Ex-Havildar Ratan Singh vs Union Of India And Ors on 19 November, 1991

Equivalent citations: 1992 AIR 415, 1991 SCR SUPL. (2) 370, AIR 1992 SUPREME COURT 415, 1992 AIR SCW 1, 1992 ALLAPPCAS (CRI) 17, (1991) 4 JT 427 (SC), 1992 (1) SCC(SUPP) 716, 1992 SCC(CRI) 358, 1992 CRIAPPR(SC) 1, (1992) 1 CURCRIR 267, (1992) 1 CHANDCRIC 97, (1991) 3 CRIMES 822

Author: L.M. Sharma

Bench: L.M. Sharma, Jagdish Saran Verma, S.C. Agrawal

PETITIONER:
EX-HAVILDAR RATAN SINGH

Vs.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT19/11/1991

BENCH:
SHARMA, L.M. (J)
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SHARMA, L.M. (J)
VERMA, JAGDISH SARAN (J)
AGRAWAL, S.C. (J)

CITATION:
1992 AIR 415 1991 SCR Supl. (2) 370
1992 SCC Supl. (1) 716 JT 1991 (4) 427
1991 SCALE (2)1047

ACT:
Army Act, 1950.' Section 3(x), 34(a)(h), 36 and 120.
Summary Court Martial--Jurisdiction of---Havildar engaged in armed action against militants---Charge of running away in a cowardly manner and leaving the post without permission of superior---Nature of offence and jurisdiction----Held offence covered by Section 34 and not by section 36--Trial by Summary Court Martial held without jurisdiction.

HEADNOTE:
The appellant, a Havildar, was charge-sheeted on the

ground that during an armed action against a group of militants when the militants opened fire he ran away in a cowardly manner and left his post without permission of his superior.

The respondent-authorities proceeded on the ground that his offence was covered by section 36 of the Army Act, 1950 and accordingly section 120 (1) of the Act was applicable. Consequently, he was tried by a summary court Martial and was convicted and reduced in rank and imprisoned for one year. He filed an application under Article 226 before the Delhi High Court which was dismissed.

In appeal to this Court it was contended on behalf of the appellant that having regard to the nature of the charge against him section 34 of the Army Act was attracted and in view of section 120(2) of the Act trial by summary Court was not permitted.

Allowing the apeal and setting aside the judgment of the High Court, this Court,

HELD: 1. Under section 120 (2) of the Army Act, 1950 if an 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. [372 D-F]

2. Section 36 covers a wide range of offences and the scope of
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section 34 is limited to a smaller area where the offence is more serious attracting more severe punishments. 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). If the allegations are assumed to be true, than the appellant, on the militants' opening fire shamefully abandoned the place comitted to his charge and which he was under a duty to defend. Both clauses (a) and (h) of section 34 are clearly attracted. The appellant was therefore guilty of a more serious offence under clauses (a) and (h) of section 34 of the Act than under section 36. 1373 D-G]

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. Consequently the impugned, hed trial by Summary Court Martial and the decision thereby must be held to be without jurisdiction and is quashed. The conviction and sentence passed against the appellant is set aside. [373 E-G]

3. The respondents-authorities can proceed to hold a fresh trial of the appellant in accordance with law. [374.-C]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 710 of 1991.

From the Judgment and Order dated 29.1. 1991 of the Delhi High Court in Cr. W.P. No. 9 of 1991.

B.Pajha and Manoj Prasad for the Appellant. V.C.Mahajan, S.D.Sharma and S.N.Terde for the Respondents. The Judgment of the Court was delivered by SHARMA, J. 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 Constitu- tion of India before the Delhi High Court, which was dis- missed 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 (herein- after 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 enti- tled 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 cov- ered 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 punisha- ble under the Act. Sub-section (2) reads as follows :-

> "(2) When there is no grave reason for immedi-

ate 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 any or the said acts; or **********
>
> (h) in time of action leaves his commanding officer or his post,guard, picquet, patrol or party without being regularly, relived 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 mili- tants is alleged to have run away when the militants opened fire and he, thus, in a cowardly manner left his post with- out permission of his superior officer. The allegations included in the charge sheet on the basis of which the appellant was tried are also to the same effect. The appel- lant is, therefore, right in his stand that if the prosecu- tion case be assumed to be correct (which he denies) he was guilty of a more serious offence under clauses (a) and (h) of section 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). 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 men- tioned in the writ petition or in the special leave peti- tion. 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 retired 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 coun- sel for the respondents stated that a fresh proceeding may now be barred 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 Arti- cle 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 05.02.92 and the apprehension expressed on behalf of the respondents 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 trial of the appellant in accordance with law. The appeal is accordingly allowed.

T.N.A. Appeal allowed.