

Ex. Naik Sardar Singh

Vs

Union of India and others

Criminal Appeal No. 67 of 1991

(S. R. Pandian, K. Jayachandra reddy JJ)

03.05.1991

JUDGEMENT

K.JAYACHANDRA REDDY, J.:-

1. This appeal, pursuant to the special leave granted, is directed against the order of the High Court of Delhi dismissing the writ petition filed by the appellant summarily.
2. The appellant was serving as a Jawan in the Indian Army. On 17th September, 1985, he applied for leave and it was granted. He was going to his home town, a village in Rajasthan. He purchased 11 bottles of scaled rum and one bottle of brandy from his Unit Canteen as he required the same to celebrate the marriage of one of his close relations at his home town. Admittedly, the appellant was entitled to carry 4 bottles of rum and one bottle of brandy as per the Unit Regulations/ leave certificate when he was proceeding on leave. According to the appellant, the remaining 7 bottles of rum he was able to purchase from the Unit Canteen over and above his entitlement on the orders of its Company Commander and Commanding Officer on compassionate grounds and that there was written order to that effect which was retained by the Salesman of the Unit Canteen at the time of delivery of the extra 7 bottles of rum. Enroute to his home town he had to pass through Surendra Nagar which was under prohibition. The local Civil Police at Surendra Nagar intercepted him and confiscated the bottles of liquor and handed over the appellant along with the liquor bottles to the City Police Station, Surendra Nagar. The City Police in turn handed over him to his Unit authorities for action. The 6th respondent, the Officer Commanding, 98 Field Regiment, ordered a summary court-martial during which the witnesses including the Civil Police Officer of Surendra Nagar were examined. Ultimately the summary court-martial sentenced the appellant to three months' R.I. and dismissed him from service with effect from 9th October, 1985 by which time the appellant had already put in 10 years of service. His plea throughout has been he had purchased the liquor for the marriage of his brother-in-law on the basis of the permit issued to him and the chits issued by his superiors enabling him to draw the extra 7 bottles of rum and that he had no other bad intention in carrying the liquor bottles. He preferred an appeal to the Army Commander mentioning several irregularities in the summary trial. He also pleaded that he was having unblemished record of service in the Army, but his appeal was rejected. Thereafter he filed a writ petition in the Delhi High Court which was summarily rejected.
3. In this appeal the learned counsel for the appellant submitted that several irregularities have been committed in conducting the summary trial. But from the records we find that the evidence has been duly recorded and further it is an admitted fact that the appellant was carrying extra 7 bottles of rum without the necessary permit. Therefore we are unable to agree with the counsel that the trial is vitiated and we are of the view that no prejudice has been caused. The main submission and perhaps

the only submission, if we may say so, in this appeal is that the sentence awarded to the appellant is wholly disproportionate to the offence committed by him. According to the learned counsel the extreme punishment of imprisonment for 3 months and dismissal from the service under the circumstances is uncalled for.

4. We find considerable force in this submission. Admittedly, the appellant was granted leave when he was proceeding to his home town and unfortunately enroute to his home town he had to pass through Surendra Nagar where there was prohibition in force. However, he had a valid permit to carry 5 bottles, the extra 7 bottles of rum, according to the appellant, were purchased from the Army Canteen itself and there is no dispute about the same. Unless he had some permits or chits given by some higher authorities permitting him to purchase these bottles, he could not have purchased the same from the Canteen over and above the bottles for which he had a valid permit. He was taking this liquor to his home town to celebrate his brother-in-law's marriage, but to his bad luck, the Civil Police of Surendra Nagar checked his baggage and confiscated the bottles as he had no valid permit to carry the extra bottles. Under these circumstances the question is whether such a severe penalty is called for. In the chargesheet it is merely stated that the action of the appellant in carrying 11 bottles of sealed rum and one bottle of sealed brandy when he was proceeding to his home town is "contrary to the existing orders on the subject". In the counter-affidavit it is stated that such an act of the appellant comes within the meaning of S. 63 of Chapter VI of the Army Act, 1950 ('Act' for short) which enumerates various types of offences.

Section 63 lays down as under:

"63. Violation of good order and discipline. - Any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and military discipline shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned."

This Section may cover various types of misconduct committed by a person by way of an act or omission. This Section also provides for awarding any other lesser punishment mentioned in the Act. Therefore much depends on the nature of the act or omission of which the person is found guilty. The provisions in Chapter VII enumerate various punishments that can be awarded. Section 71 of the Act deals with punishments awardable by court-martial and reads as under:

"71. Punishments awardable by court-martial- Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by court-martial, according to the scale following, that is to say,-

- (a) death;
- (b) transportation for life or for any period not less than seven years;
- (c) imprisonment, either rigorous or simple, for any period not exceeding fourteen years;
- (d) cashiering, in case of officers;
- (e) dismissal from the service;

(f) reduction to the ranks or to a lower rank or grade or place in the list of their rank, in the case of warrant officers; and reduction to the ranks or to a lower rank or grade, in the case of noncommissioned officers;

Provided that a warrant officer reduced to the ranks shall not be required to serve in the ranks as a sepoy;

(g) forfeiture of seniority of rank, in the case of officers, junior commissioned officers, warrant officers and non-commissioned officers, and forfeiture of all or any part of their service for the purpose of promotion, in the case of any of them whose promotion depends upon length of service;

(h) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;

(i) severe reprimand or reprimand, in the case of officers, junior commissioned officers, warrant officers and non-commissioned officers',

(j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active service;

(k) forfeiture in the case of a person sentenced to cashiering or dismissal from the service of all arrears of pay and allowances, and other public money due to him at the time of such cashiering or dismissal;

(l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence of which he is convicted is made good."

It can be seen that Ss. 71(a) to 71(e) and S. 71 (e) provide for extreme punishments and are severe in nature. Sections 71 (f) to 71 (j) and Section 71 (1) provide for comparatively lesser punishments. Section 72 of the Act is the next relevant Section which reads as under:

"72. Alternative punishments awardable by court-martial - Subject to the provisions of this Act, a court-martial may, on convicting a person subject to this Act of any of the offences specified in Sections 34 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to be punishable ' or, in lieu thereof, any one of the punishments lower in the scale set out in Section 71, regard being had to the nature and degree of the offence." (Emphasis supplied)

Section 73 of the Act deals with combination of punishments and it reads as under:

"73. Combination of punishments -A sentence of a court-martial may award in addition to, or without any one or more of the punishments specied in clause (d) or clause (e) of Section 71 and any one or more of the punishments specified in clauses (f) to (1) of that section."

It can be seen that under S. 73 of the Act, the court-martial may award more than one punishments as mentioned therein. In the instant case S. 63 also is not mentioned in the chargesheet. Assuming that the offence committed by the appellant is covered by the residuary S. 63 but in awarding the punishment the court-martial has to keep in view the spirit behind S. 72 of the Act and it has to give

due regard to the nature and degree of the offence. It can be seen that S. 63 provides for awarding any of the lesser punishments enumerated in S. 71 of the Act. In view of these provisions of law and having regard to the nature and degree of the offence, we are firmly of the view that the punishments awarded to the appellant namely, three months' R.I. and dismissal from service are severe and are also violative of S. 72.

5. In *Council of Civil Service Unions v. Minister for the Civil Service*, (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! 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 recognised 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*, (1987) 4 SCC 611 : (AIR 1987 SC 2386) 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 (at p. 2392 of AIR):

"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 *Bhagat Ram v. State of Himachal Pradesh* (1983) 2 SCC 442: (AIR 1983 SC 454) this Court held as under (at p. 460 of AIR):

"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.

6. We have heard both the learned counsel on this aspect elaborately and we are satisfied that an interference is called for and the matter has to be remanded on the question of awarding any of the lesser punishments. Having given our earnest consideration to the facts and circumstances of this case and in view of the submissions made by both the counsel, we feel that ends of justice will sufficiently be met if a lesser punishment as provided under Section 71(f) is awarded to the

appellant. Accordingly, we set aside the punishments of three months' R.I. and dismissal from service and remand the matter to the court-martial which shall award any of the lesser punishments having due regard to the nature and circumstances of the case and in the light of the above observations made by us. Since we are setting aside the sentence of three months' R.I any detention suffered by the appellant after the orders of the courtmartial shall not be treated as a disqualification for being reinstated into service which shall, however, be subject to any of the minor punishments to be awarded by the court-martial. Already much time has lapsed, therefore, we hope the court-martial would dispose of the matter as expeditiously as possible preferably within three months. The appeal is thus disposed of subject to the above directions.

Order accordingly.

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