
(2002) 08 KL CK 0027
In the High Court Of Kerala
Case No : O.P. No. 12185 of 1997

Surendran

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 02-08-2002

Acts Referred:

Navy Act, 1957 — Section 160, 160(2), 161

Citation : (2002) 3 ILR (Ker) 451

Hon'ble Judges : M. Ramachandran, J

Bench : Single Bench

Advocate : K.R.B. Kaimal, for the Appellant; B.B. Shivshankar, A.C.G.S.C., for the Respondent

Final Decision : Allowed

Judgement

M. Ramachandran, J.—The petitioner was an officer in the Indian Navy. He had been given a posting as Base Victualling Officer at Port Blair between August, 1989 and May, 1992. While working there, he had been selected for Staff Course in the Defence Service Staff College, Wellington and he was relieved from Port Blair in May, 1992. After the training he was posted at Cochin in April, 1993. He was about to be promoted as Commander, but this position was not conferred on him and instead Court Martial proceedings were initiated against him at Port Blair.

2. It is not in dispute that he was duly informed about the 7 charges which were levelled against him. He had been subjected to questioning. After this procedure, a Court Martial had been constituted. The Court Martial found the petitioner guilty of charges excepting charge No. 5 and on 12.3.1995 the following sentence was imposed on him:

"The Court having found the accused Lieutenant Commander, Kongada Namburiyil Surendran (60317-H), Indian Navy of Indian Naval Ship Magdala Additional and attached to Indian Naval Ship Jarawa under N.I. 95/69 guilty of charge No. 1, No. 2, No. 3, No. 4 u/s 41(c) of the Navy Act, 1957 and charge No.

6 u/s 68 of the Navy Act, 1957 and charge No. 7 u/s 15 of the Prevention of Corruption Act, 1988 read in conjunction with Section 77(2) of the Navy Act, 1957, sentence him to forfeit twenty four calendar months in the rank of Lieutenant Commander, to suffer a fine of Rs. 11,000 (Rupees eleven thousand only), to be dismissed from Naval service and to suffer consequential penalties involved, in default of the fine to be kept in rigorous imprisonment as class I prisoner for a period of one month."

3. The petitioner had been relieved from Naval service immediately thereafter. He had remitted the fine that had been imposed on him. Thereafter, he had submitted a petition on 31.8.1995 before the Judge Advocate General seeking a judicial review. A copy of the above petition is produced as Ext. P5. It is submitted that he had been given a personal hearing in the matter on 26.6.1996. But thereafter, by order dated 24.10.1996, he was advised that the Chief of Naval Staff (for short CNS) had retained the conviction and sentence. A copy of the said order is produced as Ext. P6, in the following terms:

"Lt. Cdr. K.N. Surendran (60317-H), Indian Navy of Indian Naval Ship Jarawa, was tried by court martial and sentenced to forfeit twenty four calendar months seniority in the rank of Lt. Cdr. to suffer a fine of Rs. 11 ,000/- (Rupees eleven thousand only), to be dismissed from Naval Service and to suffer consequential penalties involved; and in default of the fine, to be kept in rigorous imprisonment as Class I prisoner for a period of one month.

2. In exercise of powers conferred by Section 163 of the Navy Act, 1957, while taking an overall view of court martial's findings and its judgment, as also the judicial review court, that by JAG (Navy), I consider it appropriate to retain the verdict of the court martial.

3. Given under my hand at New Delhi this twenty fourth day of October, 1996."

4. The petitioner had thereafter filed an appeal to the Central Government as prescribed by Section 162 of the Navy Act, but on 7.4.1997 it was rejected observing that:

"The Central Government, after considering the representation dated 6.12.1996 submitted by ex-Lt. Cdr. K.N. Surendran (No. 60317 H), against the findings and sentence of his trial by Court Martial and also against the order passed by the Chief of the Naval Staff in judicial review, hereby reject the said representation as it is devoid of merit."

The Original Petition has been filed in the above said context.

5. The petitioner though had attacked the finding of the Court Martial as also the procedure for conducting the enquiry, had nevertheless stressed on the impact of Section 160 of the Indian Navy Act, vis-a-vis the penalty advice of the CNS. In an attempt to show that he has been put to prejudice, submissions had been made for production of the proceedings prepared by the Judge Advocate General, consequent to the application filed by him for review. Such documents have been

made available by the learned Standing Counsel Sri. B.N. Shivashankar. The learned Standing Counsel had also made available copy of the proceedings of the Court Martial relating to the petitioner. The parties mostly had confined their arguments in respect of the impact of Section 160 of the Navy Act, though Sri. Shivashankar had submitted that in view of Ext. P8 order passed by the Central Government a stamp of approval had been given to the orders of the Chief of Naval Staff. But this may amount to begging the question. The facts of the case and the legal questions posed, require that the contention of the petitioner as highlighted in respect of the procedural formalities to be followed and the extent of consideration his case was to receive as envisaged by the procedure prescribed by Section 160 of the Navy Act, are to be examined.

6. The Navy Act, 1957 is attempted to be made as a complete Code by itself and of course appropriately reference is to be made to the cognate enactments like the other penal laws as also the Evidence Act while holding disciplinary proceedings. As regards the constitution of the Court Martial there does not exist any procedural irregularities. Yet I may state the sequence of the events so as to see how the matter was progressing. The charge sheet had been issued to the petitioner on 27.1.1995. The warrant order for the Court Martial had been issued by the Vice Admiral, Flag Officer Commanding-in-Chief on 8.2.1995. The Trial Judge Advocate had appraised the parties about the formalities on 20.2.1995. The proceedings had thereafter been continued almost without any interruption and concluded by 12.3.1995. Witnesses were examined, documents were produced, and under the guidance of Trial Judge Advocate, arguments were concluded.

7. Section 106 of the Navy Act provides that if the accused pleads not guilty of the charges, the Court shall proceed to try the accused. The petitioner had pleaded not guilty and the proceedings thereafter had commenced. After the evidence had been let in, as prescribed by Section 113, when the case for the defence had been presented and the prosecutor replied, the Trial Judge Advocate had proceeded to sum up the evidence for the prosecution and the defence and had explained the law by which the Court was to be guided. The defence and the prosecution had so summed up the case on 8.3.1995, the records indicate that the Trial Judge Advocate had started his summing up at 1800 hrs. on 11.3.1995 and had completed the address by 0345 hrs. on 12.3.1995. As required by Section 117 the Court had considered the finding in camera and after reassembly the President of the Court Martial had informed the Trial Judge Advocate the finding of the Court as ascertained by them. The trial Judge had drawn up thereafter the findings as pronounced by the Court and held that except charge No. 5 all other charges stood proved. Thereafter, since the petitioner had been found guilty, an opportunity had been given to the parties to refer to the previous character and antecedents of the accused in addition to the oral evidence of general character that were to be considered. The petitioner had supplied his credentials at that time. The Court had again retired by 0430 hrs. for deciding the punishment. In conformity with the finding and after re-assembly at

0630 hrs. they had announced the sentence which stands extracted earlier.

8. It was after this that he had applied for a judicial review. The issue is whether the petitioner's rights as could be gatherable from Section 160 of the Navy Act had been improperly negated. In other words, to what degree and extent, the result and report of the judicial review was to influence the decision of the CNS. Chapter XV of the Navy Act comprises of two sections, namely, 160 and 161. The caption of Section 160 is "Judicial review by the Judge Advocate General of the Navy". As the contentions are heavily resting on the above said section, it will be proper that the provisions are extracted in full:

"160. Judicial review by the Judge Advocate General of the Navy -

(1) All proceedings of trials by court-martial or by disciplinary courts shall be reviewed by the Judge Advocate General of the Navy either on his own motion or on application made to him within the prescribed time by any person aggrieved by any sentence or finding, and the Judge Advocate General of the Navy shall transmit the report of such review together with such recommendations as may appear just and proper to the Chief of the Naval Staff for his consideration and for such action as the Chief of the Naval Staff may think fit.

(2) Where any person aggrieved has made an application under Sub-section (1), the Judge Advocate General of the Navy may, if the circumstances of the case so require, give him an opportunity of being heard either in person or through a legal practitioner or an officer of the Indian Navy."

Section 161 though may not be strictly relevant on the facts of the case, nevertheless also could be extracted herein below:

"161. Consideration by the Chief of the Naval Staff-

(1) On receipt of the report and recommendations if any, u/s 160, the Chief of the Naval Staff shall in all cases of capital sentence and in all cases where the court-martial is ordered by the President, and may in other cases transmit the proceedings and the report to the Central Government together with such recommendations as he may deem fit to make.

(2) Nothing in Section 160 or this section shall authorise the Judge Advocate General of the Navy or the Chief of the Naval Staff to make any recommendation for setting aside, or the Central Government to set aside, an order of acquittal passed under this Act."

Section 162, in the following chapter, refers to the petitions addressed to the Central Government or Chief of the Naval Staff against findings or sentences. However, such a petition had not been filed by the petitioner, A petition u/s 163 in due course had been filed, but that stands rejected.

9. After the imposition of penalty, it is not disputed that the petitioner had by Ext. P5 dated 31.8.1995 submitted an application for judicial review to the Judge Advocate General (for short JAG). As the Chief of Naval Staff had confirmed the

order, the petitioner had filed an application u/s 163 to the Central Government. Of course it could not have been possible for him to invoke the remedy of a Writ Petition at the earlier stage, as he had not exhausted the statutory remedy. It is only after the rejection of the application by the Central Government, that he has come to file this Original Petition. It may not be proper to reject the present Writ Petition upholding the plea of the Central Government Standing Counsel that the order of the Chief of the Naval Staff had merged with the orders of the Central Government and whatever defect might have been there had automatically got itself rectified. This is because, if as a matter of fact there were defects in the imposition of penalty, as contended by the petitioner, it would have been proper for the Central Government to look into it and also this Court to examine the matter especially since the scope and purport of Section 160 of the Navy Act also have been subjected to an examination.

10. As referred to earlier, a copy of the judicial review carried out by the Judge Advocate General had been made available to this Court in a sealed cover. Even though there is no secrecy attached to the said document, as could be gatherable from the provisions of the Act, I do not think it will be necessary to extract or divulge all details of that order, excepting to say that the recommendations were to the following effect:

"In conclusion I recommend that the findings of the court on Charges No. 1 to 4, 6 and 7 and the sentence of dismissal from the Naval Service forfeiture of 24 calendar months seniority in the rank of Lt. Cdr., to suffer a fine of Rs. 11,000/- awarded to him by the Court Martial be set aside and he be reinstated in service with all consequential benefits."

It may be noticed that in the court martial, charge No. 5 was already held as not proved. It is in the above background that CNS had held that the officer was clearly involved in activities tantamount to a breach of trust. It had also been endorsed that by an overall view of the court martial findings, its judgment and also judicial review carried out by the Judge Advocate General, it had been decided to retain the court martial verdict. The fact remains that after a detailed discussion, running to about almost 50 pages, the Judge Advocate General had shown as to how the charges were either flimsy or not maintainable, or not substantiated, and recommended that the petitioner was entitled to a honourable acquittal. It is not difficult to find that if the findings of the court martial were to be accepted, naturally the opinion of the Judge Advocate General was to be rejected. Both could not simultaneously exist, as the views were diametrically opposite. It was broadly in this background that Sri. Kaimal argued that the statutory review prescribed by Section 160 was not one that could be easily ignored. The section mandates that all proceedings of trial by Court Martial shall be reviewed by the Judge Advocate General, either on his own motion or on application made to him. The Judge Advocate General is obliged to transmit the report of such review together with his recommendations, as may appear just and proper to the CNS. This is for the consideration of CNS and for such action

as CNS thinks fit.

11. Learned counsel submits that this statutory power of a judicial review has to be taken very serious notice of and it was not an empty formality as has been understood by the CNS or as submitted by the learned Standing Counsel.

12. The learned Standing Counsel, on the other hand, argued that the petitioner's submission could be accepted in its face value only if the wording of the section was different and a duty had been so cast by the statutory provision itself. According to him, the matter completely rested with the CNS and he could have ignored the recommendations of JAG. His discretion/as could be gatherable from the section was unfettered.

13. Section 118 refers to the role of the Judge Advocate General, in the first instance. When the findings are drawn up by the Trial Judge Advocate, as announced by the Court, it is laid down that neither the court nor the Trial Judge Advocate is to announce in the court whether the findings was unanimous or not. The President of the Court Martial was to record a division of voting on each finding without disclosing the vote or opinion of any particular member of the Court Martial and such record shall be communicated to the Trial Judge Advocate for transmission to the Judge Advocate General of the Navy. Thus, when an application was received by the Judge Advocate General, he was already in possession of the records that had come to him from the court martial. If no application was there he was expected to initiate suo motu proceedings. It was considering the above and the case presented by the accused the Judge Advocate General was attempting the judicial reviewing. The statute prescribed a review as a judicial review. He was competent and authorised to make recommendations as it appeared to him just and proper. It was this report which accompanied the papers of the court martial to the CNS. What was to be done by the CNS was to consider all these as he thought fit. If we closely examine the section, the procedure prescribed is that the report of the review, together with the recommendations were to be placed for consideration of the CNS rather than the findings by the court martial. Sub-section (2) of Section 161 also gave a guidance in the matter when it provided that nothing in Section 160 or Section 161 authorise the Judge Advocate General or the CNS to make any recommendation for setting aside an order of acquittal passed under the Act. Therefore, the picture was clear that excepting any such situation the recommendations were to carry due weight. As we see from the orders under attack, though a reference was made to the report of the Judge Advocate General, his report has absolutely been ignored. True, the word used is "consideration by the Chief of the Naval Staff and he is given permit to pass orders as he may think fit. But, the word "review and recommendations" in the Section in fact circumscribes the unbridled powers of the CNS. The Standing Counsel submits that the CNS had no fetters while passing the orders and he was also not bound to give any reasons in support of his conclusions. These contentions are difficult to be digested in the light of the express terms that have

been used in the section. The argument of the Standing Counsel could have been capable of appreciation only in an event when the judicial review spoken to by Section 160 was not in the statute book at all. Its presence has to be underscored.

14. In this context, I may also refer to certain other submissions made by the learned counsel which may have a bearing on the issue. Referring to the decisions of the Supreme Court, reported in *S.N. Mukherjee Vs. Union of India*, , *Capt. Harish Uppal Vs. Union of India (UOI) and Others*, , *Union of India and Others Vs. R.K. Sharma*, *Union of India v. R.K. Sharma* as also the decision of the Supreme Court in *Union of India v. Himmat Singh Chahar* (Criminal Appeal No. 201 of 1994), it had been urged that the powers of this Court while dealing with the issues of Court Martial are very limited. Only in exceptional circumstances interference is warranted. However, as pointed out by the petitioner the issue decided in the above cases have no application here as the impact of Section 160 of the Navy Act and the role of the judicial review at the hands of the Judge Advocate General were never issues which had been subject matters there. Sri. Shivshankar referred to certain passages in a text book - *Military Law in India* by Mr. O.P. Sharma, since according to him there were practically no cases dealing with the issue that had been raised herein. The learned author had traced the role of Judge Advocate General from very early times, as was seen from the index. He also submitted that there were salient differences between the Navy Act, 1957 and the Army Act, 1950 in regard to the procedure of Courts-martial. In the Army there are four types of courts-martial such as general court-martial, district court-martial, summary general court-martial and summary court-martial. The Navy, on the other hand, has only one type of court-martial in normal times. Under the Navy Act, the sentence of a court-martial is not subject to revision or confirmation and takes effect immediately on pronouncement by the court-martial except in the case of a sentence of death which requires confirmation of the Central Government. As far as the Army Act is concerned, a revision and confirmation was mandatory. There is also no appeal filed as provided under the statute. It is also worthwhile to note that under the Navy Act procedure has been prescribed to be adopted in courts-martial whereas in the Army Act, the Act does not provide such procedure. The provision for judicial review by the Judge Advocate General also is peculiar to the Navy Act. This, in fact, do indicate that the role of a Judge Advocate General is unique and therefore I cannot accept the suggestion of the Standing Counsel that it is something which is routine or a formality. The appointment of the Judge Advocate General is by a statutory prescription, and the powers that are conferred on him are no means trivial. Section 169 of the Act provides that it shall be the duty of the Judge Advocate General to perform such duties of a legal and judicial character pertaining to the Indian Navy as may from time to time be referred or assigned to him by the Central Government or the Chief of the Naval Staff. Thus the presence of JAG, and the specific powers of review conferred on him are capable of pointing out that his opinion and view are of paramount

importance, and it cannot simply be ignored.

15. The proceedings indicate that on the crucial date the summing up by the trial judge advocate was there from 6 p.m. on 11.3.1995 to 3.45 a.m. on 12.3.1995 and then the court martial retired. 15 minutes later they had reassembled and had pronounced the finding and after retiring at 4.30 a.m. had declared the sentence at 6.30 a.m. after reassembling again. They had not referred to the antecedents of the petitioner or any other extenuating circumstances. In other words, the decision was off the shelf, and without expending any amount of time usually taken for a mature consideration. The Judge Advocate General had, on the other hand, opportunity to examine the matters dispassionately and came to conclusions especially with his rich legal background. When such reports on a review was presented, it is difficult to hold that the CNS could have abjectly pushed them away.

16. I find that Section 160 of the Navy Act is one of the most important provision, while finalising the procedure of the court-martial. When it is evident that the report has not received the proper attention of the CNS, I have to hold that there was no consideration as per the mandate of the section. The decision that he has taken in respect of the petitioner, upholding the findings of the court-martial, is not regular, but incomplete and therefore is liable to be set aside. Taking note of the situation that is presented, in the interest of justice, the appellate order also deserves to be set aside.

17. In the result, I quash Exts. P6 and P8. The second respondent is directed to reconsider the matter, in the light of the observations that have been made above. Appropriate orders are to be passed within a period of three months from the date of receipt of a copy of this judgment.

18. Original Petition is allowed. No order as to costs.