

Ex-Havildar Ratan Singh

Vs

Union of India and others

Criminal Appeal No. 710 of 1991

(L. M. Sharma, J. S. Verma, S. Agarwal JJ)

19.11.1991

JUDGEMENT

SHARMA, J.:-

1. Special leave is granted.

2. The appellant, Havildar Ratan Singh was tried and convicted by Summary Court Martial. He was reduced in rank and sentenced to suffer rigorous imprisonment for one year. He filed an application under Article 226 of the Constitution of India before the Delhi High Court, which was dismissed by the impugned judgment.

3. Although a number of questions were raised in the writ petition and the special leave petition, the ground urged by the learned counsel for the appellant before us is confined to one point. It has been contended that having regard to the nature of the charge against the appellant, the provisions of Section 34 of the Army Act, 1950 (hereinafter referred to as the Act) are attracted, and in view of Section 120(2) of the Act, trial by summary not permitted. The learned counsel has placed the relevant provisions of the Act indicating that the appellant would have been entitled to a qualitatively better right of defence before a court martial other than a summary court martial, which was denied to him on a wrong assumption that the case was covered by Section 36, and not by Section 34. The question, which arises in this case, is whether the Summary Court Martial had jurisdiction to try the appellant in the facts as alleged in the present case.

4. The charge sheet states that when fired upon by a group of terrorist-militants during an armed operation against them, the appellant quitted his place without orders from his superior officer. Section 120 of the Act states that subject to the provisions of sub-section (2) of the section a summary court martial may try any offence punishable under the Act, sub-section (2) reads as follows:-

"(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."

The position, thus, is that if the offence is covered by Section 34 and immediate action for the specified reasons is not warranted, the summary court martial shall not have jurisdiction to hold the

trial.

5. Section 34 states that any person subject to the Act, who commits any of the offences enumerated thereunder, shall on conviction by court martial, be liable to suffer death or such less punishment as prescribed. The offences are detailed in 12 clauses and clauses (a) and (h) appear to be relevant in the present context. They are quoted below.-

"(a) shamefully abandons or delivers up any garrison, fortress, post, place or guard, committed to his charge, or which it is his duty to defend or uses any means to compel or induce any commanding officer or other person to commit by or the said acts; or

.....  
(h) in time of action leave his commanding officer or his post, guard, picquet, patrol or party without being regularly, relieved or without leave, or....."

6. The evidence in the case, included in the paper book prepared by the appellant indicates that the appellant while engaged in an armed action against a group of militants is alleged to have run away when the militants opened fire and he, thus, in a cowardly manner left his post without permission of his superior officer. The allegations included in the charge sheet on the basis of which the appellant was tried are to the same effect. The appellant is, therefore, right in his stand that if the prosecution case be assumed to be correct (which he denies ) he was guilty of a more serious offence under clauses(a) and (h) of S. 34 of the Act than under Section 36 in reply it is contended on behalf of the respondents that the case is covered by Section 36, and, therefore, the summary Court Martial was fully authorised to try the appellant under Section 120(1).

7. There is no dispute that the appellant is governed by the provisions of the Act. It is also not suggested on behalf of the respondents that there was in existence any grave reason for immediate action so as to justify trial by an officer holding summary court martial. The Operation in which the appellant was engaged was directed against the militants who were undisputedly included in the expression 'enemy' within Section 3(x). officer. The impugned order is attempted to be justified solely on the ground that Section 36 covers the case. The argument overlooks the position that it is not the scope of Section 36 which can answer the question raised in the present case. The issue is whether the offence is punishable under Section 34 or not. Section 36 covers a wide range of offences and the scope of Section 34 is limited to a smaller area where the offence is more serious attracting more severe punishments. If the allegations are assumed to be true, then the appellant, on the militants' opening fire, shamefully abandoned the place committed to his charge and which he was under a duty to defend . Both clauses (a) and (h) are, therefore, clearly attracted. The impugned trial by Summary Court Martial and the decision thereby must be held to be without jurisdiction and have to be quashed.

8. We do not find any merit in the other points mentioned in the writ petition or in the special leave petition. They are finally rejected.

9. During the course of the hearing we drew the pointed attention of the learned counsel for the appellant that if he succeeded on the basis that the Summary Court Martial was without jurisdiction, he (the appellant) may have to be retried and awarded a more severe punishment. The learned counsel, however, decided to press the point even at the risk of a second trial of the appellant. The

learned counsel for the respondents stated that a fresh proceeding may now be barred the impugned judgment of the High Court as also the conviction and sentence passed against the appellant by the Summary Court Martial, but allow the respondents authorities to proceed to hold a fresh trial of the appellant in accordance with law. by the law of Limitation, and in view of the fact that the appellant is guilty of a very serious charge, this court should decline to exercise its power under Article 136. In reply the learned counsel for the appellant pointed out that the period of limitation for commencing a fresh proceeding against the appellant shall not expire before 5-2-92 and the apprehension expressed on behalf of the respondent that the appellant, even if guilty, may escape a trial is misconceived. We hold that the appellant is correct. Accordingly we set aside the impugned judgment of the High Court as also the conviction and sentence passed against the appellant by the Summary Court Martial, but allow the respondents - authorities to proceed to hold a fresh of the appellant in accordance with law. The appeal is accordingly allowed.

Appeal allowed.

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