Malkiat Singh Vs Union of India (UOI) and Others

Court: Delhi High Court

Date of Decision: July 24, 2008

Acts Referred: Army Act, 1950 â€" Section 101, 164(2), 191, 34, 35
Army Rules, 1954 â€" Rule 106, 107, 108, 109, 110
Constitution of India, 1950 â€" Article 14, 20, 21, 226, 227

Citation: (2009) 1 ILR Delhi 459

Hon'ble Judges: Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench: Division Bench

Advocate: M.G. Kapoor, for the Appellant; A.K. Bhardwaj, for the Respondent

Judgement

Mool Chand Garg, J.
The petitioner was enrolled as a Sepoy in the Indian Army and was later promoted as a Naik. At the relevant time,

he was serving in Headquarters 15 Corps Artillery Brigade and was employed as a driver. It is his case that on 20th May, 1995, he took a lift in a

military truck driven by one Naik (DHT) Om Prakash for going to his Unit Headquarters to have the fan belt of the gypsy replaced as the old fan

belt had worn out. He sat on the front seat along with the driver. Just after the truck covered about 200 yds., one NCO from the Military

Intelligence stopped the truck and found Naik Om Prakash carrying two barrels of petrol in the truck unauthorisedly. Both Naik Om Prakash and

the petitioner were taken in custody. On revelation by Naik Om Prakash, it transpired that one Havaldar by the name P.V. Rajan was also

involved in the transaction. The respondents decided to take out departmental proceedings against the petitioner and the other two. Even though it

is the stand of the respondent that a court of enquiry was conducted but there is nothing available on record. It is, however, a matter of record that

summary of evidence was recorded in the case of the petitioner as well as the other co-accused wherein the accused persons were set up as

witnesses against each other without disposing of the case of any one of them till the Summary Court Martial (SCM for short) was concluded.

2. In the case of the petitioner the summary of evidence was recorded on 23.6.1995. Naik Om Prakash was examined as witness No. 2 and

Havaldar P.V. Rajan was examined as witness No. 3. A similar exercise was done in the case of the other two accused persons on 22.6.1995 by

examining the petitioner as a witness against them. Thereafter, on 8th September, 1995, a joint trial was held by the third respondent by holding a

SCM. All the three persons were sentenced to be dismissed from service on 08.9.1995 after recording a plea of ""guilty"" without any

corroboration. The petitioner submit that even the requirement of Rule 115(2) of the Army Rules was not followed. It is the case of the petitioner

that as summary of evidence was irregularly recorded being against the Army rules and constitution, the court martial proceedings in their entirety

are liable to be set aside.

3. It is also the case of the petitioner that even the procedure for recording the plea of guilty as alleged by the respondents has not been recorded

as per the procedure prescribed under Rule 115(2), inasmuch as, neither any evidence was recorded nor the caution as required before recording

the plea of guilty has been given to the accused. The said Rule for the sake of reference is reproduced hereunder: ""Where an accused pleads

Guilty"", such plea and the factum of compliance of Sub-rule (2) of this rule, shall be recorded by the court in the following manner: ""Before

recording the plea of ""Guilty"" of the accused the court explained to the accused the meaning of the charge (s) to which he had pleaded ""Guilty"" and

ascertained that the accused had understood the nature of the charges (s) to which he had pleaded ""Guilty"". The court also informed the accused

the general effect of the plea and the difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself

that the accused understands the charge (s) and the effect of his plea of ""Guilty"", accepts and records the same. The provisions of Rule 115(2) are

thus complied with"".

4. This certificate is again available on a separate paper and is not in continuity of the proceedings moreover there is no evidence which has been

recorded before calling upon the petitioner to make his plea and thus is not in accordance with rules. The date has been written in a different pen.

Thus, it is pleaded that in these circumstances, the plea should be considered as that of ""not guilty"" and the procedure laid down under Rule 116(2)

of the Army Rules should have been followed which has not been done. The said Rule reads as under:

Rule 116(2): After the record of plea of ""Guilty"" on a charge (if trial does not proceed on any day other charges), the court shall read the summary

of evidence, and annex it to the proceedings or if there is no such summary, shall take and record sufficient evidence to enable it to determine the

sentence, and the reviewing officer to know all the circumstances connected with the offence. The evidence shall be taken in like manner as is

directed by these rules in case of a plea of ""Not Guilty

5. According to the petitioner he made a representation to army authorities but heard nothing from them. The petitioner then filed a writ petition

challenging the entire proceedings before the Punjab & Haryana High Court which was allowed to be withdrawn with the permission to file the

same in an appropriate forum. It is thereafter that the petitioner has filed the present petition. In the writ petition the petitioner has also made a

reference to para 4 of the Memoranda for the guidance of Officers concerned with Court Martial under the heading ""Summary of Evidence"". The

relevant portion of the said Memoranda reads as under:

4. If in any case two or more persons are suspected of complicity in an offence, and it is found necessary to call one of these as a witness for the

prosecution against the other or others charged in connection with the offence, one of two courses must be taken:

(i) Proceedings against him must be abandoned and any charge therein already preferred against him dismissed; or

(ii) Steps must be taken to ensure that the case against him is disposed of summarily or tried by court-martial, before the trial of persons concerned

against whom he is to give evidence; and that he is only tendered as a witness when he has already been acquitted or convicted.

6. It may also be appropriate to take note of the procedure mentioned in the Manual of Military Law (Vol-I) about admissions and confessions in

the rules which contains instructions that should be followed by the Army Authority. The same is reproduced hereunder:

27. Confession only admissible against the person who makes it-The general rule is that a confession is not admissible as evidence against any

person except the person who makes it. But a confession made by one accomplice in the presence of another is admissible against the latter to this

extent, that if it implicates him, his silence under the charge may be used against him, whilst on the other hand, his prompt repudiation of the charge

might tell in his favour. The Indian Evidence Act further enacts that when two or more persons are tried jointly for the same offence, a confession

made by one of such persons, affecting himself and any other of the accomplices jointly tried with him, when proved, may be taken into

consideration by the court against that other accomplice as well as against the person who made it (IEA. Section 30). When one of several

persons jointly tried pleads guilty, he ceases to be tried jointly with the others, and therefore any confession made by him cannot be taken into

consideration against the others. Though the confession of an accomplice may thus, under certain circumstances, be ""taken into consideration"" and

thus be an element in the consideration of the case against the other co-accused, it must necessarily be of less weight than sworn evidence, less

even than the sworn evidence of an accomplice who is not jointly tried. The courts have accordingly, established the following rules with regard to

this kind of evidence:

(a) Where there is absolutely no other evidence, such a confession alone will not justify the conviction of a person who is being tried jointly with its

author;

(b) The confession of co-accused must be corroborated by independent evidence, both in respect of the identity of all the persons affected by it

and of the fact the crime was committed.

7. It was submitted that since the aforesaid process was not adhered to by the army authorities, the statements made by the petitioner and the

other two co-accused persons, in his case were inadmissible and, therefore, the Summary of Evidence was recorded illegally.

8. The petitioner referring to Para 4 of the Memoranda for the guidance of the officers concerned with the court martial under the heading

Summary of Evidence"" (supra), submitted that if one of the co-accused is put up as a witness against another co-accused without first disposing of

the charges against the co-accused who has been put up as a witness, it tantamounts to forcing the co-accused incriminating himself thus

Constituting violation of Article 20 Sub-clause (3) of the Constitution of India (hereinafter referred to as the Constitution). It also violates Rule 23

of Army Rules, 1954 (for short ""Army Rules"").

9. Rule 23(3) of Army Rules provides as under:

23. Procedure for taking down the summary of evidence. (3) The evidence of each witness after it has been recorded as provided in the Rule

when taken down, shall be read over to him, and shall be signed by him, or if he cannot write his name shall be attested by his mark and witnessed

as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused will be asked -

Do you wish to make any statement"" You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in

writing and may be given in evidence."" Any statement thereupon made by the accused shall be taken down and read over to him, but he will not be

cross-examined upon it. The accused may then call his witnesses, including if he so desires, any witnesses as to character.

10. A perusal of the original record goes to show that the caution required to be given under Rule 23(3) to the accused was not complied with and

the same does not appear to be in continuity of the proceedings but taken on a separate piece of paper that does not even bear the signatures of

the petitioner at the bottom thereof. The aforesaid observed earlier, is also in violation of Para 4 of the Memoranda.

11. It was thus submitted that the proceedings undertaken by the army authorities leading to the dismissal of the petitioner is based upon

proceedings from the stage of consideration of charges till holding of a SCM which are illegal and therefore the punishment imposed upon the

petitioner is liable to be set aside.

12. In the counter affidavit, the respondents seek dismissal of the writ petition on the plea that the petitioner pleaded guilty and that the sentence

has been imposed upon him in accordance with Army rules. It was submitted that in such circumstances, the petitioner is debarred from challenging

the order passed by the SCM. It was also submitted that the petitioner has not even availed the benefit of alternative remedy available to him as

per Section 164(2) of the Army Act, 1950 (for short the said Act).

13. On facts, it has been submitted that on 17th May, 1995, 15 barrels of petrol were collected by Naik (DHT) Om Prakash and others from

FFD Khunsob. All the 15 barrels of petrol were unloaded at the Headquarters camp and kept locked in the POL store in the presence of FOL

NCO, Havaldar (DHT) P.V. Rajan. The key of the stores was handed over to the petitioner on 20th May, 1995 and it is thereafter that the

petitioner along with Naik Om Prakash extracted two barrels of petrol (400 litres each) and loaded the same in a three ton vehicle with malafide

intentions. The barrels were covered with a muff to be hid. Naik Om Prakash drove the three ton vehicle along with the petitioner (as the co-

driver) out of the cantonment area into the civil area with criminal intention and ulterior motive to sell the same in the outside market. They were

caught red-handed by Havaldar (Intelligence) Manohar Lal on 20th May, 1995 at 1650 hours. Both of them confessed before the said Havaldar

(Intelligence) to the effect that the aforesaid quantity of barrels was brought by them from Headquarters to sell the same to civilians. As observed

earlier, the aforesaid facts have not been admitted by the petitioner. It is stated that a Court of Inquiry was conducted from 22nd May, 1995 to

23rd May, 1995 against the petitioner, Naik Om Prakash and Havaldar P.V. Rajan when evidence was recorded against the petitioner and the

co-accused. Thereafter, a joint trial was conducted where they pleaded guilty to the charge and were punished with ""DISMISSAL"" from service in

accordance with the Army rules.

14. We have heard the parties. The petitioner on his part has relied upon the judgment delivered by the Supreme Court in the case of Ranjit

Thakur Vs. Union of India (UOI) and Others, It would be appropriate to take note of the relevant observations made in the aforesaid Judgement

which reads as under:

The ""Act"" constitutes a special law in force conferring a special jurisdiction on the Court-Martial prescribing a special procedure for the trial of the

offences under the `Act''. Chapter VI of the `Act'' comprising of Sections 34 to 68 specify and define the various offences under the `Act''.

Sections 71 to 89 of Chapter VII specify the various punishments. Rules 106 to 133 of the Army Rules 1954 prescribed the procedure of, and

before, the SCM. The Act and the Rules constitute a self contained code, specifying offences and the procedure for detention, custody and trial of

the offenders by the Court - Martial. The procedural safeguards contemplated in the Act must be considered in the context of and corresponding

to the plentitude of the summary jurisdiction of the Court-Martial and the severity of the consequences that visit the person subject to that

jurisdiction. The procedural safeguards should be commensurate with the sweep of the powers. The wider the power, the greater the need for the

restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the Statue. The oft quoted

words of Frankfurter, J. in Vitarelli v. Seaton 359 US 535 are again worth recalling:

...if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that

procedure must be scrupulously observed....

This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall

perish with that sword.

The history of liberty"" said the same learned Judge ""has largely been the history of observance of procedural safeguards.

15. On the other hand the respondents have relied upon a judgment delivered by the Supreme Court in the case of Union of India (UOI) and

Others Vs. Major A. Hussain (IC-14827), and have contended that this Court while exercising jurisdiction under Article 226 & 227 of the

Constitution, has no power of superintendence over the army authorities. The relevant observations made in the aforesaid judgment are

reproduced hereinbelow:

Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not

subject to the superintendence of the High Court under Article 227. If a court-martial has been properly convened and there is no challenge to its

composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands.

If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other

Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is equally fair if not more than a criminal trial provides to

the accused. When there is sufficient evidence to sustain the conviction, it is unnecessary to examine if pre-trial investigation was adequate or not.

Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is

shown that the accused has been prejudiced or that a mandatory provision has been violated. One may usefully refer to Rule 149 of the Army

Rules. The High Court should not have allowed the challenge to the validity of conviction and sentence of the accused when evidence was

sufficient, court-martial had jurisdiction over the subject-matter and had followed the prescribed procedure and was within its powers to award

punishment.

16. Relying upon the aforesaid judgment, the respondent also submitted that aberration of the procedure before holding of SCM cannot come to

the rescue of the petitioner more so, when he has pleaded guilty during the SCM and was guilty of very serious charges i.e. abetting the

commission of theft of two gallons of petrol with the malafide intention to sell them to the civilians unauthorizedly.

17. There may not be any dispute about the proposition laid down in the aforesaid judgment but the proposition starts with a CAUTION, i.e.,

proceedings leading to the award of punishment must be as a result of proceedings held in accordance with the law i.e. Defence Service Regulation

and other administrative instructions. It is also a well settled principle that the sentence should also have been awarded by properly convened

Court Martial conducted in accordance with law and further the conviction should also be based upon sufficient evidence. The punishment

awarded should also not be disproportionate to the guilt and that the judgments have to be understood and applied to the given facts of a case

which is under scrutiny of the Court.

18. At this stage, we also feel it appropriate to make a reference to the procedure which is required to be followed for holding a court martial right

from the stage of consideration of charge as provided for under the said Act and the rules framed thereunder:

(i) The procedure at a court-martial is set out partly in the Army Act (XLVI of 1950) (The Act) itself and partly in the Army Rules 1954 (the rules)

framed by the Government of India, Ministry of defense, in exercise of the powers conferred by Section 191 of the Act. The procedure of trial by

a general court-martial in broad by outlines is this. The first step towards bringing an offender to justice under the military code is to order his arrest

or confinement. (Section 101 of the Act). Military custody may mean open or close arrest at the discretion of the superior officer. A person under

close arrest does not go out of his quarter or place of his confinement except lo take an exercise. An officer placed under arrest is informed in

writing of the nature of his arrest. In order to ensure expeditious disposal of disciplinary cases, the Act requires that whenever a person subject to

military law is taken into military custody, the charge against him must be investigated with all convenient speed, (section 102).

(ii) The first investigation is usually carried out by the company commander who formulates, in the light of investigation made by him, the charge or

charges against the accused. With the list of charges so drawn up, the accused is produced before the commanding officer who holds a formal

investigation into the case. At this investigation the nature of the offence or offences charged is made known to the accused and witnesses present

depose to tads within their knowledge in support of the charge or charges. The accused is present throughout this investigation and is given full

liberty to cross-examine the witnesses. He can also call any witnesses on his own behalf and make any statement in his defense. [rule 22(1)].

(iii) After hearing the witnesses in support of the charge or charges and witnesses, if any, produced by the accused and any statement that he may

make, the commanding officer, according to the view he has formed may either dismiss the charge if the evidence docs not disclose any offence, or

dispose of the case summarily under, Section 80 of the Act, or refer the case to the proper superior military authority, or adjourn the case for the

purpose of having the evidence reduced to writing, or order his trial by a summary court-martial. [rule 22(2) and (3)]

(iv) Suppose the commanding officer remands the case for trial by court-martial, then the case is adjourned for a ''summary of evidence'' to be

taken. Its chief purpose is to give the accused, the commanding officer and the convening officer and to the presiding officer of a court-martial so

convened particulars of the evidence in respect of the charge or charges. The commanding officer may himself prepare the summary of evidence or

appoint some other officer to do so. The statements of witnesses who were present and gave evidence before the commanding officer whether

against or for the accused and any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing

of the accused. [rule 23(1)1.

v) In this regard the caution as mentioned under 23(3) is also required to be given to the accused before recording his statement.

(vi) The next stage is the arraignment of the accused. This is done by the charges being read. The accused is then questioned in respect of each

charge separately whether he pleads ''guilty'' or ''not guilty'' thereto. If he does not plead guilty to the charge the prosecution examines the

evidence. The accused is given full opportunity for making his defense and is afforded every facility for preparing it which is practicable having due

regard to the military exigencies or necessities (rule 36). The military code is quite zealous of the rights of the accused. It provides that the court

shall allow great latitude to the accused in making his defense, [rule 77(3)].

vii) Before recording the plea of guilt a certificate is required under Rule 115(2) quoted elsewhere in this judgment is to be given to the accused. In

appropriate case the procedure mentioned under Rule 116(2) may also have to be adopted.

19. In Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, while recognizing that the Army rules in Army Act have to

be applied and strictly followed the rules not meeting the requirement of Article 21 observed:

The Parliament has the power to restrict or abrogate any of the rights conferred by Part III of the Constitution in their application to the members

of the Armed Forces so as to ensure the proper discharge of duties and maintenance of discipline amongst them. The Act is one such law and,

therefore, any of the provisions of the Act cannot be struck down on the only ground that they restrict or abrogate or tend to restrict or abrogate

any of the rights conferred by part III of the Constitution and this would indisputably include Article 21. But even apart from this, it is not possible

to subscribe to the view that even where the prescribed procedure inheres compliance with principles of natural justice but makes the same

dependent upon the requisition by the person against whom the inquiry is held, it would be violative of Article 21 which provides that no person

shall be deprived of his life or personal liberty except according to the procedure established by law. If the procedure established by law

prescribes compliance with principles of natural justice but makes it dependent upon a requisition by the person against whom an inquiry according

to such procedure is to be held, it is difficult to accept the submission that such procedure would be violative of Article 21. And as far as the Rules

are concerned, they have made clear distinction between an officer governed by the Act and any other person subject to the Act. Expression

Officer; has been defined to mean a person commissioned defined to mean a person commissioned, gazetted or in pay as an officer in the regular

Army and includes various other categories set out therein. By the very definition an officer would be a person belonging to the upper bracket in

the Armed Forces and any person other than an officer subject to the provisions of the Act would necessarily imply persons belonging to the lower

categories in the army service. Now, in respect of such persons belonging to the lower category it is mandatory that Rules 22, 23 and 24 have to

be followed and there is no escape from it except on the pain of invalidation of the inquiry.

20. It may also be relevant to take note of the following observations made in the aforesaid case, i.e.:

Reluctance of the apex court more concerned with civil law to interfere with the internal affairs of the Army is likely to create a distorted picture in

the minds of the military personnel that persons subject to Army Act are not citizens of India. It is one of the cardinal features of our Constitution

that a person by enlisting in or entering armed forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution.

In the larger interest of national security and military discipline Parliament in its wisdom may restrict or abrogate such rights in their application to

the Armed Forces but this process should not be carried so far as to create a class of citizens not entitled to the benefits of the liberal spirit of the

Constitution. Persons subject to Army Act are citizens of this ancient land having a feeling of belonging to the civilized community governed by the

liberty oriented constitution. Personal liberty makes for the worth of human being and is a cherished and prized right. Deprivation thereof must be

preceded by an inquiry ensuring fair, just and reasonable procedure and trial by a Judge of unquestioned integrity and wholly unbiased. A marked

difference in the procedure for trial of an offence by the Criminal Court and the Court martial is apt to generate dissatisfaction arising out of this

differential treatment.

21. The aforesaid legal position also finds support with a latest pronouncement of the Division Bench in LPA No. 254/2001, The Chief of Army

Staff and Ors. v. Ex. 14257873 K Sigmm Trilochan Behera, decided on 17.1.2008 some of the portion needs reference:

7. Counsel for the respondent has drawn our attention towards guide to SCM issued in the year 1984, Heading (b) Arraignment at pages 7 & 8, it

is mentioned:

(iii) If the accused pleads guilty to the charge, the implications of the plea should be explained to the accused (s) by the officer holding the trial vide

AR 115(2). He should also make the following record on page ""B"" of the proceedings in the presence of the accused and obtain his signature

thereon:

Before recording the plea of guilty offered by the accused, the Court explains to the accused the meaning of the charge(s) to which he had pleaded

guilty and ascertains that the accused understands the nature of the charge(s)-to which he has pleaded guilty. The Court also informs the accused

the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court having satisfied itself

that the accused understands the charge(s) and the effect of his plea of guilty accepts and records the same. The provisions of Army Rule 115 (2)

are complied with.

(Signature) (Signature)

Accused The Court

iv) Failure to comply with the procedure explained in sub-para 16(b) (iii) above will amount to violation of the procedural safe guard provided in

AR 115 (2) and violation of Article 14 of the Constitution of India and the punishment awarded will have to be set aside. (Auth: HQ Western

Command letter No. 0337/A3 dated 30 Oct 84 attached as Appx F and Judgment of J & K High Court, see Pritpal Singh v. Union of India (J &

K) 984 (3) SLR 680).

22. The Division Bench also relied upon and reiterated the principles as enunciated in the case of Prithpal Singh v. Union Of India and Ors.

(supra).

23. The Division Bench also referred to a recent authority reported in Sukanta Mitra v. Union of India and Ors. 2007 (2) (J & K) 197 where it

was held:

9. This apart the fact remains that the appellant has been convicted and sentenced on the basis of his plea of guilt. The plea of guilt recorded by the

Court does not bear the signatures of the appellant. The question arising for consideration, therefore, is whether obtaining of signatures was

necessary.

In a case T.N. Janardhanan Pillai Vs. State, , a Division Bench of this Court has observed:

The other point which has been made basis of quashing the sentence awarded to respondent-accused relates to Clause (2) of Rule 115. Under this

mandatory provision the court is required to ascertain, before it records plea of guilt of the accused, as to whether the accused undertakes the

nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea and in particular of the meaning charge to

which he has pleaded guilty. The Court is further required under this provision of law to advise the accused to withdraw that plea if it appears from

summary of evidence or otherwise that the accused ought to plead not guilty. How to follow this procedure is the main crux of the question

involved in this case. Rule 125 provides that the court shall date and sign the sentence and such signatures shall authenticate of the same. We may

take it that the signatures of the accused are not required even after recording plea of guilt but as a matter of caution same should have been taken.

24. Lastly, the Division Bench made the following observation:

In the light of the above discussion, we find that the above-said proceedings bristle with a number of question marks. The same stand vitiated. If

dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure

must be scrupulously observed. The LPA is thus dismissed.

25. Some other judgments are also of significance where also non-compliance of the procedure laid down under the Army Act and rules have

been found to be fatal.

26. In Lance Dafedar Laxman Vs. Union of India and Others, it has been observed:

The argument of Mr. Joseph do not hold good because the Rule 22 no doubt pertains to a stage prior to trial but the decision to hold any

investigation and a trial depends upon the procedure laid down under this rule. Therefore, the procedure which has been held by the Supreme

Court is mandatory and has to be followed in letter and in spirit.

27. In Dhananjaya Reddy etc. Vs. State of Karnataka, it has been held as under:

where a law requires something to be done in certain manner that must be done in that manner or not at all if the rules require confession to the

record in a particular manner then it should have been done in that manner having not followed the rules affects the confession even if one go to

Rule 23 and applies the same to the facts of this case it is apparent, that the caution which were given to the accused was after recording the plea

of guilt and not before it. Moreover, in this case there was no evidence except the evidence of the accused regarding summary of evidence.

In that case it was also held: Purpose of Summary of Evidence, as per the rule position itself, cannot be under estimated. Since the record of

Summary of Evidence forms the basis on which it is to be further decided whether to hold General Court Martial or not and, since at the time of

recording witnesses by the Officer nominated to record Summary of Evidence accused is given chance to cross-examine the prosecution witnesses

and to lead his defence witnesses, not giving such an opportunity to the accused person is definitely going to cause prejudice to such a person. The

procedure which is to be followed at the time of recording evidence by the Officer nominated to record Summary of Evidence is, therefore,

mandatory and infraction thereof may entail the entire proceedings including

General Court Martial, to be illegal and these can be quashed.

28. Taking into consideration the material and the evidence placed on record and the law on the subject, it is apparent that the procedure adopted

by the respondent in punishing the petitioner is illegal and vitiates the proceedings; inasmuch as;

(i) The format available on record about compliance of Rule 22 is not in accordance with the requirement of the said Rule.

(ii) Recording of the confessional statement of accused persons against each other is contrary to procedure laid down in Para 4 of Memoranda and

the procedure mentioned in the Manual of Military Law (Vol-1) has not been followed which vitiates the proceedings in its entirety.

(iii) The caution which is required to be given under Rule 23(3) is on a separate page and creates a reasonable doubt about its genuineness.

(iv) The pre-requisite before recording the plea of guilt of the accused has not been followed in terms of Rule 115(2) and the certificate which

forms a part of the record is on a separate paper and again casts a doubt on its authenticity.

(v) The procedure contemplated under Rule 116(2) has not been followed.

29. Thus, we have no hesitation but to hold that the entire proceedings carried out by the respondent against the accused person who was just a

driver and not an Officer right from the stage of holding the so-called Court of Enquiry, recording ""Summary of Evidence"" and the SCM suffers

from grave procedural irregularity and strikes at the root of the case for the reasons stated above. In consequence thereto, we set aside the same

as also the sentence awarded to the petitioner. As a result of the aforesaid the petitioner will have to be reinstated in service, but shall not be

entitled to any financial benefits for the intervening period. At the same time, the respondents shall be at a liberty to hold a fresh Court Martial if

they so choose but treating the plea of the petitioner as that of `not guilty" by recording independent evidence, if any. The same shall be done by a

different set of officers other than the ones who decided the case earlier. The respondents are thus directed to re-instate the petitioner in service

within a period of three months from today and if the respondents decide to go for fresh Court Martial proceedings against the said petitioner or to

go in for any other proceedings, they can do so within a maximum period of six months from today. Needless to say that in case of an adverse

order passed against the accused/petitioner on conclusion of the said proceedings, the petitioner shall have the right to get the same redressed in

accordance with law.

30. The writ petition accordingly stands disposed of leaving the parties to bear their own costs.