

(2011) 08 DEL CK 0177
In the Delhi High Court
Case No : Writ Petition (C) 3198 of 1997

Sukhwinder Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-08-2011

Acts Referred:

Army Act, 1950 — Section 164
Army Rules, 1954 — Rule 111, 115, 2, 22, 23

Citation : (2011) 08 DEL CK 0177

Hon'ble Judges : Sunil Gaur, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Karan Chauhan, for the Appellant; Ashwani Bhardwaj and V.S. Gaur, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.

1 The Petitioner was a Havaldar in the Indian Army, attached to the 41st Vehicle Company and was assigned duties of Furniture NCO of the unit. On 31.03.1995 a complaint was received against the Petitioner pursuant to which he was arrested and sent to the unit Quarter Guard under orders of Chief Ordinance Officer (hereinafter referred to as "COO") who was also the Commanding Officer of the Company to which the Petitioner was attached i.e. 41st Vehicle Company.

2 The Petitioner was charged of not reporting for duty and assaulting, while using insubordinate language, his superior officers, for which the Commanding Officer conducted a hearing of the charge on 1.04.1995 in accordance with Rule 22 of the Army Rules 1954.

3. After hearing of charge on 01.04.1995, the Commanding Officer directed that a Summary of Evidence be prepared and detailed Lt.I.P. Mishra as the Officer to record the summary of evidence.

4. 2 witnesses were examined by the prosecution at the said proceedings and no

defence evidence was produced by the Petitioner.

5. Sub. Harpal Chand PW-1 stated that on 30.03.1995, along with CHM Kedar Nath, he was getting the unit lines cleaned for the Sainik Sammelan scheduled to be held the next day morning, when a barber came to report about a light in the barber-shop which was not switching off. He called upon the Petitioner, who was discharging duty of Furniture NCO, and asked him to get the lights mended, at which the Petitioner retaliated by saying: "bhainchod tumhari to bund fatti hai MES walon ko chai pilane mein. Main koi engineer hoon jo sabki lightein repair karta rahoon." He told the Petitioner that he has never refused to serve tea to the persons deployed, at which the Petitioner got angry and started shouting and abusing him, in the name of his mother and sister, and was close to assaulting him, when CHM Kedar Nath and Sub.S.S. Rawat intervened and to avoid an ugly situation he went quietly back to his room; but before leaving he told the Petitioner to come to the Chief Ordinance Officer's office for an interview the next day, at which the Petitioner retorted: "Tu kaun hota hai peshi pe bulane wala tere jaise bade dekhe peshi pe bulane wale". That the next day, without prior notice, the Petitioner absented from the Sainik Sammelan which was a mandatory event to be attended for all personnel. Later that day, when the COO found the furniture store closed, he enquired about the whereabouts of the Petitioner and asked CHM Kedar Nath to summon the Petitioner to his office. The Petitioner arrived at the office of the COO in Combat dress upon which he i.e. PW-1, asked him to go back and wear the normal uniform at which the Petitioner retorted: "Mein kam kar ke a raha hoon aur isi dress mein COO sahib se miloonga". He told the Petitioner to calm down, at which the Petitioner got angry and took off his belt and shirt and threw it at him and said: "Kutton salon mere court martial kara lo". The Petitioner kept on shouting and threatening the officers present till he was arrested and sent to Quarter Guard prisoner cell.

6. The witness produced 5 documents to show the absence of the Petitioner from the Sainik Sammelan.

7. After recording the statement of PW-1, the witness was tendered to be cross-examined by the Petitioner. Rather than cross-examining, the witness, the Petitioner started making a statement, which was dutifully recorded by the Officer recording the evidence, inasmuch as, he could do no more.

8. The Petitioner stated in this statement that on 30.03.1995 a barber told him about a light in the barber shop that needed urgent repair, at which he informed the barber that the work could only be done the next day and that he was not a mechanic and does not know how to fix lights. That Sub. Harpal Chand intervened and said that he i.e. the Petitioner will have to fix the light today itself. The Petitioner tried explaining to Sub. Harpal Chand that the engineers will only come the next day at which Sub. Harpal Chand told him that he does not care how Petitioner got fixed the light, but insisted that the work needed to be done today itself as it was Petitioner's duty and because of which Petitioner had been excused from several fall-ins. The Petitioner told Sub. Harpal Chand that

when he gets men from the MES, nobody offered them tea at which Sub. Harpal Chand retorted: "Gidadh ki tarhan bakta hai" and that hearing such a comment, the Petitioner also got angry and entered into an argument with him. The matter ended when Sub. Harpal Chand ordered him to repair the lights by tomorrow or else come for peshi to the COO's room. On 31.03.1995 when he was on his way back to the unit with an electrician he was informed by a personnel that he is to report to the COO immediately. Outside the COO's office he met Sub. Harpal Chand who told him that he wanted to speak with him. Wanting to avoid another argument the Petitioner refused and told Sub. Harpal Chand to leave him alone at which Sub. Harpal Chand told him that he would arrest his belt and issue a charge-sheet against him. The Petitioner got angry and removed his belt and shirt, kept it in front of Sub. Harpal Chand and left. He was arrested and locked up in the Quarter Guard where also Sub. Harpal Chand kept pestering him to eat food despite his repeated requests to leave him alone.

9. Relevant would it be to note that the record shows that beneath the above-noted statement, the officer recording the summary of evidence has certified that the Petitioner was cautioned in terms of Army Rule 23(3), but he voluntarily made the said statement which was recorded verbatim and signed by the Petitioner in the presence of independent witness, Sub. Mohan Rao.

10. On the next page, statement of CHM Kedar Nath PW-2 has been recorded who has completely corroborated PW-1. He additionally stated that at the Quarter Guard cell, he saw PW-1 trying to persuade the Petitioner to calm down and eat food.

11. After the close of the prosecution evidence, the officer recording the summary of evidence asked the Petitioner if he wanted to make any statement and told him that he was not obliged to say anything, but if he wished to make a statement it will be reduced in writing and can be used in evidence against him. The Petitioner however, declined to make any statement.

12. We note that summary of evidence proceedings have been duly signed by the Petitioner.

13. Finding sufficient material to proceed against the Petitioner at a trial, the Commanding Officer ordered to convene a Summary Court Martial. Charge-Sheet dated 10.04.1995 was issued against the Petitioner wherein 3 articles of charge were levied, which read as under:

CHARGE SHEET

No. 6908568P HAV DVR MT SUHJINDER SINGH OF 41 VEH COY IS CHARGED WITH

First Charge

AA Sec 39(d)

WITHOUT SUFFICIENT CAUSE FAILING TO APPEAR AT THE TIME FIXED AT THE

PLACE APPOINTED FOR DUTY

In that he, at 41 Veh Coy failed without sufficient cause to attend monthly SainikSammelan on 31 Mar 95 at 0730 hrs published vide DD Pt-I No 154/HQ dt 20 Mar 95 and announced by No 6908660 CHM KedarNath in Roll Call on 30 Mar 95.

Second Charge

AA Sec 40(d)

USING INSUBORDINATE LANGUAGE TO HIS SUPERIOR OFFICER

In that he, on 31 Mar 95 at 0840 hrs said to JC -212448W Sub HarpalChand (JA) 41 Veh Coy "You do whatever you want to do or words to that effect" when questioned about his absence from monthly SainikSammelan.

Third Charge

AA Sec 40(a)

ASSAULTING HIS SUPERIOR OFFICER

In that he, at 0842 hrs on 31 Mar 95 when ordered by JC-212448W Sub HarpalChand to change and come in uniform. (as the individual was in combat dress) the individual opened his shirt and belt and throw it on the fact of JC-212448W Sub HarpalChand, JA in the presence No 6908660 CHM KedarNath of 41 Veh Coy.

14. At the trial, all 3 charges were put together to the Petitioner, who pleaded "guilty". The Court after satisfying itself that the Petitioner understood the charges and the consequence of his plea of "guilt", and noting said fact as required under Rule 115 of the Army Rules 1954, recorded the said plea of guilt and obtained signatures of the Petitioner beneath the same. The Petitioner was then asked, if he wished to make any statement in reference to the charge or for mitigating the punishment, wherein he stated:"I am sorry for this lapse I did this because of the tension at work. I may please be leniently dealt with."

15. Vide order dated 10.04.1995 the Petitioner was sentenced with reduction in the rank and rigorous imprisonment for 3 months. Be it noted, that during the proceedings before sentence, it transpired that the Petitioner had 2 entries in his defaulter sheet since the time of his enrolment.

16. Aggrieved by the conviction and sentence, the Petitioner filed a petition u/s 164 of the Army Act 1950, which petition was rejected vide order dated 28.02.1997 communicated to the Petitioner under cover of letter dated 10.03.1997.

17. Instant petition was thereafter filed and a perusal of the writ petition would reveal that all and sundry contentions have been urged and when the writ petition was heard on 5.7.2011, it was found that most of the assertions of facts

on which legal issues were raised, were contrary to the record and thus learned Counsel restricted challenge to the action taken against the Petitioner only by pressing 2 counts. The same stands recorded in the order dated 5.7.2011, which reads as under:

1. Notwithstanding various contentions which are averred or pleaded in the writ petition, at the hearing today, learned Counsel for the Petitioner restricts challenge on two points. Firstly that the mandate of Sub-Rule 2 of Rule 111 of the Army Rules 1954 which requires plea of guilty to be recorded separately for each charge has been breached. Second contention urged is that the mandate of Sub-Rule 3 of Rule 23 of the Army Rules 1954 has been vitiated inasmuch as Petitioner's statement has been recorded during summary of evidence before cautioning him with respect to the consequence of the Petitioner making a statement and after recording the statement of the Petitioner, the caution has been penned down.

1. ...

2. ...

3. ...

18. The first contention urged was that the mandate of Sub-rule 2 of Rule 111 of the Army Rules, 1954, required each charge to be separately read out and plea of guilty or not guilty recorded separately, but in the instant case all 3 charges were read out together at the Court Martial and plea of guilt was recorded. Let us note the rule. It reads as under:

111. Arraignment of accused - (1) After the course and interpreter (if any) are sworn or affirmed as above mentioned, the accused shall be arraigned on the charges against him.

(2) The charges on which the accused is arraigned shall be read and, if necessary, translated to him, and he shall be required to plead separately to each charge.

19. The arguments take the Petitioner nowhere for the reason law recognizes the distinction between an irregularity and an illegality. An illegality would be a wrong which goes to the roots of a matter and ex-facie causes prejudice. An irregularity would be a wrong which does not go to the root of the matter and unless shown that prejudice has resulted, would not be prejudicial to a person.

20. It is not the case of the Petitioner that at the arraignment when the 3 charges were read out together, he got confused and thus could not understand the same and this vitiated the plea of guilt. Thus, the technical deficiency at the arraignment can be of no help to the Petitioner.

21. The second plea pertains to what happened at the summary of evidence. The argument is advanced with reference to Sub-rule 3 of Rule 23 of the Army Rules 1954 and we note the same. It reads as under:

23. Procedure for taking down the summary of evidence -(1) ...

(2) ...

(3) The evidence of each witness after it has been recorded as provided in the rule when taken down, shall be read over to him, and shall be signed by him, or if he cannot write his name shall be attested by his mark and witnessed as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused will be asked: "Do you wish to make any statement" You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." Any statement thereupon made by the accused shall be taken down and read to him, but he will not be cross-examined upon it. The accused may then call his witnesses, if he so desires, any witnesses as to character.

(4) ...

(5) ...

(6) ...

22. It is true that the procedure prescribed for taking down the summary of evidence requires that after evidence of each witness who has deposed against the accused is recorded, it is thereafter the accused is to be informed of his right to make a statement, with a caution that he is not obliged to make a statement and that statement made by him may be used in evidence followed by a right to the accused to call his witnesses.

23. But, as noted hereinabove, when the first witness was examined by the prosecution at the summary of evidence and the witness was tendered to the Petitioner for being cross-examined, taking an obstinate stand the Petitioner started making a statement and continued to do so. Now, if the Recording Officer would not record the statement made by the Petitioner, he would have raised a grievance that while conducting the recording of evidence the officer concerned did not truthfully record what transpired during the proceedings. If the Petitioner chose to follow a particular course of conduct, he did so at his risk and peril and we see no scope of an argument that the officer conducting the recording of evidence breached Rule 23(3) of the Army Rules. We would highlight that the officer truthfully recorded what transpired during the proceedings before him and notwithstanding the Petitioner having obstinately made a statement when PW-1 was tendered to him for cross-examination, gave a right to the Petitioner, after cautioning him that whatever he would say could be used against him at the right stage, i.e., when all witnesses of the prosecution made their statements. We would highlight that at the right stage when the Petitioner could exercise a right to make a statement, he declined to do so.

24. On the 2 contentions which were urged, finding no merits, we dismiss the writ petition but refrain from imposing costs.