer Commanding wrote:

"The personnel referred to vide your signal No. A 1633 dated 13 March, 73 were produced as prosecution witnesses. All of them had complained to the investigating officer that they had been harrassed by the Offg. O.C. Tpt. Coy. A.S.C. (3 Ton) and were tutored for evidence. In this connection an application by Hav. Ram Krishan, statement of N-K. Rajinder Parshad Badola makes matters self evident. Further, Dvr. Ajmer Singh pleaded total ignorance about the case.

18. In reply to these allegations which were personal to Capt. Ved Viyas (Respondent No. 11) and though this Respondent had not cared to file any affidavit in reply, the answering Respondents have pointed out that though Hav. Ram Krishan did give an application alleging that Capt. Ved Viyas and 2nd Lt. V.K. Pardhe had threatened him with dire consequences in case he failed to toe their line, he told the court that he gave the application at the behest of the

Petitioner to save him.

19. It may be noticed that Lt. Col. J.K. Kakra, Officer Commanding, in his letter dated 4th March, 1973, addressed to the HQ. I Corps Arty B.D.E. while resubmitting the Summary of Evidence after recording additional evidence, inter alia, stated:

I still maintain the view that Capt. Sansar Chand is guilty of the misuse of transport. It is however pointed that Capt. Ved Viyas the present Offg. O.C. of the Coy. is unduly influencing the witnesses and the possibility of fabrication of evidence by him cannot be ruled out.

(Emphasis supplied)

20. It is not for us to say if Hav. Ram Krishan told the truth when Summary of Evidence was being prepared or when the Court Martial recorded his statement. And this is not the solitary instance. Other witnesses made allegations against Capt. Ved Viyas and Lt. Pardhe that they held a Gita parade before the trial and the witnesses were made to swear on Gita that they would depose in the trial according to the written statements supplied to them. Two Officers Commanding made very serious allegations against him. We have already reproduced the allegations. It was obvious to Officers Commanding that Capt. Ved Viyas was acting mala fide and was out to ensure that the Petitioner was convicted by hook or crook. The Petitioner has also made allegations against him. These called for an answer by Capt. Ved Viyas and Lt. Pardhe. But they have decided to keep their mouths shut. We have, therefore, to accept them as correct. The allegations leave no doubt that Capt. Ved Viyas was very inimical to the Petitioner. He went to the extent of fabricating evidence, suppressing evidence, and tutoring the witnesses against the Petitioner. It may be remembered that Lt. Col. K.M. Upadhyaya, Officer Commanding, in his letter Annexure "PA" "had also referred to the tutoring of the witnesses and that there were some interested parties who wanted to "fix this officer".

21. Analysing Major Ajwani's letter in the above backdrop, it becomes absolutely clear that Major Ajwani was hand-in-glove with Capt. Ved Viyas and Lt. Pardhe. Thus he was anxious to know how they fared in the witness box. It is not the conduct of a person who is just curious to know the outcome of a trial in which he had some role to play. But it shows that Major Ajwani was interested in the conviction of the Petitioner. He was interested in how did the Petitioner "seal his fate". Awasthi referred to in the letter, we are told by the Petitioner and it is not denied by the Respondents, was the Petitioner's advocate in the Court Martial. Major Ajwani would have taught him a lesson only if he was there.

22. It may be borne in mind that though it is true that Major Ajwani had written the letter after he had ceased to be the Judge-Advocate, but he was writing this letter while the trial was on. The letter is dated 5th May while the trial went on till August. The letter evidently was written during the trial.

23. The question before us is whether these facts show that Major Ajwani had "a personal interest in the case"? Has Major Ajwani in fulfilling his duty as Judge-Advocate maintained "an entirely impartial position"? [rule 105(8)]. We would like to reproduce the stand taken by the Union of India and the Chief of the Army Staff in their reply which is supported by an affidavit of Col. R.C. Puri, presently Station Commander, Simla, who has verified the contents of paras 1 to 33 of the reply on merits as true to his belief "on the information derived from the record". In para 13 of the reply they have this to say:

"13. That the contents of paras 13, 14 and 15 are inter related to a personal letter written by Judge-Advocate (Major N-R. Ajwani) to Capt. Ved Vyas of which the Petitioner is trying to make a capital advantage. The Judge-Advocate (Maj. Ajwani) has given his views on the case and witnesses which was most unbecoming of a Judge-Advocate. A very high standard of personal conduct (conduct?), is expected of a Judge-Advocate at a Court Martial trial. The letter written by Maj. Ajwani was evidently after his posting out and his replacement as Judge-Advocate by Maj. KP. Singh on 14 Mar. 74 who acted as a Judge-Advocate till the conclusion of the Court Martial trial is upto 24 Aug. 74. The matter was investigated and administrative action was taken against the Judge-Advocate (Maj. Ajwani) who was given Severe Displeasure of the C.O.A.S. for his unprofessional conduct and for (not?) upholding the high standard expected of officers of the J.A.G. Dept. even though it was felt that no injustice was done to the Petitioner at his G.C.M. trial. This administrative action had no relation to the Petitioner's case. The views of a Judge-Advocate, when he was no longer concerned with this case no way leads to the conclusion that evidence was in any way tampered by him or the Petitioner suffered any prejudice. As regards Maj. K.P. Singh who took over as J.A. with effect from 14 March, 74, his conduct as a J.A. throughout the rest of the trial for a period of nearly 5 months has been correct and manifests that no prejudice has been caused to the Petitioner.

24. It is plain that even according to the standard of the answering Respondents Major Ajwani had failed to up-hold the high standard of a Judge-Advocate. His conduct was found to be unprofessional for which "Severe Displeasure" was given to him. From this it is obvious that the conduct of Major Ajwani after "his posting out" is not as irrelevant as is sought to be made out at this stage. After all the mental condition of a person can only be known by his conduct. The question is what was the mental condition of Major Ajwani while he was a Judge-Advocate? This can only be gathered from his conduct. The letter in question shows Major Ajwani's frame of mind soon after he was posted out and while the trial was still on. It is not a question that the Respondents even after taking notice of his unprofessional conduct and giving a "Severe Displeasure" to Major Ajwani, felt that no injustice was done to the Petitioner at his G.C.M. trial. Whether injustice has been done or not is not the relevant question-The question is whether Major Ajwani was "interested in the case" while he was a Judge - Advocate? The importance of the question is that the rules have ensured that the composition of the Court Martial should be above board so that not only justice is

done but justice is seemed to be done. It is for that purpose that "interest in the case" has been laid down as a disqualification for a member of a General Court Martial. This disqualification results in the General Court Martial being not properly constituted. Whenever any member is disqualified then it can be rightly said that it is coram nonjudice. Thereafter all the proceedings, howsoever solemnly and impartially conducted, will be non est. Assuming that no injustice is done to a person arraigned before such a Court Martial, the proceedings will not be saved. After all a court must inspire confidence in the mind of a person standing trial. It is no use doing justice when the Tribunal does not inspire confidence and is not constituted according to the rules.

25. It is not disputed that out of the 12 persons who have been examined while Major Ajwani was the Judge-Advocate, many were material witnesses who deposed against the Petitioner.

26. We have in the circumstances discussed above, no hesitation to hold that Major Ajwani was interested in the case and so was disqualified from being appointed as a Judge-Advocate. The importance of having an impartial Judge-Advocate can also be judged from the fact that a Judge-Advocate is required to take an oath before the Court Martial starts. The form of oath as laid down under Rule 46 is in the following term:

I swear by Almighty God that I will to the best of my ability carry out the duties of Judge-Advocate in accordance with the Army Act, and the rules made there under and without partiality, favour or affection, and I do further swear that I will not on any account at any time whatsoever, disclose or discover the vote or opinion on any matter of any particular member of this Court-martial, unless required to give evidence thereof by a court of justice or, a court-martial in due course of law.

(Emphasis supplied).

27. Somewhat similar is the oath which has to be taken by a member of the Court Martial.

28. We may refer to Section 129 of the Army Act which shows that no General Court Martial would be complete unless it is attended by a Judge-Advocate. It reads:

"Every general court martial shall, and every district or summary general court martial may, be attended by a judge-advocate, who shall be either an officer belonging to the department of the Judge Adv. General, or if no such officer is available, an officer approved of by the Judge Adv. General or any of his deputies.

29. Sub-section (1) of Section 131 requires the administration of an oath or affirmation "to every member of every court martial and to the judge-advocate before the commencement of the trial". Under Rule 92 the Judge-Advocate is enjoined upon to record or cause to be recorded in the English language all transactions of a case. He has been made responsible for the accuracy of the

record of the proceedings. The proceedings are deemed to be in the custody of the Judge-Advocate. The duties of a Judge-Advocate do not end with the summing up as required under Rule 60. He is to take part in the deliberations of the court as is evident from Rule 61. It reads:

"The court shall deliberate on its finding in closed court in the presence of the judge-advocate.

30. He is thus in a position to affect the decision. And, the presence of a Judge-Advocate, who does not seem to be impartial, will vitiate the judgment. We may refer to the decision of King's Bench Division in *R.V. Sussex Justices, Ex parte McCarthy* (1923) All E.R. Rep. 233, where the acting clerk to the Justices was a member of a firm of solicitors who were acting for a person claiming damages from the accused in respect of the same collision as that which gave rise to the charge before the Justices. The clerk retired with the Justices, as was the practice. Though this clerk was never consulted by the Justices during their deliberations, Lord Hewart, C.J., while quashing the conviction, observed:

"There is no doubt, as has been said in a long line of cases, that it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seem to be done. The question is not whether in this case this gentleman, when with the justices, made any observation or offered any criticism which he could not properly make or offer; the question is whether he was so related to the case by reason of the civil action as to be unfit to act for the justices in the criminal proceedings. The answer to that question depends not on what actually was done, but on what might appear to be done. The rule is that nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

31. It is contended by Miss Sharma, learned Counsel for the Respondents, that Major Ajwani's letter annexure "PK" does not show that he was biased against the Petitioner. At the most, it is contended, he was very close to Capt. Ved Vyas. And this will not disqualify him from being a Judge-Advocate.

32. It must be borne in mind that not only a bias but a real likelihood of bias will also result in disqualification. The Supreme Court in *S. Parthasarathi v. State of Andhra Pradesh* 1974 (1) SLR 427, dealing with a similar question observed thus:

The question then is: whether a real likelihood of bias existed is to be determined on the probabilities to be inferred from the circumstances by court objectively or, upon the basis of the impressions that might reasonably be left on the minds of the party aggrieved or the public at large.

The tests of real "likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it. Whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the

principle that justice must not only be done but seem to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry, nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision. [See per Lord Denning M.R. in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon (1968) 3 WLR 694 at P. 707-etc].

33. The facts discussed above show that Capt. Ved Viyas, according to the letters Annexures "PB" and "PC", sent by Officers Commanding, had assumed the role of a persecutor by either suppressing some evidence or by producing tutored witnesses. Major Ajwani's letter reveals that he was hand-in-glove with Capt. Ved Viyas and anxious to see that the Petitioner was convicted, leaves no doubt that he was biased. In any case there was a great and real likelihood of bias.

34. It may also be noticed that the Petitioner raised the objection against Major Ajwani the moment he came to know of his interest. He had apprised the Court Martial and had written to the Army Headquarters. Waiver, therefore, cannot be inferred. "Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question." Manak Lal Vs. Dr. Prem Chand,

35. It is true that this-Court is not a court of appeal and cannot appraise the evidence on record. But the Petitioner in this case is not asking this Court to reassess or review the evidence. As already pointed out, the contention is that the G.C.M. was not properly constituted according to the rules. The scope of interference under Article 226 has been laid down in various pronouncements of the Supreme Court. We may refer to only one. In State of Andhra Pradesh and Others Vs. Chitra Venkata Rao, the Court observed thus:

"The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to procedure prescribed in that behalf, and whether the rules of natural justice are not violated.

36. It is, therefore, the right, nay the duty, of this Court to determine whether the General Court Martial was properly constituted.

37. In these circumstances we hold that the General Court Martial was not properly constituted since Major Ajwani was disqualified to be a Judge-Advocate in the trial of the Petitioner. The proceedings and the consequential conviction and sentence of the Petitioner have, therefore, to be quashed and set aside on this ground alone.

38. It is also contended that summing-up by Judge-Advocate Major K.P. Singh was not fair. It is submitted that the drivers of the vehicles allegedly misused by

the Petitioner were no better than accomplices. It was, therefore, the duty of Judge-Advocate to warn the court about the necessity of corroboration of their evidence. It is pointed that the Judge-Advocate did not refer to the evidence produced by the Petitioner. While referring to the prosecution witnesses, the Judge-Advocate remarked that why they should lie which, according to the learned Counsel for the Petitioner, shows his bias.

39. It is not disputed that the summing-up by a Judge-Advocate should be fair. It is his duty to fairly refer to the evidence produced by the prosecution and the accused. In regard to the evidence of accomplices, a Judge-Advocate should warn a Court Martial that it is most desirable that they should find corroboration. In R.V. Linzee (1956) (SIC) All E.R. 980, Lord Goddard, C.J., described the duty of a Judge-Advocate thus:

"The duty of a judge-advocate is to point out the necessity or desirability, as the case may be, of corroboration, and, then having done that, to point out to the court what can be corroboration. It is not for him to say whether it does corroborate; that is for the court.

It was further pointed out:

"In every judge's summing-up, or nearly every judge's summing-up, if one goes through it with a magnifying glass, some sentences can be found of which one can say that it is not quite accurate or something else ought to have been said. The fact is that one should not look at the summing-up in that way. The summing-up must be taken as a whole and it must be seen that there is no misstatement of law; that is the first thing....It must then be seen whether, in those cases where a long-standing practice has become established of requiring certain warnings or directions to be given, that the directions or warnings have been given.

40. We have been read the relevant parts of the summing-up. We find he had given the necessary warning. He said: "It is no part of my duty to form, much less to express, any opinion on the facts of the case, of which you are constituted as sole judges. Should I, therefore, during the course of my summing-up inadvertently express any such opinion, I will request you to please ignore it." He proceeded to explain the law correctly.

41. As regards the question of treating the drivers as accomplices, it has been pointed to us that the counsel for the Petitioner at the trial did not refer to any witness as an accomplice in his written arguments. This fact is not denied by Shri Chhabil Dass, learned Counsel for the Petitioner. We cannot, therefore, find fault with the summing-up on this count.

42. It is true that some remarks made here and there, if read out of context, may show that the summing-up was not balanced. But taken as a whole we are satisfied that the summing-up was fair. We would, therefore, reject this contention.

43. The upshot of the discussion is that the petition is accepted. The conviction of the Petitioner is quashed and the sentence awarded to him is set aside. The Petitioner will be entitled to his costs.