Ex. Major R.S. Budhwar Vs Union of India (UOI) and Others

Court: Delhi High Court

Date of Decision: Feb. 24, 1995

Acts Referred: Army Rules, 1954 â€" Rule 22, 23, 24, 25, 37
Constitution of India, 1950 â€" Article 226

Citation: (1995) 58 DLT 339 : (1995) 34 DRJ 426

Hon'ble Judges: Chander Mohan Nayar, J; A.B. Saharya, J

Bench: Division Bench

Advocate: Shyamla Pappu and Rajinder Kumar, for the Appellant; V.K. Shali, for the Respondent

Final Decision: Dismissed

Judgement

C.M. Nayar, J.
The present writ petition challenges the legality of orders passed by the Government of India, Ministry of defense dated

December 24, 1992, rejecting the post confirmation petition dated November 15, 1990, and affirming the finding, sentence, confirmation and pro

amalgamation of General Court Martial held from January 4, 1989 to February 24, 1990. The petitioner has submitted the following facts in the

petition, which may be reproduced briefly as under:--

2. The petitioner during June, 1987 was serving as a Major in 8 JAT Regiment in Regular Army located in Kaying Area in the eastern sector. At

that time, Col. S.S. Sahota was the Commanding Officer and Major Jaspal Singh was the Second-in-Command of the above said Regiment. On

June 16,1987, at about 12.50 hours two jawans of "A" Company 8 JAT Regiment, namely, Sepoy Mahavir Singh and L/NK Inderpal Singh

absconded allegedly after shooting and killing Col. S.S. Sahota, Major Jaspal Singh, Capt. B.K. Chhetri and Capt. A. Shrivastava. The First

Information Report was filed at OIC, Police station Kaying by Capt A.V. Garde, Adjutant SJ AT Regiment. The patrol parties were sent to cover

various routes to ensure that the culprits did not escape. The petitioner further reiterates that he was also sent on a patrol to apprehend the culprits

and on June 18, 1987, at about 16.30 hours both the killers, Sepoy Mahavir Singh and L/NK Inderpal Singh surrendered and were taken to HQ

5 Mm Brigade located at Along and kept in military custody.

3. Consequently, a Staff Court of Enquiry was ordered by HQ 2 Mountain Division to investigate into the circumstances under which the above

said Jawans shot dead the four officers including the Commanding Officer as well as his Second-in-Command on June 16, 1987. The Staff Court

of Inquiry was also required to investigate the circumstances under which the said two accused shot and injured N.K. Kami Singh and L/NK

Ranbir Singh. During the Court of Enquiry the two killers Sepay Mahavir Singh and L/NK Inderpal Singh made certain insinuations against the

petitioner, Sub Major Mahtab Singh and Sub Kartar Singh. The petitioner states that he was shocked to hear the statements accusing him for

giving the task of eliminating the Commanding Officer, Col. S.S. Sahota and Second-in-Command Major Jaspal Singh. The Court of Inquiry

proceedings commenced on June 23, 1987 and completed in the first week of September, 1987 and concluded on September 12, 1987. The

Court of Enquiry was entrusted to investigate into the following terms and references:

(a) Circumstances under which L/NK Inderpal Singh and Mahavir Singh both of "A" Coy 8 JAT on 16 June, 1987 at about 12.50 hrs at 8 JAT

Loc, alleged, shot Col. S.S. Sahota, Major Jaspal Singh, Capt. B.K. Chhetri and Capt. A. Srivastava.

(b) Circumstances under which L/NK Inderpal Singh and Sepay Mahavir Singh, on 16 June 1987 at about 12.50 hrs. at 8 JAT Loc, shot and

injured N.K. Kami Ram and L/NK Ranbir Singh of 8 JAT.

(c) Examining influence of external factor if any.

(d) Establish the possible cause of the incident.

(e) Establish if there was failure of Command and apportion responsibility for the same.

(f) Circumstances under which L/NK Inder Pal Singh and Sepay Mahavir Singh deserted from 8 JAT Loc on 16 Jun 87 along with SLR No. G-

7343 and EC-9744 and 367 rds of 7.62 mm of 8 JAT.

(g) Circumstances under which L/NK Inder Pal Singh Sep Mahabir Singh were apprehended by Hav Rattan Singh on 18 June at 1715 hrs.

(a) L/NK Inder Pal Singh for having shot dead Capt. B.K. Chhetri and Capt A Shrivastava, for stealing a 7.62 mm SLR and 200 rounds and for

desertion.

(b) Sep Mahabir Singh for having shot dead Col S.S. Sahota and Maj Jaspal Singh, causing hurt to N.K. Kami Singh and L/NK Ranbir Singh,

stealing of 7.62 mm SLR, magazines and approx, 200 rounds and for desertion.

(c) Disciplinary action to be taken against the following for alleged conspiracy to kill CO and 21C and for instigating L/NK Inderpal Singh and

Sepay Mahabir Singh:--

(i) Maj. R.S. Budhwar, "A" Coy Cdr.

(ii) Sub Major Mehtab Singh (iii) Sub Kartar Singh

4. The Court of Inquiry was completed on 12th September 1987 and Genera I Officer Commanding (GOC) directed that disciplinary action be

taken against the petitioner, L/NK Inderpal Singh, Sep. Mahavir Singh, Subedar Major Mehtab Singh and Subedar Kartar Singh. The following

reasons are indicated against the said persons, which may be referred to as below:

(a) L/NK Inder Pal Singh for having shot dead Capt B.K. Chhetri and Capt A Shrivastava, for stealing a 7.62 mm SLR, five magazines and 200

rounds of ammunition and for desertion.

(b) Sep. Mahabir Singh for having shot dead Col SS Sahota and Maj Jaspal Singh, causing hurt to NK Kami Singh and L/N.K. Ranbir Singh,

stealing of 7.62 mm SLR, four magazines and approx. 200 rounds of ammunition and for desertion.

(c) Disciplinary action to be taken against the following for alleged conspiracy to kill CO and 21C and for instigating L/NK Inderpal Singh and

Sep. Mahabir Singh:--

(i) Maj RS Budhwar, "A" Coy Cdr.

(ii) Sub Major Mehtab Singh

(iii) Sub Kartar Singh

The Court of Inquiry, as stated above, was completed on September 12, 1987. The petitioner contends that as a result of deliberations of the

Court, it was felt that the following persons should be screened to obviate their motivation in the crime:

(i) JC-143631 Nb Sub Satyabir Singh

(ii) 3173269 Sep. Hari Singh

(iii) 3174021 Sep. Kishan Lal

(iv) 3175674 Sep. Ashok Kumar

(v) 3178982 Sep. Rajender Singh

5. The petitioner further contended in the petition that though there was no cogent and reliable evidence, he was blamed by the Court of Inquiry on

the conjectures and surmises based only on the incoherent statements of L/NK Inder Pal Singh and Sep. Mahavir Singh.

6. The petitioner further maintains that despite the fact that there was not even an iota of evidence on record, he was attached to 100 Field

Regiment for initiation of disciplinary action against him. On January 9, 1988, the summary of evidence in respect of the petitioner was ordered to

be recorded by Col. L.R. Shankyan, CO 100 Field Regiment. During the recording of summary of evidence six prosecution witnesses, namely,

Sep. Mahavir Singh,L/NK Inderpal Singh, Col S.K. Zutshi, Hav Vincent Xavier, Sep. Kishan Lal and Major P.A. Somaiah and eight defense

witnesses, namely, Maj (now Lt Col) R.S. Lamba, L/NK Om Kishan, L/NK Ram Chandra, Capt A.V. Garde, Maj S.K.S. Chandal, Sep

Matadin, Capt. S.P. Choudhary and Maj V.L. Kohite were examined. On close scrutiny of summary of evidence on which General Court Martial

was convened later on it is clearly discernable that no offence can be ascribed to the petitioner based on such evidence on record. The petitioner

cites the opinion of Col. L.R. Shankhyan on the summary of evidence and reiterates that under the provision of Army Rule 23, it was only the

Commanding Officer who was empowered to initiate disciplinary action against a person subject to the Army Act.

7. A perusal of the recommendation of Col. L.R. Shankhyan on the summary of evidence revealing that no offence was made out against the

petitioner, the convening authority malafidely cancelled the attachment of the petitioner from 100 Field Regiment and ho was subsequently attached

to 237 Field Regiment. The respondents, however, have denied the averments of the petitioner in this regard and have stated that in the opinion of

the CO of 100 Field Regiment, it was merely reiterated that the case was complex and, Therefore, was referred for suitable legal advice. The

petitioner had to be reattached to 237 Field Regiment as 100 Field Regiment was in the process of carrying out normal movement out of the

jurisdiction of the convening authority. It is, Therefore, reiterated in defense that the cancelling of the attachment to 100 Field Regment and

reattachment to 237 Field Regiment was routine and an administrative requirement and no malafide in this regard could be imputed against the

convening authority.

8. The two accused who shot dead the four officers were tried by a General Court Martial that concluded on December 10, 1988 and having

been found guilty were sentenced to death by hanging which was confirmed by the Central Government on February 13, 1991. The sentence was

upheld by a Division Bench of this Court in Criminal Writ No. 159/93 entitled SPE Inder Pal Singh and another v. Union of India decided on May

27, 1993. Along with other accused, the petitioner was served with the charge sheet dated December 24, 1988. The petitioner has contended that

he was thereafter served with another charge sheet which added and included the words ""on or before"" with regard to the date of incident on 14th

June, 1987. The said charge sheet is also dated December 24, 1988 and may be reproduced as follows:

The 1. IC 30367P Major Budhwar Rajbir Singh of 8 JAT, an officer holding permanent commission in

accused the Regular Army,

:

2. Ex Sub Major Mehtab Singh formerly JC 66136K Sub Maj Mehtab Singh of 8 JAT, and liable to

trial by Court-martial u/s 123 of the Army Act, and

3. JC 127909 X Sub Kartar Singh of 8 JAT, all attached to 237 Fd Regt, are charged with:--

Army COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, ABETMENT OF AN OFFENCE

Act SPECIFIED IN SECTION 302 OF INDIAN PENAL CODE, IN CONSEQUENCE OF WHICH

Section ABETMENT SUCH OFFENCE WAS COMMIT-TED, CONTRARY TO SECTION 109 READ

69 WITH SECTION 34 OF INDIAN PENAL CODE.

in that they together, at Field, on or before 14 June 1987, abetted No.3173368H Sep (L/NK)

Inderpal Singh and No 3174523 L Sep Mahavir Singh, both of 8 JAT to commit murder of 1C

14807N Colonel S.S. Sahota and 1C 28739H Major Jaspal Singh of the same unit, which was

committed in consequence of such abetment by the said Sep. (L/NK) Inderpal Singh and Sep.

Mahavir Singh

Place : Sd/-

Dinjan

(Bedi Gajinder Singh)

Leiutenant Colonel

Officiating Commanding Officer Field Regiment

Date 24.12.1983 237

To be tried by a General Court Martial.

Sd/-

(Hardial Singh)

Place: Colonel

Dinjan

Colonel A

for General Officer Commanding

2 Mountain Division

Date 24.12.1985

The petitioner contends that he has been charged on the basis of a charge sheet which is defective and vague. The form of the charge, the words

on or before"" have caused embarrassment and prejudice to the defense of the petitioner because he was not in a position to know what the

prosecution intended to allege. Therefore, the charge framed against the petitioner was defective, vague and bad in law, it has caused flagrant

miscarriage of justice.

9. The General Court Martial was held at Dinjan from January 4, 1989 to February 24, 1990. The General Court Martial had written a finding of

not guilty"" in respect of Subedar Major Mehtab Singh but gave the finding of ""guilty"" against the petitioner and Subedar Kartar Singh. The General

Court Martial sentenced the petitioner; (a) to be cashiered (b) to suffer imprisonment for life. The sentence was upheld by the Central Government

by rejecting the post confirmation petition of the petitioner.

10. The learned Counsel for the petitioner has impugned the verdict of the General Court--Martial as well as of the Central Government for the

following reasons:

(i) The provisions of Army Rule 37 were not complied with Reference is made to paragraphs 12 to 16 of the writ petition in this regard. These

averments also relate to the fact that the Convening Authority had not personally satisfied himself that the charges to be tried by the Court are for

offences within the meaning of the Army Act and that the evidence justified trial on these charges. The Convening Authority did not apply his mind

at all as two charge sheets differed in material particulars and there was legal impropriety by back-dating the later charge sheet which was served

to the petitioner on December 30, 1988. Thus, a grave miscarriage of justice has been caused to the petitioner and the entire Court-Martial

proceedings are liable to be set-aside by this Court.

(ii) The Court--Martial proceedings stand vitiated on the grounds that despite there being no evidence against the petitioner the GOC (Convening

Authority) gave direction to the Court of Inquiry on September 12, 1987, that disciplinary action be taken against the petitioner in view of the fact

that the Superior Authority had already formed an opinion to indict the petitioner, the compliance of Army Rule 22 to 25 is nothing but farce. The

entire proceedings stand vitiated.

There was no application of mind by the Commanding Officer and there was no valid exercise of discretion as required by the Army Rules. The

GCM proceedings, accordingly, stand vitiated. Commissioner of Police, Bombay Vs. Gordhandas Bhanji, .

On perusal of summary of evidence, the CO found that there was no evidence against the petitioner except the uncorroborated testimony of the

accomplices (Sep Mahavir Singh and L/NK Inderpal Singh) and, accordingly, he gave his recommendation on the summary of evidence on March

29, 1988. The recommendations of the CO referring the case to the superior authority for expert legal advice, could not be done as the CO could

have either (a) dismissed the charge or (b) refer the case to superior authority for disposal under the Army Act under Sections 83 and 84 of the

Army Act or (c) submit an application for convening of Court Martial. (Reference is made to the judgment as reported in Union of India v. Maj

Virendra Raj Kharod, SLR 1987 Volume 5 page 630.

(iii) The petitioner was served with two charge sheets dated December 24, 1988. The first charge sheet (Annexure P-10) was served on him on

December 24, 1988 while the second charge sheet (Annexure P-11) was served on him also on December 30, 1988.

(a) The charge, as framed, is not sustainable as specific allegations were required to be made pertaining to the mode of abetment, whether

abetment was by instigation or by aiding or by facilitating the commission of the offence (Sh. Madan M. Behl and Anr. v. National Small Scale

Industries, .

(b) The word ""on or before"" in the charge sheet makes the same vague and it has caused grave prejudice to the petitioner as the prosecution has

relied on the incidents of 1970, 1976, 1981, 1983, 1985, 1986 etc. Gunwantlal Vs. The State of Madhya Pradesh, .

(iv) The conviction is based on the sole uncorroborated testimony of accomplices and, Therefore, it is bad in law and cannot be sustained. Balwant

Kaur Vs. Union Territory of Chandigarh, The evidence of the accomplices was manipulated because at the time of their deposition their conviction

and sentence were not confirmed Therefore, the accomplices were not free agents and were under the fear of their findings and sentence getting

confirmed at the time when they deposed before the present GCM. The following dates will indicate these averments:

(a) Date of conclusion of GCM against Mahavir & Inder Pal 10.12.1988

(b) Date of confirmation of findings and sentence in respect of Mahavir & Inder Pal 13.2.1991

(c) Date of deposition at the GCM of the petitioner 17.6.1989

The main requirement of admissibility of evidence, as laid down by Section 30 of the Indian Evidence Act enjoins that the statement of one

accused to be admissible against the co-accused must be made in the same trial for the same offence (Rijhumal Kundanmal v. Emperor AIR 1937

Sind 218.

(v) The animus of the other accused Sep. Mahavir Singh, Sep. Hari Singh, Sep Ashok Kumar and Sep. Kishan Lal is established in view of the

fact that they were punished by Col. S.S. Sahota, the deceased officer, at the behest of the petitioner as these persons were involved in adding salt

in tea party of Subedar Hans Raj.

(vi) It is imperative that to substantiate the case of abetment of an offence involving physical violence u/s 109 read with Section 34 of the Indian

Penal Code, physical presence at the scene of occurrence is necessary. Shri Ram Vs. The State of U.P., ; Ramaswami Ayyangar and Others Vs.

State of Tamil Nadu, , Bhagwan Bux Singh and Another Vs. The State of Uttar Pradesh, ; Emperor Vs. Ahmed Hasham, , Rijhumal Kundanmal v.

Emperor AIR 1937 Sind 218; Jadunandan Jha v. Emperor AIR 1937 Pat 317, Nivedita Dina Nath v. State and Anr. 1991 All ICrl. lR 226.

(vii) The non-trial of the petitioner jointly with the principal accused Sep Mahavir Singh and L/NK Inderpal Singh has caused grave injustice to the

petitioner.

(viii) The exercise of discretion is arbitrary by holding the trial by General Court Martial. (Reference is made to the judgment of this Court in R.S.

Bhagat Vs. Union of India,).

(ix) This Court possesses ample powers of judicial review and it is a fit case where such powers should be exercised.

Ranjit Thakur Vs. Union of India (UOI) and Others, ; S.N. Mukherjee Vs. Union of India, .

(x) Frequent changes of the judge Advocate was in violation of Section 117(2) of the Army Act and Rule 104 of the Army Rules.

(xi) The petitioner did not have any motive to commit the alleged offence as he was having the most cordial relations with the deceased CO late

Col. S.S. Sahota and the ACR given by the deceased on June 4, 1987, 12 days prior to his sad demise will bear testimony to this averment.

The learned Counsel for the respondents has contended as follows:

(I) There is no infirmity in the convening order of the General Court Martial. The provisions of Rule 37 have been complied with and the order was

issued on December 31, 1988 by Brig. Bhullar GOIC 2 Mountain Division as the earlier GCM could not proceed as five members were

disqualified. Even the order can be signed by the staff officer and no fault can be found with the same. Major G.S. Sodhi Vs. Union of India

(UOI),

(II) The words ""on or before"" in the charge sheet have not caused any prejudice to the petitioner in view of the following reasons:

(i) The accusation is defined in charge as abetment;

The plea of the petitioner is not that he did not fully understand the charge or that he was bewildered by the charge;

(ii) No objection was taken to the charge at the time of pleading not guilty or even during the trial and no such plea was also taken in pre-

confirmation or even in post confirmation petition;

(iii) The Convening Authority or Court has power to amend the charge and the same is not open to challenge in exercise of writ jurisdiction of this

Court.

(III) It will not be open for this Court under Article 226 of the Constitution of India to see whether the confession made by Mahavir Singh and

Inder Pal was voluntary or not when full opportunity was granted to the petitioner to cross-examine the witnesses. The testimony of Inderpal Singh

and Mahavir Singh cannot be said to be that of an accomplice and assuming it be so the same does not require corroboration.

The testimony of the other two accused can neither be said to be confession of co-accused u/s 30 of Evidence Act nor testimony of the

accomplice u/s 133 read with Section 114(b) of the Evidence Act. They are ordinary witnesses because they have already been convicted and

sentenced at the time they deposed against the petitioner. The provisions of Sections 30 and 33 of the Evidence Act have no application to the

present case. AIR 1949 257 (Privy Council) , Kashmira Singh Vs. State of Madhya Pradesh, and Sezva Ram Nagial v. Union of India and Ors.,

1983 Cr. L.J. J&K 1789

(IV) The provisions of Sections 34, 107 and 109 lay down the principle of joint criminal liability and only two things have to be satisfied (a)

common intention (b) participated in the acts done in furtherance of common intention.

B.N. Srikantiah and Others Vs. The State of Mysore, , Gurdatta Mal and Others Vs. The State of Uttar Pradesh,

Physical presence of the accused abettor is not necessary for attracting Section 34. Mere distance from the scene of occurrence cannot exclude

culpability u/s 34 which lays down rule of evidence to infer joint responsibility for criminal act performed either by persons sharing over or by

distant direction making out a certain measure of jointness in the commission of the act.

Therefore, physical presence is not necessary in attracting Section 109 IPC Noor Mohammad Mohd. Yusuf Momin Vs. The State of

Maharashtra,

(V) The petitioner did not raise the plea that he should have been jointly tried with Sep Inderpal Singh and L/NK Mahavir Singh. He only took the

plea that he should not be tried with Kartar Singh and Mehtab Singh and no objection was ever taken during the trial itself. The petitioner has

further shown no prejudice which has been caused to him as a result of the trial in which he has been convicted. The following judgments are cited

in this regard:

1. K.C. Mathew and Others Vs. The State of Travancore-cochin, ;

2. Willie (William) Slaney Vs. The State of Madhya Pradesh, ;

3. Bimbadhar Pradhan Vs. The State of Orissa, ;

4. Gian Chand v. Union of India and Ors., 1983 Crl. L.J. 1059;

5. Col. Surjit Singh v. Union of India, Civil Writ Petition No. 5303/ 87 decided on 2.6.1988.

(VI) The bias of the Judge, Advocate against the petitioner has not been substantiated in any manner whatsoever. Moreover, the Judge Advocate

is not a member of the GCM. He does not have the power to vote. He is only adviser to the Court. There was no objection raised by the

petitioner at an early stage and new plea cannot be raised in the present proceedings. The allegations of bias have to be specific against individual

and he should be made a party.

(VII) There is a dual jurisdiction and the choice lies between Criminal Court and Court Martial u/s 125 of the Army Act The discretion is vested in

the ""Officer Commanding the Army, Army Corps, Division or independent brigade in which the accused person is serving or such other officer as

may be prescribed to decide before which Court the proceedings have to be instituted"". Therefore, there is no violation of the provisions of law to

hold the trial by General Court Martial particularly when the matter concerned the army discipline, morale and functioning. 1980 Cr.LJ. 296

(VIII) The scope of judicial review in Court--martial proceedings is very limited and the Court can only interfere in the following conditions:

(a) When there is a denial of fundamental right;

(b) When proceedings suffer from jurisdictional error;

(c) When there is error apparent on the record.

It is not open for this Court to go into sufficiency of evidence or appreciation of evidence even though it feels that on appreciation it would come to

different findings and conclusions. The present case does not highlight the fact that it is a case of no evidence and in these circumstances the Court

will have no jurisdiction under Article 226 of the Constitution of India. The following judgments are cited in this regard:

1. Capt. Harish Uppal Vs. Union of India (UOI) and Others, ;

2. Sansar Chand v. Union of India and Ors., 1980 (3) S.L.R. H.P. 124;

3. R.S. Ghalwat v. Union of India and Ors. ,1981 Crl. LJ. 1646;

4. Capt. Ashok Kumar Rana v. Union of India, 1982Cr.L.J.MOC 120 Delhii;

5. Sewa Ram Nagial v. Union of India and Ors., 1983 Crl. L.J. 1788;

6. Capt. Ram Kumar Vs. Chief of the Army Staff, ;

7. Guru Villi Bhima Rao v. Union of India and Ors., 1987 Crl.L.J. 504;

8. S.N. Mukherjee Vs. Union of India, ;

12. We have heard learned Counsel for the parties and perused the record which has been produced before us.

13. The convening of the General Court Martial on December 24, 1988, was to assemble on December 30, 1988 when it was found that five

members were disqualified. The subsequent convening order issued on December 31, 1988, by Brig. Bhullar, General Officer Commanding, IInd

Mountain Division was in accordance with the provisions of the Army Rules. The said order was signed by Lt. Col. Arshi Kewal Singh Bawa,

officiating General Officer Commanding and was in accordance with law. The objection that the convening order cannot be signed by Staff Officer

is of no consequence as there has been no violation of the provisions of the statutory rules in this regard. Rule 37 of the Army Rules reads as

follows:

37. Convening of General and District Court-martial.-(1) An officer before convening a general or district Court-martial shall first satisfy himself

that the charges to be tried by the Court are for offences within the meaning of the Act, and that the evidence justifies a trial on those charges, and

if not so satisfied, shall order the release of the accused, or refer the case to superior authority.

(2) He shall also satisfy himself that the case is a proper one to be tried by the kind of Court-martial which he proposes to convene.

(3) The officer convening a Court-martial shall appoint or detail the officers to from the Court and, may also appoint or detail such waiting officers

as he thinks expedient. He may also, where he considers the services of an interpreter to be necessary, appoint or detail an interpreter to the

Court.

(4) The officer convening a Court-martial shall furnish to the senior member of the Court with the original charge-sheet on which the accused is to

be tried and, where no Judge-Advocate has been appointed, also with a copy of the summary or abstract of evidence and the order for the

assembly of the Court-martial. He shall also send, to all the other members, copies of the charge-sheet and to the Judge-Advocate, when one has

been appointed, a copy of the charge-sheet and a copy of the summary or abstract of evidence.

The facts clearly indicate that the convening order was issued on the satisfaction of Brig. Bhullar and the requisite certificate which was

subsequently issued was on the basis of the satisfaction of the said officer. The said certificate which is filed with the counter affidavit of the

respondent is Annexure--R. 1 may be reproduced as follows:

Certificate by IC 12524N Brigadier Bhullar, Manjit Singh, VSM, Officiating General Officer Commanding 2 Mountain Division.

It is hereby certified that 1, IC 12524N Brigadier Bhullar, Manjit Singh, VSM, Officiating General Officer Commanding 2 Mountain Division, had

perused the Summaries of Evidence recorded in respect of the accused (1) IC 30367P Major Budhwar, Rajbir Singh of 8 JAT, (2) Ex Subedar

Major Mehtab Singh formerly JC 66136K Subedar Major Mehtab Singh of 8 JAT (3) JC 127909X Subedar Kartar Singh of 8 JAT, all attached

to 237 Field Regiment, before issuing the Convening Order dated 31 December, 1988 for their trial by General Court-Martial and satisfied myself

under the provisions of Army Rule 37 that there was a prima facie case against these three accused persons which ought to be proceeded with

under the Army Act, 1950 and that they be tried by a General Court-Martial.

Signed at Dinjan this Fourth day of January, 1989.

Place: Dinjan Sd/-

Dated: 4 Jan 89 (Bhullar, Manjit Singh)

Brigadier

Officiating General Officer

Commanding

2 Mountain Division

Assuming even if there is some infirmity in passing the convening order, the same cannot be agitated in this petition at this belated stage and we

cannot conclude that the entire proceedings were vitiated as the petitioner fully participated in the General Court Martial and raised no such plea at

any stage.

14. The next question, which arises for consideration and is Vehemently argued by the learned Counsel for the petitioner, is that the superior

authority had already formed an opinion to indict the petitioner and the compliance of the provisions of Army Rules 22 to 25 is nothing but farce.

Rule 22 relates to hearing of charge and the same may be reproduced as follows:

22. Hearing of Charge.--(1) Every charge against a person subject to the Act other than an officer, shall be heard in the presence of the accused.

The accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defense.

(2) The Commanding Officer shall dismiss a charge brought before him if, in his opinion, the evidence does not show that an offence under the Act

has been committed, and may do so if, in his discretion, he is satisfied that the charge ought not to be proceeded with.

(3) At the conclusion of the hearing of a charge, if the Commanding Officer is of opinion that the charge ought to be proceeded with, he shall

without unnecessary delay:--

(a) dispose of the case summarily u/s 80 in accordance with the manner and form in Appendix III, or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary Court-martial;

Provided that the Commanding Officer shall not order trial by a summary Court-martial without a reference to the officer empowered to convene a

District Court-martial or on active service summary general Court-martial for the trial of the alleged offender unless either:--

(a) the offence is one which he can try by a summary Court-martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

On a reading of this rule it is contended by the learned Counsel that the recommendations of the Commanding Officer for reference to superior

authority for legal advice could not have been done. The Commanding Officer could either, (a) dismiss the charge, or (b) refer the case to superior

authority for dismissal under Sections 83 & 84 of the Army Act, or (c) submit an application for convening of Court-martial. Reliance is placed on

the judgment of the Gujarat High Court in Union of India v. Major Virendra Raj Kharod, SLR 1987 5 630. We may at this stage reproduce the

opinion of the Commanding Officer which is filed as Annexure P.9 to the writ petition and the same reads as follows:

Opinion of CO 100FD Region S of E Recorded Against IC 30367P Maj. R.S. Bjudhwar of 8 JAT ATT with 100 FD Regt

1. I have perused the Summary of Evidence in respect of IC-30367P Maj RS Budhwar of 8 JAT as per tentative charge shown at Annx. I to

Appx. "A" to AO 70/84. My comments are as given in subsequent paras.

2. No. 3174523 L Sep Mahavir Singh (PW1) and No 3173368H L/NK Inderpal Singh (PW2) in their statements very clearly, corroborating

each others statement tried to establish convincingly the involvement of the accused IC-30367P Maj R.S. Budhwar, in the quadruple murder case,

having criminally conspired and thereby abetted the crime. Accused has been alleged to have hatched conspiracy to murder IC-14807N Col S.S.

Sahota and IC-28739N Maj Jaspal Singh only. The following substantial facts if corroborated by any independent source, the criminal conspiracy

is almost established:--

(a) Meeting of accused with both killers in his office on 14 June, 1987 between 16.00 hrs. and 16.30 hrs. as alleged.

(b) At the site of surrender accused asking killers on 18 June 87, to take on to themselves the responsibility of the crime completely sparing others.

3. Fact under para 2 (a) is not supported by any other witness. Rather, it is contradicted by No. 3178083A L/NK (Clk) Om Krishan who is said

by No. 3174523L Sep Mahavir Singh (PW1) to have been present in the office as he heard some typing in the adjoining room and also due to the

defense of alibi available to accused as per the statement of IC-25122 P Maj RS Lamba, 8 JAT (DW1).

4. Fact under para 2 (b) is corroborated partly by the statement of IC-32695F Maj. P.A. Somaiah 16 Madras (PW6) and supported by the

statement of IC-13353 Y Col S.K. Zutshi Dy Cdr 5 Mtn Bde (PW3), but the deposition of the latter is inadmissible in law being hearsay and also

having been contradicted by the person himself who is said to have made statement, i.e. No. 2578588 N. Hav Vincent Xavier, 16 Madras (PW4).

Therefore only one element has been corroborated by Maj P.A. Somaiah but again contradicted by Hav Vincent Xavier. It is also difficult to

comprehend as to how accused made such statement in the presence and hearing of the guard from other unit for inviting trouble for himself.

5. Therefore, basically, it is only the statement of two killers (PW1 and PW2) which are required to be believed with great caution to prosecute the

accused. I am, thus, of the opinion that the case be referred to higher authority for expert legal advice and suitable action thereupon.

Station: C/O 99 APO Sd/-

Date: 29 Mar 1988 (LR Shankhyan)

Colonel

Commanding Officer

100 Field Regiment.

The learned Counsel for the petitioner on the basis of the judgment in Union of India v. Major Virendera Raj Kharod (supra), Therefore, contends

that the C.O. had no option but to dismiss the charge and could not refer the case to higher authority for expert legal advice and suitable action

thereon. We may briefly refer to the facts of the above cited case which clearly indicate that the Commanding Officer, after examining the

evidence, found that the charges leveled against respondent were baseless and they were either disproved or not proved. He gave his opinion and

the relevant part as cited in the judgment may be reproduced as under:

1. After going through the complete evidence I am convinced that the charges framed against the accused Officer, IC-13851 L. Major V.J.

Kharod are thoroughly baseless, are either "disproved", as established beyond even any semblance or element of doubt and Therefore, stand

automatically dismissed.

2. 1 am like any other prudent man with reasonable understanding and normal common sense, convinced that the officer is not at all guilty of any of

the charges framed against him and recommend, without even slightest hesitation, that the officer be exonerated and be reverted back to his corps

duties with full honour, which he richly deserves.

3. That this officer in normal course, could have been recommended for a commendation in recognition of such high standard of integrity and

loyalty displayed by him, instead of being condemned as is done due to possibly a wrong initiation of case from certain quarters.

4. From the evidence recorded, certain glaring peculiarities of the case have been noticed by me and I would like to highlight them since I, as much

as any prudent man with reasonable knowledge and normal common sense, am convinced that there appears to be something unusual about the

manner in which the case was initiated and conducted...

xx xx xx xx

8. It is thus proved beyond any doubt that no offence in respect of this charge was committed and as such Maj V.J. Kharod, the accused is not

guilty of any offence. Thus the charge is not proved.

xx xx xx xx

10. Thus the second charge is disproved beyond any doubt as any prudent man with reasonable knowledge and normal common sense will be

convinced in his mind and as such Maj. V.J. Kharod is not guilty of any offence.

xx xx xx xx

12. Thus, this charge is disproved and Major V.J. Kharod is not guilty of any offence.

13. In view of above, 1 recommend that Major V.J. Kharod be exonerated of all the three charges and reverted back to his corps with full

honour.

The Division Bench of the Gujarat High Court, in view of the facts as indicated above, clearly recorded a finding that the CO had dismissed the

charges as not proved. There was, accordingly no question of convening a General Court-Martial for trial on the same charges which the CO had

held to be disproved and the respondent was not found guilty of any offence. The Bench held that the CO had recorded a clear finding in favor of

the respondent therein that he was not guilty of any offence. Under those circumstances, the CO was bound to dismiss the charge and, in fact, he

dismissed the charges when he said that the charges stood automatically dismissed. The reading of the opinion of the CO in the present case does

not indicate any such similar situation, as it has not been held that the charges against the petitioner have not been proved. On the contrary, the CO

has indicated that the following substantial facts if corroborated by any independent source, the criminal conspiracy is almost established:

(a) Meeting of accused with both killers in his office on 14 June 1987 between 1600 hrs. and 1630 hrs. as alleged.

(b) At the site of surrender accused asking killers on 18 June 87, to take on to themselves the responsibility of the crime completely sparing others.

The concluding part of the opinion, as referred to in paragraph 5, further reiterates with the usual word of caution that the statement of the two

killers (PW1 and PW2) are required to be believed with great caution to prosecute the accused. In this situation, the matter was referred to the

higher authority for expert legal advise and suitable action and it has not been found that the charges against the petitioner have not been proved

and the same have not been, dismissed as it was done in Kharod''s case. In this view of the matter, the contention of the learned Counsel for the

petitioner does not hold any merit, as the provisions of the Army Rules have not been violated. The CO was fully empowered to refer the case to

higher authority for expert legal advice. This will not imply that the allegations against the petitioner were held to be disproved and the CO had no

option but to discharge the petitioner.

15. The learned Counsel has next contended that the charge sheet served on the petitioner is not sustainable as no specific allegations with regard

to the mode of abetment have been made. The words ""on or before"" in the charge- sheet makes it vague and it has caused grave injustice and

prejudice to the petitioner as the prosecution has relied on the incidents of 1970, 1976, 1981, 1983, 1985, 1986 etc. Reference is made to the

judgment of the Supreme Court as reported in Gunwantlal Vs. The State of Madhya Pradesh, and judgment of the Mysore High Court as reported

in Bayyappanavara Muniswamy and Ors. v. State AIR 1954 Mys 81 . The judgment of the Supreme Court in Gunwantlal v. The State of Madhya

Pradesh (supra) has held that the words ""on or before"" might cause embarrassment and prejudice to the defense of the accused because he will not

be in a position to know what the prosecution actually intends to allege. It is, Therefore, fair to use the words ""on or about"" as they find in form

Xxviii to Schedule V in the Code of Criminal Procedure as it existed at that time. The facts of this case also indicate that the appellant therein felt

aggrieved of the charge framed against him and impugned the same before the High Court at the initial stage. The revision petition was rejected by

the High Court and the Supreme Court allowed the same and amended the charge by substitution of the words ""on or before"" by the words ""on or

about"". The judgment of the Mysore High Court as reported above will loose significance in view of the judgment of the Supreme Court in

Gunwantlal v. State of M.P. (supra) as the Division Bench of the High Court had held that the charge cannot be construed as comprehensive when

the words ""on or about 8th November"" are stated. The facts of the present case are distinguishable particularly for the reason that framing of the

charge against the petitioner has been contested for the first time before this Court and no such plea was taken a t an earlier stage when the

petitioner went through the entire trial and fully participated in the same. The plea of the accused is not that he did not understand the charge and he

has not been even able to point out any manifest injustice which has been caused to him as a result of the charge which has been framed against

him. The plea, accordingly, is meritless.

16. The learned Counsel for the petitioner has then contended that the conviction is based on the uncorroborated testimony of the accomplices

and, Therefore, it is bad in law and cannot be sustained. The evidence of the accomplices was manipulated because when they were deposing

against the petitioner their conviction and sentence were not confirmed. The accomplices were not free agents and were under the fear of the

findings and sentence getting confirmed at the time when they were deposing before the General Court-martial. The charge of abetment against the

petitioner is not sustainable as it is well settled that the physical presence at the scene of occurrence is necessary (Section 109 read with Section 34

of the Indian Penal Code).

17. The learned Counsel for the respondents, on the other hand, has contended that the testimony of Inder Pal Singh and Mahavir Singh, the

alleged accomplices, cannot be said to be that of an accomplice and, in any case, the same does not require corroboration. The provisions of

Sections 30 and 133 of the Evidence Act would not apply in the present case as Inder Pal Singh and Mahavir Singh are ordinary witnesses

because they have already been convicted and sentenced at the time they deposed. Section 30 of the Evidence Act is held to be not applicable as

it relates to a confession made by one of the accused persons affecting himself and some other of such persons as they were tried separately and

were not tried jointly for the same offence. Section 133 defines the accomplice and reads as follows:

Section 133. Accomplice.--An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because

it proceeds upon the uncorroborated testimony of an accomplice.

It is argued mat in any case the accomplice shall be a competent witness against an accused person and question of corroboration is a question of

fact and this Court has no jurisdiction to go into the same and the sufficiency of evidence relating thereto. The provisions of Section 30 of the

Evidence Act have been interpreted in the judgment as reported in Rijhumal Kundanmal v. Emperor AIR 1937 Sind 218 which clearly lays down

that Section 30 contemplates that the statement of one accused admissible against the co-accused must be made in the same trial when both

accused are charged with the same offence and it must be a confession which affects himself as well as his co-accused.

18. Let us proceed on the assumption with the evidence of Inderpal Singh as well as Mahavir Singh, who actually committed the heinous crime of

shooting their Commanding Officers as well as two other officers of the Regiment is that of accomplices so far as the petitioner is concerned. The

petitioner has been charged with abetment of an offence and it is well settled that it is unsafe to act upon the testimony of an accomplice unless it is

corroborated. In AIR 1949 257 (Privy Council) the position of law has been stated as under:

The law in India relating to the evidence of accomplices stands thus: Even before the passing of the Indian Evidence Act, 1872, it had been held

by a Full Bench of the High Court of Calcutta in R.V. Elahee Buksh, 5 W.R. Cr. 80: Beng. L.R. Sup. 459, that the law relating to accomplice

evidence was the same in India as in England. Then came the Indian Evidence Act which by Section 133 enacts that:

An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the

uncorroborated testimony of an accomplice.

Illustration (B) to Section 114, Evidence Act, however, provides that:

The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.

Reading these two enactments, together the Courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an

accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an

accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be

used to corroborate the evidence of another accomplice. The law in India, Therefore, is substantially the same on the subject as the law in England,

though the rule of prudence may be said to be based upon the interpretation placed by the Courts on the phrase ""corroborated in material

particulars"" in Illustration B to Section 114.

The Supreme Court has also settled the law in Kashmira Singh Vs. State of Madhya Pradesh, with regard to the necessity of corroboration for

confession and evidence of an accomplice and the relevant portion may be reproduced as follows:

Then, as regards its use in the corroboration of accomplices and approvers. A co-accused who confesses is naturally an accomplice and the

danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when

the ""evidence"" is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness

who though not an accomplice is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the

law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice provided the Judge has the rule of caution, which

experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it. Two of us had occasion to examine

this recently in Rameshwar Vs. The State of Rajasthan, . It follows that the testimony of an accomplice can in law be used to corroborate another

though it ought not to be so used save in exceptional circumstances and for reasons disclosed. As the Privy Council observe in Bhuboni Sahu v.

The King, 76 Ind. App. 147 :

The tendency to include the innocent with the guilty is peculiarly prevalent in India, as judges have noted on innumerable occasions, and it is very

difficult for the Court to guard against the danger... The only real safeguard against the risk of condemning the innocent with the guilty lies in

insisting on Independent evidence which in some measure implicates such accused.

19. The perusal of the judgments as stated above, will clearly hold the proposition that generally speaking there is a great necessity to corroborate

the testimony of an accomplice before the conviction is upheld. At the same time, it has been highlighted by the Supreme Court in the case of

Kashmira Singh (supra) that all these are rules of prudence and so far as the law is concerned, a conviction can be based on the uncorroborated

testimony of an accomplice provided the Judge has applied the rule of caution to hold that it will be safe to disregard it. The facts of the present

case, at this stage, may be cited to reiterate that the evidence of Inderpal Singh and Mahavir Singh was recorded at the time of the trial of the

petitioner when they were examined as ordinary witnesses. Their testimony was recorded on oath and they were cross-examined at length by the

petitioner.

20. There is also force in the next contention of Counsel for the respondents. Section 34 is only a rule of evidence and does not create a

substantive offence. It means, that if two or more persons intentionally do a thing jointly, it is just the same as each one of them had done

individually. The position of law is settled by the Supreme Court in B.N. Srikantiah and Others Vs. The State of Mysore, and reference may be

made to paragraph 12 of the judgment at page 675:

(12).--The imperfection in the charge is curable provided no prejudice has been shown to have resulted because of it. The appellants had notice

that they were being tried as ""shares in the offence"" and their liability was collective and vicarious and not individual. No doubt they were charged

u/s 149 of the Indian Penal Code with being members of an unlawful assembly the common object of which was murder of the deceased but they

were also charged that they with accused Nos. 5 and 6 had committed murder by intentionally causing the death of the deceased. The prosecution

led evidence to show that at least two of the appellants were waiting for the arrival of the evening Bus by which the deceased and his companions

were traveling and that the appellants and others met them at the bund and there was a concerted attack by them followed by a chase and assault

with choppers by all the appellants resulting in death because of 24 injuries of a serious nature given by the appellants collectively. Of these injury

No. 5 individually and others cumulatively were sufficient in the ordinary course of nature to cause death. Section 34 is only a rule of evidence and

does not create a substantive offence. It means, that if two or more persons intentionally do a thing jointly it is just the same as if each of them had

done individually. As the Privy Council have pointed out in AIR 1925 1 (Privy Council)

Section 34 deals with the doing of separate acts, similar or diverse, by several persons, if all are done in furtherance of a common intention, each

person is liable for the result of them all, as if he had done them himself.....

To similar effect is the law laid down by the Supreme Court in Gurdatta Mal and Others Vs. The State of Uttar Pradesh, .

21. The next question which is strongly canvassed by learned Counsel for the petitioner with regard to the charge of abetment is that Section 109

of the Indian Penal Code relates to active abetment at the time of commission of the offence and in a case of physical violence the abettor is

required to be present at the scene of occurrence. She has relied upon the judgment as reported in Emperor Vs. Ahmed Hasham, ; Jadunandan

Jha Vs. Emperor, and Nivedita Dina Nath v. State and Another, 1991 All ICrl. LR 226. The judgments of Bombay and Patna High Courts only

draw the distinction between Sections 109 and 114 of the Indian Penal Code. We may here refer to the relevant paragraph from the judgment of

the Bombay High Court, which may be reproduced as follows:

Section 114 applies where a criminal first abets an offence to be committed by another person and is subsequently present at its commission.

Active abetment at the time of committing the offence is covered by Section 109 and Section 114 is clearly intended for an abetment previous to

the actual commission of the crime, any time, that is, before the first steps have been taken to commit it.....

There is force in the contention of Counsel for the respondents that physical presence is not necessary for attracting the provisions of Section 34 of

the Indian Penal Code and mere distance from the scene of crime cannot exclude culpability of the petitioner. Physical presence is not necessary in

attracting Section 109 of the Indian Penal Code. The first judgment, which is cited to support the proposition is Noor Mohammad Mohd. Yusuf

Momin Vs. The State of Maharashtra, . The relevant portion from paragraph 7 may be reproduced as follows:

So far as Section 34, Indian Penal Code is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that

liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its

application. Section 109, Indian Penal Code on the other hand may be attracted even if the abettor is not present when the offence abetted is

committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit

an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an

act or illegal omission. Turning to the charge u/s 120-B Indian Penal Code criminal conspiracy was made a substantive offence in 1913 by the

introduction of Chapter V. A in the Indian Penal Code. Criminal conspiracy postulates an agreement between two or more persons to do, or

cause to be done, an illegal act or an act which is not illegal by illegal means. It differs from other offences in that mere agreement is made an

offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the

substantive offence of criminal conspiracy is some what wider in amplitude than abetment by conspiracy as contemplated by Section 107 IPC. A

conspiracy from its very nature is generally hatched in secret. It is, Therefore, extremely rare that direct evidence in proof of conspiracy can be

forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by

circumstantial evidence. Indeed in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts.

Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the

difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have

conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained

becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto.

The other judgment which reiterates the same proposition is Tukaram Ganpat Pandare Vs. State of Maharashtra, wherein it has been categorically

held that mere distance from the scene of crime cannot exclude culpability u/s 34 which lays down the rule of joint responsibility for a criminal act

performed by a plurality of persons.)

22. We may now deal with the question of the powers vested in this Court for judicial review of orders passed in Court-Martial proceedings and

the scope of exercise of such powers in writ proceedings under Article 226 of the Constitution of India. It has been argued by learned Counsel for

the petitioner that this Court possesses wide powers of judicial review and the Court-martial proceedings in the present case are liable to be

quashed as such proceedings have resulted in failure of justice to the petitioner. Reliance is placed on the judgments of the Supreme Court as

reported in M.A. Rasheed and Others Vs. The State of Kerala, ; Ranjit Thakur Vs. Union of India (UOI) and Others, ; S.N. Mukherjee Vs.

Union of India, and K.L. Mehndiratta (Major) v. Union of India and Ors., 1993 M LJ1039.

23. In M.A. Rasheed and Ors. v. The State of Kerala, (supra) the Supreme Court has reiterated the settled proposition of law that ""administrative

decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The Courts inquire

whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect.

The standard of reasonableness to which the administrative body is required to conform may range from the Court''s own opinion of what is

reasonable to the criterion of what a reasonable body might have decided. The Courts will find out whether conditions precedent to the formation

of the opinion have a factual basis."" The case of Ranjit Thakur v. Union of India and Ors., (supra) relate to the interpretation of the provisions of

the Army Act and the relevant rules framed thereunder. The relevant portion which states the law is contained in paragraph 9 and the same reads

as follows:

Re: contention (d): Judicial review generally speaking, is not directed against a decision, but is directed against the ""decision making process."" The

question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the

offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience

and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that

even on an aspect which is, otherwise, within the exclusive province of the Court-Martial , if the decision of the Court even as to sentence is an

outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial

review. In Council of Civil Service Unions v. Minister for the Civil Service, (1984) 3 WLR 1174Lord Deplock said:

...Judicial Review has I think, developed to a stage today when without reiterating any analysis of the steps by which the development has come

about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The

first ground I would call "illegality", the second "irrationality" and the third procedural impropriety". That is not to say that further development on a

case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of

proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community...

In Bhagat Ram Vs. State of Himachal Pradesh and Others, this Court held:

It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the

gravity of the misconduct would be vocative of Article 14 of the Constitution.

The point to note and emphasize is that all powers have legal limits.

In the present case the punishment is so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain

uncorrected in judicial review.

24. In S.N. Mukherjee v. Union of India, (supra) the Supreme Court has reiterated that Court under Articles 32, 226, 136 and 227 have powers

of judicial review in respect of the proceedings of Court-martial and the proceedings subsequent thereto and can grant appropriate relief if said

proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution of India or if the said proceedings suffer

from the jurisdictional error or an error in law apparent on the face of the record. The Bombay High Court in K.L. Mehndiratta (Major) (supra)

has similarly stated that the jurisdiction of the High Court under Article 226, though limited, can be exercised to enforce fair play and good

conscience which cannot be allowed to be obliterated under the guise of high and strict standard of discipline. The procedure to be adopted is

expected to be in consonance with a sense of fairness and stand to the good conscience of a prudent man.

25. The learned Counsel for the respondents, on the other hand, has asserted that the scope of judicial review is limited in Court-martial

proceedings and this Court can only interfere in exercise of powers under Article 226 of the Constitution of India when there is denial of

fundamental right, when the proceedings suffer from jurisdictional error or when there is an error apparent on the face of record. He has also relied

on the judgment of the Supreme Court in S.N. Mukherjee v. Union of India, (supra) and the relevant paragraph has already been reproduced

above. He has referred to the other judgments, which have been cited in the opening part of this judgment while recording his submissions.

26. In Capt. Harish Uppal Vs. Union of India (UOI) and Others, the Court has stated the position of law in paragraph 4 and the same reads as

follows:

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 Commanding 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. 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 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 constituted by or

under 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.

We may also refer to the Division Bench judgment of this Court in R.S. Ghalwat v. The Union of India and Ors., 1981 Crl.LJ. 1646 which clearly

defines the powers of the High Court in exercise of jurisdiction under Article 226. Paragraph 17 may be reproduced as follows:

We, however, do not propose to dispose of this matter on this short point and heard the matter on the footing that the writ petitioner was also

asking a writ of certiorari, against the finding of a statutory tribunal, i.e. General Court-Martial constituted under the Act. But even then the

jurisdiction of this Court is limited to only finding out whether there is error of jurisdiction or it is a case of total lack of evidence. We do not sit as a

Court of appeal. If there was legal evidence available on which a finding could be given, the sufficiency 01 otherwise is for the authority to decide

and this Court cannot substitute its opinion for that of Court Martial.

The Jammu & Kashmir High Court in Sewa Ram Nagial v. Union of India and Ors., 1983 Crl.LJ. 1788 has gone to the extent of holding that

where the conviction is based on uncorroborated testimony of accomplice the writ jurisdiction of the High Court under Article 226 is barred. The

High Court, however, is competent to quash an order which is based on no evidence at all. However, as regards an order passed on insufficient

evidence it has certainly no power to interfere with it, even if it on its own appraisal of the evidence comes to a contrary conclusion. The relevant

portion is contained in paragraph 13 at page 1793 which reads as follows:

13. We now turn to the fourth and the ninth grounds that the conviction is not based upon any evidence, as the only evidence relied upon by the

prosecution is that of the two accomplices, namely, Aya Singh and Sarwan Dass, who were inimical towards him as also his confessional

statement, which too was procured by torture, inducement, threat and promise. These grounds are also without any force. A case of ""no evidence

is surely different from a case of ""insufficient evidence"". Whereas in the former case the Court exercising its extraordinary writ jurisdiction is

competent to quash an order which is based upon no evidence at all, in the latter case, it has certainly no power to interfere with it, even if into its

own appraisal of the evidence comes to a contrary conclusion. So long as there is some legal evidence to justify the impugned finding, it will be

powerless to interfere with it in its writ jurisdiction. The present case is admittedly not a case of ""no evidence"" for, on the petitioner''s own showing

there is not only the evidence of the two accomplices, but there is also his own confessional statement to support his conviction. An accomplice in

terms of Section 133 of the Evidence Act is a competent witness against an accused, whose conviction can be based upon his uncorroborated

testimony. Section 133 of the Army Act makes the provisions of the Evidence Act applicable to proceedings before Courts Martial, unless there is

any provision in the Army Act which is inconsistent with the provisions of the Evidence Act. In case of any such inconsistency, the Evidence Act

has to yield to the Army Act which renders the testimony of an accomplice wholly inadmissible or even unreliable. Corroboration of the testimony

of an accomplice is, however, sought by Courts under Illustration (b) to Section 114 of the Evidence Act, which says that the Court may presume

that an accomplice is unworthy of credit unless he is corroborated in material particulars. The Legislature , it will be seen, has advisedly used the

word ""may"" instead of the word ""shall"" to manifest its intention that the Court is not bound to raise such a presumption. What section 114,

Therefore, provides is that as a matter of prudence the Court may in some cases look for corroboration of the accomplice"s evidence. If that be

so, as in fact it is, then clearly it will be a question that will precisely relate to weight of evidence, and the jurisdiction of this Court to interfere with

the order of the G.C.M. will be clearly ousted.

The Division Bench of the Patna High Court in Guru Villi Bhima Rao v. Union of India and Ors., 1987 Crl. L.J. 504 has similarly held that the High

Court may interfere with an order of General Court-Martial under Article 226 on the grounds that (a) where a General Court-Martial has acted

without or in excess of its jurisdiction or failed to exercise it; (b) where the order of the General Court-Martial is erroneous on the face of the

record, and (c) where there has been violation of principles of natural justice. The High Court will not interfere with the findings of fact even if

erroneous, as it does not act an Appellate Court.

27. We may also notice the judgment of this Court in Capt. Ram Kumar Vs. Chief of the Army Staff, wherein it has been held that ""under Article

226 of the Constitution, the High Court does not review the findings of a Tribunal, such as the General Court Martial, as if it were hearing an

appeal. To justify interference by the High Court it has to be shown that the findings of the Tribunal are vitiated by an error of law, or the Tribunal

lacked jurisdiction to deal with the matter, or violated a rule of natural justice or something of that kind"". In Ram Murti Wadhwa Vs. Union of India

and Others, the Division Bench of this Court has elaborately dealt with the stage to raise objection with regard to error or defect of procedure as

well as the powers of the Court to entertain petitions under Article 226. The position of law is stated in paragraphs 52 and 53 at pages 707-708

and the same read as under:

52. Secondly, if there is any defect of procedure or deviation from the Act or the rules at the stage of Court-Martial the proper stage would be to

point it out then and there and register in the form of a protest. Later on an objection on the ground of error or defect of procedure cannot be

entertained unless the irregularity or the illegality is such as goes to the jurisdiction of the Court-Martial or the confirming authority.

53. Every irregularity or non-observance of the rules can by no means be regarded as affecting the jurisdiction of the Court to proceed with the

trial. It must be such as vitiates the trial and ultimate conviction of the accused. This is not to say that the proceedings of a Court-Martial are

entirely immune from scrutiny by this Court. The Court can enquire and ascertain whether the person held in custody was subject to military law or

the Court itself was properly convened and constituted. A writ of certiorari under Article 226 of the Constitution can be issued for the purpose of

examining the record and proceedings of a Court-Martial if the complaint is that the Court-Martial was not duly constituted, that it had no

jurisdiction over the person or over the subject-matter of the charge or that there is an error of law apparent on the face of the record or that the

principles of natural justice were violated so as to result in miscarriage of justice. This is the view which a Full Bench (Dua C.J., S.K. Kapur &

Hardy J.J.) of this Court has propounded in Sundarajan v. Union of India, (supra). We respectfully follow that view. We are not prepared to hold

that a writ or order under Article 226 can be issued for examining mere errors of procedure. To do so would be to convert the high prerogative

writ jurisdiction into a jurisdiction of appellate review. Where a Court-Martial has acted within its jurisdiction neither the merits of the conviction

nor the propriety of the sentence can be reviewed by this Court upon an application for certiorari. As was said by a Division Bench of this Court.:

We may repeat that we are not entitled to go into the regularity of steps taken by the Court-Martial in the course of trial or by the confirming

authority in confirming the finding and the sentence which do not go to their jurisdiction."" (S.P.N. Sharma v. Union of India AIR 1968 Delhi 156

I.D. Dua C.J. and S.N. Shankar JU, (2).

28. The jurisdiction of this Court under Article 226 is, Therefore, defined and is limited to the extent of finding it whether there is an error of

jurisdiction and it is a case of total lack of evidence. This Court, as has been consistently held, does not sit as a Court of Appeal. In case legal

evidence was available on which a finding could be given, the sufficiency or otherwise was for the Authority to decide and this Court cannot

substitute its opinion for that of Court-Martial. The facts of the present case establish that there is evidence on record to implicate the petitioner.

The evidence, as has been discussed in the earlier part of the judgment, is on record and the petitioner had full opportunity to cross-examine such

witnesses. It cannot also be said that the conviction is based only on the uncorroborated testimony of the alleged accomplices. The Court on its

own appraisal of the evidence may come to a contrary conclusion but it is not open to quash an order until and unless the impugned order was

based on no evidence at all. The sufficiency and insufficiency of evidence is not a matter for this Court to consider in a petition under Article 226 of

the Constitution of India. The same is for the Authority to decide. The error or defect of procedure of which some instances have been given by

learned Counsel appearing for the petitioner, cannot be entertained in the present proceedings as these may be mere procedural irregularities and

they cannot be regarded as errors of law apparent on the face of the record and no challenge was made at an appropriate stage and the principles

of natural justice have not been violated.

In view of the settled position of law and the powers of this Court to exercise jurisdiction under Article 226 of the Constitution of India, we are not

inclined to interfere in this matter. The writ petition is dismissed.