Lt. Col. Des Raj Shanwal Vs Union of India (UOI) and Others

Court: Delhi High Court

Date of Decision: Sept. 17, 2002

Acts Referred: Army Act, 1950 â€" Section 109, 130, 192, 3, 52
Army Rules, 1954 â€" Rule 37, 37(3), 95
Constitution of India, 1950 â€" Article 14, 226, 33
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 18, 42

Hon'ble Judges: S.B. Sinha, C.J; A.K. Sikri, J

Bench: Division Bench

Advocate: G.D. Gupta, S.R. Kalkal and Pankaj Kumar, for the Appellant; Kirtiman Singh and N.K. Pandey for Maninder Singh, for the Respondent

Final Decision: Allowed

Judgement

S.B. Sinha, C.J.
The petitioner in this writ petition has questioned an order of General Court Martial (in short, "GCM") whereby and

whereunder he was awarded the punishment of six month"s rigorous imprisonment and was also dismissed form service.

2. The petitioner was tried under six (6) different charges, which were as follows:-

First Charge Army Act Section 82(f)

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (F) OF SECTION 82 OF THE ARMY ACT WITH INTENT TO DEFRAUD

In that

At field on II Apr 72 while was Commanding Officer of 13 Raj RIF with intent to defraud caused by Major JC Sharma of the my unit to pay a

sum of Rs. 3635.93p from the unit regimental fund account to M/s. Nagarwal Mohan Lal unit canteen contract or of 13 Raj RIF on the ground

that the said firm had supplied to the unit "Lungie" to the value of Rs. 3635.93p well knowing that no such "lungis" had ever been supplied by the

said M/s. Nagarmal Mohan Lal.

Second Charge Army Act Section 63

AN OMISSION PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

In that

At fields during Feb 72, while was the Commanding Officer 13 Raj RIF having come to know that my unit personnel had improperly brought from

Bangladesh arms, equip and stores improperly committed to ''deposit the same with the ordinance in contravention to HQ 95 Mtn Bde Sig No.

03184 dated 2 Jan 72 which stipulates that all arms, ammunition and equipment captured in Bangladesh will be deposited with the ordinance.

Third Charge Army Act Section 69

COMMITTING A CIVIL OFFENCE THAT IS TO SAY DISHONEST MISAPPROPRIATION CONTRARY TO SECTION 403 OF THE

INDIAN PENAL CODE.

In that

At field on or around 14 Mar 72 dishonestly misappropriate seven NSP weapons property, which come in my possession during operation in

Bangladesh

Fourth charge Army Act Section 52(f)

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (F) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD

In that I,

At field on 3 Apr 72, while was the commanding officer 13 Raj RIF with intent to defraud, caused Maj JC Sharma of my unit to pay a sum of Rs.

1885/- from the unit Regiment fund account to M/s Nagarmal Mohan Lal Canteen Contract or 13 Raj RIF on the ground that the said firm had

supplied two refrigerator and one water pump to the value of Rs. 1885/- to 13 Raj RIF, well knowing that no such item had ever been supplied by

the said M/s. Nagarmal Mohan Lal.

Fifth Charge Army Act Section 52(F)

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (F) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD

In that I,

At field on 18 Apr 72 while was the Commanding Officer 13 Raj RIF, with intent to defraud, caused Maj JC Sharma of my unit to pay a sum of

Rs. 1050/- from the 13 Raj RIF Officer''s Mess account to M/s. Nagarmal Mohan Lal canteen contractor 13 raj RIF on the ground that the said

firm had supplied on refrigerator to the value of Rs. 1050/- the officer''s mess 13 Raj RIF, well knowing that no such refrigerator had ever been

supplied by the said M/s. Nagarmal Mohan Lal.

Sixth charge:

DISHONESTLY MISAPPROPRIATING PROPERTY BELONGING TO GOVT.

In that, I

At field during Aug 72 while the Commanding Officer 13 Raj RIF dishonestly got the damaged gear box assembly of my private jeep No. BRT

3853 replaced by the serviceable gear box assembly of Jeep BA No. 21086, property of the Government.

3. The GCM found the petitioner guilty of four charges, namely, second third, fourth and fifth charges. However, by an order dated 03.10.1974,

the Chief of the Army Staff while confirming the sentence approved the findings of the General Court Martial only on two charge, namely, charge

Nos. 2 and 3.

4. At the time of Indo-Pak war, the petitioner was a Lieutenant Colonel.

The petitioner while assailing the aforementioned judgment of conviction and sentence has raised the following questions:-

(a) The GOC of 16th Infantry Division being biased allegedly hatched up a conspiracy against him. He had also mala fide transferred him thrice to

Jalandhar.

(b) The GCM was improperly constituted inasmuch as it was convened by an Officer holding the rank of Lieutenant Colonel and has signed as

Officiating General Officer Commanding 16th Infantry Division, which is in contravention of the provisions of Section 109 of the Army Act, 1950.

The same was also constituted in violation of Rule 37 of the Army Rules, 1954.

(c) The petitioner had been denied the qualitative opportunity to defend, which is guaranteed under Rule 95 of the Army Rules. Although the

petitioner discussed his case with an Advocate, Colonel V.P. Anand, who had kept his brief for almost two months and the convening authority

managed to engage him as a prosecution counsel in the said GCM trial of the petitioner and the same has prejudiced his case.

(d) The petitioner, who was a victim of conspiracy as would be evident from the fact that the witnesses had been tutored and they had been asked

to adduce evidence against the petitioner under threat, promise and coercion.

5. In a similar situation, some of the blamed officers were only awarded the sentence of Censure and some of them, who were members of HQ

16th Infantry Division, were totally exonerated. The defense of the petitioner to the effect that he had purchased the weapons in question from

Mukti Vahini Camp and got a proper license from the District Magistrate, Nadia had not been considered in its true perspective.

5. The respondents, however, would submit that as the sentence imposed upon the petitioner was confirmed on 03.10.1974 and his representation

was rejected by the Government of India on or about 1905.1976, this writ petition, which was filed in the year 1979, should not be entertained on

the ground of gross delay and laches on the part of the petitioner. Although mala fide had been alleged against Bhagat Singh & Ors. but as they

had not been imp leaded as parties in this writ petition, the said plea cannot be entertained in this writ petition.

6. As regards improper constitution of the GCM, it had been contended that in terms of Section 130 of the Army Act, the accused Officer was

given an opportunity to object to being tried by any of the members of the GCM and as the petitioner did not raise any objection in the said

proceedings, he cannot be permitted to do so in this proceeding, particularly when he had been given such opportunity twice.

7. As regard the allegation of the petitioner to the effect that Major Ram Singh was a witness in the GCM proceedings and, thus, the entire

proceeding was vitiated, it was contended that the GCM was convened by the officiating GOC, Brigadier, Jagdish Rai Malhotra and not by Major

Ram Singh. Reference in this connection has been made to the convening order dated 06.06.1973 as contained in Exhibit "K" to the G.C.M.

proceeding. It had further been contended that Major Ram Singh was called as a defense witness and not by the prosecution and in that view of

the matter, the petitioner should not be permitted to raise the said question.

8. As regard engagement of Colonel V.P.Anand, it was submitted that the petitioner did not object to the procedure followed by the GCM and in

fact was being defended by the defense Officer appointed by the Army as well as two civilians. In this connection, our attention has been drawn to

the statement of Colonel V.P. Anand wherein it was stated that the petitioner did not tell him about the fact of the matter much less his defense.

Even he had not shown the proceedings of the Court of Inquiry, as the petitioner himself was not in possession thereof.

9. On the question of basis, the respondents placed reliance on the decision of the Apex Court in Kumaon Mandal Vikas Nigam Ltd. v. Girja

Shankar Pant and Ors. (2002) 1 SCC 182

10. This Court, according to the respondents, in exercise of its jurisdiction under Article 226 of the Constitution of India cannot re-appreciate the

evidence. So far as the purported evidence of the petitioner to the effect that he had purchased the weapons, it was urged that the receipt

produced by him was suspected to be not genuine. Reference in this connection has been made to pages 210- 213 of the paper book and as

allegedly the petitioner in his rejoinder to the counter-affidavit had not traversed the allegations contained therein he would be deemed to have

admitted the same. It has been contended that after the sentence was awarded by the GCM, the petitioner got affidavits filed by different persons

on or about 05.03.1975, which cannot be taken into consideration by this Court.

11. As regard disparity of imposition of sentence, it had been contended that other persons were found to have appropriated certain items of

crockery in the interest of the Officers Mess, whereas the petitioner was found to have appropriated certain arms and ammunition in contravention

to Signal No. 3154 and thus, he is not a person similarly situated.

12. As regard the second charge that the personnel / officers under him had improperly brought arms and ammunitions, it was submitted that the

stand of the petitioner to the effect that he had taken all precautions Therefore is contrary to his statement before the Summary of Evidence where

he had allegedly admitted that he was aware that certain officers/personnel under him were in possession of NSP weapons.

13. As regards the question of disproportionate punishment, it has been submitted that in terms of Section 63 read with Section 69 of the Army

Act, the penalty of dismissal from service is a lesser penalty. Relying on or on the basis of the decision of the Apex Court in Union of India and

Others Vs. R.K. Sharma, it was submitted that the matter relating to quantum of punishment cannot be interfered with by this Court.

14. Section 109 of the Army Act and Rule 37 of the Army Rules read thus:-

Section 109. Power to convene a general court-martial. -- A general court-martial may be convened by the Central Government of the Chief of

the Army Staff or by any officer empowered in this behalf by warrant of the Chief of the Army Staff.

Rule 37. Convening of General and District court-martial. -- (1) An officer befroe 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 to 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 form the curt 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 the which the accused is

to be tried and, where no judge- advocate has been appointed, also with a copy of the summary 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 of evidence.

15. So far as the preliminary objection raised by the respondent to the effect that this Court should not entertain this writ petition as the petitioner

has approached this Court after a period of three (3) year is concerned, the same in our opinion cannot be accepted.

16. Ordinarily, the question as to whether a writ petition should not be entertained on the ground of delay is considered at the time of issuing rule

nisi. The petitioner has been fighting out this case for a period of about 13 years, and, thus, now it would cause a gross injustice to him if this writ

petition is dismissed on the ground of delay and laches alone, particularly when it is not the case of the respondents that they had been in any

manner prejudiced thereby.

17. The submission of the learned counsel for the respondents to the effect that having regard to the provisions of Section 133 of the Army Act,

the petitioner may not be permitted to raise the question of lack of jurisdiction on the part of the concerned authority, in our opinion, is also not

correct. In the event it is found that the 3GCM has been illegally convened, the same would go to the root of the matter and, thus, any order

passed by it would be coram non judice. It is now well known that the order passed by an authority, who lacks inherent jurisdiction in respect

thereof, the order would be a nullity and, thus, non est in the eye of law.

18. Army Act, 1950 and the Rules framed there under, namely, Army Rules, 1954 having regard to the provisions contained in Article 33 of the

Constitution of India abridges the Fundamental Rights of the Army personnel. In terms of the provisions of the Army Act, Army personnel are tried

by different kinds of Court Martial, namely, General Court Martial; District Court Martial; Summary General Court Martial; and Summary Court

Martial.

19. A bare perusal of the Section 109 of the said Act, which occurs in Chapter X of the said Act, as noticed hereinbefore, would clearly show that

either the Central Government or the Chief of the Army Staff or an officer empowered in this behalf by warrant of the Chief of the Army Staff only

can convene a General Court Martial. No other person has been empowered in this behalf. It is not in dispute that the form of warrant can be

issued by the Chief of the Army Staff to the General Officer Commanding, but not to the rank of Lieutenant Colonel. However, in the instant case,

from Exhibit "K", it appears that the General Court Martial was convened by Jaspal Singh, Lieutenant Colonel, purporting to convey the order of

Brigadier Jagdish Rai Malhotra, Officiating G.O.C., which is in the following terms:-

In lieu of IAFD 916

FORM OF ORDER FOR THE ASSEMBLY OF A GENERAL COURT MARTIAL UNDER THE ARMY ACT

Orders by IC - 3964A Brig. Jagdish Raj Malhotra, Officiating General Officer Commanding 16 Infantry Division.

Place : Field Dated: 6 Jun 73

IC-8453A Major The details of officers as mentioned below will (Substantive) assemble at CHANDMINADIR on twelfth day of June

SHANWAL DESH 1973 for the purpose of trying by a General Court RAJ, 13th Bn. Martial the accused person named in the margin and

RAJPUTANA RIFLES such other persons as may be brought before them. attached 221 Medium

Regiment, The senior officer to sit as presiding officer.

MEMBERS.

IC-1908""H Brig. GILL KULWANT SINGH, CSO HQ ii Corps.

IC - 7318A Lt. Col. LAMBA NARINDER SINGH, of 166 Fd. Regt.

IC - 7884A Ltd. Col. DASGUPTA SRIJANA DIPANKAR, of 3 Assam

IC - 10018K Lt. Col. NAMBIAR SATISH Vrc. of 1 MLI IC-10503Y Lt. Col. DUBE VIRENDRA KUMAR, of 4 DOGRA

WAITING MEMBERS

MR-1168Y Lt. Col.R.K. KAUSHAL, of 416 Med. Bn. IC-7947X Lt. Col. BRAR PURAN SINGH, of 60 Engr. Regt.

JUDGE ADVOCATE

IC - 207 10y Maj. K.P. SINGH DAJAG HQ Western Command is appointed Jude Advocate

PROSECUtor

IC-21044L Maj. J.P. SINGH, 15 RAJPUT is appointed as prosecutor

The accused will be warned and all witnesses duly required to attend.

The proceedings (of which only three copies are required) will be forwarded to this HQ through Deputy Judge Advocate General, HQ Western

Command.

Signed this SIXTH day of June 1973.

(JASBIR SING)

LIEUTENANT COLONEL ASSISTANT ADJUTANT AND QUARTERMASTER GENERAL OFFG GENERAL OFFICER

COMMANDING 16 INFANTRY DIVISION.

It is now a well-known proposition of law that a person officiating in a particular post cannot exercise the statutory power, unless such power is

conferred expressly upon him by statute. No records have been produced before us to show that the said G.O.C. was authorised to convene the

General Court Martial. There is furthermore nothing on record to show that Shri Jasbir Singh could issue the said order dated 06.06.1973.

Furthermore, from a bare perusal of the provisions of Section 109 of the Army Act, it until be evident that the Officer convening a General Court

Martial must be empowered in this behalf by the Chief of the Army Staff. In the instant case, it has not been shown before us that the

aforementioned Jaspal Singh was so authorised.

20. Furthermore, in the instant case from the records it does not appear that the provisions of Rule 37 of the Army Rules, as noticed hereinabove,

had been complied with. Satisfaction required to be reached would be on the part of the authorised officer and nobody else. Thus, application of

mind is required to be applied by the designated authority as envisaged under Rule 37 of the Army Rules. In a letter dated 13.07.1999 having

regard to a decision of the Apex Court whereby General Court Martial proceedings were quashed as the related General Court Martial

documents did not indicate application of mind by the convening authority, it was stated:-

Courts Martial : Signing of convening order

1. Reference this HQ letter No. 35418/AG/DV-1 dated 16 Jun 89.

2. In a recent case the Supreme Court has quashed the GCM proceedings against an officer as the GCM documents did not indicate application

of mind by the convening authority at the time of convening the GCM. In the past also we had similar cases where the High Courts have quashed

GCM proceedings on similar grounds.

3. In order to establish that the GCM/ DCM/SGCM has been convened after due application of mind, it is imperative that convening orders be

signed personally by the convening authority and not by the Staff Officer. In this connection, please refer to Para 6 of letter under reference.

4. The contents of this letter may be communicated to all formations under your command for compliance.

The respondents do not deny or dispute the said fact.

21. The submission of the respondents, however, to the effect that the General Court Martial was convened by officiating GOC, Brigadier Jagidsh

Rai Malhotra does not appear to be correct, as the same is not specifically mentioned in the aforementioned letter dated 0606.1973. Had it been

the position, there was no necessity of the said Jaspal Singh signing the aforesaid document dated 06.06.1973. The order convening a General

Court Martial must show application of mind by the person convening the same. There is nothing on record to show that the records had ever been

placed before Brigadier Jagdish Rai Malhotra, except his name having been appeared at the top of the said order. The respondents, despite the

fact that such a question had been raised in the writ petition, did not choose to file any document to show that the said allegations are not correct.

22. Major General Ram Singh was a witness in the General Court Martial. It matters not whether he has been called on behalf of the prosecution

or on behalf of the defense. The witnesses are called by the prosecution or defense for the purpose of arriving at truth; if a witness, who is required

to depose on behalf of the defense, at the instance of his higher Officers becomes a party to the convening General Court Martial, there would

certainly be a likelihood of bias. Such a bias shall vitiate the entire proceedings.

Other instances of bias against the petitioner by the Officer are galore. In this behalf, the petitioner in the writ petition stated:-

18.....Rfn. Hari Singh stated that he had made the statement in the court of inquiry or summary of evidence under compulsion. He had stated that

sometime on or about 30 or 31st August, 1972, in the afternoon when the petitioner was on temporary duty to Jullundur, Capt. P.S. Bedi and

Capt. S.K. Sharma, Capt. D.R. Jangra, 2nd Lt. S.V.S. Saxena held a conference in the Officers Mess of the Battalion to implicate the petitioner.

Capt. P.S. Bedi had remarked that they should level false allegations against the petitioner as he was away to Jullundur. On or about 4.10.1972,

Capt. P.S. Bedi and Capt. S.K. Sharma on his battalion came to 221 Med Regt. and met him. He asked him to make the statement as suggested

by him otherwise he would be put to death. He had further told him that the petitioner would go home and Maj. Bhagat Singh would take over the

command of the battalion and that he would work comfortably in the unit. Rfn. Hari Singh had told him that he had put in only a service of about a

year and a half that he should not fire the gun over his shoulders. Rfn. Hari Singh had further stated that he was produced, later on, before Brig.

M.R. Rangapa who had told him that he and the Divisional Commander were fed up with the state of affairs in the battalion and that they wished

that the petitioner was thrown out of the Army. Rfn. Hari Singh had stated that on 12.10.1972 he had come out of the petitioner"s room in

Officers" Mess of 13 RAJ RIF, Capt. P.S. Bedi met him. Major Bhagat Singh was also there. Capt. P.S. Bedi had read out a letter and its

contents were to the effect that Lt. Col D.R. Shanwal who then was the Officer Commanding of 13 RAJ RIF would be sent home on 25.10.1972

on charges leveled against him and Major Bhagat Singh would take over the command of the battalion with effect form 26.10.1972. Capt. P.S.

Bedi told him that in case he wished to serve in the said battalion, he should state as directed by him. He further stated that on 13.10.1972 in the

morning before he made the statement in the Court of inquiry, he was briefed by Capt. P.S.Bedi as to how he was to make a statement. He had

further stated that Capt. P.S.Bedi had given him some money for expenses during the journey when he had deserted. He got him some clothes

stitched and promised to pay him Rs. 15,000/- after the conclusion of the case. He had stated that the statement made by him in the Court of

Inquiry and Summary of Evidence against the petitioner were false and were made under coercion, fear and temptation for money. Hav. Subha

Chand stated that he was shown his statement in the Summary of Evidence and he identified his signature appended therein. He had stated that he

was made to state under coercion and compulsion by Capt. P.S. Bedi who was then his Coy Commander and MTO for some time. Capt. P.S.

Bedi had told him that he would not allow him to serve in the battalion unless he made the statement as desired by him. Mess Waiter Vijay Singh

was forced to allege homosexuality against the petitioner as would be evidenced form his letter, copy whereof is annexed as Annexure "B" to the

petition.

48. That the petitioner was the victim of conspiracy hatched by Maj. Gen. Ram Singh and Maj. Bhagat Singh; the second-in- command of the

battalion was used as a tool to throw mud on the petitioner. The petitioner has annexed a copy of the document marked as Annexure "R" to the

petition which show that Maj. Bhagat Singh was in possession arms brought from Bangladesh. These were unlicensed; not purchased by him and

were without receipt. Despite all this, Maj. Bhagat Singh was not charged for mis-appropriation of Government property. The petitioner who had

not brought the arms from Bangladesh had purchased them in India, held receipts and licenses and despite all this, he had been charged with

misappropriation. Maj. Bhagat Singh was found guilty for not forwarding the representation of Rfn/Painter Baby Dayal and Rfn/Mess Waiter Vijai

Singh to his of (petitioner) expeditiously. Maj. Bhagat Singh had committed offences within the purview of Section 63 of the Army Act, that is the

violation of the orders. Maj. Bhagat Singh who had leveled false and the baseless allegations and was used as a tool in the conspiracy against the

petitioner had been awarded a very slight punishment, that is, severe displeasure of GOC II Corps whereas for the same offence, the petitioner

was given the severest punishment of dismissal from service.

23. The respondents in their counter affidavit sought to traverse the said allegations in the following terms:-

18. ..... It may be stated here that Rifleman Hari singh and Hawaldar Subhachand were examined as witnesses at the Court Martial proceedings

as PW4 and PW 11 respectively. The statement of both these witnesses at the Court Martial Proceedings differed from the statement made by

them earlier and general Court Martial declared them hostile, the statement made by the said witnesses earlier and also before the general Court

Martial. The general Court Martial after apprising the evidence did not believe their deposition before it. The said finding of the general Court

Martial to disbelieve the statement made by the PW4 and PW 11 cannot be questioned in proceedings under Article 226 of the Constitution of

India.....

48. The contents of para under reply as stated are denied. It is denied that there was any conspiracy as alleged in para under reply. The petitioner

has miserably failed to substantiate his allegation of mala fide. The allegation of the alleged conspiracy and bias have in fact been taken merely for

the sake and to prejudice this Hon''ble Court. The said allegation have neither been substantiated nor has nay merit in them. It is further submitted

Major Bhagat Singh was punished for his offence. The petitioner has also been punished for his offence. Major Bhagat Singh cannot be said to be

similarly situated in as much as the petitioner who was commanding officer of the battalion had committed a grave offence and the petitioner in fact

instead of setting an example on officers and men working under him took active part in unauthorized and illegal transaction of the personnel of his

units.

The counter affidavit has been affirmed by one Shri Upendra Kumar, Civilian, Staff Officer, Deputy Assistant Adjutant General, Army

Headquarters, New Delhi. He did not have any personal knowledge about the case. He affirmed his competence to swear on affidavit only on the

ground that he had gone through the records relating to the said case. The verification of the said affidavit is in the following terms:-

Verification:

Verified at Delhi on this 2nd day of November, 1979 that the deposition made above is true to my knowledge based upon official record and no

part of it is false and nothing that is material has been concealed there from.

24. The General Court Martial derives its authority from the Statute. In absence of any reason assigned in the impugned order showing application

of mind as regards appreciation of evidence, it was not for the deponent of the said counter affidavit to state as to how the matter was dealt with.

The said counter affidavit has been affirmed by a person who was not competent in that behalf and even the verification thereof is not in

accordance with law.

25. The petitioner in the writ petition has categorically stated as to how and in what manner he had been dealt with. According to him, when he had

protested and raised the contentions against the officer concerned that certain spare parts were found at Suratgarh, he was transferred to

Jalandhar.

It has also been the specific case of the petitioner that the evidence in the General Court Martial proceedings had been obtained under threat,

pressure and coercion.

26. Major General Bhagat Singh & Others might not have been imp leaded as parties, but this Court in the instant case is not concerned with an

allegation of basis in a purely administrative action. In this case, he has questioned the proceedings wherein the authorities are required to perform

judicial function. He has alleged mala fide and bias on the part of the officers concerned as also the irregularities and the illegalities in convening of

the General Court Martial. Such allegations have been made with a view to show that he has been denied a fair and impartial trial, which is the

hallmark of justice.

In the General Court Marital proceedings, the petitioner has not only been convicted, but also has been dismissed from service.

A trial under General Court Martial must not only pass the test of reasonableness, but also must be shown to have been held fairly and in an

impartial manner.

27. It is now a well-settled principle of law that justice is not only to be done, but manifestly seen to be done. In "Natural Justice" by Pal Jackson,

it was stated:-

It is the recognition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it

may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached had a fair hearing been given by

an impartial tribunal. The maxim is applicable precisely when the court is concerned not with a case of actual injustice but with the appearance of

injustice, or possible injustice. In Altco Ltd. v. Sutherland (1971) 2 LR 515 Donaldson J said that the court, in deciding whether to interfere where

an arbitrator had not given a party a full hearing, was not concerned with whether a further hearing would produce a different or the same result. It

was important that the parties should not only be given justice, but, as reasonable men, know that they had justice or ""to use the time allowed

phrase"" that justice should not only be done but be seen to be done. In R. v. Thames Magistrates Court, exp. Polemis (1974) 1 W.L.R. 1371, the

applicant obtained an order of certiorari to quash his conviction by a stipendiary magistrate on the ground that he had not had sufficient time to

prepare his defense. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had no defense

to the charge.

It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not

seen to be done,m as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: ''Well, even if the case had been

properly conducted, the result would have been the same.'' That is mixing up doing justice with seeing that justice is done'''' (per Lord Widgery C.J.

at p. 1375) : Stringer v. Minister of Housing [1970] 1 W.L.R. 1281.

In Maxwell v. Department of Trade [1974] 1 Q.B. 523 Lawton L.J. expressed a similar idea when he said, ''''Doing what is right may still result in

unfairness if it is done in the wrong way.'''' Barrs v. British Woll Marketing Board. [1957] S.C. 72 per Lord President (Clyde). It is because the

assurance that justice has been seen to be done is, in itself, an important element in the public confidence in the settlement of disputes, whether in

the courts or by other bodies, that, for example, the rules of natural justice may apply even to what might be regarded as ''''open and shut cases.

Megarry J. explained why, when warning of the danger of regarding any case as ''''open and shut'''':

When something is obvious'' (it may be said), ''why force everybody to go through the tiresome waste of time involved in framing charges and

giving an opportunity to be heard? The result is obvious from the start.'' Those who take this view do not, I think, do themselves justice. As

everybody who has anything to do with the law well knows, the path of the is strewn with examples of open and shut cases which, somehow, were

not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained of fixed and

unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a

moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded

any opportunity to influence the course of events'''' (John v. Rees [1970] Ch. 345).

28. In Union of India and Others Vs. Harish Chandra Goswami, the law as regarded non-compliance of Rule 37 of the Army Rules has been laid

down in the following terms:-

7.....Admittedly there is no record whatever in the file to show that the personnel of the Court-Martial were appointed by or nominated by the Lt.

General. The order for the Assembly of a General Court-Martial did not contain either the signature or the initial of the Lt. General. It was signed

only by the Colonel and none else. In the circumstances the said order cannot be considered to be an order evidencing the appointment of

personnel of the Court- Marital by the Ltd. General. There is no dispute before us that under Rule 37, the Commanding Officer has to apply his

mind to satisfy himself that the charge to be tried by the Court are for offences within the meaning of the Act and that evidence justifies the trial of

those charges. It is also admitted that the Commanding Officer has also to satisfy himself that the case is a proper one to be tried by the kind of

Court- marital which he proposes to convene. However, learned counsel for the appellants contends that Sub-rule (3) of Rule 37 is only

procedural in nature and there is no need for the application of mind by the Commanding Officer in matter of appointment of the personnel of

Court-martial. That contention loses its relevance in the present case in view of the categorical stand taken by the appellant, that there was an

order by the Commanding Officer appointing or detailing the officers to form the Court-martial. According to the learned counsel as stated earlier,

the form for Assembly of Court-martial is the only relevant from and when it is signed by an officer on behalf of the Lt. General, that is sufficient

proof of the appointment of the personnel of the Court-martial by the Ltd. General. We are unable to accept this contention in view of the fact that

the said form does not contain either the signature or the initial of the Ltd. General. Even assuming that the Lt.General passed an oral order, there is

no record of any kind whatever to prove it. The form of Assembly of Court-marital was not contemporaneous to such oral order, if any. In the

absence of any record whatever to show that the appointment of the personnel of the Court-martial was by the Ltd. General, we are not

persuaded to accept the contention of the appellants that the requirements of Rule 37 were fully satisfied. It is unnecessary for us to consider

whether Sub- rule (3) of Rule 37 requires an order in writing or not in view of the specific stand taken by the learned counsel for the appellants in

this case that there was an order in writing and the said order was nothing else but the form for Assembly of the Court-material.

29. Yet again in Captain Surinder Singh Sandhu v. State of Punjab and Ors. 1989 (7) SLR 564 it has been held:-

5. Mr. B.S. Sehgal, counsel for the petitioners sought to contend that once Commission as Officer has been granted, even though it was an

Honorary Commission, the petitioners must be deemed to be Commissioned Officers and would thus fulfill the qualification of being Ex-

Commissioned Officers of the Armed Forces. Reference was, in this behalf made to Section 3 of the Army Act, 1950 (hereinafter referred to as

''the Act'') whereby Clause (xii) thereof, a ""Junior Commissioned Officer"" has been defined and by Clause (xviii) an ''officer''. The emphasis being

on Sub-clause (f) of Clause (xviii) with a view to show that an ''Officer''. as defined there under does not include a ''Junior Commissioned Officer''.

The argument thus being once an Honorary Commission has been granted to a Junior Commissioned Officer, he comes within the definition of

''Officer'' in clause (xviii) which specifically excludes Junior Commissioned Officer. In other words, a person granted Honorary Commission as

Officer, cannot, thereafter be treated to be a Junior Commissioned Officer.

6.Mr. H.S. Bedi Advocate-General, Punjab, on his part, adverted to the defense Service Regulations framed by the Central Government u/s 192

of the Act, with pointed reference to Regulation 179, which reads as under:-

(a) The status of a JCO as such is not affected by the grant to him of the honorary rank of Lieut., or Captain, nor does the commission granting

him that rank confer on him any additional powers of command.

(b) Such honorary commissioned officer will take rank according to their Junior Commissioned Officers rank and will accordingly be junior to all

officers. No promotion to or in the grade of JCOs will be made in the case of a JCO granted a commission as honorary officer.

7. A plan reading of this regulation would show that it provides a complete answer to the point canvassed as in simple and clear language it lays

down that the status of a Junior Commissioned Officer is not affected by the grant, to him, of an Honorary Commission in the Army. This being so,

he cannot be described as an Ex-Commissioned Officer of the Armed Forces and it follows that neither of the petitioners fulfill the prescribed

qualification for the post. No exception can thus be taken to them being held to be ineligible for appointment. Both the writ petitions are

accordingly hereby dismissed. There will, however, be no order as to costs.

30. The petitioner has alleged that despite his requests made in terms of Rule 95 of the Army Rules, he had not been provided with a defending

officer. Although the petitioner asked for some Major J.P. Singh, he was detailed as a prosecutor, as would appear from the respondents letter

dated 11.06.1973. It would also demonstrate bias on the part of the authorities concerned.

It has further been contended by the petitioner that he had handed over the brief to Col. V.P. Anand, Advocate practicing in Punjab and Haryana

High Court, but even the aforementioned Col. V.P. Anand had been engaged as a prosecution counsel. It is really strange as to why the

respondents had engaged the very same officer and the very same counsel whose services the petitioner wanted to procure. If even on that count a

likelihood of bias is raised in the mind of the petitioner, the same cannot be said to wholly unjustified.

31. In Ex-Havildar Ratan Singh Vs. Union of India (UOI) and Others, the Apex Court observed that any Army Officer is entitled to a qualitatively

better right of defense.

32. We may notice the Apex Court in Union of India and Another Vs. Charanjit S. Gill and Others, referred to its earlier decision in Lt.-Col. Prithi

Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, and lamented that even after lapse of two decades there from neither the

Parliament nor the Central Government had realized their constitutional obligation. It was held:-

11. In the absence of effective steps taken by Parliament and the Central Government, it is the constitutional obligation of the courts in the country

to protect and safeguard the constitutional rights of all citizens including the persons enrolled in the Armed Forces to the extent permissible under

law by not forgetting the paramount need of maintaining the discipline in the Armed Forces of the country.

We must bear in mind that there is even no provision for an appeal. In law, the Court Martial or the confirming authority are also not required to

record reasons. Trial through Court Martial is akin to the age-old jury, which has since been discarded, even in England.

33. Yet, again recently in Union of India (UOI) and Others Vs. L.D. Balam Singh, the Apex Court held:-

Turning attention on to the procedural aspect, be it noticed that Section 18 is an offence which cannot but be ascribed to be civil in nature in terms

of the provisions of Army Act -- if Section 18 is to be taken recourse to then and in that event the provisions of the statute come into play in its

entirety rather than piecemeal. The charge leveled against the respondent is not one of misdeeds or wrongful conduct in terms of the provisions of

the Army Act but under the NDPS Act -- in the event, we clarify, a particular state is taken recourse to, question of trial under another statute

without taking recourse to the statutory safeguards would be void and the entire trial would stand vitiated unless, of course, there are existing

specific provision Therefore in the particular statute. Needless to record that there were two other civilian accused, who were tried by the Court at

Patiala, but were acquitted of the offence for non-compliance of the mandatory requirements of the NDPS Act. Once the petitioner was put on

trial for an offence under the NDPS Act, the General Court Martial and the Army authorities cannot reasonably be heard to state that though the

petitioner would be tried for an offence u/s 18 of the NDPS Act, yet the procedural safeguards as contained in the statutory provision would not

be applicable to him being a member of the Armed Forces. The Act applies in its entirety irrespective of the jurisdiction of the General Court

Martial or other Courts and since the Army authorities did not take into consideration the procedural safeguards as in embodied under the Statute,

the question of offering any credence to the submissions of Union of India in support of the appeal does not and cannot arise. There is no material

on record to show that the authorities who conducted the search and seizure at the house of the respondent herein has in fact done so in due

compliance with Section 42 of the statute which admittedly stand fatal for the prosecution as noticed above -- as a matter of fact, two of the

civilians stand acquitted therefore.

34. Furthermore, in this case the petitioner has alleged that the person similarly situated had been dealt with leniently. It is true that as noticed

hereinbefore the respondents in their counter affidavit contended that the petitioner being an officer, he was required to set an example, but in the

instant case, the petitioner had brought on record various materials to show that his defense had not been considered at all. it is really a matter of

great surprise that although petitioner was initially charged on six grounds and ultimately he was found guilty of 2 charges and how the same

sentence had been maintained. It may be true that in certain circumstances a captain of a team may be handed over a severer punishment than the

ordinary personnel, but even for the said purpose, the doctrine of proportionality is required to be maintained.

35. In Ranjit Thakur Vs. Union of India (UOI) and Others, and allegation of mala fide was made and the question of prejudice had been raised as

regards perception of one officer in the court martial. It was held that the participation of respondent No. 4 in the court martial rendered the

proceeding coram non judice. As regards the quantum of punishment, it was held that the punishment is strikingly disproportionate so as to call for

and justify interference.

36. The matter relating to proportionality of punishment had been considered in great details on Om Kumar and Ors. v. Union of India (200) 2

SCC 386 wherein Jagannadha Rao, J, inter alias held:-

69. The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of

arbitrariness"" of the order of punishment is questioned under Article 14.

70. In this context we shall only refer to these cases. In Ranjit Thakur Vs. Union of India (UOI) and Others, , this Court referred to

proportionality"" in the quantum of punishment but the Court observed that the punishment was ""shockingly"" disproportionate to the misconduct

proved. In B.C. Chaturvedi Vs. Union of India and others, this Court stated that the court will not interfere unless the punishment awarded was

one which shocked the conscience of the court. Even then, the court would remit the matter back to the authority and would not normally

substitute one punishment for the other. However, in rare situations, the court could award an alternative penalty. It was also so stated in Union of

India and another Vs. G. Ganayutham (Dead) by LRs.,

71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary

cases is questioned as ""arbitrary"" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority . The court

will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies

in such a context. The court while reviewing punishment and if it is satisfied that administrator for a fresh decision as to the quantum of punishment.

Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken int eh courts, and such

extreme or rare cases can the court substitute its own view as to the quantum of punishment.

In this case, we find that the impugned order suffers from arbitrariness.

37. For the reasons aforementioned, we are of the opinion that it is not possible to sustain the impugned order, which is set aside accordingly.

Normally this Court in a given situation would have remitted the matter back to the appropriate authority, but the fact remains that the petitioner

was tried in the year 1976 and for one reason or the other for more than 23 years, this writ petition could not be taken up for hearing by this

Court. In the aforementioned situation and particularly having regard to the fact that the petitioner has reached the age of superannuation; we are of

the opinion that he is entitled to the retiral benefits. It is, Therefore, not necessary that he may be tried again. However, in the facts and

circumstances of this case, he shall not be entitled to the back wages.

38. This writ petition is allowed with the aforementioned observations and directions, but without any order as to costs.