ARMED FORCES TRIBUNAL, REGIONAL BENCH, CHENNAI

O.A. (Appeal) No.61 of 2014

Thursday, the 29th day of January 2015

THE HONOURABLE JUSTICE V. PERIYA KARUPPIAH
(MEMBER - JUDICIAL)
AND
THE HONOURABLE LT GEN K. SURENDRA NATH
(MEMBER – ADMINISTRATIVE)

Rank Ex-Sep (Gnr),
Name-D.Ramana Naik
Service No.15219659-N
S/o Mr. S.Krishna Naik
aged about 24 years
Village-Nusikottala Thanda
Post-Manpreu, Taluk-Kalyanadurg
District-Anantapur (A.P) .
Pin-515 751. … Applicant

By Legal Practitioners:
M/s. M.K. Sikdar & S.Biju

vs.

1. Union of India, Through
The Secretary, Government of India
Ministry of Defence, New Delhi-110 011.

2. The Chief of the Army Staff
Integrated HQs of MOD (Army)
Post-DHO, New Delhi-110 011.

3. The Officer-in Charge
Artillery Records, Pin-908 802
C/o 56 APO.

4. The Commanding Officer
No.6, Field Regiment
Pin-925 706, C/o 99 APO. … Respondents

By Mr. N. Ramesh, CGSC

ORDER

(Order of the Tribunal made by
Hon'ble Justice V. Periya Karuppiah, Member (Judicial)

1. The applicant has filed this application to quash the impugned order dated 05.10.2012, viz., Summary Court Martial (SCM) proceedings and sentence of "Dismissal from Service" passed by the 4th respondent and direct the respondents to reinstate the applicant in service with effect from 05.10.2012 with seniority, back wages and all consequential monetary benefits along with interest.

2. The factual matrix of the case of the applicant would be as follows: The applicant enrolled in Indian Army as Sepoy (Gunner/Driver Mechanical Transport) on 22.09.2008 and he was performing his duties with full dedication. He had only one Red Ink Entry in his service records till 2012. The applicant submits that on 27.10.2011, he received a phone call from his home that his one year old son was seriously ill. The applicant was thereby compelled to leave the Unit without permission on the night of 28.10.2011, but on 29.10.2011, he informed his Unit and requested for the grant of leave on extreme compassionate grounds. Thereafter, he voluntarily reported to the 4th respondent on 31.12.2011. However, the applicant was tried by the SCM and was awarded a punishment of "Dismissal

from service" on 05.10.2012. The applicant submits that the punishment is disproportionate to the gravity of the offence. The applicant submits that while awarding the sentence, mitigating circumstances could have been considered. The applicant further submits that he has the liability of taking care of his family and now he is suffering from financial problem and he is always ready to continue in military service as he is young and physically and medically fit to serve Indian Army. The applicant has also cited judgments of various AFT Regional Benches, Hon'ble AFT Principal Bench, New Delhi and the Hon'ble Supreme Court of India. The applicant submits that it is the settled law that Section 15 of the AFT Act, 2007 which enunciates a judicial review of the administrative action will over-ride Section 164 of the Army Act, 1950 and this Tribunal has full jurisdiction to entertain an appeal under Section 15 of the Armed Forces Tribunal Act, 2007. Therefore, the applicant requests that this appeal may be allowed.

3. The respondents filed a counter affidavit which would be as follows: The applicant had already overstayed leave for 25 days from 29.03.2010 to 17.04.2010. Now, he absented himself without leave from 29.10.2011 to 31.12.2011 (Total period of absence 64 days). The respondents submit that though the presence of the applicant was essential at his home when his one year old son was seriously ill, but for reaching home, the applicant had shown an unsoldierly behaviour.

The respondents submit that while the applicant was in Delhi, the Battery Havildar Major Aji Kumar KV spoke to him and asked him to return to the Unit, but the applicant neither returned to the Unit nor did he speak with the authorities concerned in spite of aware of its consequences. The applicant was tried by Summary Court Martial on a charge under Section 39(a) of the Army Act, i.e., "Absenting himself without leave". At the trial, the applicant had pleaded "Guilty" to the charge and thereupon, he was sentenced to be dismissed from service on 05.10.2012. Though the message that the applicant's one year old son was seriously ill, applicant did not approach the authorities concerned through proper channel, but absented himself from the Unit by crossing the Unit fence illegally. Had the applicant requested the 4th respondent, he would have been granted leave on compassionate grounds. He was earlier punished for overstaying leave for 25 days without sufficient cause and awarded 21 days RI for the same. The applicant was showing utter disregard to integrity, loyalty and discipline by absenting himself without leave. The respondents submit that the retention of the applicant in service would be detrimental to the general discipline of the Army. During the Summary of Evidence, the applicant was permitted to cross-examine the prosecution witnesses, but the applicant declined. The applicant was declared a deserter with effect from 29.10.2011. As per the

procedures in vogue on the subject, 6 Field Regiment initiated Apprehension Roll and dispatched it to all concerned including the NoK of the applicant. Therefore, the statement that the applicant that he never received any letter from the 4th respondent is false and baseless. The applicant had been given adequate time for his defence and sufficient opportunity was accorded in the SCM proceedings. In order to set an example to all the ranks and to prevent recurrence of such cases of gross indiscipline, the 4th respondent awarded the applicant, the punishment of "dismissal from service". Therefore, the respondents pray that this appeal may be dismissed, being devoid of any merit.

4. On the above pleadings, the following points were found emerged for being considered in this appeal.

(1) Whether the SCM proceedings and the sentence of "dismissal from service" passed against the applicant dated 05.10.2012 are liable to the quashed?

(2) If so, whether the applicant be re-instated in service with effect from 05.10.2012 with seniority and back wages and with all other consequential monetary benefits?

(3) To what relief, the applicant is entitled for?

5. We heard Mr. M.K. Sikdar, learned counsel for the applicant and Mr. N.Ramesh, learned CGSC assisted by Major Suchithra Chellappan, learned JAG Officer appearing for respondents. We have perused the

records produced on either side containing the Summary Court Martial proceedings. We have given our anxious thoughts to the arguments advanced on either side.

6. **Point Nos. 1 and 2**: The present appeal is filed by the applicant challenging the verdict of the Summary Court Martial dated, 05.10.2012 rendered against the applicant on the charge of absenting himself without leave from the Unit lines on 29.10.2011 till he rejoined voluntarily on 31.12.2011 framed under Section 39(a) of Army Act 1950. The facts regarding the enrolment of the applicant as Sepoy on 22.09.2008 and that he was posted and served in Artillery Centre, Nasik Road Camp under the 4th respondent and lastly at Hisar, Haryana, are indisputable. A Summary Court Martial was convened against the applicant for trying the offence under Section 39(a) of the Army Act, for he had without leave absented himself from the Unit lines on 29.10.2011. The said factum of absenting himself from the Unit lines, was not disputed by the applicant. It is also an undisputed fact that he rejoined the Unit on 31.12.2011 at 2000 Hrs. The reasons put forth by the applicant for his absence without leave is that he received a phone call from his home that his one year old son was seriously ill and on hearing the said news, the applicant became imbalanced and since he had already exhausted his leave, he thought that he would not be given any leave and therefore, he moved to his

native place in order to save his son and on that emotional thought he left the Unit. It is also admitted by him that while he reached Delhi Railway Station for boarding the train, Battery Havildar Major of the Unit, viz., Aji Kumar KV spoke to him over phone and asked him to return to the Unit assuring him that he would be granted leave on compassionate grounds. But the applicant thought that two days would lapse if he return to the Unit and proceed to his native place and in the meantime, his son's sickness would deteriorate further and therefore, he had not followed the instructions of the then Battery Havildar Major Aji Kumar KV and proceeded to his native place. However, it is submitted by the learned counsel for the applicant that the applicant had reached his native place and because of his presence, he could arrange for a good doctor to save the life of his son and on seeing that his son was out of danger, he had immediately returned to the Unit and rejoined the Unit. He had absented himself for 64 days only, and therefore, his case should have been considered sympathetically. He would also submit that the applicant had also admitted his guilt in the course of Summary Court Martial expecting some leniency in punishment but he was punished with the dismissal from service which is disproportionate to the mistake committed by the applicant. He would further submit that the Summary Court Martial was hurriedly convened and the verdict pronounced by the

Presiding Officer was not in consonance with the gravity of the offence where admission given by the applicant owning commission of offence. In such cases where the guilt is admitted by the applicant to the charge, liberal sentence be imposed. He would also submit that the applicant's character was certified to be very good and he was having only one previous punishment for overstayal of leave to which he was sentenced to 21 days R.I. The applicant had also undertaken not to repeat this offence, yet it was not considered by the Summary Court Martial but he was imposed with sentence of dismissal from service which is shockingly a disproportionate one. He would therefore request this Tribunal to set aside the SCM proceedings and to relieve the applicant from the charge or to reduce the punishment of dismissal from service into that of any simple punishment and consequently direct the respondents to re-instate the applicant into service.

7. The learned CGSC would submit in his argument that the applicant was given the punishment of dismissal from service on 05.10.2012 despite he pleaded guilty to the charge since his loyalty towards service being unsatisfactory and his retention in service would be detrimental to the general discipline in the regiment. He would further submit that the Summary Court Martial was convened properly, in accordance with the rules and regulations and the applicant was given an opportunity to cross-examine the prosecution witnesses to

which he declined to do so and he was given due caution as per Army Rule 23 before he pleaded guilty. He would also submit that the applicant had previously overstayed leave for 25 days and within his three (3) years of service, he had committed the present offence despite the fact that the leave policy in the unit is very liberal. He would also submit that the way in which the applicant absented himself without leave would show his utter disregard to the chain of command and discipline in the Army and therefore, the dismissal of service was imposed as punishment which is proportionate to the gravity of the offence committed by the applicant. He would therefore request that the appeal be dismissed.

8. We have carefully perused the proceedings of the Summary Court Martial conducted on the charge of absenting without leave for the relevant period against the applicant on 05.10.2012. The documents produced in respect of the Summary Court Martial would show that the convening of the Summary Court Martial and the proceedings conducted do not disclose anything repugnant to the rules and regulations governing the conduct of SCM. The respondents have also furnished the reasons for the award of sentence of dismissal by the Presiding Officer in the form of a separate typed set. In the Memorandum in terms of Army Order in AO 307/80, the reasons are given by the Presiding Officer. According to the reasons, the general

discipline in the regiment would be put to detriment, if the applicant is retained in service. It is also opined that the individual is a habitual offender as he had been punished earlier for overstayal of leave in the year 2010. When we consider the reasons given towards the punishment of dismissal, we could understand that the applicant was considered as a habitual offender. The Presiding Officer was convinced that the applicant was a habitual offender, even though he was punished for only one previous commission of offence. For treating a person as a habitual offender, he should have already committed at least two or three similar offences and the present offence should be either third or fourth. The commission of offence for the second time would not make any individual much less the applicant as a habitual offender. It is true that the applicant was punished by awarding a sentence of 21 days R.I on an earlier occasion as seen in the proceedings, before the present sentence was awarded by the Summary Court Martial. We also find that the general character of the applicant has been "very good" irrespective of the said trial. We also find that the applicant returned to the Unit on his volition after the lapse of 64 days and he was permitted to join in service. The reasons for absenting himself from the Unit on emotional situations were not controverted by the respondents. However, we do not find any procedural mistake committed by the respondents in convening the

Summary Court Martial and the proceedings conducted are found well within the rules.

9. As regards the sentence passed by the Court, we have already seen that the terming the applicant a habitual offender is not correct. The said reference as to habitual offender, would make us to think and believe that there was some perversity against the applicant in passing an order of dismissal from service towards sentence. In a judgment of the Hon'ble Apex Court reported in **(1991) 3 SCC 213** in the case of **Ex-Naik Sardar Singh** vs. **UOI & Ors.,** judicial review against the punishment awarded by Court Martials has been dealt with. It reads thus:

> **"** *5. In Council of Civil Service Unions v. Minister for the Civil Service, Lord Diplock said: (All ER P.950),*
>
> *"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'Illegality' , the second 'irrationality' and the third 'procedural impropriety'. This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community;…."*

This principle was followed in Ranjit Thakur v. Union of India where this Court considered the question of doctrine of proportionality in the matter of awarding punishment under the Army Act and it was observed thus: (SCC p.620, para 25)

"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 if 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. "

In Bhagat Ram v. State of H.P., this Court held as under: (SCC p. 453, para 15),

" 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 Article 14 of the Constitution. "

Applying these principles to the instant case, we are also constrained to say that there is an element of arbitrariness in awarding these severe punishments to the appellant. **"**

In the said judgment, the Hon'ble Apex Court had found that the perversity can be a recognized ground for judicial review of a sentence if it is disproportionate to the offence. Similarly, the judgment of a

Hon'ble Apex Court in **(2011) 13 Supreme Court Cases 553** in between **Union of India and Others** and **Bodupalli Gopalaswami,** would also guide us to come to conclusion. The relevant passage is at para 47 which reads as follows:

> *"47. In the circumstances, the punishment of dismissal from service is shockingly disproportionate to the gravity of the offences held to be proved. While we may not interfere with the findings of guilt, in a case of this nature, having regard to the nature of offences, we may consider the proportionality of punishment to find out whether it is perverse and irrational. Even accepting the said findings of guilt regarding Charges 1, 4 and 5 (c), it is clearly a case of shockingly disproportionate punishment being meted out to the Commandant for offering an alternative interpretation to Para 86, for the lapses of his supervisory officer and for the breach committed by the contractor. "*

In this judgment, the Hon'ble Apex court had considered the previous judgment of the Hon'ble Apex Court reported in **(1991) 3 SCC 213** and had laid down that the punishment imposed should be shockingly disproportionate to the charges framed against the accused and there should be an irrationality or perversity in passing the sentence to in order to interfere the same.

10. Applying the principles laid down by the Hon'ble Apex Court when we approach the present case, we find that the applicant pleaded guilty and requested for lenient punishment. The admitted case would be that he left the Unit from Hisar, Haryana to his native

place without obtaining leave or informing the Unit and when he was intervened at Delhi Railway Station, he did not change his mind to return to the Unit and proceeded to attend his son. The illness of the son and seriousness of the disease as spoken to by the applicant are not disputed and the only thing that was insisted by the respondents is that the applicant had been unbecoming of a soldier and he was not a dedicated person. The answer was that the applicant was emotionally imbalanced and only on his arrival at his native place, he could save his son and he immediately returned to the Unit on 31.12.2011. The circumstances as told by the applicant would show that his dedication towards the Unit has not disappeared and he also owned up his mistake and also submitted himself for being found guilty to the charge and asked for leniency. He had also pleaded that he would not commit such offence in future. There was one similar offence committed by him which is overstayal of leave. It is also not disputed that the applicant has exhausted his leave for that year. Nevertheless, he would ordinarily have been given advance of next year's leave, considering the compassionate circumstances. Even though, it is an undisputed fact that he had committed a serious breach of discipline in absenting himself without leave, the Presiding Officer ought to have applied his mind in weighing the mitigating circumstances objectively while awarding punishment. The dismissal

from service is grossly excessive with regard to the offence committed by the applicant. The Presiding Officer has come to the conclusion that the applicant be awarded punishment of dismissal from service on the ground that the applicant was a habitual offender. Admittedly, the present offence was committed on the second occasion and this would not make the applicant a habitual offender. We therefore find that the action of the Presiding Officer in awarding the said sentence was perverse, unreasonable and unduly harsh and the sentence imposed against the applicant is disproportionate to the offence committed. The applicant is a young Army jawan, and considering the nature of offence a summary trial and punishment under Army Act Section 80 would have been adequate. Instead, the Commanding Officer chose to try the applicant by a Summary Court Martial and awarded him the punishment of dismissal from service, which as we have seen is disproportionate to the offence committed. In view of the foregoing, we are inclined to agree with the counsel for the applicant that the punishment awarded is excessive and liable for judicial review and correction.

11. We are satisfied that an interference is required in awarding the punishment by the Summary Court Martial against the applicant. Accordingly, we set aside the punishment of dismissal from service against the applicant and substitute it with the award of Six (6) weeks

R.I. under Section 71(c) of the Army Act. Any detention suffered by the applicant at the time of Summary Court Martial shall be set off to the present punishment and that should not be considered as a disqualification for being re-instated into service.

12. The applicant has asked for re-instatement with back wages, seniority in rank and such other benefits. Since the offence was committed by him under peculiar circumstances, lesser punishment has to be imposed in this appeal, however, we feel that the entire guilt of the accused cannot be absolved. Therefore, we are of considered view that the applicant is not entitled for back wages and other benefits during his period of absence except the relief of re-instatement. Accordingly, the period of said absence from the date of dismissal to the date of rejoining, on the basis of this order will be treated as non-qualifying service. Both the points are decided accordingly.

13. **Point No.3:** We have come to the conclusion of setting aside the punishment of dismissal from service passed against the applicant in the Summary Court Martial while upholding the validity of the verdict of the Summary Court Martial. Consequently, the punishment of dismissal from service is modified into R.I for six weeks. Therefore, the applicant is directed to surrender before the respondents within a period of six weeks from today along with the

copy of this order and on such surrender of the applicant, the respondents are directed to admit the applicant into the rolls of designated Unit of the Army and to put the applicant towards serving of sentence of six (6) weeks R.I after setting off the period of any detention in respect of this case. We make it clear that the applicant will be entitled to pay and allowances from the date of his rejoining only and back wages, pay and allowances and other benefits asked for by him during the period of his absence are not ordered.

14. In fine, with the aforesaid directions and observations, the appeal is partly allowed. No order as to costs.

Sd/	Sd/
LT GEN K. SURENDRA NATH	JUSTICE V.PERIYA KARUPPIAH
MEMBER (ADMINISTRATIVE)	MEMBER (JUDICIAL)

29.01.2015
(True copy)

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

To:

1. The Secretary, Government of India
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2. The Chief of the Army Staff
Integrated HQs of MOD (Army)
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5. M/s. M.K. Sikdar & S.Biju
Counsel for applicant.

6. Mr. N. Ramesh
For respondents.

7. OIC, Legal Cell, ATNK & K Area, Chennai.

8. Library, AFT, Chennai.

HON'BLE MR.JUSTICE V. PERIYA KARUPPIAH
MEMBER (JUDICIAL)
AND
HON'BLE LT GEN K. SURENDRA NATH
MEMBER (ADMINISTRATIVE)

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