

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

**Transferred Application No. 451 of 2010
[Writ Petition No. 5460 of 2009 of M.P. High Court at Jabalpur]**

Friday the Third day of June, 2011

“Hon’ble Mr. Justice A.N. Varma, Member (J)
Hon’ble Lt. Gen. B.S. Sisodia, Member (A)”

Shambhunath Patel, S/o shri Mandvi Sharan Patel, R/o Village Musauwa, Post Karondi, Tehsil Gurh, District Rewa (M.P.) No. 15677396 Y Signal Man of 59 Wireless Experimental Unit, C/o 56 APO.

Applicant

By Legal Practitioner Shri P.N. Chaturvedi, Advocate.

Versus

1. Union of India through Secretary, Ministry of Defence, New Delhi.
2. Chief of Army Staff, Army Headquarters, New Delhi.
3. General Officer Commanding-in-Chief, Central Command, Lucknow (U.P.).
4. Col. S.K. Lohamni, Commanding Officer, Depot Regiment (Corps of Signals) Jabalpur, Presiding Officer, General Court Martial.
5. Commanding Officer, Depot Regiment (Corps of Signals), Jabalpur, District Jabalpur.

Respondents

By Legal Practitioner Col. R.N. Singh Senior Central Government Counsel and Shri Raj Kumar Singh, Advocate, Central Government Counsel.

ORDER

“Hon’ble Mr. Justice A.N. Varma”

1. By means of a petition under Article 226 of the Constitution of India (Writ Petition No. 5460 of 2009) the applicant assailed the order of his dismissal dated 16.10.2007 before the Madhya Pradesh High Court at Jabalpur. Upon constitution of Tribunal under the Armed Forces Tribunal Act 2007, the said petition in exercise of powers under Section 34 of the said Act was transferred to the Tribunal as such the matter is before us for adjudication.

2. The factual matrix of the case are as follows :-

3. The applicant was enrolled in Indian Army as a Sepoy (Signalman) on 21.09.2002. While serving with 59 Wireless Experimental Unit, the applicant was sanctioned leave with effect from 13.11.2006 to 02.12.2006. He thereafter got his leave extended for 10 days i.e. upto 12.12.2006. While on leave he suffered from “ANTRAL GASTRITIS and ABDOMEN ANEMIA” on account of which he could not join his duties at 59 Wireless Experimental Centre, located somewhere in Jammu and Kashmir. On account of his illness he had taken medical treatment from Dr. B.L. Mishra, Medical Specialist, Government T.B. Hospital, Rewa and remained under his treatment throughout. On having become fit to resume duties he reported at 1 Signal Training Centre at Jabalpur on 11.05.2007. Thus he had overstayed leave from 13.12.2006 to 10.05.2007 i.e. for 150 days on account of which he was charge-sheeted and Summary Court Martial proceeded against him. As a result of the said proceedings the applicant was awarded punishment of

dismissal from service. Being aggrieved against the order of his discharge dated 16.10.2007 the applicant preferred a Statutory Petition under Section 164(2) of the Army Act, 1950. The Chief of Army Staff vide order dated 22.06.2009 dismissed the same.

4. Both the aforesaid orders were assailed by the applicant in Writ Petition (W.P. No. 5460 of 2009) The respondents filed their return before the High Court at Jabalpur and Rejoinder Affidavit was filed by the applicant before the Tribunal upon transfer of the petition.

5. We have heard Shri P.N. Chaturvedi, Learned Counsel for the applicant as also Col. (Retd) R.N. Singh, learned Senior Central Government Counsel assisted by Shri Raj Kumar Singh, learned Central Government Counsel for respondents.

6. Learned Counsel for the applicant vehemently argued that the impugned order of discharge is manifestly illegal, arbitrary and without application of mind. He further submitted that the Appeal of the applicant preferred against the order of discharge was also not decided in accordance with law. The applicant after expiry of his leave got the same extended by 10 days, thereafter he suffered from severe ANTRAL GASTRITIS and ABDOMEN ANEMIA consequent to which he was treated by a Government Doctor at District T.B. Centre, Rewa, Madhya Pradesh. The applicant also filed a certificate duly signed by the said Doctor, copy of which has been filed along with the petition as Annexure No. P-1. Upon having recovered from his illness and fit to resume duty he was again issued with the certificate dated 10.05.2007 by the said doctor, copy of which has been filed along with the petition

as Annexure No. P-4. Learned Counsel pointed out that father of the applicant vide Annexure No. P-3 also informed the Commanding Officer of 59 Wireless Experimental Centre that his son was suffering with severe gastritis and was not in a position to join his duties, as such he be excused from absence from duty and over stayal from leave. Learned Counsel submitted that neither the certificates filed by the applicant nor the application sent by his father were taken into account by the authorities in the court martial proceedings. Learned Counsel also drew our attention towards paragraph 17 of the Counter Affidavit wherein the respondents had averred that the applicant should have reported to the nearest Military Hospital for necessary medical treatment, therefore, the Court did not take any cognizance of the Certificates given by the civil Doctor.

7. Learned Counsel referred to Section 143 of the Army Act, 1950 (hereafter to be referred as Act) and submitted that if any trial for desertion or absence without leave, overstaying leave or not rejoining when warned for service, the person tried states in his defence any sufficient or reasonable excuse for his unauthorized absence, and refers in support thereof to any officer in the service of the Government. The Court shall address such officer and adjourn the proceedings until his reply is received. Learned Counsel submitted that since the applicant in proceedings had filed the aforesaid two documents, therefore as per provisions of Section 143 of the Act reference ought to have been made to the Government officer and till such time its reply was received the Court Martial proceedings ought to have been adjourned. According to him in not adjourning the proceedings there

was clear violation of mandatory provision of Section 143 as such the entire trial stood vitiated.

8. The Learned Counsel next argued that the applicant had put in only about 5 years of service in Army and was only 23 years of age when the order of punishment was passed. According to him the applicant had overstayed leave for genuine cause for which he also submitted relevant Certificates showing cogent reasons for absence. According to Learned Counsel the punishment awarded is severely harsh and not commensurate to the offence. In this connection he referred to paragraph 448 and Table of punishment appended thereto. According to Learned Counsel normally punishment for absence without leave or overstaying leave in the said Table is indicated, as Rigorous Imprisonment for three months or less to be undergone in Military custody. Since the applicant had overstayed on account of his severe illness and had also shown sufficient cause for not resuming duty after expiry of leave along with the Certificates, therefore, at the most in view of paragraph 488 he could have been awarded punishment to undergo rigorous imprisonment for three months in military custody. Dismissal from service for the said offence was not warranted. In support of his case Learned Counsel relied upon a decision rendered by Delhi High Court reported in 2003 (2) Service Cases Today page 583 Lachhman (Ex. Rect.) Versus Union of India and others.

9. Col. (Retd) Singh, learned Senior Central Government Counsel in opposition submitted that the applicant had overstayed leave for 150 days in a short span of service without any valid reason. According to him Army has established medical

facilities all over the country which are provided to all ranks free of cost. In case the applicant was suffering from any serious disease or otherwise he could have reported to nearest Military Hospital for necessary medical treatment. Overstayal of leave for a military personnel cannot be accepted. Regarding the provisions of Section 143 of the Army Act, 1950 Learned Counsel submitted that cognizance of certificates was rightly not taken and no reference was made as the same had been issued by a civil Doctor. Regarding quantum of punishment the Learned Counsel argued that since the applicant had overstayed leave for 150 days without any valid reason, therefore, the punishment awarded was perfectly justified and no interference as such is warranted.

10. Section 143 of the Army Act, 1950 reads as follows :-

“143. Reference by accused to Government officer. – (1) If at any trial for desertion or absence without leave, overstaying leave or not rejoining when warned for service, the person tried states in his defence any sufficient or reasonable excuse for his unauthorized absence, and refers in support thereof to any officer in the service of the Government, or if it appears that any such officer any officer in the service of the Government, or if it appears that any such officer is likely to prove or disprove the said statement in the defence, the court shall address such officer and adjourn the proceedings until his reply is received.

(2) The written reply of any officer so referred to shall, if signed by him be received in evidence and have the time effect as if made on oath before the court.

(3) If the court is dissolved before the receipt of such reply, or if the court omits to comply with the provisions of this section, the convening officer may, at his discretion, annul the proceedings and order a fresh trial.”

11. The aforesaid provision lays down that if in any trial for desertion or absence without leave overstaying leave or not joining when warned for service a person who is being tried for desertion or absence without leave states in his defence any sufficient or reasonable excuse for his unauthorized absence and in support of his contention refers to any officer in service of the Government, the court shall address such officer and adjourn the proceedings until his reply is received.

12. In the case at hand the applicant had submitted two certificates, one dated 01.12.2006 (Annexure No. P-1) by Dr. B.L. Mishra, Authorized Medical Attendant, District T.B. Officer, District T.B. Centre, Rewa, Madhya Pradesh and the other by the same officer dated 10.05.2007 (Annexure No. P-4). The authorities ought to have referred the said two certificates to the said Doctor for verification and genuineness or otherwise of the same as provided under Section 143 of the Army Act, 1950. Further, so long as the reply was not received the Court Martial proceedings ought to have been adjourned. This procedure, however, was not followed, though in the Counter Affidavit filed by the respondents it is not disputed

that the said certificates were not filed in defence rather in paragraph 17 of the Counter Affidavit it has been averred that “If he was not well, he should have reported to the nearest Military Hospital for necessary medical treatment. Therefore the court did not take any cognizance of the certificate given by civil doctor.” Since admittedly the said certificates were not referred to the Government Doctor concerned, therefore, there is a clear violation of the provisions of Section 143 of the Army Act, 1950. In view of the aforesaid we are of the considered opinion that for want of compliance of Section 143 of the Act the entire Court Martial proceedings stands vitiated.

13. Regarding next submission by the Learned Counsel for the applicant that the punishment is severe and harsh, Table of Punishment appended to paragraph 448 of the Regulations for the Army, 1987 is reproduced herein under :-

“(i) Normal punishment. – Rigorous imprisonment for three months or less to be undergone in military custody.

Offences :-

Disobedience, not of a grave nature.

Insubordination, not of a grave nature.

First desertion or fraudulent enrolment.

Absence without leave or overstaying leave.

Failing to appear at parade.

Quitting parade, guard, etc., without leave.

Absence from camp or after tattoo.

Intoxication.

Releasing or suffering prisoner to escape.

Escaping from custody.

Losing by neglect, arms, etc.

False answer on enrolment. Minor contempt of court-martial.

Neglect of orders.

Act prejudicial, etc., not of a grave nature.

Sentry plundering, etc., not of a grave nature.

Sentry sleeping on or quitting post in peace time.

Use of force to superior, not of a grave nature.

Failing to rejoin for active service, not of a grave nature.

Making away with, under Army Act, Section 54(a), other than arms and ammunition.

False accusations and complaints, not of a grave nature.

Striking or ill-treating a subordinates, not of a grave nature.

First offences not of a grave nature.”

14. Perusal of the aforesaid provision reveals that normal punishment for absence without leave or overstaying leave is rigorous imprisonment for three months or less to be undergone in Military custody. In the case at hand the applicant had overstayed leave for a genuine case in support of which documentary evidence had also been furnished which admittedly was not considered, the punishment of dismissal from service for overstaying leave therefore on the face of

it appears too be against the aforesaid provision. The respondents in right perspective ought to have awarded the sentence in accordance with the Table of Punishment as provided under para 448 of the Regulation for Army.

15. In Lachhman (Ex. Rect.) Versus Union of India and others (Supra) Division Bench of Delhi High Court while setting aside the order of discharge and allowing petition of the petitioner observed as follows :-

“1. Under the garb of discipline, the disciplined force cannot be allowed to loose its human face. If young recruits to such a Force are dismissed or removed at the drop of hat on the whimsicality of the governing or commanding authority, it is likely to produce a negative effect and shudder the young aspirants from joining Armed Forces particularly the Army even if they have will to serve the nation. Even otherwise the unemployment scenario of this country is so deplorable and dismal that even the highly educated persons are begging for lowly jobs. Though this aspect cannot be lost sight of while dealing with disciplinary action against the delinquent particularly when action is culminated into removal from service yet discipline cannot be sacrificed at the altar of humanitarian considerations.

15. Last but not the least the sentence awarded both by the Commanding Officer as well as by the Appellant Authority appears disproportionate to us in the facts and circumstances of the case. Because we find that it was not a case of overstay or unauthorized absence. It was a case of the petitioner having proceeded on leave that too on the recommendation of immediate

officer which could be treated to imply sanction by the competent authority. He was a young recruit of 20 years. For such a charge and explanation of the petitioner and the circumstances under which he proceeded and returned on the expiry of leave, he ought not have been deprived of his livelihood.”

16. Thus for what has been said hereinabove, we are satisfied that the order of discharge stands vitiated and punishment awarded is not commensurate to the offence said to have been committed and is extremely harsh and excessive.

17. We, in the circumstances, allow the Transferred Application and set aside the orders dated 16.10.2007 and 22.06.2009. The applicant shall be reinstated forthwith with all consequential benefits.

18. No order however as to costs.

(Lt. Gen. B.S. Sisodia)
Member (A)

(Justice A.N. Varma)
Member (J)

Dwivedi