

Court No. 2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 595 of 2010

Friday this 17th day of November, 2017

Hon'ble Mr. Justice S.V.S.Rathore, Member (J)

Hon'ble Lt Gen Gyan Bhushan, Member (A)

VIJAY KESHAV SINGH son of Raghuraj Singh R/O, Village Lohiya Nagar, Bidhuna H. No.-29, Post- Bidhuna, District- Etawah (U.P.).

..... **Petitioner**

By Legal Practitioner: Shri PN Chaturvedi, Advocate
Learned Counsel for the Petitioner.

Versus

1. The Union of India, Through Secretary, Ministry of Defence Sena Bhawan, D.H.Q. P.O. New Delhi – 110001.
2. The Chief of the Army Staff (C.O.A.S), Sena Bhawan, D.H.Q. P.O., New Delhi – 110001.
3. The Officer In-Charge, Rajput Regiment Record, Fatehgarh, U.P.-209601.
4. The Commanding Officer 24 Rajput Regt, C/O 56 A.P.O.

..... **Respondents**

By Legal Practitioner: Shri Anurag Mishra,
Learned Standing Counsel for the Central Government assisted by Maj Rajshri Nigam, Departmental Representative.

ORDER

Per Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

1. Writ Petition No.15772 of 2006 was preferred by the present petitioner before the Hon'ble High Court of Judicature at Allahabad and under the order dated 16.04.2010 of the Hon'ble High Court of Judicature at Allahabad, it was transferred to this Tribunal and registered as T.A.No.595 of 2010 in pursuance of the provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and now processed for hearing after exchange of affidavits.

2. By means of the instant T.A., the petitioner has made the following prayers:-

“(a) Issue/pass an order or direction to the respondents to quash/set-aside the SCM proceedings allegedly held from 08-08-1998 to 14-08-1998 awarding the sentence of four months R.I. and dismissal to the accused petitioner.

(b) To take back the petitioner in Army Service with full back seniority and all consequential benefits.

(c) It is also prayed that this Hon'ble Court may be pleased to pass any other order or direction which may deem fit and proper keeping the explained circumstances in view.

(d) To award the cost of the writ petition in favour of the petitioner.”

3. In brief the facts, as per the averments made in the writ petition, necessary for the instant T.A. may be summed up as under :

4. The petitioner was recruited in the Indian Army in the year 1987. He served at different places with clean record upto 1997. In 1998 when the petitioner was serving in the field area in Jammu & Kashmir Sector, the incident occurred due to which he was tried by the Summary Court Martial (herein after referred to as the “SCM”) for two charges under Sections 40(a) and 41(1) of the Army Act arising out of the same transaction that took place in July 1998. The petitioner was charge sheeted as under:

CHARGE - SHEET**THE ACCUSED NUMBER 2986563K LANCE NAIK VIJAY KESHAV SINGH OF 24TH BATTALION THE RAJPUT REGIMENT IS CHARGED WITH :-**

FIRST CHARGE **DISOBEYING IN SUCH A MANNER AS TO SHOW A WILFUL DEFIANCE OF AUTHORITY A LAWFUL COMMAND GN EN PERSONALLY BY HIS SUPERIOR IN THE EXECUTION OF HIS OFFICE.**

Army Act Sec.41(1) in that he,

At 0945h on 23 Jul 98 when detailed by no.2986473H NK Ram Swaroop, Orderly NCO of Alfa Company for sentry duty from 10.00 – 12.00h at Coy Post, dply in CI OP RAKSHAK (J&K) at Said Bakar refused to go sentry duty before 12.00h on same day.

SECOND CHARGE **ASSAULTING HIS SUPERIOR OFFICER.**

Army Act Sec 40(a) in that he,

At Coy Post Said Bakar while dply in CI OP RAKSHAK (J&K) on 23 Jul 98 at 11.00h while he was found absent on sentry duty ordered by no.2986473H NK Ram Swaroop, orderly, NCO of same Coy to go on sentry duty that day from 10.00h to 12.00h. on enquiry from him as to why he was absent from the said duty, picked up a stick and charged on him saying “You disappear from here or also I will hit you”, or words to that effect.

Period of close arrest – 06 days.

Place : Field
Dated : 01 Aug 98.

Sd. Illegible
(Deric Sebastian)
Colonel
Commanding Officer
24th Battalion, The Rajput Regiment.

5. The SCM after concluding the trial, inflicted the punishment of four months imprisonment in civil prison and dismissal from service. Facts, that emerge from perusal of the records, are that the petitioner was recruited in Indian Army in the year 1987 and in July 1998 he was serving in the field area in Jammu & Kashmir Sector. On 22nd July 1998, the petitioner was on duty from 1900 hrs to 2200 hrs. During the said duty at 2100 hrs, Nk Ram Swaroop informed him that he had been detailed for patrol duty, so the petitioner went on night patrol duty. As per the version of the petitioner in this T.A., the petitioner returned at about 6 AM in the following morning. No information of any other duty was given to him. As per the norms prescribed, in normal course for exchanging duties, the fresh duty could not have been assigned to the petitioner till 1200 hrs, but at 1015 hrs when the petitioner was sleeping, the NCO Nk Ram Swaroop woke him up and informed that he has been detailed for sentry duty, which has already commenced at 1000 hrs. The petitioner expressed his inability as he had come back from night patrol duty. It is alleged that at that point of time, the petitioner picked up a stick and

assaulted the NCO. Hence the petitioner was charge sheeted accordingly and has been punished by the SCM.

6. Learned counsel for the petitioner has raised various arguments challenging that due procedure in the SCM proceedings was not followed. In the alternative, he has argued that the punishment to the petitioner was disproportionate to his misconduct.

7. Learned counsel for the respondents has argued that the misconduct of the petitioner is of a serious nature as he has refused to obey the order of his superior and has assaulted NCO, who had gone to ask him to report for duty.

8. The petitioner was dismissed from service in the year 1998, therefore, keeping in view the facts that emerge after perusal of the records, we do not consider it appropriate to go through whether proper procedure was followed at that time or not. Therefore, we are confining ourselves only to the question of appropriate sentence.

9. After careful perusal of the entire records, the facts that emerge are that the petitioner was detailed in the intervening night of 22/23 July 1998 for night patrol duty. As per the version of the T.A., the petitioner came back at about 0600 hrs, while as per the statement of the petitioner himself recorded in the SCM proceedings, he came back at 0100 hrs on 23.07.1998. The petitioner has denied that the order of his detailment of sentry duty from 10 AM to 12 AM was given to him earlier, as per the practice adopted in normal circumstances, his next duty should have been fixed only from 1200 hrs on 23.07.1998.

10. We have gone through the summary of evidence and we do not find any evidence on the point whether the petitioner was detailed on night patrol duty in the intervening night of 22/23 July 1998 and at what time he came back to the unit after completing the night patrol duty. When we take up all the facts together, then it is clear that the petitioner had performed his duty in the intervening night of 22/23 July 1998 and thereafter as per the statement of the petitioner himself, he performed the duty again on 23.07.1998 from 1600 hrs to 1900 hrs. It has come in the evidence that the order for detailment of the petitioner for sentry duty on 23.07.1998 from 1000 hrs to 1200 hrs was issued at 09 AM on 23.07.1998. It is the case of the respondents that the said order was issued in the presence of the

petitioner. However, the petitioner has denied this fact. So when we take up all the facts together, then it is clear that the petitioner had performed the night patrol duty in the preceding night and thereafter on the next date, he again performed the duty under orders of his superior from 1600 hrs to 1900 hrs. The only mistake of the petitioner was that he failed to report on duty at 10 AM and thereafter when NCO Nk Ram Swaroop went to ask him to report for duty, then he assaulted him. However, act of assault has not been proved and the respondents have not been able to make out a case categorically establishing this fact. We cannot ignore the pressure and risk factor to a person involved in the night patrol duty in a counter insurgency area. Therefore, after such a strenuous duty, a soldier is required to take rest, so that he may regain his strength to effectively perform his next duty. We have gone through the evidence on record. It has nowhere come in the evidence that there was any emergency at that point of time, due to which the normal procedure was not followed and the order for fresh duty of the petitioner was passed. The petitioner has taken a specific defence that he was not given the order of his detailment of duty from 1000 hrs to 1200 hrs and there is no evidence that there was any emergency or there was shortage of troops due to which fresh duty order was passed only one hour prior to the time of duty. The mistake of the petitioner was that he was of the view that his next duty would start from 1200 hrs and not before that except in case of any emergency. Apart from it, when a person is sleeping and his sleep is disturbed by any reason, then he takes some time to regain his senses. If during such short period any misconduct has been committed, then it deserves to be viewed from a different angle. So keeping in view the aforementioned facts, we find that the sentence of dismissal from service inflicted on the petitioner was disproportionate to the mistake/misconduct committed by him. In such circumstances, the proper sentence would have been any other punishment except punishment of dismissal from service.

11. Admittedly, the petitioner has served his sentence of four months. That would be more than the required punishment for the misconduct of the petitioner. Thus, we find that though the proceedings of the SCM deserves to be upheld, but the punishment inflicted upon the petitioner deserves to be modified.

12. Since the petitioner had already remained in custody for more than four months, so we do not find it appropriate to inflict any other punishment. We direct

that the said punishment shall be treated to be sufficient punishment for the charges levelled against him.

13. Accordingly, the T.A. is allowed in part. The punishment of the petitioner is modified from dismissal to discharge from service. Punishment for his misconduct is confined only to the term of imprisonment already undergone by him. The petitioner shall be notionally treated to be in service till the date of his acquiring pensionable service. However, he shall not be entitled to the back wages for the said period on the principle of 'no work no pay', but shall be entitled for service pension taking into account his notional service. The respondents shall calculate the pension of the petitioner from the date of his notional discharge.

Four months custody of the petitioner shall not result in his disqualification for the purpose of entitlement of his service pension. The benefit of continuity for all other purposes shall be granted including pension.

The respondents are directed to complete this exercise within a period of four months from today, failing which the petitioner shall be entitled to interest @ 9% per annum on the amount accrued from due date till the date of actual payment.

Learned counsel for the respondents as well as the Registrar of this Tribunal are directed to communicate this order to the authorities concerned to ensure compliance of the order.

No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice S.V.S.Rathore)
Member (J)

Dated: November , 2017.

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