

ARMED FORCES TRIBUNAL, REGIONAL BENCH, CHENNAI

O.A.No.35 of 2012

Friday, the 30th day of August, 2013

THE HONOURABLE JUSTICE V.PERIYA KARUPPIAH
(MEMBER-JUDICIAL)

AND

THE HONOURABLE LT GEN ANAND MOHAN VERMA
(MEMBER-ADMINISTRATIVE)

C. Chellathurai
S/o N. Chellaiah, Driver Grade II
(dismissed from service)
"C" Coy, 5033 ASC BN (MT)
Zion Street, Kumarapuram
Thoppur P.O., Nagercoil District
Tamil Nadu-629402.

... Applicant

By Legal Practitioner:
Mrs. Malarvizhi Udayakumar

vs.

1. Union of India, represented by
Defence Secretary
Ministry of Defence, New Delhi.

2. Chief of the Army Staff
Army Head Quarters
Additional Directorate General
Discipline & Vigilance (DIV 3)
Adjutant General's Branch, New Delhi – 110 011.

3. HQ 33 Corps 'A' Br
C/o 99 APO.

4. Commanding Officer
5033 ASC BN (MT)
C/o 99 APO

... Respondents

Mr. B.Shanthakumar, SPC

ORDER

(Order of the Tribunal made by
Hon'ble Lt Gen Anand Mohan Verma
(Member-Administrative)

1. This petition has been filed seeking relief to quash the Summary Court Martial Proceedings dated 11th February 1994 and consequently to re-instate the petitioner in service with all consequential benefits.

2. The factual matrix is that the petitioner was enrolled as Cleaner (Motor Transport) in 1980 and subsequently was upgraded as Driver Grade II. When he was posted to a Unit in Siliguri (West Bengal) in January 1994, he during Sainik Sammelan made a statement which was construed as insubordination and consequently he was tried for this offence by a Summary Court Martial and was awarded the punishment of six months R.I. and dismissal from service. His appeal against the sentence awarded by the Summary Court Martial was rejected by the Chief of the Army Staff by an order dated 6th May 1996. He sent a representation on 26.2.2006 which was rejected vide respondent's letter dated 26th April 2006 wherein it is stated that only one petition can be submitted against the findings and sentence of the Court Martial. The petitioner filed the present Original

Application on 13th March 2012 with M.A No 20 of 2012 for condoning the delay of 5607 days. The delay was condoned and the main O.A. was admitted.

3. The petitioner through his O.A. and pleadings of the learned Counsel Mrs. Malarvizhi Udayakumar would state that he had an unblemished service of nearly 14 years during which he served wherever he was posted by the Army. On 18th January 1994 during Sainik Sammelan, the petitioner would submit that in a very humble manner he voiced his opinion that he would not be able to perform guard duty at night. However, the Commanding Officer Lt Col VN Singh, the fourth respondent issued a Charge Sheet on 5th February 1994 under Army Act Section 40(c) for using insubordinate language. The petitioner would state that the Charge Sheet was signed by the 4th respondent and the subsequent proceedings were initiated and inquiry was conducted by the very same officer. The same officer thereafter constituted the Court by which the petitioner was tried by Summary Court Martial and awarded very severe and harsh punishment not commensurate with the alleged offence. The petitioner would say that the order passed by the 4th respondent during the Summary Court Martial is bad in law and is against the Principles of Natural Justice. No man can be a Judge of his own case the learned counsel would plead.

His Post-Confirmation Petition against the award of punishment and sentence of Summary Court Martial was rejected and subsequently, he submitted a Reference Petition on 26th February 2006 which too was rejected stating that only one appeal can be preferred. The petitioner would highlight that the CO himself being the officer against whom the alleged offence was committed and the said officer himself constituting the Court was commented upon by JAG Branch and an explanation was sought for from the officer concerned. The learned counsel for the petitioner would plead that the Army Act Section 120, Note 2(d) was not complied with and the entire proceedings are vitiated. The offence against the officer holding the trial would be sufficient to disqualify an officer to sit as a Member of GCM or DCM and would debar from holding an SCM, unless there is an emergency. In the instant case, the offence was allegedly committed on 18th January 1994 whereas the Summary Court Martial took place on 11th February 1994 which indicates that there was sufficient time to make a reference to the authorities and obtain prior approval in time. No prior approval was obtained in writing. In support of her arguments, the learned counsel would cite judgments reported in **1982 (2) SLJ 582 (SC) and AIR 1987 SC 2386 (1)** between **Ranjit Thakur and UOI & Ors.** The learned counsel would submit that the petitioner is physically fit and being a civilian driver is entitled to serve till the age

of 60. Therefore, she would plead that the petitioner be re-instated into service with all consequential benefits.

4. The respondents would submit that all civilian GT drivers are required to perform duty for 48 hours for a week. They have to perform night guard duties for the safety and security of vehicles/stores. The excess duty hours so spent by an individual are compensated by granting suitable relief/compensatory day-off. The petitioner had refused to perform the night guard duty and had used insubordinate language to his superior officer during Sainik Sammelan conducted by Lt Col VN Singh, the then Commanding Officer of the Unit. The petitioner was charged under Army Act Section 40 (c) and was tried by Summary Court Martial on 11th February 1994. His petition was rejected by the Chief of the Army Staff by the order dated 6th May 1996 and a Reference Petition was rejected by Army Headquarters vide letter dated 26th April 2006. The respondents would also plead that the petitioner remained silent for 5067 days before approaching the appropriate forum and therefore, the case suffers from delays and laches and is hopelessly barred by limitation and therefore be dismissed.

5. Heard both sides and perused the documents.

6. The learned counsel for the petitioner along with written arguments has submitted the petitioner's status in which it has been mentioned that the terms and conditions laid down in AI 182/51 which govern civilians in the army do not include or indicate such employees be subject to Army Act. Though the learned counsel did not press this point, we examine this issue. In the case of **Gurvinder Singh & ors. vs. UOI & ors. (O.A.No.1491 of 2011 dated 23.08.2012)**, the Chandigarh Regional Bench of Armed Forces Tribunal examined the issue of civilian GT drivers being discriminated against. The Armed Forces Tribunal of Chandigarh Regional Bench in its order produced a sample appointment letter which states that such civilian employees would be subject to Army Act 1950 vide Army Order 141/72 and held that the petitioners who were civilian GT drivers are subject to the Army Act 1950 only for the purpose of discipline. Thus, there is no ambiguity that the petitioner in the instant case is subject to Army Act 1950 and therefore, disciplinary action against him as per the said Act is not entirely illegal.

7. The short point that needs to be determined in this case is whether or not the trial by Summary Court Martial was legally valid or not and, if so, was the punishment awarded unduly harsh.

8. Admittedly, the petitioner during Sainik Sammelan on 18th January 1994 did make a submission that he will not be able to do night duties as he was not trained for such a task. The Commanding Officer Lt Col VN Singh who was conducting the Sainik Sammelan considered this to be an act of insubordination and filed a charge sheet which reads,

" CHARGE SHEET

The accused No 6627745-A Dvr Gde II C Chellathurai of 'C' Coy, 5033 ASC Bn (MT) is charged with:-

*ARMY ACT
SECTION 40(c)*

*USING INSUBORDINATE LANGUAGE
TO HIS SUPERIOR OFFICER*

In that he, at Field, on 18 Jan 94 while attending unit Sainik Sammelan, got up and said to IC-32085-P Lt Col V N Singh of the same unit, "MAIN NO 6627745-A DVR GDE II C CHELLATHURAI NIGHT GUARD DUTY NAHIN DUNGA, AAP HAMAIN DABANA CHAHATE HAIN. HUM AAPKI BAAT NAHIN MANTE. " I, No 6627745-A Dvr Gde II C Chellathurai will not give the night guard duty. You are trying to suppress us. We don't agree to your orders, or words to that effect and left the Sainik Sammelan without permission.

*Station: Field
Dated: 05 Feb 94*

*Sd/-
(V N Singh)
Lt Col
Offg Commanding Officer
5033 ASC Battalion (MT)"*

9. Before initiating disciplinary action the CO sought from his superior Headquarters, i.e., Headquarters 33 Artillery Brigade which was the Station Headquarters, vide his letter dated 2nd February 1994 for pre-trial advice and confirmation that SCM can be conducted by Lt Col VN Singh, Officiating CO of the Unit. The said letter was signed by Lt Col VN Singh. There is no response from the higher Headquarters to this letter. However, there is an endorsement on this letter written in hand which states,

"CERTIFICATE

It is certified that matter was discussed with Lt Col MM Verma of HQ Arty Bde on 03 Feb 94 and he had advised that SCM can be conducted."

This certificate has been signed by Lt Col VN Singh on 3rd February 1994. No formal and prior approval of the superior HQ has been produced by the respondents. Identity and appointment of Lt Co MM Verma have not been revealed either. In the absence of a written prior approval, we are inclined to hold that the SCM was conducted without obtaining prior approval of the superior HQ.

10. In the Summary Court Martial Proceedings submitted by the respondents, the accused prayed for a minimum punishment and

he called a witness UDC S YOLMO. The said witness was asked to comment on the petitioner's character to which the witness replied "*I have nothing to say in regard to his character*". The sentence awarded was RI for 6 months in a civil prison and to be dismissed from service. The said proceedings were sent to higher HQ, i.e. HQ ## Artillery Brigade which was the Station Headquarters and was counter-signed. During the processing of the Post-confirmation Petition submitted by the petitioner, Army Headquarters vide their letter dated 7th February 1995 observed as under:

" AS ABOVE

Reference your letter No 201440/243/A1 dt 07 Feb 95.

The case has been examined at this HQ in consultation with JAG's Deptt. It is observed that offence committed by the individual was against the CO himself. As such a doubt is cast on the validity of trial in terms of Note 2 (d) below AA Section 120. Moreover, it is seen that the offence was committed on 18 Jan 94 whereas trial was held on 11 Feb 94. Apparently there was sufficient time to put up the matter before competent authority for consideration for ordering a DCM. Thus, the circumstances under which Offg CO has tried the individual for offences against himself, are not clear from the comments forwarded by the unit.

3. You are requested to obtain above clarification from the unit and forward to this HQ 12 Dec 95, positively. "

A reply to this letter was submitted by the Unit vide its letter dated 27 Nov 1995 and the relevant extracts are:

" 2. The SCM conducting offr Lt Col VN Singh, the then offg CO, is presently att with HQ 35 Inf Bde for the purpose of discp wef 23 Feb 95.

3. Based on the available record relating to the subject case, the following comments are offered:-

(a) The matter was referred by the SCM conducting offr to HQ 33 Corps Arty Bde (Stn HQ) vide letter No 2474/6627745-A/STI2(Civ) dt 02 Feb 94. No written reply to the said letter from HQ 33 Corps Arty Bde (Stn HQ) exists on record. However an endorsement of the SCM conducting offr exists on the office copy thereof viz "It is certified that matter was discussed with Lt Col MM Verma of HQ Arty Bde on 03 Feb 94 and he had advised that SCM can be conducted". A photo copy of the said letter with endorsement thereon is att for your perusal please.

(b) No other document for pre-trial advice like Application (IAFD-937) for a Court Martial or Charge Sheet duly endorsed by the Superior Mil Auth for trial by SCM or an Explanatory Memorandum in terms of AR-130 exists on record.

(c) The SCM proceedings relating to the subject case were countersigned by the superior Mil Auth (Cdr 33 Corps Arty Bde) without any obsn on validity of the trial.

4. It is not impertinent to mention that a similar case relating to Petition of No 9410077X Ex-Dvr Gde II DB Limbu was considered and rejected vide Army HQ letter No INDARMY/DV-3 0/05643/DV-3 dt 04 May 95 without any obsn. In this connection please refer to HQ East Comd letter tgm No 201440/241/A1 dt 24 May 95 and your letter tgm No 1725506/2/A1(94) dated 29 May 95.

5. In view of the above, the validity of the trial by SCM in the subject case may please be considered in the light of AR-149. "

Subsequent to this Lt Col VN Singh who was then attached to HQ 35 Inf Bde was asked by the Unit, i.e. 5033 ASC Battalion for his comments on the said case. The relevant extract of this letter dated 14th December 1995 is as follows:

XXXXXXXXXXXXXXXXXXXX

" 3. Thereafter, the SCM was conducted by you on 11 Feb 94 and proceedings fwd to HC 33 Corps (DJAG) vide letter No 2474/6627745-A/ST12(Civ) dt 13 Feb 94 for perusal/remarks. A copy of the said letter is enclosed. The SCM proceedings were recd back from HQ 33 Corps Arty Bde (Stn HQ) under letter No.408107/Stn/9/A dated 28 Feb 94 duly countersigned by Cdr 33 corps Arty Bde. A copy of the said

letter and countersigned portion of the proceedings are enclosed. No other corres was made with the superior mil auth relating to SCM of the above named indl, as per existing record, before or after the trial.

4. You are, therefore, requested to fwd your comments on the obsn made vide army HQ letter No.C/05633/DV-3 dated 16Nov 95, copy already fwd to you vide our letter of even No.dt 27 Nov 95, keeping in view the non-observances of the provision of Note 2(d) below AA Sec 120 which stipulates inter alia :-

a) It is most undesirable that an offence against an individual should be tried by that individual, and the reason for immediate action would require to be unusually weighty to justify the provision as to reference to higher authority being disregarded when the offence is one against the offence holding the trial.

b) Where it is necessary for the CO of the accused to give material evidence for the prosecution, he should apply for a DCM so as to secure an impartial trial.

c) Please fwd your reply/comments direct to HQ 33 Corps under intimation to this unit at the earliest. "

In reply, Lt Col VN Singh vide his letter dated 23 Dec 1995, states thus,

" 1. Refer to 5033 ASC Bn (MT) letter No 2474/66 27745/ST-12(Civ) dt 14 Dec 95.

2. As the case is quite old, I can comment only after perusing the related documents. From the documents fwd by 5033 ASC Bn (MT) vide their letter u/r to me, it is evidently clear that offence was committed on 18 Jan 94, hearing of charge by me was done on 01 Feb 94, S of E was recorded on 01 Feb 94 and the docu were fwd to HQ 33 Corps Arty Bde, the superior authority in this case on 02 Feb 94 for advice and confirmation that SCM can be conducted by Lt Col VN Singh, Offg CO of the unit. The HQ 33 Corps Arty Bde though did not state in writing confirming the conduct of SCM by me. However as endorsed on the letter (2474/66 27745A/ST-12(Civ) dt 02 Feb 94) that the matter was discussed with the authority who advised holding SCM. The matter thereafter was discussed with the then DJAG, HQ 33 Corps, who advised holding SCM after confirming the said charge and accordingly the individual was tried on 11 Feb 94, after giving 96 h time to the accused after serving him the charge sheet.

3. Thereafter the proceedings were sent to DOAG HQ 33 Corps and confirming authority who confirmed the trial and award of punishment.

4. From the above it is clear that due procedure was followed before and after trial as required by law. The very fact that proceedings were confirmed by confirming authority proves beyond doubt that the case was referred, discussed and concurred by all agencies in chain. The time between 18 Jan 94 to 11 Feb 94 is itself a sufficient indicator that the matter was referred and discussed before trial and due deliberation was done on the case. "

11. Perusal of the above documents makes it very clear that the offence of insubordination was committed when Lt Col VN Singh was conducting a Sainik Sammelan, Lt Col VN Singh signed the charge sheet, he himself ordered summary of evidence and thereafter, he himself conducted the Summary Court Martial. Here, we turn to Section 120 (2) of Army Act which reads:

" 120. Powers of summary courts-martial—(1) Subject to the provisions of sub-section (2), a summary court-martial may try any offence punishable under this Act.

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69, or any offence against the officer holding the court.

....

Notes 2(d) (i) and (ii) to Section 120 Army Act read:

" (d)Offence against the officer holding the trial:- It is difficult to lay down a definite rule in this matter, but, speaking generally, a

consideration of personal interest which would suffice to disqualify an officer to sit as a member of a GCM or DCM debars him from holding a SCM (save in case of emergency) without previous reference. Offences under AA ss.40 and 41 when committed towards a CO fall under this category, and should not, except in case of emergency, be tried by SCM without previous reference to the officer empowered to convene a DCM (or an active service a SGCM) for the trial of the alleged offender. Theft or misappropriation of property of which a CO is either part-owner or trustee (e.g., mess or regimental property) should not, except as aforesaid, be tried by SCM without such reference. The reasons behind this restriction are:

(i) It is most undesirable that an offence against an individual should be tried by that individual, and the reason for immediate action would require to be unusually weighty to justify the provision as to reference to higher authority being disregarded when the offence is one against the officer holding the trial.

(ii) At a trial by SCM the officer holding the trial cannot himself give evidence against an accused person appearing before him, except evidence of a formal character such as the production of document. But see AR 123 which authorizes the court to record, "of its own knowledge" certain facts for guidance in determining the sentence. If he gives formal evidence, he must be sworn/affirmed as a witness. "

12. In the instant case, there was no emergency and indeed the officer conducting the trial had made a reference to his higher authorities for seeking permission to conduct the trial. Yet there is no written prior approval obtained from the higher HQ and identity of Lt Col MM Verma with whom Lt Col VN Singh discussed the case is also not revealed. Thus, it is apparent that Lt Col VN Singh himself was the officer against whom offence was committed, he signed the charge sheet, he ordered an enquiry and thereafter he conducted the trial. We profitably refer to **AIR 1987 SC 2386 (1)** in the case between **Ranjit Thakur and UOI and Ors.**, wherein the Hon'ble Supreme court held,

" It is the essence of a judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirements of natural justice is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial 'coram non judice' . AIR 1945 PC 38, Foll (Para 6).

"As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "am I biased?; but to

look at the mind of the party before him. Thus tested the conclusion becomes inescapable that, having regard to the antecedent events, the participation of officer in the Court-Martial rendered the proceedings coram non judice. (Para 7).

13. It is a principle of natural justice that no person can judge a case in which he has an interest. The rule must be very strictly applied to any appearance of a possible bias even if there is actually none. *Nemo debet esse judex in propria causa*, No man can be a Judge of his own cause is a well settled principle of natural justice. Justice must not only be done, but must be seen to be done. In this case it is obvious that principle of natural justice has not been strictly followed. Also, scrutiny of the SCM proceedings reveals that the petitioner was not given a reasonable opportunity to present his side. With these observations we hold that the SCM proceedings in the instant case suffer from serious infirmity of violation of natural justice and consequently legally not valid and are liable to be set aside.

14. Though the answer to the first part of the point is in the negative, we still consider it prudent to comment on the quantum of punishment awarded by the Summary Court Martial. Admittedly, this was the first offence committed by the petitioner though Lt Col VN Singh in the Memorandum attached with the SCM Proceedings states that the petitioner

"has been continuously misbehaving in a very arrogant manner and challenging the authority" , but no evidence has been produced either in the Summary Court Martial to substantiate this allegation. We once again turn to **AIR 1987 SC 2386 (1)** in which the Court held :

" Judicial review, generally speaking, is not directed against a decision, but is directed against the 'decision making process'. 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. (1984) 3 WLR 1174 (HL) and AIR 1983 SC 454, Foll. (Para 9)

.....

"In Bhagat Ram v. State of Himachal Pradesh, AIR 1983 SC 454 (at p 460) this Court held:

"It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Art. 14 of the Constitution. "

Considering that this was the first offence nearly in his 14 years of service, the punishment is also considered to be too harsh, even the constitution of SCM is sustained.

15. Since the trial by the Summary Court Martial is legally not valid, the sentence awarded by the said Court is liable to be set aside. While the sentence of dismissal can be set aside, the punishment of 6 months RI cannot be undone since it has already been executed. We therefore, consider this period of 6 months spent in civil prison to be regarded as being in service for this duration and will be entitled to pay and allowances for this period at the rate he was entitled to when he was sent to the civil prison.

16. The petitioner who is present in the Court appears to be physically fit. However, there has been a long gap of almost over 19 years and re-instatement will not be proper in the interest of the organization as also the petitioner. The petitioner has not completed the requisite service for

claiming full pension. Therefore, we consider it fit to notionally re-instate him till he reaches the service which entitles him to full pension. The arrears however will be calculated with effect from a period of three years prior to filing of this Original Petition.

17. In fine, the application is partly allowed, in that the Summary Court Martial proceedings dated 11th February 1994 along with the sentence awarded by the said Court Martial is set aside. The petitioner is notionally re-instated into service till he reaches the service which entitles him to get full pension. The arrears of benefits will be calculated with effect from 13th March 2009 and he would be entitled to full pension with effect from today. For the period of 6 months that he spent in civil prison, the petitioner will be paid full wages which he was drawing at the time when he was sent to prison. Time for implementation of this order is three months. In default, the arrears and six months' award of wages will carry an interest of 9%. No costs.

Sd/
LT GEN ANAND MOHAN VERMA
(MEMBER-ADMINISTRATIVE)

Sd/
JUSTICE V. PERIYA KARUPPIAH
(MEMBER-JUDICIAL)

30.08.2013
(True copy)

Member (J) – Index : Yes / No
Member (A) – Index : Yes / No

Internet : Yes / No
Internet : Yes / No

Vs

To:

1. The Defence Secretary
Ministry of Defence, New Delhi.
2. Chief of the Army Staff
Army Head Quarters
Additional Directorate General
Discipline & Vigilance (DIV 3)
Adjutant General's Branch,
New Delhi – 110 011.
3. HQ 33 Corps 'A' Br
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5033 ASC BN (MT)
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5. Mrs. Malarvizhi Udayakumar
Counsel for Petitioner.
6. Mr. B. Shanthakumar, SPC
For respondents.
7. OIC, ATNK & K Area HQ, Chennai.
8. Library, AFT, Chennai.

HON'BLE JUSTICE V.PERIYA KARUPPIAH
MEMBER (J)
AND
HON'BLE LT GEN ANAND MOHAN VERMA
(MEMBER (A)

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