
(1988) 11 AHC CK 0024

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 14384 of 1983

Uma Shanker Pathak

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-11-1988

Acts Referred:

Army Act, 1950 — Section 130, 164, 52
Army Rules, 1954 — Rule 115(2), 34, 34(1)

Citation : (1990) 2 LLJ 109

Hon'ble Judges : B.N. Misra, J;A.N. Varma, J

Bench : Division Bench

Advocate : B. Pandey, for the Appellant; Shishir Kumar, for the Respondent

Final Decision : Allowed

Judgement

A.N. Varma, J.—The petition assails the validity of the order dated October 19, 1982 passed by the Summary Court Martial held against the petitioner sentencing him to two months' rigorous imprisonment and reducing him from the rank of Havildar to ranks which means to the post of Sepoy on a charge which has been characterised in the counter-affidavit as petty theft.

2. The order has been challenged on several grounds. Before, however, we deal with the grounds we may briefly summarise the essential facts. The petitioner joined the Army in January, 1972 as a Sepoy in Mahar Regiment. In course of time he was promoted as Lance Naik, and thereafter Havildar, claimed by the petitioner to be an out-of-turn promotion, which rank he was holding at the relevant time, i.e., September, 1982. As a Havildar he was in charge of the stores of the petitioner's unit which was at that time posted at Babina. Two guns described as unserviceable (non-service pattern) were found missing from the stores whereupon a Court of Enquiry was ordered into the incident. The Court of Enquiry after making the necessary enquiry concluded that the petitioner was responsible for the theft. Thereupon a summary of evidence was ordered. On the evidence collected at the summary of evidence the petitioner was charge-

sheeted, the charge being theft of a double-barrel gun and a single-barrel gun, both of non-service pattern, said to be war trophies captured in 1971 war and entrusted to the petitioner's unit, punishable u/s 52(a) of the Army Act, 1950. The charge-sheet dated September 18, 1982 was issued by the Commanding Officer of the petitioner's regiment asking the petitioner to appear at the Summary Court Martial on September 19, 1982 to be presided over by the Commanding Officer for answering the charge. The respondents contended that at the trial of the charge before the Presiding Officer, the petitioner pleaded guilty whereupon on a consideration of the evidence collected at the trial he was found guilty of the charge of theft of Government property u/s 52(a) and sentenced as aforesaid.

3. The order passed by the Summary Court Martial was then communicated to the petitioner and it is not disputed that he has already served out the sentence. The Reviewing Officer in his remark endorsed on the impugned order states that the petitioner had a right of appeal u/s 164 in terms of the Army Order 220/72.

4. An elaborate memorandum of appeal submitted by the petitioner to the G.O.C-in-Command, Central Command, Lucknow was, however, returned as not maintainable several months later which order was communicated to the petitioner by the Commanding Officer by his letter dated July 25, 1983. The letter advised the petitioner to put forth his grievance against the award of Summary Court Martial through a complaint in terms of paragraph 361 of the Regulations framed under the Army Act. The petitioner, however, chose to approach this Court straightway by means of this petition presented on November 22, 1983. The petition was admitted on February 16, 1984.

5. Before we consider the submissions, we may dispose of a preliminary objection raised by Shishir Kumar, counsel for the Union of India, The objection was that under the provisions referred to above, the petitioner has an alternative remedy by way of a statutory complaint and consequently this Court should relegate him to that forum.

6. We are not persuaded to relegate the petitioner to the alternative remedy after the petition was admitted in 1984 and has been pending here since. It would be unjust and unfair to the petitioner in the extreme to drive him to that course now. Further, the Commanding Officer had himself advised the petitioner to file an appeal u/s 164 of the Army Act, which advice the petitioner, who was not conversant with the niceties of law, had scrupulously acted upon by filing a detailed memorandum of appeal. But the appeal was, as mentioned above, returned several months later on the ground that the same did not lie. Having thus put the petitioner on the wrong track, it ought not to be open to the respondents now to ask for the dismissal of the petition at the very threshold on the ground of existence of alternative remedy. More than five years have already elapsed and in view of the rank to which the petitioner has been reduced under the impugned order he is due to retire in January, 1989. It would be plainly in just and harsh in these circumstances not to entertain this petition on merits. It

is settled law that existence of alternative remedy is not an absolute bar to exercise the jurisdiction under Article 226 of the Constitution of India, particularly, where, as here, the breach of rules of natural justice and of the procedure laid down, is manifest as we will presently demonstrate.

7. Having disposed of the preliminary objection we turn to the merits of the petitioner's claim. The first ground canvassed by Sri R. Pandey, the petitioner's learned counsel, relying on the decision of the Supreme Court in the case of *Ranjit Thakur v. Union of India* (1988 1 LLJ 256) that the respondents did not adhere to procedural safeguards incorporated in Section 130 of the Army Act of asking the accused immediately after the court assembles whether he objects to being tried by any officer sitting on the court, was given up immediately by Sri Pandey when the order of their Lordships of the Supreme Court dated August 10, 1988 passed upon a review petition filed by the Union of India against the decision cited above was brought to our notice by the respondent's counsel. By this order their Lordships of the Supreme Court have qualified the statement of the law enunciated in *Ranjit Thakur v. Union of India* (supra) and held that the comments made in the judgment cited above with regard to the procedural safeguards mentioned therein were not attracted to cases triable by Summary Courts Martial. The present being undisputedly a case of Summary Court Martial as distinct from Summary General Court Martial the provisions of Section 130 of the Army Act cannot be pressed in aid by the petitioner.

8. The second submission deserves a serious consideration. The argument was that there has been a patent breach of the mandatory provisions of Rule 115 (2) of the Army Rules 1954 inasmuch as even assuming that the petitioner had pleaded guilty to the charge, the Commanding Officer was bound to ascertain that the petitioner fully understood the nature of the charge to which he was said to be pleading guilty and to inform him of the general effect and implications of that plea, etc. This obligation, it was submitted, the Commanding Officer completely omitted to discharge.

9. In order to appreciate the submission it will be convenient to extract here Rule 115 (2):

"(2) If an accused person pleads 'Guilty', that plea shall be recorded as the finding of the court, but before it is recorded, the court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty".

10. The provision embodies a wholesome provision which is clearly designed to ensure that an accused person should be fully forewarned about the implications of the charge and the effect of pleading guilty. The procedure prescribed for the trial of cases where the accused pleads guilty is radically different from that

prescribed for trial of cases where the accused pleads "not guilty". The procedure in cases where the plea is of "not guilty" is far more elaborate than in cases where the accused pleads "guilty". This is apparent from a comparison of the procedures laid down for these two classes of cases. It is in order to save a simple, unsuspecting and ignorant accused person from the effect of pleading guilty to the charge without being fully conscious of the nature thereof and the implications and general effect of that plea, that the framers of the rule have insisted that the court must ascertain that the accused fully understands the nature of the charge and the implications of pleading guilty to the same.

11. Keeping this legislature intent in mind, we proceed to consider the facts of the present case. The Commanding Officer holding the Summary Court Martial has recorded in the impugned order how he has conducted the proceedings. The relevant part is being extracted here-

"Proceedings of a Summary Court Martial held on Babina Cantt, on Tuesday the Nineteenth day of October, 1982 by I.C-- 18658 Lt. Col. K.K. Sharma, Commanding, the 15th Battalion the Mahar Regiment for the trial of all such accused persons as he may duly have brought before him".

Present

I.C.--18658-H Lt. Col. K.L.Sharma Commanding the 15th Battalion The Mahar Regiment.

Arraignment

Question to the Accused.

By the Court--How say you 9214494 X B Q M H Uma Shankar Pathak are you guilty or not guilty of the said charge preferred against you?

Answer--Guilty.

Question--Are you guilty or not guilty of the.....charge?

Answer--The accused having pleaded guilty to the said charge, the provisions of Army Rule 115 (2) are here complied with.

"If the accused pleads guilty to any charge the provision of Army Rule 115 (2) must be complied with and the fact that this has been done, recorded.

Proceedings on a plea of Guilty.

The accused No. 9214494X B.Q.H. Uma Shankar Pathak of the 15th Battalion The Mahar Regiment is found guilty of the charge.

The summary of evidence is ready (translated), explained, marked exhibit "K" signed by the Court, attached to the proceedings.

Do you wish to make any statement in reference to the charge or in mitigation on the punishment?

Question to the accused.

The accused says:

I am sorry for committing the offence. I wish to serve and promise to be a good soldier in the Army.

Question--Do you wish to call any witnesses as to character?

Answer--No.

Sd/-Lt. Col."

12. The proceedings extracted above do not, in our opinion, fulfill the requirement of the law. A bald certificate by the Commanding Officer that "the provisions of Army Rule 115 (2) are here complied with" is not enough. As the note quoted above and underlined by us would bear what is expected of the court where the accused pleads guilty to any charge is that the record of proceedings itself must explicitly state that the court had fully explained to the accused the nature and the meaning of the charge and made him aware of the difference in procedure. The instructions to the Court printed on the pro forma quoted in Annexure-1 (copy of the impugned order) stating that "question to the accused and his answers both will be recorded verbatim as far as possible" make this amply clear.

13. It is thus apparent that the questions and answers have to be reproduced by the Court in their entirety, which, in the context of Army Rule 115 (2), means all the questions and answers must be reproduced verbatim. In the present case, however, the Court has not done this. Instead the court merely contents itself with the certificate that "the provisions of Army Rule 115 (2) are here complied with".

14. Our conclusion that the questions and answers must be reproduced by the Court verbatim is further fortified by the instructions which have been issued under the Army Act the Summary Courts Martial which reads as follows:

"Plea of Guilty.-- (i) If an accused person pleads guilty to the charge(s) on which he is arraigned, he should be explained the meaning of the charge(s) and ensure that he understands the nature of charge(s). The general effect of plea of guilty and difference in procedure to be followed consequent to the said plea should also be explained to him. The endorsement, thereafter, be made on page "8" of the proceedings as per specimen given below-

"Before recording the plea of guilty offered by the accused, the Court explains to the accused the meaning of the charge(s) to which he had pleaded guilty and ascertains that the accused understands the nature of the charge(s) to which he had pleaded guilty. The Court also informs the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court having satisfied itself that the accused understands the charge(s) and the effect of his plea of guilty, accept and record the same. The

provisions of Army Rule 115 (2) are complied with."

15. Though this particular instruction was stated by the learned counsel for the Union of India to have been issued subsequent to the trial of the petitioner, it does not follow that the court in the present case was not required to state specifically in the order itself that it had informed the accused of the general effect of the plea of guilty and the difference in procedure which would follow consequent to the said plea. The instructions merely make explicit which was already implicit previously. For, if we were to countenance and accept the kind of certificate granted by the Court to itself in the present case, namely, that it has complied with Rule 115 (2), as sufficient compliance with the law, it might sometimes result in arbitrariness and it may not be easy for the appellate or reviewing authority or a court of law to ascertain that the statutory safeguards embodied in Rule 115 (2) have been scrupulously adhered to.

16. The position which, therefore, emerges from the foregoing discussion is that the impugned order itself does not disclose whether the Court complied with the mandatory requirement of Rule 115 (2). Equally it is also not clear whether the petitioner was given the evidence mandated in the last two lines of Sub-rule (2) of Rule 115.

17. Now the petitioner has categorically stated in his affidavit that he had not pleaded guilty. He has further asserted in paragraph after paragraph of the petition that the procedure prescribed under the rules was not followed in the present case by the Court. The allegations could have been met by someone who was present at the trial of the case. Instead the counter-affidavit has been sworn by one Capt. P.R. Sharma who does not appear to have been present at the trial as the assertions in the petition have been sought to be met on the basis of perusal of record and not on personal knowledge.

18. We are unable to reject the version of the petitioner on averments made in the counter-affidavit based on no more than "perusal of record". This court, therefore, holds that there was a clear breach of Rule 115 (2) and the breach has the effect of vitiating the entire trial. The plea of guilty recorded by the Court was irregular and unwarranted, the accused not having been made aware of the implications of such a plea nor of the nature of the charge.

19. The next ground of attack was based on the alleged violation of Army Rule 34 (1) which reads as follows:-

"34. Warning of accused for trial: (1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and these steps shall be taken accordingly.

The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused person is on active service less than

twenty four hours."

19. The contention was that in the present case the petitioner was informed of the charge only eight hours before the trial was to commence on October 19, 1982 whereas under Rule 34 he was entitled to at least ninety six hours notice prior to his arraignment. The submission must be accepted. The charge-sheet was signed by the Commanding Officer on October 18, 1982 and the trial commenced at 13.30 hours on October 19, 1982. According to Rule 34, which embodies a wholesome rule of natural justice, the petitioner should have been given at least ninety-six hours notice before he was arraigned so that he could prepare his defence. In paragraph 26 of the counter affidavit, however, it was asserted that the petitioner had been informed of the trial through his friend n Lt. Vinod Dora who had explained the charge sheet to the petitioner and had even asked if he would like to have any witnesses in his defence, to which the petitioner replied in the negative. It is further stated that the date and the time of the trial, composition of the Court, etc., had also been published in the Battalion routine order dated October 16, 1982 and that there was thus sufficient compliance with Rule 34.

20. We are unable to agree. Even if we assume that the petitioner was informed of the details of the trial on October 16, 1982, Rule 34 would not be deemed to have been complied with in that notice would still fell short of ninety six hours. In our opinion, the requirement that at least ninety six hours notice should be given to the accused, is mandatory. The language used in Rule 34 is peremptory. It states that "the interval between his being so informed and his arraignment shall not be less than ninety six hours". Such an interpretation is also consistent with the principle of natural justice in that the purpose of the rule is to enable the accused to have sufficient notice so that he may prepare his defence. That being so, the breach of Rule 34 must vitiate the entire trial.

21. On the conclusion that we have reached in regard to breach of Rules 34 and 115 (2), the petitioner is clearly entitled to succeed. Indeed, on the breach of either of these two rules the impugned order would be liable to be struck down.

22. We may now briefly comment on the remaining points urged in support of the petition. Learned counsel argued that even if Section 130 and Rule 44 do not apply to the cases triable by Summary Court Martial in view of the order dated August 8, 1988 of the Supreme Court reviewing its decision in *Ranjit Thakur v. Union of India* (supra) the principle underlying the same ought to be treated as a necessary concomitant of a just and fair trial and, therefore, applicable even to the petitioner's case, that is, he should have been asked by the Court whether he has any objection to being tried by the officer constituting the Court.

23. The submission has no merit. It ignores Article 33 of the Constitution of India which vests in Parliament the power to modify the rights conferred in Chapter in to the Constitution in their application to Armed Forces. This aspect was considered in depth by their Lordships of the Supreme Court in the case of Lt.-

Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, . Their Lordships have ruled that the law prescribed for trial of offences by Courts Martial under the Army Act and the Rules framed thereunder need not satisfy the requirement of Article 21 because to the extent the procedure prescribed by law is in derogation of Article 21, Article 21 shall stand modified in its application to the Army Forces by the enactment of the procedure in the Army Act itself.

24. Counsel next submitted that Rule 180 has been breached in the present case. The argument was that as the enquiry instituted against the petitioner affected his character or military reputation he should have been given full opportunity of being present at the Court of Enquiry and to give evidence as well as to cross-examine prosecution witnesses.

25. The submission is devoid of any substance. It was based on the averments made in paragraph 10 of the petition that no such opportunity was given to the petitioner, which have been denied in paragraphs 19 and 25 of the counter affidavit. Alternatively, it is asserted in the counter affidavit that the statements recorded at the Court of Enquiry, which is merely a fact finding body, not being admissible in evidence the same was not used in convicting the petitioner. The alleged omission hence did not materially affect the fairness of the trial in that the petitioner was given full opportunity to examine his witnesses and to cross-examine the prosecution witnesses at the Summary of Evidence which was ordered against him, the evidence collected at which alone could be used against the petitioner.

26. There is considerable merit in the stand taken by the respondents. At any rate, as at present, we are not persuaded that irregularities, however technical and trivial, committed under Rule 180 shall have the effect of vitiating the entire trial. For, a Court of Enquiry is in the nature of a preliminary investigation prior to framing of the charges. It provides for examination of certain issues generally concerning a situation or persons. We are hence inclined to think that the alleged breach of Rule 180 in the present case did not produce any serious illegality so as to vitiate the trial.

27. Reliance was also placed on Regulation 458 of the Regulations framed under the Army Act which provides that in all cases under the Army Act where the charge is of indecency, fraud or theft, except ordinary theft, civil offences, etc. shall be referred by the convening office to the Deputy Judge, Advocate General of the Command before the trial is ordered. This, the petitioner alleged, was not done in the present case. A simple answer to this submission is furnished by the averments made in paragraph 28 of the counter-affidavit wherein the stand taken is that the theft of two unserviceable (non-service pattern) shot guns falls in the category of ordinary thefts and consequently the pre-trial advice of the Deputy Judge, Advocate General was not warranted.

28. That finally brings us to the last submission which was confined to the quantum of punishment. Learned counsel submitted that the respondents

themselves characterised the offence as an ordinary theft, but, while awarding punishment, not only was the petitioner sentenced to two months' rigorous imprisonment but he was also reduced to the rank which was grossly out of proportion to the alleged offence. There is no merit in this contention. Section 77 of the Army Act provides:-

"77. Result of certain punishments in the case of a warrant officer or non-commissioned officer-

A warrant officer or a non-commissioned officer sentenced by a Court Martial to transportation, imprisonment, field punishment or dismissal from the service, shall be deemed to be reduced to the rank."

In view of the fact that the petitioner was sentenced imprisonment, the reduction to the ranks was automatic. The language used in the statute is "shall be deemed to be reduced. to the rank" which is explicit and unambiguous.

29. In the premise, the petition succeeds and is allowed. The impugned order and sentence passed by the Summary Court Martial. (Annexure 1 to the petition) are quashed. The petitioner is entitled to and shall be reinstated with all monetary and service benefits. He shall be further entitled to the costs of this petition.