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CAPTAIN HARISH UPPAL

v.

UNION OF INDIA AND OTHERS

November 27, 1972

[A. ALAGIRISWAMI AND C. A. VAIDIALINGAM, JJ.]

B

Army Act, 1950, *Sections* 158 *and* 160—*Upward revision of sentence—Whether violative of natural justice principle in the circumstances of the case.*

Army Act, Section 160—*Whether opportunity to be heard necessary when Confirming Officer decides to send back the matter to the Court Martial for considering upward revision of the sentence.*

C

Army Act, Sections 112 *and* 157—*Whether the words 'authority' and 'Officer' denote different authorities.*

Army Act, Section 164—*Whether opportunity to be heard necessary before confirmation of upward revision of sentence by the Army Chief of the Staff.*

D

The petitioner was found guilty by the Court Martial (acting under the Army Act) under section 392 IPC of committing robberies of a bank property and the private property of the Manager and peons of the Bank during the period of the liberation of Bangladesh, in Bangla Desh. The Court Martial sentenced the petitioner 'to be cashiered'. When the matter went to the Officer Commanding under whom the petitioner was working as an Officer, for confirmation of the sentence u/s 153 of the Act, he returned the same to the Court Martial for re-considering whether the upward revision of sentence was necessary in the light of the observations

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made by the Confirming Officer. The Confirming Officer had pointed out in his report that the robberies were committed during the liberation of Bangladesh where the Indian Forces had gone as liberators and as guardians and custodians of the life and property of the people of Bangladesh. Considering the nature and gravity and maintenance of high standard of discipline in the Armed Forces, the sentence awarded was not commensurate. The Confirming Officer further directed that the delinquent officer

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should be given opportunity to address the Court, if he so desired, if the Court decides to enhance the sentence. In the fresh proceedings before the Court Martial, the Officer did not present himself. The Court Martial revoked the earlier sentence and sentenced him to be cashiered and to suffer rigorous imprisonment for two years. The said sentence was duly confirmed by the Chief of the Army Staff. In the petition challenging the legality of the order under Art. 32 of the Constitution, the petitioner contended that the impugned order was bad for the violation of the principle

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of natural justice inasmuch as that the Court Martial while re-considering the sentence did not act as a free agent, that no opportunity of being heard was given to the Officer at the time of remand and at the time of the final confirmation by the Army Chief of the Staff and that the revision was recommended by an officer subordinate in rank to the officer who convened the Court Martial.

In dismissing the petition,

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HELD : (i) Sec. 158 of the Army Act describes the procedure regarding the re-consideration of the sentence by the Court Martial. In considering a petition filed under Art. 32 of the Constitution, the only relevant Article is Art. 21, and the procedure established by law has been com-

pletely followed in this case. The circumstances requiring the reconsideration pointed out by the Officer Commanding were unexceptionable and there was no violation of the principle of natural justice. The petitioner failed to appear before the Court Martial in the fresh hearing. [1031 C-D] A

A. K. Kraipak & Ors. Etc. v. *Union of India and Ors.* [1970] (1) SCR 457 and *Purtabpore Co. Ltd.* v. *Cane Commissioner of Bihar & Ors.*, [1969] (2) SCR 807, distinguished.

(ii) No opportunity to be heard was necessary before the Confirming Officer formed the opinion to send the case back to the Court Martial for re-consideration of sentence. [1032 C] B

(ii) The words 'authority' and 'Officer' in Sec. 112 of the Army Act have one and the same meaning. The Officer recommending the reconsideration of the sentence was also an Officer commanding the Division though he was only officiating and was a Brigadier. The actual confirmation of the enhanced sentence was made by the Chief of Army Staff who was higher in rank than the convening Officer. [1033 C] C

(iv) In the face of the very clear indication in the Constitution, the provisions of Code of Criminal Procedure cannot be adopted in respect of Court Martial. It was open to the petitioner to make a petition to the Chief of the Army Staff under section 164 of the Army Act which he did not do. [1033 H] D

ORIGINAL JURISDICTION : Writ Petition No. 456 of 1972.

Petition under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus.*

A. K. Sen and *B. Datta* for the petitioner.

F. S. Nariman, Addl. Solicitor-General of India, B. D. Sharma and *S. P. Nayar* for the respondents. E

The Judgment of the Court was delivered by

ALAGIRISWAMI, J. The petitioner was an officer of the Indian Army who served in Bangla Desh. On 11th December, 1971 he was in a place called Hajiganj. He was tried before the Summary General Court Martial on the charge of committing robbery at Hajiganj by causing fear of instant hurt to the Custodian of the United Bank Ltd., of certain properties belonging to the Bank and also the personal property of the Manager of the Bank as well as of a Chowkidar of the Bank. The Court sentenced the petitioner to be 'cashiered'. This sentence was subject to confirmation under the provisions of Chapter XII of the Army Act. Maj-Gen. Hira, General Officer Commanding, 23 Mountain Division, of which the petitioner was an officer, passed an order directing the revision of the sentence. Thereafter the petitioner was brought before the same Court Martial, as had tried him earlier, and he was asked whether he wanted to address the Court. On receiving a reply in the negative, the Court, after considering the observations of the confirming authority, revoked the earlier sentence which they had imposed on the petitioner and sentenced him to be cashiered and F G H

A to suffer rigorous imprisonment for two years. Brig. D. P. Bhilla, the Officiating General Officer Commanding 23 Mountain Division, referred the finding and sentence for confirmation to the Chief of the Army Staff, who in due course confirmed the finding and the sentence. The present petition is filed under Article 32 of the Constitution for quashing the order passed by the Chief of the B Army Staff, after setting aside the order passed by Maj-Gen. Hira.

Shri A. K. Sen appearing on behalf of the petitioner raised four points in support of his contention that the order passed against the petitioner should be quashed :

1. The authority to confirm the sentence passed by C a Court Martial does not confer on the confirming authority the power to enhance the sentence. That authority cannot, therefore, achieve that object indirectly by directing the revision of the sentence. The Court Martial's verdict should be unfettered.
2. D In any case, the confirming authority should have given a hearing to the affected party.
3. The confirmation can be made only by the officer who convened the Court Martial and not by a different officer as was done in this case.
4. The officer who finally confirmed the sentence on E the petitioner should also have heard the petitioner.

(1) The officer who convened the Summary General Court Martial, which tried the petitioner, was Maj-Gen. Hira. It was he that directed the revision of the sentence passed on the petitioner. The argument is that this order was in such terms that the Court F Martial which revised the sentence was compelled to and was left with no alternative but to enhance the sentence and that this was against all principles of natural justice. Under Section 153 of the Army Act no finding of a Court Martial shall be valid except so far as it may be confirmed as provided under the Act. Under Section 157 the findings and sentences of summary general courts-martial G may be confirmed by the convening officer or if he so directs, by an authority superior to him. Under Section 158, a confirming authority may, when confirming the sentence of a court-martial, mitigate or remit the punishment thereby awarded, or commute that punishment for any punishment or punishments lower in the scale laid down in section 71. Under Section 160, any finding or sentence of a court-martial which requires confirmation may be H 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. Even after revision the sentence passed

by the court martial would have to be confirmed because of provision of Section 153. The order passed by Maj-Gen. Hira directing revision of the sentence passed by the court martial is as follows :

"The Summary General Court Martial, which assembled at Field, on 9 March 1972 and subsequent days for the trial of IC-16394 Substantive Lieut (Actg. Capt.) HARISH UPPAL, Arty, 198 Mountain Regiment, will reassemble in open court on 15 May 1972 at Field at 1000 hrs for the purpose of reconsidering the sentence awarded by it, *whilst in no way intending the quantum of punishment to be awarded, the court should fully take into consideration the following observations of the Confirming Officer.*

2. The accused was convicted by the Court under Army Act Section 69 for committing a civil offence, that is to say, Robbery, contrary to section 392 of the Indian Penal Code, the particulars hereby averred that he, at HAJIGANJ (BANGLA DESH) on 11 December 1971, by causing fear of instant hurt to the Custodians committed Robbery in respect of the undermentioned articles, the property belonging to the persons indicated as follows :—

(a) The property of the United Bank Ltd. COMILLA Dist.	
(i) Cash in Pakistan Currency.	Rs. 11,222.91
(ii) 28-12 Bore guns Registered No. 027373 and 342.	Two with seven cartridges.
(iii) Wall clock.	One
(iv) Telephone Set Auto TIP (Sky Blue)	One
(v) Telephone CE without hand set (Black)	One
(vi) Pens (eagle)	Two
(vii) Locks with four keys	Two
(viii) Winter uniform of peons and guard.	Two pairs
(b) Personal property of Shri MAKALAM, Manager, United Bank Ltd., HAJIGANJ Branch : Wrist Watch (Romer popular)	One
(c) Personal property of Shri Habiullah, Chowkidar, United Bank Ltd., Hajiganj Branch : PAKISTAN Currency	Rs. 6/-

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3. It is, therefore, apparent that apart from the property of the United Bank Ltd., the accused committed robbery in respect of the personal properties of its two custodians at a time when the War of liberation of BANGLADESH was still being waged on some fronts though the hostility in the town had ceased in HAJI-
B GANJ area and the situation was fast returning to normalcy.

4. It would be appreciated that the charge of which the accused was convicted is of a very serious nature. The punishment of 'Cashiering', therefore, awarded for the offence appears to be palpably lenient. The maxi-
C mum punishment provided for the offence under IPC Sec. 392 is 10 years RI. Even though the proper amount of punishment to be inflicted is the least amount by which descipline can be effectively maintained, it is nevertheless equally essential that the punishment awarded should be appropriate and commensurate with
D the nature and gravity of the offence and adequate for the maintenance of the high standard of discipline in the Armed Forces. It should be clearly borne in mind that our Forces had been ordered to march into BANGLADESH as the liberators of the oppressed people who had been subjected to untold torture and miseries at the hands of Pak troops. It is, therefore, clear that our Forces
E had gone there as guardians and custodians of the lives and property of the persons of that country. The conduct of the accused by indulging in broad day light bank robbery is despicable and his stooping so low as to deprive Shri HABIBULLAH (PW-2), Chowkidar of the United Bank Ltd., of paltry amount of Rs. 6 in Pak
F currency as also his taking away the Romer Wrist watch from Shri MAKALAM (PW-4), Manager of the said Bank, is indeed highly reprehensible. Such actions on the part of responsible officer of the Indian Army are calculated to bring a blot on the fair name of the Indian Army. It is, therefore, our imperative duty to ensure that
G such cases dealt with firmly when a verdict of guilty has been returned by the court.

5. There are certain norms and standards of behaviour laid down in the Armed Forces for strict adherence by persons who have the honour to belong to the Corps of Officers of the Indian Army. A person of the
H rank of an officer, who indulges in such an offence, should, therefore, be awarded suitable punishment. In the course of six years commissioned service he had once been convicted under Army Act Section 41(2) for

disobeying a lawful command given by his superior officer in the execution of his duties for which he was severely reprimanded on 13 June 1970.

6. The accused/or his defending officer/counsel should be given an opportunity to address the court, if so desired. The court should then carefully consider all the above and *should they decide to enhance the sentence, then the fresh sentence should be announced in open court as being subject to confirmation.*

7. The attention of the court is drawn to Army Act Section 160, Army Rule 68 and the form of proceedings on revision given on page 370 of N1ML (1961 Reprint), which should be amended to conform to the provisions of Army Rule 67(1).

8. After revision, the proceedings shall be returned to this Headquarters.

Sd/-
(R. D. HIRA)
Maj-Gen.
General Officer Commanding 23 Mtn Div.

Field
03 May 1972.

It was contended that in the face of such strong observations by the General Officer Commanding the Division the officers constituting the court martial would have felt compelled to enhance the sentence and the revised sentence passed on the petitioner was not the free act of the court martial but one forced on them by the Officer Commarding and that this militates against the principle of natural justice. But it should be remembered that under the provisions of the Army Act set out earlier the confirming authority could himself mitigate or remit the punishment awarded by the court martial or commute that punishment for any lower punishment and, therefore, when a sentence is directed to be revised by the confirming authority it necessarily means that the confirming authority considers that the punishment awarded by the court martial is not commensurate with the offence and it should, therefore, be revised upwards. To object to this is to object to the provisions of section 158 itself. A direction by the confirming authority merely showing that the punishment awarded by the court martial is not commensurate with the offence, would be certainly unexceptionable and would be in accordance with the provisions of law. Instead of baldly stating so the confirming authority in this case has given reasons as to why he considers that the punishment awarded to the petitioner was wholly inadequate.

A We consider that the reasons given by him cannot be taken exception to. It was urged that the confirming authority proceeded on the basis that in respect of the charges against the petitioner the evidence available was as he had set out in his order directing revision and that this was not correct. We must point out that this Court cannot go into the evidence B in support of the charge against the petitioner. Indeed the court martial itself could not have set out the evidence against the petitioner; it should have only given the finding and the sentence. Under the provisions of Article 136(2) of the Constitution this Court cannot grant special leave in respect of any judgment, determination or order passed or made by any court or tribunal C constituted by or under any law relating to the Armed Forces. In considering a petition filed under Article 32 of the Constitution this Court can only consider whether any fundamental right of the petitioner has been violated and the only Article relevant is Article 21 of the Constitution. There is no doubt that the procedure established by law as required under that Article has been completely followed in this case.

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It is, however, urged that the decisions of this Court have laid down that the rules of natural justice operate in areas not covered by any law validly made and that they do not supplant the law of the land but supplement it and, therefore, though the procedure established by law may have been followed as required under E Article 21, the principles of natural justice should also be followed. The cases relied on are *A. K. Kraipak & Ors. etc.* v. *Union of India & Ors.*(1) and *Purtabpore Co. Ltd.* v. *Cane Commissioner of Bihar & Ors.*(2). This Court in the first decision had pointed out that what particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances F of that case, the frame work of the law under which the enquiry is held and the constitution of the tribunal or body of persons appointed for that purpose. It was also pointed out that the Court has to decide whether the observance of that rule was necessary for a just decision and that the rule that enquiries must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice. There is no G analogy between the facts of that case and the present and applying the ratio of that to the facts of this case we are not satisfied that any rule of natural justice has been violated. The latter was a case where the authority competent to pass the order had simply passed an order adopting what the Minister had directed and had not applied his mind. The facts of this case are quite different. The H confirming authority while pointing out the facts had left the discretion regarding the punishment to be imposed to the court

(1) [1970] 1 S.C.R. 457. (2) [1969] 2 S.C.R. 807

martial. If the court martial in spite of the direction given by the confirming authority had reaffirmed its original order, the confirming authority could do nothing because it can exercise its power of directing revision only once and that power was already exhausted. Furthermore, when the court martial reassembled to revise its earlier order under the directions of the confirming authority, the petitioner was given the reasons of the confirming officer for requiring revision and asked whether he wanted to address the court, he replied in the negative. It was open to him to have pointed out to the court martial how the observations of the confirming authority were wrong, how they were not borne out by the evidence on record. Having failed to avail himself of the opportunity accorded to him, the petitioner cannot be now heard to complain that he was not given an opportunity by the confirming authority before he directed revision. The court martial had originally found the petitioner guilty of the charge of robbery, under Section 392 of the Indian Penal Code. There was, therefore, no question of the court martial, when it proceeded to reconsider the matter, of reconsidering the finding of guilty. Therefore, any attempt to question the order of the confirming authority on the basis that he relied upon facts which were not proved for directing revision, is wholly beside the point. And as far as the question of sentence is concerned, one cannot quarrel with the sentiments expressed by the confirming authority. We find ourselves unable, therefore, to agree to petitioner's contention that the order of the confirming authority directing revision is in any way vitiated.

(2) We have already held above that the confirming authority, when he directed a revision of the sentence passed on the petitioner, was only exercising the powers conferred on him by Section 160 of the Army Act. He also made it clear that the court martial was not bound by his opinion by stating that *should the court martial decide to enhance the sentence* the fresh sentence should be announced in open court as being subject to confirmation. Right in the beginning of his order he had also stated 'Whilst in no way intending the quantum of punishment to be awarded, the court should fully take into consideration the following observations'. To hold in the circumstances that the confirming authority should have heard the appellant before he directed the revision of the sentence passed on him would not be a requirement of principle of natural justice. In the circumstances and facts of a case like the present one where the petitioner had an opportunity of putting forward whatever contentions he wanted to rely upon before the court martial, we do not consider that there is any substance in this contention.

(3) The contention here was that while the court martial was convened by a Maj-General the officer who directed revision was a Brigadier, and that only the convening officer can confirm or

A direct revision. This is perhaps the one contention with the least substance put forward on behalf of the petitioner. The contention is based on the words found in Section 157 of the Army Act that the findings and sentences of summary general courts-martial may be confirmed by the *convening officer* or if he so directs, by an authority superior to him. The words 'convening officer' and 'an B authority superior to him' are sought to be contrasted and it is argued that while a confirmation can only be by a convening officer and by no other, the authority superior to him may also confirm showing that in the latter case neither the rank of authority nor the person holding the post is relevant. Section 112 of the Act which deals with the power to convene a summary general C court martial shows that this attempted distinction between "authority" and "officer" is without substance. The officer is the authority and the authority is the officer. Both the words refer only to one person. To accept this argument would mean that if the officer who convened the court martial is transferred to a distant place or retires or is dead, the whole procedure would have to be gone through again. A useful comparison will be of decisions D under Article 311 of the Constitution where it has been held that the power to deal with an officer under that Article can be exercised even by an authority lower in rank to the authority which originally appointed the officer, if at the relevant period of time that authority was competent to appoint the officer sought to be dealt with. It may be noted that in this case the officer who con- E vened the court martial was a Maj-General Officer Commanding the 23rd Mountain Division, and the officer who directed that the findings and sentence should be confirmed by the Chief of Staff was also the officer Commanding the same Division, though he was only officiating and was a Brigadier. The confirmation itself was by the Chief of Army Staff, higher in rank than the convening F officer.

(4) The contention that Brig. Bhilla should either have given a hearing to the petitioner or the Chief of Army Staff should have given a hearing to the petitioner before confirming the subsequent sentence by the court martial is not a requirement under the Act. While it can be at least said that there is some semblance of reason- G ableness in the contention that before he ordered what in effect was an upward revision of the sentence passed on the petitioner, he should have been given a hearing, to insist that the confirming authority should give a hearing to the petitioner before it confirmed the sentence passed by the court martial, is a contention which cannot be accepted. To accept this contention would mean H that all the procedure laid down by the Code of Criminal Procedure should be adopted in respect of the court martial, a contention which cannot be accepted in the face of the very clear indications in the Constitution that the provisions which are

applicable to all the civil cases are not applicable to cases of Armed Personnel. It is not a requirement of the principles of natural justice. Indeed when he was informed that the subsequent sentence passed on him had been sent to the Chief of the Army Staff for confirmation it was open to the petitioner to have availed himself of the remedy provided under Section 164 of presenting a petition to the confirming officer, i.e. the Chief of the Army Staff in this case. He does not appear to have done so.

We are, therefore, of the opinion that there are no merits in this petition and dismiss it.

S.B.W. *Petition dismissed.*