

ARMED FORCES TRIBUNAL REGIONAL BENCH CHENNAI

O.A. (Appeal) No. 166 of 2013

Monday, the 7th day of July, 2014

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

AND

THE HONOURABLE LT. GEN. K. SURENDRA NATH
(MEMBER – ADMINISTRATIVE)

A.Sudalai Muthu, S/o Sri R.Arumugam
No.14394653-M, Ex-Sep/Clk
3/56, Burma Colony, Near BMC, Matric School
Miller Puram, Tuticorin, Tamil Nadu - 628008

. . . Applicant

By Legal Practioner
Mr. M.Selvaraj

Vs.

1. Union of India
Represented by
Additional Director General, Personnel Services
Adjutant Generals Branch Integrated
Headquarters Ministry of Defence (ARMY), New Delhi
2. The Officer in Charge Records
The Madras Regiment
Wellington, Nilgiris – 643 231
3. The Officer in Charge Records
Defence Security Corps records
PIN-901277, C/o 56 APO
4. The Principal Controller of Defence Account (Pension)
Droupahti Ghat, Allahabad, UP
5. The Commanding Officer
25 WEU, C/o 56 APO

.....Respondents

Mr.B.Shantakumar, SPC

ORDER

[Order of the Tribunal made by
Hon'ble Lt Gen K Surendra Nath, Member (Administrative)]

The applicant in his application has requested that this Tribunal may call for all the records pertaining to passing of the order of dismissal in Summary Court Martial proceedings dated 18.12.2006 and set aside the same and consequently reinstate him with all attendant benefits and pass such further orders to render justice.

2. In brief, the applicant states that he was enrolled in the Army as Sepoy on 23.12.1985 and was working at various places before he took voluntary discharge from the Army on 01.03.1994 after having put in 8 years and 2 months of service. After a gap of approximately 4 years, he joined the Defence Security Corps (DSC) on 31.07.1998. While working in the DSC at Lucknow, he was granted leave to visit his home town from 02.01.2006 to 19.02.2006. The applicant states that four days prior to the completion of his leave, while on his return journey, he fell prey to drugging by a tea vendor at Bhopal Railway station and was kidnapped by terrorists and was tortured. When he regained consciousness, he was able to escape from them; however, he was struggling for expenses to report for duty. He, however, promptly reported to the nearest military unit, i.e., Movement Control Office (MCO) at Agra. He was handed over to the Military Police who investigated the case and after prolonged investigation, the Military Police found that the applicant was mentally disturbed, lost his memory and hence admitted him in the Military Hospital, Jhansi where he was treated for his illness. The applicant alleges that he was also given electric shock treatment. On discharge from hospital, he reported to his parent unit, 25 WEU at Lucknow. He explained the

extenuating circumstances and state of his mental health which caused him to overstay leave by 95 days. He was again referred to Command Hospital, Lucknow for psychiatric treatment. On return from the hospital, the Commanding Officer conducted a Summary Court Martial for offences under Army Act 39 (b) and dismissed the applicant from service on 18.12.2006. The applicant further states that in addition to the 8 years and 2 months service that he had put in the Army, he had also put in 8 years and 4 months and 6 days of service in the DSC at the time of his dismissal from service. The applicant would aver that the SCM Proceedings were not conducted in accordance with the Army Act and, therefore, liable to be set aside. Further the reason for his not reporting to the unit on completion of leave was due to circumstances beyond his control and his mental disability. The application sent by his wife to the Commanding Officer would also show that there were extenuating circumstances in support of the overstay of leave. Therefore, the applicant would state that his dismissal is not valid and the punishment is disproportionate to the offence under the Military Law. He requests for reinstatement in the DSC with all attendant benefits.

3. The respondents in their reply statement stated that the applicant was initially enrolled in the Regiment of Artillery on 23.12.1985 and was discharged with effect from 28.12.1994 at his own request on extreme compassionate grounds after rendering service of 8 years, 2 months and 9 days under Rule 13 (3) III (iv) of Army Rules 1954. Thereafter, he voluntarily re-enrolled in DSC on 31.07.1998. While serving with 35 DSC Platoon attached to 25 Wireless Experimental Unit (WEU), Lucknow, he was granted leave of absence from 02.01.2006 to 19.02.2006. However, on completion of leave he did not report for duty on due date, i.e., 20.02.2006. He overstayed leave from

20.02.2006 to 24.05.2006 till he voluntarily reported at MCO, Agra on 25.05.2006. The applicant was tried by Summary Court Martial under Army Act Section 39(b) and was dismissed from service on 18.12.2006. At the time of his dismissal from service, though he had opted to count his former service in the Army for a period of 8 years 2 months and 9 days along with DSC service, the service rendered by him in the Army and with DSC cannot be considered as qualifying service as he was tried by Summary Court Martial under Army Act Section 39 (b) and was dismissed from service. In accordance with Rule 113(a) of Pension Regulations for the Army 1961 (Part-1), the applicant was ineligible for grant of service pension or gratuity as he was dismissed from service. At the time of his disciplinary proceedings, the applicant claimed that he was mentally disturbed during the period of his absence and that he was undergoing treatment for the same. On scrutiny of medical papers and medical examination by psychiatrists at MH, Jhansi, it is seen that he was not suffering from psychiatric problems and nothing was detected by the psychiatrists during their investigations either at MH, Jhansi or at Command Hospital, Lucknow. Moreover, the applicant failed to produce any reasonable evidence to establish the claim that he was mentally abnormal or that he was kidnapped by terrorists. The respondents would further aver that the Court Martial proceedings were conducted in accordance with the rules and regulations applicable to the Army and the punishment awarded to the applicant was just and reasonable considering the gravity of the offence and, therefore, the O.A. should be set aside as there is no merit or substance in the case.

4. We have heard the arguments of Mr.M.Selvaraj, Learned Counsel for the applicant and Mr.B.Shantha Kumar, Learned Senior Panel Counsel as well as by Maj

Suchithra Chellappan, learned JAG Officer and also perused all the documents that were made available.

5. The applicant initially joined the Army on 23.12.1985 and took voluntary retirement on compassionate grounds on 01.03.1994. After a gap of around four years, he re-enrolled in DSC on 31.07.1988. We note from the records that while serving with the DSC, the applicant had put in an application for discharge from service *vide* his application dated 08.03.2005 on extreme compassionate grounds. DSC Records, *vide* letter dated 19.05.2005, placed his discharge application in abeyance owing to shortage of replacements and he was to be in the waiting register and his discharge would be considered as and when the deficiency of clerks was made up in the DSC. The applicant was granted leave of absence from 02.01.2006 to 19.02.2006. However, on completion of leave he did not report back for duty on due date but overstayed leave for 95 days. During the investigation, he claimed that he left his home in Tuticorin on 16.02.2006 to rejoin duty; that at Bhopal, he drank milk from a tea vendor and, after that, he became unconscious and, allegedly, he was kidnapped by terrorists and that he was taken to various locations such as Kanpur etc.; and he escaped from their captivity and then he was somehow able to manage to reach MCO, Agra. He was handed over to Military Police at Agra who investigated the case, and was thereafter admitted in MH, Jhansi for treatment as the individual claimed loss of memory. In the meantime, his wife also wrote an application stating that her husband was missing and that she received a telegram on 23.02.2006 stating that he had been taken to reside in an ashram in Hardwar, Uttaranchal. At MH, Jhansi, he was examined by the psychiatric specialist. After thorough investigation, the psychiatrist concluded *vide* his report dated

03.07.2006, *“he has no psychotic illness and should be tried administratively for desertion and feigning mental illness”*. The individual was thereafter sent to his unit. He was again referred to Command Hospital, Lucknow for psychiatric evaluation. The Graded Specialist who examined the applicant stated, *“General physical examination and systemic examination were within normal limits. MSE reveals a kempt, cooperative individual maintaining adequate eye contact and observing service etiquettes. He was anxious but there were no gross depressive features. There was no presence of psychosis. Judgment was unimpaired”*. He was discharged from the hospital after treatment and counseling for anxiety. At the Unit, consequent to investigation of his overstaying of leave, he was tried by Summary Court Martial from 05.12.2006 to 18.12.2006 on charges of overstaying of leave granted to him under Army Act Section 39(b). He was found guilty and was awarded the punishment, *“To be dismissed from service”*. The punishment was promulgated on 18.12.2006. We note from the records as well as from the statement given by the respondents that at the time of his discharge he had a total service of 8 years, 2 months and 9 days in the Army and 8 years and 46 days in the DSC. Total service rendered in army and DSC together is 16 years, 3 months and 25 days.

6. On the above pleadings, the following points emerge for consideration:

(a) Point No.1: Was the investigation of charges and Summary Court Martial against the applicant conducted in accordance with law and as per laid down procedure?

(b) Point No.2: If so, was the punishment given to the individual, i.e., “to be dismissed from service” proportional and commensurate with the gravity of offence?

(c) Point No.3: What remedy, if any, is the applicant entitled to?

7. Point No.1: We have examined the documents relating to the SCM of the applicant. These documents include the hearing of charges, summary of evidence and SCM proceedings. The Hearing of Charge under Army Rule 22 was conducted on 31.08.2006. On completion of the hearing, the Commanding Officer ordered that “*Summary evidence be reduced to in writing*”. We find no infirmity in the said procedure and the Record of Proceedings placed before us. We have also examined the Summary of Evidence as recorded by Lt Col R K Pandey and we find that the applicant and the independent witness, i.e., JC 3675035W Sub Maj LD Joshi were present throughout the recording of the evidence and the applicant, i.e, the accused was given liberty to cross examine all the prosecution witnesses. At the end of the recording of the evidence, the applicant was also given an opportunity to make his own statement which he duly recorded. We have also examined the charge sheet given to him under Army Act Section 39 (b), i.e., “*without sufficient cause overstaying leave granted to him*”, as also the proceedings of the Summary Court Martial that was conducted from 05.12.2006 to 18.12.2006. While the applicant’s absence from the unit and failure to rejoin from leave is well documented, the applicant in his defence once again reiterated that he was drugged at Bhopal Railway Station and allegedly taken by some terrorists to convert him to Islam and he was beaten up; he managed to escape from the terrorists and reported to MCO, Agra. He further claimed that his absence was due to circumstances beyond his control and, therefore, he should be pardoned.

8. From the proceedings, we find that the Summary Court Martial was done in accordance with the laid down procedures and the accused was given adequate opportunity to cross examine the witnesses and to make his own statement before the pronouncement of verdict by the Court. At the end of the proceedings, the Court pronounced its verdict, *"the accused is guilty as charged and he is sentenced to be dismissed from service"*

9. Points 2 and 3: We note from the proceedings of the Court Martial that at the time of SCM, prior to the sentencing, his general character has been "Exemplary". We also note from extracts of Conduct Sheet that he had incurred no punishments in Army as well as with the DSC and that this was the first offence that he had committed. From the investigation report of the Psychiatrist at the MH, Jhansi, we see that the applicant suffered no apparent loss of memory and was perhaps feigning. However, the Graded Specialist at CH, Lucknow noticed that the individual was suffering from anxiety and sleeplessness and his biodrives were reportedly reduced. From the above, we can deduce that the statement given by the applicant that he was kidnapped and that he had a loss of memory etc. does not appear to be true. However, we note that in his application for discharge from service dated 01.03.2005 the applicant stated that *".../ am in much stress and strain and am unable to perform my duties well in time. So, I request your kind honour to consider my case and grant permission to go on discharge from service on extreme compassionate ground."* Taken together with the opinion of the Graded Specialist at the Command Hospital that the applicant was suffering from

anxiety and some depression, we can deduce that the individual was in a disturbed state of mind for some time.

10. The Presiding Officer of the SCM, while apportioning the quantum of punishment should have taken into count the mitigating factors in favour of the accused, i.e., **(i)** exemplary general conduct, prior to the instant offence; **(ii)** 16 years of otherwise unblemished service with the Army and DSC; **(iii)** general disturbed state of mind of the accused at the time of offence; **(iv)** his application for discharge on compassionate grounds pending for more than 1½ years; and **(v)** that the applicant had already completed minimum pensionable service of 15 years. The Hon'ble Supreme Court in its judgment in the case of Ranjit Thakur vs Union of India and others reported in 1987 (4) SCC 611 made the following observations:

“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 Honourable Court allowed the appeal with the following observation:-

“The question, however, which arises for consideration is the relief which can be granted to the appellant. He has already undergone the sentence. He has not been working since 1991. He had also remained in Hospital for a long time. Although, thus, it is not possible for us to grant him all the prayers made in his writ petition before the High Court, we are of the opinion that

keeping in view the peculiar facts and circumstances of this case, interest of justice would be met if it is directed that he should be deemed to have been discharged from 7.9.1991. He would, thus, be entitled to all benefits arising therefrom.”

In light of the above judgment of the Hon'ble Supreme Court, and the mitigating factors listed above, the instant case is fit for the application of the dictum as laid down by the Hon'ble Apex Court. We are of the considered view that the punishment meted out to the applicant is excessive and fit for judicial review.

11. The fact on the ground is that the applicant has already been dismissed from service by Summary Court Martial under Section 71 (e) of the Army Act. The applicant was about 40 years of age at the time of his dismissal and since then out of service for approximately 8 years. Therefore, it would not be prudent to reinstate him. There is no doubt that discharge from service is lesser than dismissal from service since the discharge of service will not affect the prospect of the accused person towards his civil employment. But the result of discharge as well as dismissal from service is one and the same for the accused as in either case he cannot continue in service. In the extant case, the applicant had already completed 16 years of service and would otherwise be eligible for pension, but for this punishment of dismissal. Though discharge is not listed as a punishment in Army Act Section 71, in light of Hon'ble Supreme Court judgment (Supra) and in accordance with provisions of Section 15 (6) (b) and (e) of the Armed Forces Tribunal Act, 2007, this Tribunal has the power to remit the whole or any part of the sentence with or without condition if the sentence imposed is found excessive and to pass any other order as it may think appropriate. In our earlier discussion we have already concluded that the punishment awarded to the applicant is disproportionate to the offence committed. Therefore, it can be remitted to that of discharge from service.

12. In fine, the OA is partially allowed. The punishment of dismissal from service awarded to the applicant by the Summary Court Martial on 18.12.2006 is reduced to discharge from service. Accordingly, the applicant is entitled for grant of pension, gratuity and any other entitlements as applicable, if otherwise eligible. This order shall be complied with, within three months from the date of receipt of this Order. In default, an interest of 9% *per annum* is payable from that date. No order as to costs.

Sd/-

Lt Gen K Surendra Nath
Member (Administrative)

Sd/-

Justice V Periya Karupiah
Member (Judicial)

07.07.2014

[True copy]

Member (J) - Index : Yes / No

Internet : Yes / No

Member (A) - Index: Yes / No

Internet : Yes / No

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To

1. Additional Director General, Personnel Services
Adjutant Generals Branch
Integrated Headquarters
Ministry of Defence (ARMY)
New Delhi
2. The Officer in Charge Records
The Madras Regiment
Wellington, Nilgiris – 643 231
3. The Officer in Charge Records
Defence Security Corps records
PIN-901277, C/o 56 APO
4. The Principal Controller of Defence Account (Pension)
Droupahti Ghat, Allahabad, UP
5. The Commanding Officer
25 WEU, C/o 56 APO
6. Mr.M.Selvaraj
Counsel for the Applicant
7. Maj Suchithra Chellappan
JAG Officer for respondents
8. O I C, Legal Cell
ATNK & K Area, Chennai
9. The Library
AFT, RBC, Chennai

**Hon'ble Justice V.Periya Karupiah
(Member-Judicial)**

AND

**Hon'ble Lt.Gen.K.Surendra Nath
(Member -Administrative)**

O.A.No 166 of 2013

Dated: 07.07.2014