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ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 343 of 2011

Tuesday this the 21st day of February,2012.

"Hon'ble Mr. Justice Janardan Sahai, Member (J)
Hon'ble Lt. Gen. P.R. Gangadharan, Member (A)"

Lt Col Ranjodh Singh(SL-4092P),aged about 48 years, S/o Shri Kehar Singh, Additional Officer, HQ Uttar Bharat Area,Bareilly(U.P.).

Applicant

By Legal Practitioner Shri Lalit Kumar, Advocate.

Versus

1. Union of India Through Secretary, Ministry of Defence,South Block, New Delhi.
2. The General Officer Commanding Uttar Bharat Area,Bareilly(U.P.)
3. The Commandant,Kumaon Regimental Centre,Ranikhet(Uttarakhand).

Respondents

By Legal Practitioner Shri Alok Mathur, Sr.Standing Counselfor the Central Government

ORDER

"Hon'ble Mr. Justice Janardan Sahai"

1. It appears that the applicant was charged in respect of illegal gratification and was brought to trial by a GCM,

which convicted and sentenced the applicant to cashiering from service and to suffer 5 years' RI. The conviction and sentence of the applicant was set aside by the Tribunal by its order dated 05.10.2010 in TA No.68 of 2010. While doing so the Tribunal authorized re-trial of the applicant subject to the conditions in the proviso to sub-section (2) of section 16 of the Act. In consequence of the Tribunal's order, the GOC, Uttar Bharat Area passed a Convening Order dated 29.06.2011 detailing officers for the purpose of trying by a GCM. This order has been challenged by the applicant by means of the present OA.

2. We have heard Sri Lalit Kumar, learned counsel for the applicant and Sri Alok Mathur, Sr.Standing Counsel.

3. Before us, the learned counsel for the applicant has raised two broad contentions. The first is that by using the word 'trial' in the impugned convening order, the convening authority has ordered a de novo trial and not a retrial, as has been authorized by the Tribunal. The second contention is that the trial now being held by the officers detailed in the convening order by an altogether different set of officers than those who had constituted the GCM which had tried and convicted the applicant earlier is not permissible. We shall deal with each of these contentions in the order in which they have been advanced.

4. In support of the first contention that a retrial does not mean a de novo trial but the evidence which had already been led in the earlier trial would be read in evidence alongwith additional evidence which may now be taken, learned counsel for the applicant placed reliance upon the decision of the Supreme Court in ***Satyajit Banerjee v. State of West Bengal and others***,(2005) 1 SCC 115. The respondents on the other hand relied upon the following decisions:

(1) ***Desh Raj v. The State***, 1973 Cr.L.J.1415(Alld)

(2) ***State v. Ranganagouda Venkanagouda Thimmanagpudar***, decided by Mysore High Court, AIR 1961 Mysore 69.

(3) ***Kittunni Subramoniam v. Kunhumon and others***, decided by Kerala High Court, 1974 Cr.L.J.548

In the Mysore decision AIR 1961 Mysore 69(supra) the argument that retrial ordered in appeal under section 423(1)(b) Cr.P.C.1898would be restricted to proceeding only from the point where the illegality had occurred was repelled and it was held that such restriction may prejudice the accused himself. The scope of retrial in an appeal under section 423(1)(a) Cr.P.C. 1898 was again considered by the Kerala

High Court in Kittunni's case (supra) and it was held in para 7,8 and 9 of the Reports as follows:

> " 7. *There was a difference of view between two learned Judges of this Court in Kunjan Sivan v. State of Kerala : 1969 KLT 602 regarding the actual decision of the Supreme Court in MANU/SC/0133/1962 :[1963]3SCR412, one learned Judge taking the view that what the Supreme Court said in that decision was that retrial under Section 423(1)(a) of the Cri. P.C. meant de novo trial and the other that it included restricted trial also. When the matter was referred to another learned Judge his opinion was that the decision of the Supreme Court in MANU/SC/0133/1962 :[1963]3SCR412 was that retrial could be partial also.*"
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> "8. *This Court had even previously taken the view in Mariyam v. State of Kerala 1961 KLT 33 that the retrial contemplated by Section 423(1)(a) could be restricted and that it could be ordered from the stage at which the error or illegality crept in.*"
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> "9. *In conclusion it can be said that the expression 'retrial' as used in Section 423(1(a) of the Code includes limited retrial also. Retrial can be ordered from the stage at which the error or illegality crept in. It can be restricted even to hearing.*"

In Santoo Ram v State of U.P.and another, 1970 ALJ 338, the Allahabad High Court was considering the effect of retrial ordered in criminal appeal in consequence of which a fresh trial was held and the applicant was again convicted but on the basis of the evidence taken in the previous trial. The High Court went to the extent of holding that where retrial was ordered under section 423 Cr.P.C. the

evidence previously recorded could not be considered. It was held "*The order of the court of appeal, dated the 13th of July,1965 whereby the conviction of the applicant in consequence of the first trial, was set aside, was an order within the purview of the provisions contained in Sec.423 of the Code of Criminal Procedure, and it was, therefore, not open to the courts below to take into consideration the evidence led by either party at the previous trial.*"

5. In ***Desh Raj***'s case(Supra), the Lucknow Bench of the Allahabad High Court has interpreted the provisions of section 423(1)(a) of the Code of Criminal Procedure, which relates to the appellate powers of the High Court under the Old Code of Criminal Procedure, 1898 and observed as follows:

> " *Section 423(1)(a).Cr.PC authorizes the qppellate Court in an appeal from an order of acquittal, to reverse such order and direct that further inquiry be made or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence son him according to law, The word "retrial" occurring in Clause (a) is of wide amplitude and gives a discretion to the appellate Court either to order a denovo trial, if the exigency of the situation so demands, or from the particular stage where the illegality was committed, or serious irregularity materially prejudicing an accused occurred, and it does not fetter the Court's discretion in any manner. The object is to subserve the ends of justice and how that object will be achieved, will be dependent upon the peculiarity of each case.*

It appears from the decided cases that while exercising the appellate power under the Code of Criminal Procedure retrial can be ordered de novo or from the stage where the illegality has been found to have occurred. Whether the retrial would mean a de novo trial or whether it would be a commencement from a particular stage would depend upon the intention in the judgment ordering retrial.

6. We shall now consider whether the Supreme Court decision in ***Satyajit Banerjee***'s case has the effect of impliedly overruling the view taken by the High Courts. In Satyajit Banerji's case the trial court had acquitted the accused of the offence of cruel treatment meted out to the deceased under Section 498A IPC and abetting her suicidal death. The trial court had recorded its conclusion that the evidence of the prosecution is not reliable and the accused could not be held guilty of the suicidal death. The trial court acquitted the accused. In the revision preferred by the mother of the deceased to the High Court, the High Court through JK took note of the various infirmities in the prosecution case, such as belated seizure of suicide note by the investigating agency 125 days after the incident, no examination of hand writing expert, belated FIR and single testimony of the mother of the deceased on the allegation

of cruelty and also took note of the fact that in the post-mortem reported presence of ligature mark on the neck of the deceased indicating hanging but the High Court observed that the trial court ought to have been more, dynamic and to have taken active truth instead of resigning to the fate as ordained by the prosecution. The High Court observed that the trial court ought to have invoked its powers under section 311 of the Criminal Procedure Code and summoned for examining the father of the deceased and other additional witnesses whom it considered necessary. Before the Apex Court, it was contended on behalf of the accused that merely because a different view of the evidence was possible, the High Court in exercise of the revisional powers ought not to have directed a retrial and reliance was placed upon ***Bansi Lal v. Laxman Singh***. It was held by the Apex Court that the settled legal position was that the revisional jurisdiction, at the instance of the complainant, has to be exercised by the High Court only in very exceptional cases. The Apex Court went on to hold that the High Court ought not to have directed the trial court to hold a de novo trial. In Satyajit Banerjee's case the propriety and legality of the High Court's order in a Revision against acquittal to direct de novo trial where there already was legal evidence on the record which was considered and prosecution case found to be suffering from weakness was

question. The infirmity in the Trial Court judgment pointed out by the High Court was that the trial judge should have summoned certain other witnesses whose evidence was material. The evidence already recorded was legal evidence. In the present OA the question is not about the propriety or legality of the order of retrial but whether retrial directed by the Tribunal was a retrial de novo viz for taking fresh evidence altogether or for taking additional evidence alone. In para 27 of the report, the Apex Court in **Satyajit Banerjee's** case held that even if a retrial is directed in exercise of revisional powers by the High Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case and the trial Judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial. It appears from para 27 of the report that the observations made therein were in respect of the exercise of revisional powers by the High Court. The context is important, as it is to be noted that the appellate power of interference under the Code of Criminal Procedure are wider than the revisional power in that while in appeal against acquittal, the High Court can reverse the order of acquittal and find the accused guilty ~~whereas~~ but in revision an order of acquittal cannot be converted into one of conviction. It is also to be

noted that in Satyajit Banerjee's case, the reason for the interference by the High Court was that the trial court could have exercised powers under section 311 Cr.P.C. and summoned the relevant witnesses. The evidence already on record was legal evidence.The observations made by the Supreme Court in ***Satyajit Banerjee***'s case have therefore to be read in the context of the facts of that case and the law laid down relates to the exercise of revisional jurisdiction. In our opinion, the decision in ***Satyajit Banerjee***'s case does not have the effect of impliedly overruling the High Court decisions as noticed above. We are, therefore, of the view that the question whether the retrial was to be a de novo trial or to begin from a particular stage would depend upon the directions given in the appellate order. In this light, we shall consider the scope of the retrial which the Tribunal had authorized in its previous order and the reasons which prevailed with it in setting aside the conviction of the applicant.

7. The Tribunal had found that out of five Members of the GCM, two Members were of the rank of Major whereas the applicant was a Lt.Colonel and the GCM was therefore illegally constituted. Another ground which prevailed with the Tribunal in allowing the appeal was that the applicant was not given a suitable defending officer and had thereby suffered prejudice. It was also found that

the applicant did not get proper opportunity to cross-examine the witnesses. Lastly, the Tribunal found that the applicant was prejudiced as he did not got proper opportunity to lead the defence evidence. It was held that "*With all the evidence available, acquitting the appellant on the ground that the court was illegally constituted or that he could not get proper legal assistance does not appear to be just. To take additional evidence in the Appeal or to recall the prosecution witnesses for cross examination in the Appeal would virtually be a fresh trial in the appeal. In the circumstances, it would be in the interest of justice that the conviction of the appellant be set aside and re-trial be authorized.*" These findings indicate that infirmity in the trial prevailed from the very inception viz from the constitution of the court and choice of the defending officer. The entire trial was vitiated also for want of proper opportunity to cross examine witnesses. The want of opportunity to lead defence evidence was an additional ground. In these circumstances, the retrial which was authorized by the Tribunal was intended to be a de novo trial viz a trial in which fresh evidence would be taken and that already on record to be ignored and we do

not find any merit in the first contention of the learned counsel for the applicant.

8. Learned counsel for the applicant relied upon the provisions of section 117 of the Army Act read with Rule 83 of the Army Rules that a fresh trial would be permissible only when the original court martial had been dissolved before giving effect to the sentence. The dissolution provided under section 117 of the Army Act and the retrial envisaged in section 16 of the Armed Forces Tribunal Act is contemplated in different situations. The two provisions operate in different fields and in any case there is nothing in section 117 of the Army Act which may control the provision of retrial in section 16 of the AFT Act.

9. Learned counsel for the applicant submitted that the lacunae in the prosecution case cannot be directed to be filled up as a result of the retrial and he relied upon para 21 of the Supreme Court decision in ***Dhanpal v. State***, 2009 Cr.L.J.4647. In that case the High Court had allowed the state appeal against acquittal and convicted the accused. The apex court held that the High Court was not justified in weaving out a different and a new prosecution version. The view taken by the Supreme Court is reiteration of the settled law but in the present case the retrial has been ordered for entirely different reasons,

which we have already referred to above and Dhanpal's case is not applicable.

10. Learned counsel for the applicant then submitted that a retrial under the AFT Act can be ordered only for the purpose of taking additional evidence and in support of this contention he placed reliance upon sub-section (2) of section 16 of the Act. Under that provision, the Tribunal has the power of quashing a conviction, to make an order authorizing the appellant to be retried by court martial but the power has been hedged in by the condition that the Tribunal shall only exercise this power when the appeal against conviction is allowed by reasons only of evidence received or available to be received by the Tribunal under the Act. Under section 17 of the Act, the Tribunal has the power to receive evidence. The power of authorizing retrial is thus available both in the event where evidence has been received as also where the evidence is available to be received by the Tribunal. Evidence in the Summary of Evidence for instance would fall in the category of evidence available to be received. In our view the interpretation put forth by the learned counsel for the applicant is not supported by the language employed in sub-section (2) of section 16. Section 16 does not contain anything to confine its applicability to taking additional evidence alone. Where for instance retrial is ordered on the

ground that the court failed in the circumstances of a particular case to advise the accused to withdraw the plea of guilty or has failed to convert the plea of guilty to not guilty which it is required to do if the accused does not understand the effect of his plea, there would be no evidence at all in the trial and a retrial would mean de novo trial. In the present case the entire evidence had been recorded before an illegally constituted GCM. The applicant had also not been given opportunity to cross-examine the prosecution witnesses. The Tribunal had also found that examining the witnesses before the Tribunal itself would amount to virtually a fresh trial. In these circumstances, it can neither be said that the Tribunal's jurisdiction was circumscribed by ordering only additional evidence to be recorded in a trial nor has the Tribunal directed that.

11. The other and last contention of the learned counsel for the applicant is that retrial being only for the purpose of taking additional evidence, can be conducted by the same set of Members who had earlier constituted the Court by virtue of Army Rule 86. In our opinion, this contention is simply to be noticed for being rejected. The GCM was found to be illegally constituted. A retrial by the same set of members would be perpetuating the same illegality. It also appears that the applicant had filed a writ petition

against the Tribunal's order and one of the points raised was that when retrial will take place Members of the Court will stand changed and in consequence thereof there will be miscarriage of justice. The High Court dismissed that petition and observed that "*the fact remains that the Tribunal concluded that the trial, as was conducted, was not in consonance with law and, accordingly, directed re-trial.*"

12. For all these reasons, we do not find any merit in this OA and it is dismissed.

(Lt Gen P.R. Gangadharan)
Member (A)

(Justice Janardan Sahai)
(Member (J)