Union Of India & Ors vs Capt.A.P. Bajpai on 20 February, 1998

Equivalent citations: AIR 1998 SUPREME COURT 1214, 1998 AIR SCW 1051, 1998 ALL. L. J. 826, (1998) 2 JT 213 (SC), (1998) 1 SCR 1041 (SC), 1998 (1) SCR 1041, 1998 CRIAPPR(SC) 185, 1998 (3) ADSC 87, 1998 (4) SCC 245, 1998 (2) JT 213, (1998) 2 SUPREME 316, (1998) 2 ALLCRILR 138, (1998) 1 CURLR 886, (1998) 2 ALL WC 1201, (1998) 2 LAB LN 461, (1998) 2 SCALE 131, (1998) 1 SCT 764, (1998) 2 RECCRIR 301, 1998 SCC (L&S) 1099

Author: D.P. Wadhwa

Bench: Sujata V. Manohar, D.P. Wadhwa

PETITIONER:
UNION OF INDIA & ORS.

Vs.

RESPONDENT:
CAPT.A.P. BAJPAI

DATE OF JUDGMENT: 20/02/1998

BENCH:
SUJATA V. MANOHAR, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

THE 20TH DAY OF FEBRUARY, 1998 Present :

Hon'ble Mrs. Justice Sujata V. Manohar Hon'ble Mrs. Justice D.P. Wadhwa P.P. Malhotra, N.N. Goswami, Sr, Advs., A.K. Srivastava, Hemant Sharma and Ms. Anil Katiyar, Advs, with them for the appellants.

J.S. Sinha, Rajiv Dutta, Randhir Singh, Advs, for the Respondent J U D G M E N T

The following Judgment of the Court was delivered:

D.P. Wadhwa. J.

The respondent, an officer in the army, was tried by General Court Martial on the following two charges:

"(i) Under Army Act Section 52(a) for committing theft of property belonging to the Government in that he, at Pithoragarh on 08 Sep 77 committed theft of the following property belonging to the Govt :-

(aa) Jam td Kissan 4 tins (450 gms each) - 1.800 Kgs (bb) Pine apple td 6 tins (850 gms each) - 5.100 Kgs.

(cc) Sausage td 9 tins (400 gms each) - 3.600 Kgs.

(dd) Coffee 1 tins (500 gms)

- 0.500 Kgs.

(ee) Milk td 54 tins (397 gms each)

- - 21. 438 Kgs.

(ii) Under Army Act Section 39 (b) for absenting himself without leave in that he, at Pithoragarh, in 03 Jun 78, while attached to Station Headquarters Pithoragarh, absented himself without leave until voluntarily rejoined on 07 Jun 78."

After the conclusion of the trial by order dated January 21, 1979 General Court Martial held the respondent not guilty of the first charge of theft, but found him guilty of the second charge and sentenced him to forfeit three years' service for the purpose of promotion and to be severely reprimanded. Under Section 153 of the Army Act, 1953 (for short `the Act'), the finding or sentence shall be valid except so far as it may be confirmed as provided by the' Act. Under Section 154 the finding and sentence of General Government, or by any officer empowered in this behalf by warrant of the Central Government. When the matter was placed before the General Officer Commanding U.P. Area, the competent confirming authority, he in the exercise of his power under Section 160 of the Act revised the findings of the General Court martial on the first charge and directed it to reconsider the entire evidence relating to the first charge in the light of the observation made by him in the order. He gave the following directions for the General Court Martial to observe:

"If the Court, on revision, revokes its earlier finding on the first charge and find the accused guilty of the first charge, it shall revoke its earlier sentence and pass a suitable fresh sentence. After this revision order is read in open Court, the accused shall be given a further opportunity to address the Court. Therefore, if it becomes

> necessary to clear any points raised by the accused, the Judge Advocate may give a further Summing up.
>
> The attention of the Court is invited to Army Act Section 160 and Army Rule 68 and the form of proceedings on revision on page 370 of the MIML 1961 reprint, which should be modified to conform to Army Rule 62(10)."

In pursuance to the aforesaid order of the confirming authority, General Court Martial assembled on March 10, 1979 and on the request of the respondent was adjourned to the following day. The respondent made written submissions which were taken on record. After reconsideration the court held the respondent guilty of both first and the second charges. Respondent was thereafter sentenced to be dismissed from service by order dated March 11, 1979. The conviction and sentence so passed on the respondent was confirmed by the Chief of the Army Staff by order dated September 14, 1979 which was promulgated on September 24, 1979.

The respondent under Section 164 (2) of the Act preferred a post confirmation petition before the Central Government which was rejected. The respondent thereafter filed the writ petition in the High Court of Judicature at Allahabad challenging his conviction and sentence. A Division Bench of the High Court by impugned judgment dated December 22. 1992 set aside the conviction and sentence passed on the respondent on the first charge and held that punishment on the second charge was yet to be confirmed by the confirming authority so as to make the same operative. On leave being granted, the appellants have filed this appeal.

The stage from which the High Court thought it necessary to interfere in the proceedings was when the confirming authority passed order under Section 160 of the Act revising the order of the General Court Martial holding the respondent not guilty of the first charge. High Court was of the view that the confirming authority had analysed the evidence minutely almost returning the finding of guilt against the respondent and leaving no discretion with the General Court Martial to act otherwise. High Court termed the observations of the confirming authority unwarranted and said that even the subsequent confirming authority being the Chief of the Army Staff overlooked the abuse of the power committed by the first confirming authority under Section 160 of the Act in reappreciating the whole evidence on record in respect of the quilt of the respondent and further that the authorities did not care to read the revisional order of the confirming authority properly and rejected the statutory representation of the respondent. High Court did notice the following observations of the confirming authority in its order of revision but said it was a very ingenious method adopted by the confirming authority to influence the Court Martial and said that the whole thing was a mere camouflage:

> "While in no way wishing to interfere with the discretion of the court to arrive at a particular finding or sentence, and regarding the value to be attached to the evidence on record and the inference to be deducted therefrom, I, as the confirming officer, am of the view that the finding of `not guilty' on the first charge arrived at by the court is perverse being against the weight of overwhelming evidence...."

High Court was thus of the view that the first confirming authority over-stepped its jurisdiction and that its order was invalid. High Court relied on a decision of the Delhi High Court in Naib Subedar Avtar vs. Union of India [1989 Cr1.L.J. 1986 rendered by a single Judge where that Court took the view that the confirming authority could not appreciate evidence as its jurisdiction was limited and that where the confirming authority had given directions to the Court Martial to reverse the findings of "not guilty"

> into "guilty", the order of the confirming authority was held to be bad and liable to be quashed.
>
> In our view, the High Court did not properly appreciated the scope and intent of Section 160 of the Act. Section 160 is as under:
>
> "160. (1) Any finding or sentence of a court-martial which requires confirmation may be once revised by order of the confirming authority and on such revision, the court, if so directed by the confirming authority, may take additional evidence.
>
> (2) The court, on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent.
>
> (3) In case of such unavoidable absence the cause thereof shall be duly certified in the proceedings, and the court shall proceed with the revision provided that, if a general court-martial, it still consists of five officers, or, if a summary general or district court-

martial of three officers."

Rule 68 of Army Rules, 1954 deals with confirmation and revision of finding or sentence of a Court Martial. There are Notes under this Rule and Note 6 is relevant. These are:

> "68. Revision.- (1) Where the finding is sent back for revision under Section 160, the court shall reassemble in open court, the revision order shall be read, and if the court is directed to take fresh evidence, such evidence shall also be taken in open court. The court shall then deliberate on its finding in closed court.
>
> (2) Where the finding is sent back for revision and the court does not adhere to its former finding, it shall revoke and finding and sentence and record the new finding, and if such new finding involves a sentence, pass sentence afresh.
>
> (3) Where the sentence alone is sent back for revision, the court shall not revise the finding. (4) After the revision, the presiding officer shall date and sign the decision of the court, and the proceedings, upon being signed by the Judge-Advocate, if any, shall at once be transmitted for confirmation.

NOTES 1 to 5 xxx xxx xxx

6. If a court brings in a finding of "not guilty" against the weight of evidence, the court may be re-

assembled and the confirming officer may give his views on the evidence, directing the attention of the court to any special points which it appears to have failed to appreciate."

The finding of sentence of the Court Martial can be revised once by the confirming authority. If after remand the Court Martial returns the same finding or sentence confirming authority would be bound by the same. As to why the confirming authority would like the Court Martial to reconsider the matter, it has per force to give its views which it can do only after examining the evidence on record and the proceedings of the Court Martial.

In Capt. Harish Uppal vs. Union of India and Others [1973 2 SCR 1023] the petitioner, an officer in the Army, was tried before the Summary General Court Martial on the charge of committing robbery on December 11, 1971 at Hajiganj (in Bangladesh) of the properties of the Bank, its Manager as well as of the Chowkidar. The court sentenced him to be cashiered. This sentence was subject to confirmation. The confirming authority passed an order directing the revision of the sentence. Thereafter the petitioner was brought before the same Court Martial and after considering the observations of the confirming authority revoked the earlier sentence and now sentenced him to be cashiered and to suffer rigorous imprisonment for two years. This finding and sentence were subsequently confirmed. It was challenged in the Supreme Court in a petition under Article 32 of the Constitution and one of the arguments was that the authority to confirm the sentence passed by a Court Martial did not confer on the confirming authority the power to enhance the sentence and that authority could not achieve that object indirectly by directing the revision of the sentence. It was contended that the Court Martial verdict should be unfettered. This Court examined the order of revision of the confirming authority. While sending the matter back of the Court martial the confirming authority gave a caution that "whilst in no way intending the quantum of punishment to be awarded, the court should fully of punishment to be awarded, the court should fully take into consideration the following observations of the Confirming Officer" and also that the court should then carefully consider all the above and should they decide the enhance the sentence, then fresh sentence should be announced in open court as being subject to confirmation. This Court held that the order of the confirming authority directing revision was in no way vitiated.

In Gian Chand vs. Union of India and others [1983 Crl.L.J. 1059] a division bench of the Delhi High Court said that a direction given by the confirming authority to the General Court Martial to reconsider the finding or sentence could not be said to be a fetter on the exercise of powers of the General Court Martial. High Court said that an order under Section 160 was a sort of an application for review which was made by the confirming authority and the statute, thereupon, caste a duty on the General Court Martial to reconsider its earlier finding or sentence but it was not obliged to change its earlier view. It further said that the Court Martial when it was reconsidering the matter in pursuance of a direction having been issued under Section 160 had to apply its mind to the case independently, uninfluenced by any observations which might have been made in the direction given by the confirming authority. These two decision, it would appear, were not brought to the

notice of the Judges of the Allahabad High Court while delivering the impugned judgment as there is no reference to the aforesaid two decisions, one of the Supreme Court and the other of the Division Bench of the Delhi High Court.

In Ex. Lieut Jagdish Pal Singh vs. Union of India and Ors. [Criminal Appeal NO. 104 of 1991 decided on May 7, 1997] the appellant was a commissioned officer in the Army and faced trial before a Court Martial on the accusation of taking away large number of bottles of Rum worth about Rs. 5616/- from the military canteen. After trial the Court Martial held the charge not proved against the appellant. When the matter was placed before the confirming authority as required under Section 153 of the Act, the confirming authority remitted the matter to the Court Martial indicating various aspects of the case which had not been considered properly. It was made clear by the confirming authority at the outset that the observations made by the confirming authority were not made to in any way interfere with the discretion of the members of the Court Martial in basing its finding on reconsideration of the matter. Thereafter the Court Martial met again and on reconsideration came to the finding that the appellant was held guilty of the offence and sentenced him to be dismissed from service. The finding and sentence were later confirmed by the confirming authority. The appellant filed a writ petition in the Delhi High Court it was contended that the revisional authority was empowered merely to direct for additional evidence and that no such direction had been given and on the contrary observation on merits of the case was made overstepping the limit of jurisdiction by the confirming authority. This Court held that the confirming authority had not made any finding which was likely to cause prejudice against the appellant and that it had at the very outset made it clear that the Court Martial was free to decide by adverting to certain basic features indicated by the confirming authority. This Court therefore refused to interfere in the matter.

We are unable to subscribe to the submissions now advanced before us that the jurisdiction of the confirming authority is confined only to giving of directions for recording additional evidence by General Court Martial or that from the order of the confirming authority "inference cannot be escaped that this is based not on any independent judgment but influenced by the undisguised opinion expressed by the confirming authority on merits of the case" or that the revisional order contained such unwarranted observations, which were tantamount to recording of finding, which was in no way the function of the confirming authority or that jurisdiction" by confirming authority. It was asserted that the order in revision was liable to be quashed and rightly done so by the High Court. All this, however, appears to us to be mistaken view entertained by the High Court both in law and from the facts of the case.

There is no dispute that in the conduct of the Court Martial proceedings before and at the stage of reconsideration procedure as prescribed was followed. It is the true that the confirming authority did analyses the evidence on the record of proceedings of the Court Martial but that was so done in the context of indicating where the Court Martial could have gone wrong in appreciation of evidence and nevertheless caution had been administered to the Court Martial that what was said in the revision order was not intended in any way to interfere with the discretion of the Court Martial to arrive at a particular finding or sentence and regarding the value to be attached to the evidence on record and the inference to be deducted therefrom. Confirming authority said:

> "Consequently, I am also of the view that the sentence awarded on finding the accused quality of the second charge is not commensurate with the gravity of the offence. At the very outset, I wish to impress that where the Court ignores the broad features of the prosecution case, and restricts itself to a consideration of minor discrepancies and further meticulously juxtaposes the evidence of different witnesses on disputed points and discards the evidence in its entirety when discrepancies are found, the method can rightly be criticised as fallacious. It has to consider whether there is any direct/reliable evidence on questions which have to be established by the prosecution. Undoubtedly, in considering whether evidence is reliable, it is justified in directing attention to other evidence which contradicts or is inconsistent with the evidence relied upon by the prosecution. But to discard all evidence because there are discrepancies without any attempt at evaluation of the inherent quality of the evidence is unwarranted. The court should make an effort to disengage the truth from falsehood. It is an error to take and easy course by holding the evidence discrepant and the whole case untrue. Even when the prosecution witnesses have not deposed the whole truth and although it may not be possible to get an absolutely true picture of the events from their evidence, it is not proper and justifiable to say that the prosecution case is a complete fabrication. Bearing in mind these principles the Court should examine the evidence adduced before them in respect of each charge."

It was contended by the respondent that the very use of the expression "perverse" in the revision order would have influenced the mind of the members of the General Court Martial as the officers constituting the General Court Martial were lower in rank than the confirming authority who was of the rank of Major General and that the confirming authority of its own appreciated whole of the evidence instead of saying as to what evidence was to be considered by the General Court Martial which had the effect of influencing the General Court Martial. An argument was also raised that when the Court Martial reassembled after the revision order the whole proceeding concluded within half an hour and the General Court Martial returned finding of guilt against the respondent. That according to the respondent would show that the General Court Martial did not apply its mind independently and was swayed by the opinion of the confirming authority. It was lastly submitted that there was no ground for the confirming authority to interfere in the proceeding of the General Court Martial which had considered the evidence and argument in depth and held the first charge not proved against the respondent. We are unable to agree to any of the submissions. Confirming authority cannot act merely as a rubber stamp. The fact that the finding and sentence of Court Martial should be valid only after it is confirmed by the competent authority would show that it has to examine the whole of the record of the proceeding of the Court Martial before confirming the finding or sentence. It is the requirement of Section 160 that when the confirming authority wished that the finding or sentence of a Court Martial required revision it should not send back the case as a matter of course but record reasons as to why the confirming authority thought so as to where the Court Martial has failed in its duty to properly examine the facts and in application of correct law. When the matter is remitted back to the Court Martial under Section 160 the Court Martial may take additional evidence if so directed by the confirming authority. In the present case no such direction was given by the confirming authority and there was no occasion for the General Court Martial to record additional evidence. Full opportunity was given to the respondent to make submission before

the General Court Martial after it had reassembled and as the record would show copy of the revisional order was also supplied to respondent and he made his submission in writing. The Court thereafter that it revoked its earlier finding and sentence and held the respondent guilty of the first and second charge. It cannot be said that the finding and sentence after reconsideration was arrived at in a hurried fashion. We have noted above that now it was the Chief of the Army Staff who confirmed the finding and sentence and when he did so it could not be said that the whole of the record was not before him. We do not think that the confirming authority exceeded its jurisdiction in analysing the evidence recorded during Court Martial proceedings. The revision order was not intended in any way to interfere with the discretion of the Court Martial and the Court Martial was also not bound by any such observation.

We, therefore, allow the appeal, ser aside the Judgment of the High Court and dismiss the writ petition filed by the respondent.