

(1991) 09 MP CK 0034

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 2323 of 1991

Surinder Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-09-1991

Acts Referred:

Army Act, 1950 — Section 121, 162, 39, 46
Army Rules, 1954 — Rule 133, 22
Constitution of India, 1950 — Article 20(2)
Penal Code, 1860 (IPC) — Section 377

Citation : (1991) 2 MPJR 342 : (1992) 37 MPLJ 245 : (1992) MPLJ 245

Hon'ble Judges : K.L. Issrani, J; D.M. Dharmadhikari, J

Bench : Division Bench

Advocate : H.S. Ruprah, for the Appellant; Indira Nair, for the Respondent

Final Decision : Allowed

Judgement

D.M. Dharmadhikari, J.

The only point involved in this petition under Article 226 of the Constitution of India which is filed by a member of the Indian Army, is whether he having once been convicted and sentenced on "plea of guilty" in a summary court-martial held under the provisions of the Army Act and the Rules, be retried in General Court-Martial for the same offences.

The question arises on the following facts:

In a summary court-martial held on 17-12-1990 (Annexure-P/1) the petitioner, who is a Havaldar, pleaded guilty to the charge of sodomy u/s 377 of the Indian Penal Code, for other charges u/s 46(a) and Section 39(a) of the Army Act (shortly referred to as the Act). The petitioner was convicted and sentenced to six months' rigorous imprisonment apart from his reduction to ranks and dismissal from service. By a warrant (Annex. P/2) issued on 17-12-1990 he was sent to civil prison to suffer the sentence of imprisonment.

In accordance with the provisions contained in Section 162 of the Act read with Army Rule 133, the summary court-martial proceedings were sent to the Officer Commanding, who by communication sent to the jail authorities through a warrant issued on 23-2-1991 (Annexure-P/4) set aside the court-martial proceedings and directed release of the petitioner.

The petitioner thereafter received the impugned notice dated 8-6-1991 (Annexure-P/6) intimating to him that he would be tried again for the same offences. He was called upon to give a list of three officers to defend him. By communication dated 22-7-1991 (Annexure-P/11) the petitioner came to know that the general court-martial will be held against him. He thereafter approached this Court challenging the general court martial proceedings and questions the competence of the authorities to hold it.

By order passed on 29-7-1991, as modified by order dated 12-9-1991, we allowed the trial to go on but stayed the passing of the confirmation order. Learned counsel appearing for the petitioner, Shri H. S. Ruprah, contends that second court martial for the same offences is barred by the provisions of Section 121 of the Act and Article 20(4) of the Constitution of India.

In reply the learned counsel Smt. Indira Nair, appearing for the respondents/military authorities, supported the action contending that the General Officer Commanding, in exercise of his powers u/s 162 of the Act, rightly quashed the summary court-martial proceedings since it was found that the mandatory provisions contained in Rule 22 of the Army Rules were not followed. The submission is that the first court martial being null and void, the second court martial was not barred. Reliance is placed on Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, Para. 37 at page 1432, Anand Narain Shukla Vs. State of Madhya Pradesh, and on Major G.S. Sodhi Vs. Union of India (UOI), Para. 14 at page 1622.

Having considered the rival contentions of the learned counsel appearing for the parties, in our opinion, the impugned proceedings in the General Court Martial held against the petitioner deserve to be quashed, on the face of clear bar contained in Section 121 of the Act and in Article 20(4) of the Constitution of India.

The contention raised on behalf of the respondents cannot be accepted that since in the summary court martial the provisions of Rule 22 were not followed, the second court martial is competent. It may be seen that Rule 22 is contained in Chapter V, Section I under the head "Investigation of charges and remand for trial the power of Commanding Officers". Rule 22 is the first step in framing charge against the concerned member of the Army, other than an officer, and contains a procedure to be followed before actual convening of the court-martial. The contention of the Army Authorities is that, as required by Rule 22 of the Rules, the accused was not given any opportunity to cross-examine the witnesses. We fail to understand how the alleged breach of such provisions and

non-observance of such a formality at the stage of charge can vitiate the subsequent trial proceedings in which the petitioner pleaded guilty and only prayed for leniency in punishment.

The provisions of Section 162 of the Act are reproduced below which only permit setting aside of summary court martial proceedings, on receipt of the proceedings, by Officer Commanding only for some reasons which affects the merit of the case and not on any technical grounds :

"162. Transmission of proceedings of summary Court Martial - The proceedings of every summary court martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held, or to the prescribed officer; and such officer, or the Chief of the Army Staff or any officer empowered in this behalf by the Chief of Army Staff, may, for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed." (*Italics for emphasis by us.*)

The Commanding Officer, therefore, could not have set aside the summary court-martial proceedings for some technical flaw in procedure that was followed at pre-trial stage. The contention on behalf of the respondents, therefore, cannot be accepted that the summary court-martial proceedings were void from its inception. We make it clear that we are only incidentally expressing our opinion on the validity of the summary court martial proceedings which stand quashed by the order of the Officer Commanding passed u/s 162 of the Act and the said order has not been challenged before us by either of the parties.

The main question before us is whether on setting aside of summary court-martial proceedings, resulting in conviction and imposition of sentence on the petitioner, the petitioner could be tried again for the same offences in general court-martial. To us, the second trial of the petitioner for the same offences is clearly barred by the expressed term of Section 121 of the Act which reads as under : -

"121. Prohibition of second trial - When any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a Criminal Court, or has been dealt with under any of the Sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a court-martial or dealt with under the said sections."

We are also of the view that the petitioner has a constitutional protection under Article 20(2) of the Constitution which enshrines a prohibitory mandate against the course sought to be adopted by the respondents/authorities in compelling the petitioner to face a re-trial and a risk of fresh conviction and sentence. Article 20(2) of the Constitution is as under : -

"20(2) No person shall be prosecuted and punished for the same offence more than once."

In the decisions of the Supreme Court in *Maqbool Hussain Vs. The State of Bombay*, *S.A. Venkataraman Vs. The Union of India (UOI)* and *Another*, as reiterated in *Mohammad Safi Vs. The State of West Bengal*, it has been held that "the above constitutional provision contains a fundamental right based on the principle of "autrefois convict" or "double jeopardy". The roots of that principle are to be found in the well established rule of the common law of England "that where a person has been convicted of an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence. To the same effect is the ancient maxim "nemo debetbis puniri pro uno delicto", that is to say that no one ought to be twice punished for one offence or as it is sometimes written "pro eadem causa" that is for the same cause. This is the principle on which the party pursued has available to him the plea of "autrefois convict" or "autrefois acquit". The plea of "autrefois convict" or "autrefois acquit" avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned.....the question for the jury on the issue is whether the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown are the same in the two trials.

In the present case the petitioner, on the "plea of guilty" was convicted, sentenced and has also suffered part of the sentence. The petitioner's second trial, therefore, is prohibited by Section 121 of the Act as also Article 20(2) of the Constitution of India.

The petition, therefore, succeeds and is hereby allowed. The proceedings of General Court-Martial commenced with impugned notices (Annexure-P/6 and Annexure-P/11) are hereby quashed. It is directed that the petitioner shall not be tried or prosecuted for the same offences in any Court-martial.

In the circumstances, we make no order as to costs.