

**(2011) 06 J&K CK 0020**

**In the Jammu And Kashmir High Court**

**Case No :** Service Writ Petition (SWP) No. 1634 of 2001

Sushil Kumar Pandey

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

**Date of Decision :** 03-06-2011

**Acts Referred:**

Army Act, 1950 — Section 130, 131, 39A

**Citation :** (2011) 2 JKJ 627

**Hon'ble Judges :** Hasnain Massodi, J

**Bench :** Single Bench

**Final Decision :** Dismissed

## Judgement

Hasnain Massodi, J.—The Petitioner was enrolled in Army on 26th November 1997 and on completion of his training at Bihar Regiment

Center, was on 9th of November 1998 allotted to 1 ?Battalion Bihar Regiment (1-Bihar hereafter).

2. On 29th May 1998 Sepoy Arvind Kumar Panday 4276328N of 1 Bihar, died in action during operation VIJAY in Battalic Sector, Kargil. The

deceased Sepoy belonged the village wherefrom the Petitioner hails. The Petitioner was accordingly asked by his superior officers to escort dead

body of deceased, Sepoy Arvind Kumar Panday to his village. The Petitioner on 30th May 1999 left his Regimental Headquarter with the dead

body of Sepoy Arvind Kumar Panday for village Chaita, Tehsil Ujdajarpur, District Samastipur, Bihar. The dead body was handed over to the

parents of the deceased Sepoy. However the Petitioner instead of returning to his Regimental Center, stayed back and reported to Transit Camp

Jammu on 14.07.1999 and thereafter to his Regimental Center at on 22nd July 1999. The Petitioner thus instead of reporting to duty after handing

over dead body of the deceased Sepoy, remained unauthorisedly absent from duty for about one and a half month. The authorities, on his return

served charge sheet on the Petitioner on 23.07.1999, convened a Summary Court Martial on 26.07.1999 and dismissed the Petitioner from the

service u/s 39-A Army Act.

3. The Summary Court Martial order dated 26.07.1999 is questioned in the present writ petition on the following grounds:

(i) That the punishment awarded to the Petitioner is disproportionate to the lapse attributed to the Petitioner,

(ii) That in terms of Section 72 read with Section 63 Army Act award of lesser punishment even where unauthorized absence was proved, ought

to have been considered and awarded by the Summary Court Martial,

(iii) That the Summary Court Martial did not follow the prescribed procedure in-as-much as the Petitioner was not served charge sheet and

summary of the evidence and not allowed to produce any document in his defence,

(iv) That the Summary Court Martial violated the mandatory procedure laid down under Section's 130, 131, 134 to 139 Army Act as the

Petitioner was neither given an option of participation of any of the officers sitting in the Summary Court Martial nor where the Petitioner's

witnesses examined by a Commission as required under the Act.

(v) That the Petitioner was not given an opportunity to explain the reasons compelling the Petitioner to over stay at his native village and not to

report to his duty immediately after the dead body of deceased Arvind Kumar was handed over to his parents,

(vi) That the Summary Court Martial while awarding punishment did not take into account meritorious service rendered by the Petitioner during

Operation VIJAY and that the Petitioner at the cost of his life, brought back dead bodies of two Army Officers from enemy area and was given a

cash award by his State Government,

(vii) That the Petitioner after handing over dead body of Sepoy Arvind Kumar to his parents remained in his native village to carry out the order of

his superior officer to collect pension papers of the deceased from his parents and that because of shock and grief on account of demise of their

son, parents of the deceased were not in a position to handover the papers till

last rites of deceased were performed; that the Petitioner having been asked to move from the cold region Battalic Kargil to a hot region (Samstipur Bihar) fell ill and was admitted in Primary Health Center Chaila Samstipur where the Petitioner remained under treatment till 03.07.1999, which also contributed to his failure to report to his Regimental Center immediately after the dead body of the deceased was handed over to his parents.

4. The Petitioner on the strength of the case set up seeks following relief's:

a. A writ of certiorari quashing the order dated 26.07.1999 whereby the Petitioner has been dismissed from service.

b. A writ of mandamus commanding the Respondents to reinstate the Petitioner and grant him all consequential benefits from the date of his dismissal from service.

5. The writ petition is opposed on the grounds that the Summary Court Martial was conducted in accordance with the provisions of the Army Act

and after charge sheet, summary of evidence was handed over to the Petitioner and the Petitioner afforded an opportunity of being heard. The

Petitioner is said to have failed in his duty to carry out lawful command of his Commanding Officer. It is averred the Petitioner willfully avoided to

report back to his Regimental Center after handing over dead body of the deceased to his parents so as to avoid to be associated with Operation

VIJAY. The Respondents deny that during Summary Court Martial proceedings any of the rights of the Petitioner was violated or mandatory

procedure laid down in Army Act and Rules was disregarded. The Petitioner is said to have been on his return to Regimental Center on

22.07.1999 medically examined and given sufficient time and assistance to prepare his defence. The Respondents dispute the Petitioner's claim that

the Petitioner participated in Operation Vijay and insist that the Petitioner was stationed at Battalic Rear, at Darchiks. It is also disputed that the

Petitioner collected dead bodies of two Army Officers from the enemy area or that the Petitioner was given any award by the Army. It is pleaded

that the Petitioner was deputed on a temporary duty and it was necessary for him to report to the Bihar Regimental Center at Danapur Patna after

he performed temporary duty and seek orders from Adjutant Bihar Regimental Center Danapur. The Petitioner is said to have deliberately stayed

back at his home and undertaken return journey only when he was traced and

through a telegram dated 06.07.1999 asked to report back to the Regimental Center. The Respondents deny that the Petitioner collected any documents from the parents of the deceased Sepoy Arvind Kumar and claim that such papers were directly collected by Regimental Center on 10/12 June 1999- well before the Petitioner, as per his claim, went to the parents of the deceased. The Respondents also dispute the Petitioner's claim that the punishment awarded was disproportionate to the misconduct proved against the Petitioner. It is insisted that as the Petitioner deliberately did not report back, fearing that he may be associated with Operation VIJAY, the punishment awarded was proportionate, having regard to the gravity of offence committed by the Petitioner.

6. I have gone through the writ petition and counter affidavit filed by the Respondents as also the record available on the file. I have heard Ld.

Counsel for the parties at length.

7. The scope of judicial review as regards Court Martial matters is limited and the Court in exercise of such power has not to sit as an Appellate

Court and reexamine or re-appreciate the evidence that led to the findings returned. The approach of the Court in such matters is to be "limited one

with circumspection" to examine the question, whether the Petitioner has not been heard or the proceedings otherwise have been conducted in

violation of statutory provisions or it is the case of no evidence. The Court may in appropriate case also see whether the punishment awarded is

disproportionate to the offence committed by the delinquent officer.

8. The Supreme Court in *Ranjit Thakur Vs. Union of India (UOI) and Others*, , referring to observations made by Lord Diplock in *Council of Civil*

*Service Union v. Minister for the Civil Service* (1984) 3 All ER 935, has delineated the scope of judicial review in the matters of administrative

action including the Court Martial decisions. It has been held that the aforesaid action/decision is subject to control of judicial review on three

grounds namely "illegality", "irrationality" and "procedural impropriety". The Court proceeded to observe that if the decision of Court Martial even

as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. It was held that judicial review, generally

speaking, is not directed against a decision, but directed against the "decision-making process". The principal of law was reiterated in *Union of*

India and Others Vs. Himmat Singh Chahar, where the Apex Court observed;

It is of course true that notwithstanding the finality attached to the orders of the Competent Authority in the Court Martial Proceeding the High

Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding

out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of

justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceeding or that the

authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a power of an

Appellate Authority permitting the High Court to re-appreciate the evidence and in coming to a conclusion that the evidence is insufficient for the

conclusion arrived at by the Competent Authorities in Court Martial Proceedings. At any rate it cannot be higher than the jurisdiction of the High

Court exercised under Article 227 against an order of an inferior Tribunal.

9. Having taken an overview of the ambit and scope of judicial review in Court Martial matters, let us scan the Summary Court Martial

proceedings and the developments preceding said proceedings, so as to see whether procedural safeguards available to the Petitioner under the

Army Act and Army Rules, have been followed or in any manner violated, as is alleged in the petition and whether the order impugned, suffers

from any infirmity as would warrant interference under Article 226 Constitution of India.

10. The complaint received against a person subject to Army Act is to be dealt with in accordance with the Army Act 1950 and Army Rules

1954. The Officer, receiving the complaint, may constitute Court of Inquiry in accordance with Rule 177 of Army rules 1954, to collect evidence

in connection with the complaint received and to report with regard to the matter, referred to it. The Court of Inquiry, so constituted, is to follow

the procedure laid down in Rule 179. The Presiding Officer of the Court of Inquiry is required to give previous notice of time and place of the

Court of Inquiry to all persons including the person, against whom the complaint is received, except where a person against whom the evidence is

being collected, is a prisoner of war, who is still absent. Rule 180 casts a duty on

the Court of Inquiry to provide full opportunity to the person, against whom evidence is being collected, in case the inquiry affects the character and military reputation of the person, of being present throughout the inquiry and of making any statement and of giving any evidence, such person may wish to make or give, and of cross-examining any witness, whose evidence in his opinion affects his character or military reputation. The person, against whom evidence is being collected by the Court of Inquiry, is also to be afforded an opportunity to produce any evidence in defence of his character or military reputation. The Presiding officer is further made duty bound to take such steps as may be necessary to ensure that any such person, so affected and not previously notified receives notice and fully understands his rights under this rule. Once the Court of Inquiry, in accordance with the procedure laid down in Rule 179, 180 & 181, concludes that the complaint/allegations against the Officer are substantiated by the evidence, so collected, the conclusion, so drawn, or the evidence, so collected, is to be placed before the competent authority, to be transmitted to the Commanding Officer for "hearing of the charge".

11. The Commanding Officer in the instant case as evident from "Record Of Proceedings Before Commanding Officer" under Army Rule 22 (para

7) appears to have set up a Court of Inquiry to collect evidence against the Petitioner and after going through the whole evidence collected by the

Court of Inquiry and the statement of accused directed, Maj. KPR Hari to record the evidence in writing under Army Rule 23. The Commanding

officer, however, did not dispense with the requirement of calling and hearing of witnesses in terms of Army Rule 22(1) and heard the witnesses

Subedar S.A. Singh JC-18529P and Subedar V.D. Rai JC-558191N and gave the Petitioner liberty to cross examine the witnesses and making

any statement and call any witnesses in his defence. The Petitioner, however, as per the "Record Of Proceedings Before Commanding Officer

under Army Rule 22, declined to make a statement and did not produce any witnesses. Though the Petitioner is claimed to have made a statement

before the Court of Inquiry yet the record of Court of Inquiry has not been made available so as to enable the court to know the stand taken by

the Petitioner in his statement before the Court of Inquiry. The Respondents by withholding the record of Court of Inquiry have cast a doubt on the

order made by the Commanding Officer in terms of 23 Army Rules. However, since requirement of Rule 22 (1) has not been dispensed with, no

prejudice is caused to the Petitioner in as much as Petitioner has been given liberty to cross examine the witness and make his statement and also

call any witness in his defence. Maj. KPR Hari recorded Summary of evidence on 23rd July 1999 and complied with the requirement of Rule 23

(1 to 3).

The Petitioner was given an opportunity to cross examine the witnesses and cautioned that in the event he cross examined the witnesses the

statements made during cross examination may be used in evidence against the Petitioner. The Petitioner was thereafter in terms of Rule 23 (3)

given liberty to make a statement, if he so desired. The Petitioner was informed that he was not obliged to make any statement and that statement if

any may be used as evidence. The Petitioner however, was not informed that he may, if he so desires, call any witness in his defence. It is pertinent

to point out that after the accused in terms of Rule 23 (3) is asked that he may, if he so desires, make any statement in his defence and the

statement is taken down and read over to the accused, the accused has a right in terms of Rule 23 (3) to call his witness, if he so desires. The right

available to the accused to call his witnesses, after he makes his statement casts a reciprocal duty on the officer recording Summary of evidence to

inform the accused that he has a right to call his witnesses, if he so desires. In the present case perusal of summary of evidence reveals that Maj.

KPR Hari observed his duty in breach and did not inform the Petitioner that he had a right to call the witness. There was thus infringement of an

important right available to the Petitioner under Rule 23(3) Army Rules. In the circumstances, whole material contemplated by Rule 23 was not

before the Commanding Officer when the Commanding Officer in terms of Rule 24 decided not to refer the matter to the superior officer or to

dismiss the charge, but decided to sent the matter to Summary Court Martial. The decision of the Commanding Officer in the said background is

vitiating and so are the proceedings emanating there-from.

12. The Commanding Officer, on perusal of Summary of evidence recorded by I.C 4078798P Major KPR Hari concluded as under:

It has been established beyond doubt that No. 4276341F Sep. Sushil Kumar

Panday absented himself without leave willfully for the fear of taking part in Operation VIJAY.

13. The Petitioner's case with the above observation was directed to be tried by Summary Court Martial and the Commanding Officer proceeded

to preside over the Summary Court Martial. S/Shri I.C 58355W Lieutenant Sreekumar RK JC 152934F Subedar A. R. Purty attended the trial

and Mr. V. Vishwanathan all from 1 Bihar appeared as friend of the accused and I.C58355W Lt. Sreekumar R. K acted as an intervener. The

Petitioner pleaded guilty to the charge and asked to be given an opportunity to continue in the service. The Commanding Officer, however did not

acceded to the Petitioner's request and awarded punishment of dismissal from service.

14. Though the procedure laid down under Army Rules for Summary Court Martial as regards association of two independent officers, an

interpreter and a friend of the Petitioner with the proceedings, was followed yet the Commanding Officer after returning a finding on conclusion of

hearing of the charge that the charge against the Petitioner was established beyond doubt"" disqualified himself for being associated with the

Summary Court Martial and ought not to have presided over the Summary Court Martial. The Summary Court Martial is not an idle formality or a

mere eye wash designed to willy-nilly return a finding of guilt against the Petitioner, but a fair, just and transparent exercise to try the Petitioner and

thereafter on an objective, impartial and dispassionate appraisal of the material brought on the file to return/record finding sustainable on such

material. In the present case though the Commanding Officer was otherwise Competent to conduct Summary Court Martial yet because of his

having prejudged the matter he was disqualified to preside over Summary Court Martial. The Commanding Officer by presiding over Summary

Court Martial after having framed an opinion that the charge was ""established beyond doubt"" against the Petitioner, became a judge of his own

cause, offended the spirit of maxim NEMO DEBET CESS JUDEX IN CAUSA PROPRIA SUA, resulting in gross violation of the principles of

natural justice. The Rule against bias is to be traced more to the conditions of public policy that actuality of bias affecting the Tribunal. Lush J. in

Sergeant v. Dale (1877) 2 Q.B.D. 558 at page 567 observed; that the rule "" is



to clear away everything which might engender suspicion and distrust of the Tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security".

This statement of policy was confirmed by Lord Esher M.R. in *Eckarsley v. Mersey Docks & Harbour Board* (1894) 2.Q.B.D. 667 in the following words:

The doctrine which is applied to judges, not merely of the superior Courts, but to all judges, that, not only must they be not biased, but that, even though demonstrated that they would not be biased, they ought not to act as Judges in a matter where the circumstances are such that people?not necessarily reasonable people, but many people?would suspect them of being biased

Again Lord Hewart C.J. in *R.V. Sussex justices*(1924) 1 K.B 256 observed that ""it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"". The integrity of this principle has remained unquestioned till date.

The Summary Court Martial proceedings in the circumstances as laid down in *Himmat Singh Chahar's* case (supra) got vitiated in view of infringement of principles of natural justice.

15. The conclusions drawn as regards infringement of Rule 23 Army Rules, and violation of principle of nature justice, make it unnecessary to look into the question of proportionality of punishment awarded. However, some important facts need to be highlighted, that if considered would have persuaded the Commanding Officer to award lesser punishment.

16. The case against the Petitioner was not one of over staying his leave, but his failure to report back to duty after performing temporary duty assigned to him. It is important to point out that the Petitioner, after his colleague Sepoy Arvind Kumar Pandey died in Battalic Sector volunteered to escort his dead body all the way from Battalic Kargil, to his native village at Samastipur Bihar. Petitioner's case is that he was directed not only to handover dead body to the parents of the deceased return but also to wait and collect papers from the family, so that the pension case of deceased Army personnel was settled in time and that this as also his indisposition contributed to the delay in reporting back to duty. The

Respondents in their reply have admitted that the Petitioner was asked to collect necessary documents from the parents of the deceased. The

Petitioner's case is that parents of the deceased, shocked by untimely and tragic death of their son were not in a position to lay hands on necessary

documents and handover such documents to the Petitioner and that Petitioner was constrained to frequent residence of the deceased a few times

with the assurance from the parents that once the mourning was over the documents would be handed over to him. The Respondents have not

denied that the Petitioner reported to Regimental Centre at Danapure Bihar on 3rd June 1999 for necessary instructions and that he was asked to

meet the family members of the deceased. The Petitioner, it is admitted, rushed to the Regimental Centre once a telegram was sent to the Petitioner

by his Regimental Centre at Battallic. The Petitioner did not stay back at his residence once the telegram was received by him indicating that the

Petitioner stayed back only to be able to collect all the documents necessary for settlement of pension case of Sepoy Arvind Kumar Pandey. The

Commanding Officer while awarding punishment has not taken into consideration all these factors including the Petitioner's case that as he had

moved from a cold region (Battallic Kargil) to hot region (Samastipur Bihar) he fell ill and was hospitalized in a local hospital at Samastipur Bihar.

There was no material before the Commanding Officer to presume that the Petitioner avoided to report back to duty for the fear of participation in

Operation VIJAY. The punishment awarded to the Petitioner against the said backdrop is excessive and disproportionate to the lapse attributed to

the Petitioner. It has been observed in Rajit Thakur's case (supra) and quoted with approval in *Shil K.R. Roy v. Secretary Ministry of Defence* and

*Ors.* (2007) 12 SCC 462, that:

The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the

offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience

and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that

even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an

outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review.

The punishment awarded in present case, for the reason discussed, and in view of legal position is disproportionate to the lapse attributed to the Petitioner.

17. For the reasons discussed above, the order dated 26th July 1999 whereby the services of the Petitioners have been terminated, is held to have been passed in disregard of Rule 23 Army Rules 1954 and in violation of principles of natural justice and thus liable to be set aside. The writ petition is accordingly accepted and the order of the Summary Court Martial dated 26.07.1999 whereby the Petitioner has been dismissed from service is set aside. The Petitioner shall be allowed to resume his duty. However, the Respondents shall be free to proceed afresh in the matter, from the stage Summary of evidence was recorded. The Respondents shall workout the benefits to which the Petitioner is entitled in wake of quashment of the order dated 26th July 1999 in accordance with Rules. Disposed of alongwith connected CMP(s).