

SEP ROHITASH KUMAR Petitioner
Through : Mr. P.D.P. Deo, Adv.

versus

CHIEF OF ARMY STAFF & ORS. Respondents
Through : Mr. Ankur Chhibber, Adv.
along with Captain Rahul
Soni.

CORAM :-**HON'BLE MS. JUSTICE GITA MITTAL****HON'BLE MR. JUSTICE J.R. MIDHA**

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| 1. | Whether Reporters of Local papers may be allowed to see the Judgment? | YES |
| 2. | To be referred to the Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

GITA MITTAL, J. (Oral)

1. The present writ petition has been filed by the petitioner aggrieved by the order dated 7th May, 2008 passed by the Chief of the Army Staff on the post confirmation petition filed by the petitioner assailing the finding and sentence dated 13th October, 2007 of the Summary Court Martial.

2. The undisputed facts giving rise to the present petition are within a narrow compass. The petitioner was enrolled on 11th January, 1999 and was serving with the 19th Battalion of the Jat Regiment of the Indian Army at the time of unfortunate happening. A fire incident took place in the night intervening 26th/27th August, 2006 in the house which stood allotted to

Captain Sumit Sood bearing No.P-27/3, Khetrapal Enclave, Suratgarh Military Station. The admitted position is that the petitioner was assigned sahayak duties with Captain Mayuresh Limye who was a neighbour of Captain Sumit Sood. For the reason that no accommodation was available for the sahayak in the house allotted to Captain Mayuresh Limye, the petitioner was required to sleep in the quarter attached with the accommodation of Captain Sumit Sood.

3. The respondents have contended that Sepoy Joginder Singh and Sepoy Om Prakash came to the servant quarter which was occupied by the petitioner in the night of 26th August, 2006 and induced him to imbibe some liquor with them. Thereafter these two jawans set the premises of Captain Sumit Sood on fire and also stole his car.

4. A court of inquiry was conducted by the respondents and between 16th January to 22nd April, 2007, summary of evidence was also recorded into this incident. So far as the petitioner is concerned, he was put under closed arrest on 14th April, 2007. He was released from closed arrest for one day on 12th June, 2007 and thereafter re-arrested on 13th June, 2007 when the following four tentative charges were levelled against him.

- “(i) For abetting Sepoy Joginder to set Captain Sumit Sood’s house building no.P-27/3, Suratgarh Military Station, on fire resulting in destruction of Government as well as private property and committing theft of his car to settle a personal grudge, thereby causing severe financial loss to the Government and Captain Sumit Sood.

- (ii) On intervening night 26-27 August, 2006 along with No.319707Y Sepoy Joginder and No.3194884L Sepoy Om Prakash both of 19 Jat committed house breaking by night at House No.P27/3, Military Station Suratgarh the residence of IC 62360Y Captain Sumit Sood.
- (iii) On intervening night of 26-27 August, 2006 abetted No.3193707Y Sepoy Joginder of 19 Jat to cause to destroy by fire, the evidence at the site regarding the presence of the accused persons at the incident site who committed mischief by fire at house No.P-27/3 at Suratgarh Military Station.
- (iv) On intervening night of 26-27 August 2006 improperly consumed alcoholic drinks in the servant quarter as well as inside P27/3 Suratgarh Military Station, the resident of Captain Sumit Sood."

5. On a consideration of the matter, the petitioner was subjected to a Summary Court Martial only on the following sole charge:-

"Charge : Army Act Section -63	AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE In that he,
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At Suratgarh, on the night of 26-27 August, 2006, improperly and without authority consumed liquor in the servant quarter of House No.P-27/3, Khetrapal Enclave, Suratgarh Military Station, resulting in his failure to take any preventive action when the said house was put on fire."

6. The Summary Court Martial was conducted on 13th October, 2007. The petitioner was found guilty of the charge and on the same day, the sentence of dismissal from service and rigorous imprisonment of eight months to be undergone in civil prison was awarded to the petitioner.

7. It was further directed that period spent by the petitioner in military custody during investigation, inquiry and trial of the

case being the period of 184 days was to be set off against the sentence of imprisonment of eight months awarded to the petitioner. The petitioner had completed the sentence of imprisonment on 9th December, 2007.

8. It is submitted by Mr. P.D.P. Deo, learned counsel appearing for the petitioner that his confinement in closed arrest and the findings and sentence of the Summary Court Martial were without jurisdiction, illegal and arbitrary and based on no evidence at all. Aggrieved thereby, the petitioner filed a post confirmation petition under Army Act 164(2) on 5th November, 2007 before the Chief of Army Staff.

9. Despite the petitioner undergoing the sentence of rigorous imprisonment in civil prison, this petition was kept pending without any reason and justification for a long period of almost seven months till the passing of the order on 7th May, 2008. The Chief of the Army Staff has arrived at a conclusion that Sepoy Joginder Singh and Sepoy Om Prakash were the actual perpetrators of the offence who stood court martialled separately and sentenced to rigorous imprisonment of two years and one year respectively. On a consideration of the petitioner's age, service and exemplary record, the Chief of the Army Staff was of the view that the punishment imposed upon the petitioner was harsh and need to be corrected by grant of suitable relief. Despite finding lack of culpability of the petitioner, however, the Chief of the Army Staff directed as follows:-

“7. I, therefore, commute the sentence of dismissal, awarded by the court to “six months forfeiture of past service for the purpose of the pension”. Further I remit six months Rigorous Imprisonment out of eight months awarded by the court. The petitioner will be entitled to all consequential benefits on reinstatement.”

10. We find that in view of the delay in consideration of the said post confirmation petition and the passing of the order only on 7th May, 2008, by the time when the order was passed and communicated, the petitioner had already undergone the full sentence of eight months rigorous imprisonment which had been awarded by the Summary Court Martial.

11. The present writ petition has been filed assailing the order dated 7th of May, 2008 of the Chief of the Army Staff.

The learned counsel for the petitioner has assailed the findings and sentence of the Summary Court Martial as well on several grounds urging that the provisions of the Army Act and the Rules thereunder have been violated. A grievance has been made by the petitioner that the basic requirement of provision to have a friend of accused and/or a lawyer of his choice was not complied with and that the petitioner was compelled to undergo an unfair trial. It has been contended that there was no evidence against him. In any case, taking the charge levelled against the petitioner and the totality of the findings which were brought on record, the allegations were not serious enough to invite the severe punishment which has been meted out to him. Apart from the contention that the

punishment awarded by the Summary Court Martial, even though partially commuted by the Chief of the Army Staff, is still grossly disproportionate to the allegations levelled against the petitioner in the award. It is also contended that the same was unwarranted and has been awarded arbitrarily without application of mind.

12. Mr. P.D.P. Deo, learned counsel for the petitioner would urge that despite the clear findings of the petitioner's innocence returned in para 5 of the order dated 7th May, 2008, the Chief of the Army Staff has been influenced in maintaining some kind of sentence on the petitioner probably to justify the harsh and rigorous imprisonment which the petitioner had already undergone.

13. Mr. Ankur Chhibber, learned counsel appearing for the respondents has vehemently refuted all contentions of learned counsel for the petitioner and submitted that having regard to the evidence brought on record, the finding of guilt by the Summary Court Martial on the charges which were levelled against the petitioner was fully justified. It has further been contended that the Chief of the Army Staff has taken a lenient view in the matter by commuting and bringing down the severity of the punishment which was imposed against the petitioner.

14. We have given our considered thought to the submissions made by both sides. Before proceeding any further, we may also usefully extract the relevant portion of the statement of

the prosecution witness No.7 Sepoy Joginder Singh. Sepoy Joginder Singh who appeared as prosecution witness No.7 stated that the petitioner had come to the quarter with some medicine meant for common cold and cough and that Sepoy Om Prakash insisted that if he has sum rum that will cure the petitioner of his common cold and cough. He had also confirmed that the plan to set the house on fire or commit theft was not discussed with the petitioner who was completely unaware of the same.

15. None of the witnesses who were examined by prosecution even remotely suggest the petitioner's culpability in the matter at all.

16. We may also notice that the Chief of the Army Staff was also of the same view when he recorded the following observations in the order dated 7th May, 2008.

“5. Whereas, considering the circumstances and evidence there is nothing on record to suggest his involvement in the incident of theft of car or putting the house on fire. There is also no evidence to indicate that he abetted the commission of the offence. The main offender i.e. Sepoy Joginder Singh (PW-1) has exonerated the petitioner by stating that he was completely unaware of their nefarious design to set the house on fire and that the (petitioner) was not a party to the commission of crime. Additionally Sepoy Om Prakash (PW-3) one of the accused has brought out that after consuming liquor when he accompanied Sepoy Joginder to the residence of unit Second-in-Charge, Sepoy Joginder (PW-1) offered him a cardamom which he chewed. After that he (Sepoy Om Prakash) started feeling dizzy and lost balance. Thus, the

possibility of some drug been mixed in the liquor served to Sepoy Rohitash Kumar (the petitioner) by Sepoy Joginder to ensure that he does not get up during the night cannot be ruled out. It is also a fact that no one in the vicinity came to know of the incident nor anybody heard the noise. In view of this, though unusual it is not improbable that the petitioner also did not come to know of the incident specially when he had consumed liquor and "Farata Fan" (circulator) was on next to his cot in the room, which could have muffled the outside noise of door breaking. As per evidence the petitioner was the first one to have informed others about the incident and call for help after he got up in the morning. Had he been party to the commission of crime he would not have reported about the fire incident. The mere fact of his reporting the incident immediately on waking up in morning clearly est his innocence. The actual perpetrators of the offence i.e. Sep. Joginder and Sep Om Prakash who were Court Martialled separately have got Rigorous Imprisonment for two years and one year respectively."

17. The discussion by the Chief of Army Staff suggests the possibility of drug laced drink having been administered to the petitioner by Sepoy Joginder Singh to ensure that he did not wake up when the nefarious plan was being implemented. Reference is also made to the circulator (fan) being used which was next to the petitioner's cot was making noise. The record shows that even the officer on duty who was awake and on duty check as well as persons in the vicinity remained unaware about the occurrence. In this background the conclusion that the petitioner was guilty of "negligent omission" is contradictory and ignores relevant material noticed elsewhere in the order.

18. We find that other observations in the order dated 7th May, 2008 also noticed that the petitioner was not responsible at all for the house being set on fire by Sepoy Joginder Singh and Sepoy Om Prakash. Despite holding that the “petitioner was not directly involved in the incident”, the order concludes that “his negligent omission facilitated the burning of the house”.

19. So far as consideration of the petitioner’s service record is concerned, we find that the Chief of the Army Staff has recorded the following conclusion:-

“6. In view of the forgoing facts and circumstances of the case, young age and about nine years of service of the petitioner, his exemplary character and pre-trial custody of 184 days, eight months Rigorous Imprisonment and dismissal awarded to the petitioner, who was in no way connected with the commission of the offence, is definitely harsh. The same need to be corrected by grant of suitable relief to the petitioner.”

20. The above narration (underlining by us) would show that a considered view was taken by the Chief of Army Staff that the petitioner was in no way connected with the commission of the offence thereby clearly suggesting that a view was taken that the petitioner was not guilty of the charge which was levelled against him. The order records that the service of nine years of the petitioner is unblemished and is of exemplary character. The order also notices that the punishment of dismissal and rigorous imprisonment in these circumstances was unduly

harsh and deserves to be corrected. In this background, we are unable to see the justification for the punishment which has been imposed upon the petitioner despite the finding that the petitioner was not guilty of the charge which had been levelled against him.

21. We may notice that the Chief of the Army Staff has recorded that the petitioner was in no way connected with the commission of the offence and to that extent has set aside the finding of the order dated 13th October, 2010 of the Summary Court Martial.

22. The instant case also manifests the arbitrariness with which the matter has been dealt with regard to the incident on the night of 26th/27th August, 2006 for which Summary Court Martial has been convened on 13th October, 2007 after lapse of six months. The petitioner was kept in closed arrest for a period of 184 days before completion of the trial which was almost the full period of the sentence which the Chief of the Army Staff has preserved against him. Having absolved the petitioner of culpability in the occurrence, there could be no warrant for vesting him with the harsh punishment of rigorous imprisonment or any other penal consequences.

23. In view of the above discussion, the punishment of six months forfeiture of past service for the purpose of pension and the sentence of rigorous imprisonment imposed by the order dated 7th May, 2008 is not legally sustainable and is hereby set aside and quashed.

24. The respondent would pass necessary order correcting the service record of the petitioner within six weeks and grant all necessary and consequential benefits to him as a result of the above. This writ petition is accordingly allowed in the above terms.

GITA MITTAL, J

SEPTEMBER 14, 2010
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J.R. MIDHA, J