Ranjit Thakur

Vs

Union of India and Others

Civil Appeal No. 2630 of 1987

(A. P. Sen, M. N. Venkatachaliah JJ)

15.10.1987

JUDGMENT

VENKATACHALIAH, J. –

1. This appeal, by special leave, preferred against the order dated July 3, 1986, of the Division Bench of the Patna High Court in C.W.J.C. No. 2823 of 1986 raises a substantial question as to the scope and content of the procedural safeguards in Section 130 of the Indian Army Act, 1950 ('Act') in the conduct of the courts-martial.

2. The High Court dismissed, in limine, the appellant's writ petition, under Article 226, challenging the proceedings dated March 30, 1985, of the summary court-martial imposing the punishment of dismissal from service and a sentence of an year's rigorous imprisonment on the appellant.

3. Appellant, Ranjit Thakur, joined the Armed Services on September 7, 1972, and was, at the relevant time, a Signalman in "4 Corps Operating Signal Regiment". Apparently, appellant had not commended himself well to respondent 4, who was the commanding officer of the regiment. On March 29, 1985, appellant was already serving out a sentence of 28 days' rigorous imprisonment imposed on him for violating the norms for presenting representations to higher officers. Appellant is stated to have sent representation complaining ill-treatment at the hands of respondent 4 directly to the higher officers. Appellant was punished for that by respondent 4. Appellant was held in the Quarter-guard Cell in handcuffs to serve that sentence of rigorous imprisonment.

4. While so serving the sentence appellant is stated to have committed another offence on March 29, 1985, for which the punishment now impugned was handed down by respondent 4. The nature of this offence had better be excerpted from the charge-sheet itself :

Accused 1429055-M Signalman Ranjit Thakur of 4 Corps Operating Signal Regiment is charged with -

> #Army Act Disobeying a lawful command given by his superiorSection officer41(2)
> In that he at 15.30 hrs. on May 29, 1985 when ordered by JC 106251-P Sub Ram Singh, the Orderly Officer of the same Regiment to cat his food, did not do so.##

To try this offence a summary court-martial was assembled the very next day i.e. March 30, 1985. Respondent 4 and two others were on the court-martial. Some witnesses were examined. Appellant is stated to have pleaded guilty. A sentence of rigorous imprisonment for one year was imposed, in pursuance of which appellant was removed immediately to the civil prison at Tejpur to serve out the

sentence. Appellant has served out the sentence. He was also dismissed from service, with the added disqualification of being declared unfit for any future civil employment. The representation of the appellant to the confirming authority under Section 164 of the Act was rejected by General Officer Commanding on May 24, 1985.

5. The High Court, however, persuaded itself to dismiss, in limine, appellant's writ petition challenging the proceedings of the summary court-martial.

6. We have heard learned counsel on both sides. The matter was adjourned on two earlier occasions on the submission of the learned Additional Solicitor General, that the question whether a lesser punishment was warranted was engaging the attention of the appropriate authorities. Apparently, nothing came out of it.

7. The submission of Shri Sinha, in support of the appeal, admit of being formulated thus :

> (a)(i) The proceedings of the court-martial are vitiated by non-compliance with the mandate of Section 130(1) of the Act in that the summary court-martial did not afford to the appellant an opportunity to challenge its constitution as required by that section;
>
> (ii) The proceedings of the court-martial were vitiated by bias on the part of respondent 4 who participated in and dominated the proceedings;
>
> (b) Inasmuch as the appellant was then serving a sentence or rigorous imprisonment, he was not in "active service" and that no question of disobeying any lawful command could at all arise;
>
> (c) Appellant's refusal, while serving a sentence to accept food did not amount to disobedience, under Section 41, of any lawful command of a superior officer in such manner as to show a wilful defiance of authority;
>
> (d) At all events, the punishment handed down is so disproportionate to the offence as to amount, in itself to conclusive evidence of bias and vindictiveness.

Re contention (a) :

8. The records of the proceedings of the special summary court-martial do not indicate that the procedural safeguard against bias contained in Section 130 of the Act was complied with. Section 130 provides :

> 130(1) At all trials by general district or summary general court-martial, as soon as the court is assembled, the names of the presiding officer and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court.
>
> (2) If the accused objects to any such officer, his objection, and also the reply thereto of the officer objected to, shall be heard and recorded, and the remaining officers of the court shall, in the absence of the challenged officer, decide on the objection.

9. The proceedings do not indicate - this was not disputed at the hearing - that appellant was asked

whether he objects to be tried by any officer, sitting at the court-martial. This, in our opinion, imparts a basic infirmity to the proceedings and militates against and detracts from the concept of a fair trial.

10. The "Act" constitutes a special law in force conferring a special jurisdiction on the court-martial prescribing a special procedure for the trial of the offences under the 'Act'. Chapter VI of the 'Act' comprising of Sections 34 to 68 specifies and defines the various offences under the 'Act'. Sections 71 to 89 of Chapter VII specify the various punishments. Rules 106 to 133 of the Army Rules, 1954 prescribe the procedure of, and before, the summary court-martial. The Act and the Rules constitute a self-contained code, specifying offences and the procedure for detention, custody and trial of the offenders by the courts-martial.

11. The procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary jurisdiction of the court-martial and the severity of the consequences that visit the person subject to that jurisdiction. The procedural safeguards should be commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the statute. The oft-quoted words of Frankfurter, J. in Vitarelli v. Seaton (359 US 535, 546-47 : 3 L ed 2d 1012, 1021) are again worth recalling :

> .... if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. ... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

12. "The history of liberty" said the same learned judge "has largely been the history of observance of procedural safeguards" (McNobb v. US, 318 US 332, 347 : 87 L ed 819, 827).

13. We are afraid, the non-compliance of the mandate of Section 130 is an infirmity which goes to the root of the jurisdiction and without more, vitiates the proceedings. Indeed it has been so held by this Court in Prithi Pal Singh v. Union of India (AIR 1982 SC 1413 : (1982) 3 SCC 140 : 1982 SCC (Cri) 642) where Desai, J. referring to the purpose of Section 130 observed: [SCC pp. 167-68, SCC (Cri) p. 667, para 32]

Whenever an objection is taken it has to be recorded. In order to ensure that anyone objected to does not participate in disposing of the objection. ... This is a mandatory requirement because the officer objected to cannot participate in the decision disposing of the objection. ... The provision conferring a right on the accused to object to a member of the court-martial sitting as a member and participating in the trial ensures that a charge of bias can be made and investigated against individual members composing the court-martial. This is pre-eminently rational provision which goes a long way to ensure a fair trial.

14. What emerges, therefore, is that in the present case there is a non-compliance with the mandate of Section 130 with the attendant consequence that the proceedings of the summary court-martial are rendered infirm in law. This disposes of the first limb of the contention (a).

15. The second limb of the contention is as to the effect of the alleged bias on the part of respondent 4. The test of real likelihood of bias is whether reasonable person, in possession of relevant

information, would have thought that bias was likely and is whether respondent 4 was likely to be disposed to decide the matter only in a particular way.

16. 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". (See Vassiliades v. Vassiliades (AIR 1945 PC 38 : 221 IC 603)).

17. 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.

18. Lord Esher in Allinson v. General Council of Medical Education and Registration ((1894) 1 QB 750, 758-59) said :

> The question is not, whether in fact he was or was not biased. The court cannot inquire into that. ... In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased.

19. In Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon ((1969) 1 QB 577, 599), Lord Denning M.R. observed :

> .... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would thinks that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.

20. Frankfurter, J. in Public Utilities Commission of the District of Columbia v. Pollak (343 US 451, 466-67 : 96 L ed 1068, 1079) said :

> The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or

> may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment.

21. Referring to the proper test, Ackner, L.J. in Regina v. Liverpool City Justices, ex parte Topping ((1983) 1 WLR 119 : (1983) 1 ALL ER 490, 494) said :

> Assuming, therefore, that the magistrates had applied the test advised by Mr Pearson : 'Do I feel prejudiced ?' then they would have applied the wrong test, exercised their discretion on the wrong principle and the same result, namely the quashing of the conviction, would follow.

22. Thus tested the conclusion becomes inescapable that, having regard to the antecedent events, the participation of respondent 4 in the courts-martial rendered the proceedings coram non-judice.

Re contention (b) :

23. The mere circumstance that the appellant was, at the relevant point of time, serving a sentence of imprisonment and could not therefore, be said to be in 'active service' does not detract from the fact that he was still "a person subject to this Act". This is clear from the second clause of Section 41(2) which refers to offences committed when not in 'active service'. The difference is in the lesser punishment contemplated. We are, therefore, unable to appreciate the appositeness of this contention of Shri Sinha.

Re contention (c) :

24. The submission that a disregard of an order to eat food does not by itself amount to a disobedience to a lawful command for purposes of Section 41 has to be examined in the context of the imperatives of the high and rigorous discipline to be maintained in the Armed Forces. Every aspect of life of a solider is regulated by discipline. Rejection of food might, under circumstances, amount to an indirect expression of remonstrance and resentment against the higher authority. To say that a mere refusal to eat food is an innocent, neutral act might be an over-simplification of the matter. Mere indication need not always necessarily be neutral. Serious acts of calumny could be done in silence. A disregard of a direction to accept food might assume the complexion of disrespect to, and even defiance of authority. But an unduly harsh and cruel reaction to the expression of the injured feelings may be counter-productive and even by itself be subversive of discipline. Appellant was perhaps expressing his anguish at, what he considered, an unjust and disproportionate punishment for airing his grievances before his superior officers. However, it is not necessary in this case to decide contention (c) in view of our finding on the other contentions.

Re contention (d) :

25. 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 recognised grounds of judicial review. In Council of Civil

Service Unions v. Minister for the Civil Service ((1984) 3 WLR 1174 (HL) : (1984) 3 All ER 935, 950) Lord Diplock said :

> 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'. That 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 recognised in the administrative law of several of our fellow members of the European Economic Community;. ...

26. In Bhagat Ram v. State of Himachal Pradesh (AIR 1983 SC 454 : (1983) 2 SCC 442 : 1983 SCC (L&S) 342) this Court held : [SCC p. 453, SCC (L&S) P. 353, 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.

The point to note, and emphasis is that all powers have legal limits.

27. In the present case the punishment is so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review.

28. In the result, for the forgoing reasons, the appeal is allowed, the order of the High Court is set aside, the writ petition preferred in the High Court allowed and the impugned proceedings of the summary court-martial dated March 30, 1985, and the consequent order and sentence are quashed. The appellant is entitled to and shall be reinstated with all monetary and service benefits. There will, however, be no order as to costs.

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