

Commander Ranvir Kumar Sinha Vs. the Union of India and Others

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Court : Mumbai

Decided On : Dec-19-1990

Reported in : 1991(2)BomCR28; 1991CriLJ1729

Judge : D.J. Moharir and; S.M. Daud, JJ.

Appeal No. : Criminal Writ Petition No. 1377 of 1988

Appellant : Commander Ranvir Kumar Sinha

Respondent : The Union of India and Others

Advocate for Def. : M.J. Sethna and;H.V. Mehta, Advs. for;A.S. Khan

Advocate for Pet/Ap. : Captain B.P. Sinha (Rtd.) and;K.S. Vakil, Advs.

Judgement :

Daud, J.

1. This petition under Art. 226 of the Constitution impugns the verdict of the Court Martial (CM), later confirmed with a modification by the Chief of Naval Staff (CNS) vis-a-vis the charges found established against the petitioner.

2. Petitioner was in command of the Indian Naval Ship 'Karwar' which ship was commissioned at Riga in Soviet Union of 14th July 1986. The said ship set sail from Riga on 21st July 1986 and arrived at Bombay on 17th October 1986. An

incident took place on 23rd October 1986 in which the petitioner was involved. On the basis of the happenings at that incident, a Board of Inquiry (BOI) was convened. The said Board interrogated a number of persons, some, more than once in between 26th December 1986 to 5th March 1987. While this enquiry was in progress, Pathak, Kishorilal and Tiwari, who were borne on INS Karwar were transferred to different establishments. Pathak was transferred to INS 'Deepak'. The Executive Officer of INS Deepak, which post is equivalent to the second-in-command of the ship, was Commander Mohanty. This Officer was a member of the Board of Inquiry. Kishorilal and Tiwari were first transferred to INS 'Trata'. Later, the two were transferred to INS 'Kunjali', which is a detention centre-cum-Police Station of the Indian Navy in Bombay. Petitioner had not been present at all the interrogations or further interrogations made by the BOI. This was because he had to go on various naval exercises out of Bombay. On 9th September 1987, he made a representation complaining of the alleged irregularities committed in the conduct of proceedings before the BOI. This representation, purporting to be under section 23 of the Navy Act, 1957 (the Act), was rejected by the Flag Officer Commanding-in-Chief, Eastern Command, on 21st October 1987. A further representation was made by the petitioner repeating the same grievances on 30th Oct. 1987 and addressed to the CNS. The CNS rejected the representation on 5th March 1988.

3. After the conclusion of the BOI, there came to be issued a Warrant directing a Court Martial against the petitioner. Six charges were levelled against the petitioner and three of them for which the CNS affirmed his guilt were :

1. Did between 14th June, 1986 and 20th August 1986 contravene Regulation 2808 of Regulations for the Navy, Part I, in that, he permitted sale of Ram (liquor) to sailors on board Indian Naval Ship Karwar and thereby committed an offence punishable under section 68 of the Navy Act, 1957.

2. Was between 23rd August 1986 and 17th October 1986 guilty of an act to the prejudice of good order and naval discipline in that he directed Lieutenant Commander Ashok Kumar Naik the Executive of Indian Naval Ship Karwar to stop the liberty of Dudh Nath Pathak, Petty Officer Medical Assistant

now Chief Petty Officer Medical Assistant, during the passage of the ship and to give extra duty without recourse to disciplinary action and thereby committed an offence punishable under section 74 of the Navy Act, 1957.

4. Did on 23rd October 1986 contravene para 6 read with paras 1 and 8(g) of annexure 'Y' to annexure 'C' of Confidential Navy Order 11/79 as amended by Confidential Navy Order 15/81 in that, he landed undeclared dutiable goods ashore, namely a car engine and, thereby committed an offence punishable under section 68 of the Navy Act, 1957.

The sections mentioned above require reproduction to the extent relevant and are as follows :

'68. Every person subject to naval law who neglects to obey or contravenes any provisions of this Act or any regulation made under this Act or any general or local order, shall, unless other punishment is provided in this Act for such neglect or contravention, be punished with imprisonment for a term which may extend to two years or such other punishment as is hereinafter mentioned.'

'74. Every person subject to naval law who is guilty of an act, disorder, or neglect to the prejudice of good order and naval discipline, not hereinbefore specified, shall be punished with imprisonment for a term which may extend to three years or such other punishment as is hereinafter mentioned.'

Punishments imposable are to be found in S. 81 of the Act and two of them are :

'(1)(b) forfeiture of seniority in rank in the case of officers;

(1) severe reprimand or reprimand.'

Regulation 2808 is to the following effect :

'Beer, wines and spirits may be sold to sailors in canteens in shore establishments in accordance with such instructions as may be issued by the Chief of the Naval Staff from time to time.'

Though not mentioned in the charge-sheet, the prosecution had relied upon Regulation 229 which is to the following effect :

'229. Prohibition on sale/consumption of certain articles

(1) No sort of beer, wine, spirituous liquor, opium or narcotic drugs, psychotropic substances shall be sold on board by any person nor shall any person belonging to the ship sell articles of any other description to any other person belonging to the ship without the written sanction of the Commanding Officer and all loans, transfers, gifts or barter of spirits, intoxicating drinks, opium or narcotic drugs or psychotropic substances are hereby prohibited on board,

(2) Tradesmen shall not be permitted to board Indian Naval Ships to sell their goods or obtain orders and where the exclusion of a particular tradesman from boarding one of the Indian Naval Ships would cause real inconvenience to the ships company, the circumstances shall be reported to the Administrative Authority for consideration. (3) The Administrative Authority may at its discretion permit the sale of newspapers on board.

(4) The distribution in ships of circulars or advertisement for the promotion of raffles is hereby prohibited.' At the trial recourse was also had to Navy Order 45/73. This order incorporates the following : 'The Regulation prohibiting issue of spirits, beer and wines on sailors on board ship will continue to be operative.'

This Order was repealed and the preface to the Index of Orders etc. which is to be found at Exh. 5 to the petition, makes this clear when it says :

'All Nos/CNOs and NOs issued on 31st December 1977 or earlier are no longer operative.'

This would naturally take in its sweep the Navy Order bearing No. 45/73.

4. Before the Court-Martial commenced, the petitioner brought to the notice of the Court, the pendency of the representation made by him under Section 23 of the Act to the CNS. S. 23 says :

'(1) If an Officer or seaman thinks that he has suffered any personal oppression, injustice or other ill-treatment at the hands of any superior officer, he may make a complaint in accordance with the regulations made under this Act.

(2) The regulations referred to in sub-section (1) shall provide for the complaint to be forwarded to the Central Government for its consideration if the complainant is not satisfied with the decision on his complaint.'

This section is to be found in Chapter VI, the title whereof is 'Service Privileges'. Petitioner contended that until the representation moved by him was decided, the proceedings before the Court-martial should not go ahead. To this the reply of the prosecution was that commencement of the proceedings before the Court-Martial was an act independent of the decision to be given by the CNS on the S. 23 representation. The CM was initiated on the basis of a circumstantial letter and the authorities giving the said letter had jurisdiction to direct the initiation of a Court Martial. This contention was accepted and the Trial Judge Advocate (TJA) overruling the objection advanced on behalf of the petitioner stated as follows :

'I have heard the submission of the learned Defence Counsel. Any person subject to naval law has a statutory right under section 23 of the Navy Act 1957 to make a complaint or representation if he feels aggrieved at the hands of a superior authority for whatsoever reasons he may think. The representations are to be made in accordance with Regulations framed in this regard. The relevant regulations are contained in Regulations 235 to 241 of Regulations Navy Part II (Statutory). The regulations inter alia, provide the procedure how the statutory complaints are to be made in that, it prescribes that if the complainant is not satisfied from the redress received or he does not receive any reply to his representation within a month he is entitled to request that his representation be forwarded to the next superior authority and so on to the Chief of the Naval Staff for necessary action to be taken and thereafter to the Central Government. This is a right enshrined in the special law in the Navy which the accused exercised. The second portion of the submission is regarding convening of a court-martial. The convening authority, in this case, the Administrative Authority has got independent authority to convene the Court-Martial whenever he is satisfied that there is a need

for a case to be tried by Court-Martial. For this purpose, the proceedings of Board of Inquiry may form necessary basis to order further inquiry into the matter, to see whether there is a prima facie case for Court-Martial or not. The proceedings of Board of Inquiry received from the Flag Officer Commanding-in-Chief, Western Naval Command were analysed by the Convening Authority, whereupon the considered it necessary to order a further investigation with a view to take final decision whether a trial by Court-Martial is to be ordered or not. The matter has been investigated and a report submitted to the convening authority, thereupon the convening authority has decided to order a Court-Martial. To that extent the individual right in this case of the accused are not affected by enforcing provisions of S. 23 of the Navy Act 1957. I therefore rule that the Court-Martial has been legally convened and is constitutional.'

5. At the trial, a number of witnesses were examined and cross-examined. Petitioner was represented by a professional Counsel assisted by a next friend from the Navy. The prosecution was conducted by a Naval Officer. Recording of evidence over, the petitioner was called upon to state whatever he wanted to so state. The statement then given, technically known as a statement from the seat, was couched in these words :

'I am aged 40 years. I joined National Defence Academy on 1st January 1965 and passed out successfully. After doing my initial training, I got a commission in the Executive Branch of Navy on 1st July, 1969. I was a Cadet Training Officer on board INS Tir. I got my first sea Command on promotion to the rank of Lieutenant on INS Bassein. After that, I was Instructor in Naval Academy and there I specialised in Torpedo and Anti-Submarine Course. After doing a long tenure in fleet ships like INS Kirpan and Udaygiri as specialised TAS Officer, I became flag Lieutenant to Flag Officer Commanding Western Fleet in Bombay. I travelled during my Annual Leave of 3 months around the world. After doing my appointment as Flag Lieutenant, I was appointed as Senior Trial Officer in Watt Bombay, in the rank of Lieutenant Commander. I was given my sea command of INS Chetak after which I was selected for Staff College at Wellington where I successfully completed and I was awarded M.Sc. degree from Madras University. I also passed my Command Examination of Navy from Wellington. I was posted to

Naval Headquarters as Assistant Director of Naval Plans. After 18 months, I was appointed as Staff Officer to two successive Deputy Chiefs of the Naval Staff. On completion, I was deputed for the commissioning of INS Karwar. During and after commissioning of INS Karwar and passage from USSR to Bombay, I was only trying to implement Naval Regulations and orders to keep (flying) the Flag of the Service, as also the country to which I and my crew belonged. Beyond that, I have nothing else to say and this is an unfortunate circumstances where some allegations are made against me and I respectfully submit that I have contravened no regulations of the Navy and I have not imported any car engine and other dutiable goods. In fact, I have filed my custom declaration as any other officer member of my crew did on touching the first Indian Port Bombay.'

The statement from the seat over, the Prosecutor and the defence Counsel addressed the Court. The address of the partisans over, the TJA gave a summation and left it to the members of the CM to give their verdict. On 14th January 1988, the Court have its findings which were to the effect that the petitioner was found guilty on charge Nos. 1 to 4. Then came a hearing on the subject of punishment. Petitioner through his Counsel made what is described as a mitigation statement. The relevant portion from that statement reads as follows :

'The alleged charges for which I am being tried before this Honourable Court are false and I can only attribute this because I did my utmost to enforce discipline amongst the crew of the ship during the ship's maiden passage from USSR to India Officers of excellent records are selected to the Naval Headquarters for deputation abroad to commission a newly acquired ship as better skill, sound discretion and deep fore-thought are required from Commanding Officers who are commissioning a ship abroad I further beg to submit that since the first rummaging by Kunjali on 24th October 1986 took place barely seven days after the arrival of ship in Bombay. I have seen nothing but a Damocle's sword hanging over my neck till today. Thus, out of my seventeen months of 'command of INS Karwar, I have remained under severe mental stress and strain for fifteen months We have also been put to huge financial expenses, apart from the social stigma that has got attached to me by now In view of the circumstances explained above I beg the indulgence of the Hon'ble Court to show mercy

on me while awarding punishment.'

The Court recorded a sentence reading thus :

'The Court having found the accused guilty of the offences charged in the first charge, second charge, third charge and the fourth charge adjudges the said Commander to forfeit three years (36 calendar Months) seniority in the rank of Commander and to be severely reprimanded and to suffer the consequential penalties involved.'

After the pronouncement of the verdict, the Court was declared dissolved. The Act by S. 160 provides a remedy of judicial review of Court-Martial proceedings. This section says :

'(1). All proceedings of trials by court martial or by disciplinary courts shall be reviewed by the Judge Advocate General (JAG) of the Navy either on his own motion or on application made to him within the prescribed time by any person aggrieved by any sentence or finding, and the Judge Advocate General of the Navy shall transmit the report of such review together with such recommendations as may appear just and proper to the Chief of the Naval Staff for his consideration and for such action as the Chief of the Naval Staff may think fit.

(2) Where any person aggrieved has made an application under sub-section (1), the Judge Advocate General of the Navy may, if the circumstances of the case so require, give him an opportunity of being heard either in person or through a legal practitioner or an officer of the Indian Navy.'

Availing of this remedy, the petitioner on 20th May 1988 moved an application for judicial review to the JAG. The said application is at Exh. P.A personal hearing was given to the petitioner on 7th July, 1988. On 14th July 1988, the petitioner addressed Exh. V to the CNS and portions therefrom need to be reproduced. They are thus :

'No copy of the incident Register Ex. P/5 was annexed to the Court-martial paper book. So my Counsel remained' under the bona fide impression that this exhibit must be the combined exhibit XIV before the BOI which consisted of two leaves of

paper, the first leaf containing three numbers, 10133, 996340, and 119585 type 004, found on the engine which was in my car and the second leaf contained the report to the higher authorities. My Counsel therefore prepared the defence on this charge on the basis of the complete Ex. XIV produced at the Box. It is only at the hearing of the Review on 7th July 1988 that it was found that the first leaf referred to above did not form a part of Ex.P/5. This took my Counsel completely by surprise and in this state of mind, an important submission did not occur to him at the spur of the moment. This submission is as follows :

..... It was very important from the point of view of the defence and in the interest of justice and fair play that the first leaf containing the numbers found on the engine and jotted on the pad should have been exhibited along with the incident report. It is because one of the numbers found on the engine was 101 33 that I sent certain documents including enclosures 3 and 4 along with my letter Ex. P/7 to Co Kunjali on 27-10-1986. The aforesaid first leaf was thus not produced by the prosecution at the court-martial to shut out my defence that the engine found in my car was the old one imported in 1980. In any case, since Cdr. Awasthi has referred to 'numbers' found on the engine having been noted down on the jotting pad, the prosecutors cannot with any degree of credibility rule out that one of those numbers was No. 10133 which pertained to my old engine, which engine, I had intimated the ASD on 23-10-1986 as having been brought inside the Dockyard by me. Since it cannot be ruled out that one of the numbers on the engine found in the dicky of my car was 10133, this engine could not possibly be an allegedly new engine brought by me from a foreign country on board INS Karwar.'

JAG drew up a note of the submissions made before him and his finding thereon. In regard to charge No. 3 he opined that the same lacked specificity and thus vitiated the finding recorded thereon. The JAG however agreed with the findings of the CM on Charge Nos. 1, 2 and 4. In regard to the sentence he was of this view :

'The CM had awarded a sentence of forfeiture of 36 calendar months seniority in the rank of Commander and severe reprimand and consequential penalties involved. The defence Counsel had urged that this sentence is too harsh considering that the accused has an exemplary record of service and was

specially selected to commission the ship from abroad. I have given my due consideration to this aspect and I find that in view of my recommendation that charge No. 3 should be set aside, there is scope for reduction in sentence. Taking the entire facts and circumstances into consideration, in my view the ends of justice would be met if the punishment of forfeiture of seniority be reduced to 24 calendar months, keeping the other punishment intact.' The views of the JAG were submitted for approval to the CNS who accepted the same. Aggrieved, the petitioner has come with the instant petition to this Court.

6. Learned Counsel representing the parties have been heard at great length, The first submission advanced by Captain Sinha (Retd.) representing the petitioner is that a number of pre-trial irregularities had been committed and that these had deprived his client of a fair opportunity. The deprivation was of such a degree as to vitiate the commencement, continuance and conclusions of the CM. Certain witnesses had been interrogated more than once by the BOI. The Regulations governing the proceedings before the BOI permit a person whose character and reputation was likely to be affected, to be present. In fact Regulation 205 required that the person be provided with full opportunity to be present throughout the enquiry and for making any statement and giving any evidence which he may wish to make or give and for cross-examining any witness whose evidence in his opinion affected him and producing any evidence in his defence. In the case of the petitioner while the proceedings before the BOI were in progress, he was directed to take part in various naval exercises. This compelled him to be away from Bombay and thus deprived him of the opportunity to be present when the BOI interrogated witnesses. Some witnesses were questioned more than once and these included Pathak, Kishorilal and Tiwari. On his part, the petitioner had protested against the BOI continuing with the proceedings before it in his absence. Finding that no heed was being paid to his grievance, the petitioner made a representation under section 23 to his immediate superior and after the rejection by that superior, to the CNS. As said earlier, the immediate superior rejected the representation on 29th October 1987, while the CNS rejected it on 5th March 1988. The petitioner would have it that continuing with the BOI proceedings in his absence despite his protests deprived him of a valuable opportunity. This was all the more serious in that some of the witnesses had gone back on what they had

stated at the earlier stages in the proceedings before the BOI. First and foremost he should not have been given duty while the BOI was in progress. If this was unavoidable, proceedings before the BOI could have been adjourned to such dates as and when he would be available to participate in the proceedings before it. Counsel for the respondents replies to this contention by referring to the location of S. 23 in Chapter VI. He submits that S. 23 deals only with 'service privileges' and not complaints in relation to the procedure followed at the pretrial stages. Captain Sinha argues that S. 23 is wide enough to be availed of by any officer or sea-man, who thinks that he has suffered any injustice. The injustice may be in relation to service privileges or procedure in the carrying out of any investigation, enquiry or trial. Any injustice which the aggrieved person feels has been inflicted upon him, can be the subject of a complaint under section 23 of the Act. Attractive as this submission of learned Counsel is, an essential rule of interpretation is that legal provisions should be construed in the context in which they are placed. S. 23 appears in Chapter VI which deals with 'service privileges'. Therefore, the section has to be construed as confined to a feeling of oppression, injustice or ill-treatment vis-a-vis the service Conditions and privileges. The pre-trial and trial provisions are regulated by the Regulations and Chapter XIII of the Act. Lapses committed during the pre-trial stages cannot be the subject of a complaint maintainable under section 23 of the Act. Captain Sinha is however right in submitting that the complaint was not rejected because of its non-maintainability under section 23, but because the Officers to whom it was addressed found it to be bereft of merit. A complaint in regard to procedural lapses could be entertained by the superior Officers de hors S. 23 for they had supervisory jurisdiction over the officers who constituted the Board of Inquiry. This apart, it is not every violation of the pre-trial procedures that can give rise to a plea of the verdict of the CM being vitiated. Captain Sinha relies upon *Ranjit Thakur v. Union of India*, : 1988 CriLJ158

'The Act and the Rules constitute a self-contained Code, specifying offences and the procedure for detention, custody and trial of the offenders by the Courts-Martial. The procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary jurisdiction of the Court-martial and the severity of the consequences that visit the person subject to that jurisdiction. The procedural safeguards should be commensurate

with the sweep of the powers. The wider the power, the greater the need for the restraint in the exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the statute.'

Learned Counsel contends that overlooking of the procedural irregularities at the pre-trial stages though approved by the Delhi High Court in *Flying Officer Sundarajan v. Union of India*, : AIR1970 Delhi29 , did not find favour with the Supreme Court in *Prithipal's case*, : 1983 CriLJ647 , Justice Desai speaking for the bench observed :-

'Frankly, we have our reservations about the view taken by the Full Bench of the Delhi High Court but as we have held that Rr. 22, 23 and 24 have not been violated on account of the failure of the petitioner to insist upon their compliance which it was obligatory upon him to do, we refrain from expressing any opinion on this point.'

Now these observations do not say that every infraction of any rule governing pre-trial stages would have the effect of vitiating the succeeding proceedings before the Court-Martial, leave alone the verdict given by that Court. The infraction has to be of an important safeguard vis-a-vis the person to be proceeded against. It is true that the petitioner could not be present as all the interrogations, by the BOI because of his being required to participate in various naval exercises. But it is not as if this was all. Upon his return he was told of his entitlement to receive transcripts of the answers given by the witnesses at the questionings or further questions. The complaint is that he was not allowed to make notes so as to be effectively in a position to cross-examine the said witnesses. But the providing of transcripts was an observance of the rule of natural justice requiring the likely delinquent to be informed of what had been stated by the witnesses against him at a pretrial stage. Petitioner though deprived of the opportunity to effectively cross-examine witnesses at the proceedings before the BOI, had notice of what they had said at different times before the commencement of the trial before the Court. What they stated in the proceedings before the BOI was not going to be substantive evidence. The limited use to which the same could be put has been enumerated in Regulation 207. The said Regulation reads as follows :

'The proceedings of a board or any confession, statement or answer to a question made or given before a board shall not be admissible in evidence against a person subject to naval law or subject to the laws relating to the regular Army or Air Force nor shall any evidence respecting the proceedings of the board be given against any such person except upon the trial of such person for wilfully giving false evidence before the board, provided that nothing in this regulation shall prevent the proceedings from being used for the purpose of cross-examining any witness.'

Therefore, the fact that the petitioner was not present at all the questionings or that he was not allowed to make notes for further cross-examination of witnesses interrogated before BOI would not be so serious a deprivation as to vitiate the proceedings before the CM or the said CM's verdict.

7. Captain Sinha next submits that Pathak, Kishorilal and Tiwari, who were important witnesses against his client were transferred during the proceedings before the BOI or the pre-trial investigation. The transfers were not innocuous but were made so as to place the witnesses under the influence of Officers who could coerce or induce them into deviating from the truth. Pathak was transferred from INS Karwar to INS Deepak. Deepak's Executive Officer was Cdr. Mohanty. This Officer was a member of the BOI, but the mere transfer of Pathak to a ship officered by a member of the BOI would not give rise to the inference suggested on behalf of the petitioner. Petitioner himself does not say that Cdr. Mohanty harboured any spite or ill-will against him. It would be far-fetched to say that Cdr. Mohanty was interested in bringing material against the petitioner so that he could be Court-Martialled. Learned Counsel points to an alleged voluntary statement allegedly made by Pathak and forwarded under Exh. K to the President of the Board of Inquiry. A recital appearing in this voluntary statement is worded thus :

'G. Yadav came to my quarter and said C.O. has sent me to tell you that he is crying and asking pardon, he is ready to come to your house. I asked why the C.O. is so much upset. He said, as you are going to Deepak and Ex.O. of Deepak is a member of Board he will take out the truth from you.'

This would not show any pressure of the suspect upon Pathak. All that the statement indicates is what Yadav is alleged to have told Pathak. If true, it

conveyed the apprehension of the petitioner vis-a-vis the ability of Cdr. Mohanty to extract the truth from Pathak. That however is not to be equated, with Cdr. Mohanty being in a position or wanting to exercise any pressure upon Pathak to testify in a particular way at the BOI. Assuming the worst, the passage reproduced above conveys no more than an apprehension entertained by the petitioner, and, as we see it, without any basis therefore. On the basis of such a baseless apprehension, it cannot be said that the transfer of Pathak was actuated by improper considerations. Counsel however points to the transfers of Kishorilal and Tiwari, arguing that one transfer may be a happenstance, but as many as three, could not be ascribed to a mere coincidence. Kishorilal and Tiwari being transferred at about the same time as Pathak may be ascribable to a host of reasons, Unless there be some foundation for the plea that someone in the BOI was interested in seeing that an adverse verdict was brought against the petitioner, it will not be open to us to agree to the conclusion suggested by the learned Counsel viz. that the transfers were actuated by a desire to somehow find a case worth being placed before a CM against the petitioner. It was argued - and it is possible to take the said view - that the transfers were made with a view to free the witnesses from the possible pressure that could be brought to bear upon them by the petitioner who stood in the position of a superior to the said witnesses.

8. The next contention to be considered is about the validity of the holding of the Court Martial until the CNS had ruled upon the Section 23 application moved by the petitioner. Captain Sinha submits that a second petition in regard to a procedural lapse had been moved by the petitioner after the same was overruled by the immediate superior and before he moved the CNS. The proceedings before the BOI had a bearing upon the decision to convene a CM. Had the objection under section 23 been sustained, there would have been either a quashing of the proceedings altogether or a direction to admit further testimony before the BOI. Going ahead with the trial despite the pendency of the objection, was depriving the petitioner of a valuable right. We find no substance in this submission. This is not because we agree with the respondents contention that the initiation of the trial was an act independent of the consequences of the proceedings before the BOI. In a sense the proceedings before the BOI were for the ascertainment of whether or not the petitioner could be indicated. Therefore, it is not as if the mere writing of

a circumstantial letter constituted an independent cause of action to initiate and go ahead with the trial before the Court. The important reason for our negating the petitioner's contention is that the material collected whatever it be - was not going to be the last word on the subject. There was to be a trial and at the trial nothing self-contradictory said at the BOI except that which went in favour of the defence, could be looked into. In that sense the procedure before the BOI did not so prejudice the petitioner as to deprive him of a proper opportunity to get material in his favour. Those who had been questioned more than once at the BOI had to face the question as to why they gave contradictory versions. That explanation was sought from them and the veracity or otherwise as to what they had said at different stages, had to be decided by the Court. The TJA referred to this aspect of the matter in his submission in the following words :

'The Hon'ble Court may have keenly observed that all the witnesses have deposed before the Court voluntarily regarding their earlier statements before the Board of Inquiry alleging that they were under tremendous amount of pressure from the accused to suppress the truth before the Board of Inquiry. They have also brought out that the accused in his capacity as Commanding Officer had threatened them and directed them to make statements which were not true. As and when they went out of the clutches of the accused they told the truth before the Board of Inquiry. One such witness viz. Singh, Witness No. 8, voluntarily went before the President of the Board of Inquiry before proceeding on leave and offered himself to tell the truth. The witnesses have sought to explain this, perhaps, anticipating that the Defence Counsel would ask them to reconcile the earlier statements. The Defence Counsel did confront them with their depositions before this Court-Martial. These contradictions are to be considered by the Court keeping in view the explanations given by the witnesses, whether the same are acceptable to them or not is to be decided by them'.

Therefore, the fact that some witnesses had given conflicting statements before the BOI had been brought to the notice of the CM and what the CM had to make of the conflicting stands was explained to them by the TJA. Even at the preliminary stages the TJA had made it clear that the circumstantial letter was a mere ex parte statement of alleged facts and that the Court would have to act upon evidence.

This evidence would have to come through the mouths of the witnesses or the documents tendered before it. All aspects considered we find no infirmity in the pre-trial procedure which would vitiate the trial or the verdict rendered therein. Having so held, we now proceed to consider the other points canvassed charge-wise :-

9. In relation to charge I, petitioner was accused of having violated Regulation 2808. Respondents have made a strange effort to disown their having taken recourse to Navy Order 45 of 1973. This attempt to shrug off Navy Order 45 of 1973 is not going to deceive us. The TJA in his summing up has made a reference to the Navy Order 45 of 1973. Though no reference is made to this order in the charge-sheet, there is no denying the fact that Navy Order 45 of 1973 was referred to, and, more than once. In fact the said Navy Order was not in force, for it had been repealed much earlier, Captain Sinha submits that Regulation 2808 did not apply and that Regulation 229, which had been referred to, was not specified in the charge. Even otherwise, Regulation 229 had not been pressed into service in the charge formulated against the petitioner. To us, charge No. 1 suffers from lack of specification and particularisation. The prosecution itself did not know what it wanted to press against the petitioner. Regulation 2808 cannot be said to cover the case of the petitioner. It permits sale of beer, wine and spirit to sailors on shore establishments. It is submitted that the Regulation has to be read as prohibiting sales everywhere, except on shore establishments. INS Karwar when berthed at Riga between 14th July 1986 to 20th July 1986 was not a shore establishment. The contention is that liquor in whatever form is not allowed to be sold to sailors on board a ship. Sailors can purchase liquor only from canteens on shore establishments. What constitutes a shore establishment has not been defined anywhere. The sale of rum which is said to have been effected on the basis of an oral permission given by the petitioner was from out of canteen stores. We have been referred to different portions of the testimony recorded at the trial to show that a canteen had been set up for the crew of INS Karwar and that recourse to this canteen had been taken by the crew until the ship set sail from Riga on 21st July 1986.

What the evidence recorded at the CM indicates is the existence of an IN Detachment. This was supposed to be a place with recreational facilities open to all Navy men present at Riga. But the specific prohibition in relation to sale of liquor to sailors on board a ship is to be found only in Navy Order 45 of 1973 and that at Clause 5. where it is said :

'The Regulation prohibiting issue of spirits, beer and wines to sailors on board a ship will continue to be operative.'

As said earlier, the index to Navy Orders extant on 31st December 1985 specifically made a reference to the non-operativeness of NOs, CNOs etc. issued on and up to 31st December, 1977. We have been referred to the preface para 6 which indicates the existence of a list of cancelled Nos, CNOs and SNOs. The cancelled list does not include Navy Order 45 of 1973. If so, there is a conflict in the preface itself in paragraphs 6 and 8 - one indicating the continuance of Navy Order 45 of 1973, and the other, showing that it had ceased to be operative. The Index to Navy Orders on the basis of which the superior officers were to act itself being contradictory, the petitioner is not to be blamed for contravening a possibly nonexistent Navy Order, clause 5 of which prohibited issue of liquor to sailors on board a ship. As said earlier Regulation 2808 does not in terms say that sale of liquor to sailors on board a ship is prohibited, All that it indicates is the permissibility of sale of liquor to sailors on shore establishments. The negative viz. that sailors can be sold liquor only on shore establishments can be spelt out from Regulation 2808, but the contrary viz. that it specifies no more than the mere permissibility of liquor sale also on shore establishments is a possible inference to be drawn therefrom. As to Regulation 229, it seems to be aimed against hawkers and pedlars coming into the ships while at ports - the prohibition also covering sales inter se the crew on board a ship. Sale from the canteen stores would not appear to be covered by Regulation 229. It was argued that the Court consisted of high officers of the Indian Navy conversant with the practices and customs prevalent. They were aware of the fact that sale of liquor on board a ship to sailors was impermissible. Section 68 covers not only the Act or Regulations made thereunder, but also 'any general or local orders' which would cover practices prevalent and of which a Court-Martial could take judicial notice vide Section 132

of the Act. The Court had drawn upon its experience and knowledge as members of the Naval force to come to the conclusion that petitioner had committed an offence punishable under section 68 of the Act by permitting sale of liquor to sailors on board. This finding was a finding of fact and could not be interfered by a Writ Court. Plausible as the argument is, what should not be lost sight of is the fact that the petitioner has been convicted for an offence under the Navy Act and that this conviction is going to stand in the way of his career. Unless an offence had been made out in clear terms, the Court of facts was not entitled to record a conviction under section 68 of the Act. While a writ Court cannot interfere with findings of fact except for some special reasons, an error of law committed by the statutory Court can be corrected by a writ Court. So it was held by the Court of Appeal in *R. v. Northumberland Compensation Appeal Tribunal ex p Shaw* (1952) 1 All ER 122. In the course of the judgment, Denning LJ said (1952) 1 All ER 127

'The Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law.'

The petitioner is said to have contravened a general or special order prohibiting the sale of liquor to sailors on board a ship. The only specific prohibition we have been able to come across, is that contained in clause 5 of the Navy Order 45 of 1973. Once that Navy Order had been repealed, the prohibition disappeared and the petitioner cannot be blamed for believing that the prohibition previously in force had become inoperative. Therefore, the finding of guilt vis-a-vis charge No. 1 cannot be sustained.

10. This brings us to charge No. 2 and it relates to the deprivation of liberty of D. N. Pathak, POMA, for nearabout 22 days during the period 23rd August 1986 to 17th October 1986. The petitioner is said to have harboured a grudge against Pathak because of that person's tendency to match him in the acquisition of goods of foreign make. Petitioner is said to have given direction to his second-in-

command to stop the liberty of Pathak. He did not stop there, but directed his second-in-command to impose extra duty upon Pathak and this without recourse to the procedure governing imposition of penalties. The imposition of summary punishments is governed by Regulations of the Navy at Part II. This part contains a Chapter titled 'Summary Punishment and Procedure'. A Commanding Officer is empowered to summarily try and punish any offence triable under the Act committed by a sailor other than a capital offence. The punishment imposable included -

'12. Stoppage of leave for a period not exceeding sixty days.

13. Extra work or drill for not more than two hours in a day for a period not exceeding seven days.'

By depriving Pathak of his liberty and imposing upon him extra duty without recourse to the disciplinary provisions, the petitioner is said to have committed an offence punishable under section 74 of the Act. Capt. Sinha contends that Section 74 provides for punishment to a person guilty of an act disorder or neglect to the prejudice of good order and naval discipline. The words 'good order and naval discipline' are nowhere defined. The concept incorporated in this section has been taken from English law. Therefore, Courts should go by the concept as understood in English law. Counsel has referred us to paragraph 430 of Halsbury's Laws of England Vol. 41, 4th Edition. In the commentary it is stated that in some instances though not in all, the state of mind of the accused i.e. the existence or absence of mens rea is a relevant consideration; e.g. where the particulars of the charge alleged that he behaved improperly, the prosecution must prove that he knew at the material time that his behaviour was improper. Reliance for this proposition is placed upon R. v. Miller (1983) Times 6th June C.MSE. The relevant excerpt from the Times has been made available and the passage relied therefrom by Counsel reads as under :

'Lord Justice Watkins, giving the judgment of the Court, said that the only issue upon each of the charges under section 62(a) which the Court had to resolve was whether each entry undoubtedly made on the claim forms was to the appellant's knowledge false in a material particular. The verdicts on these charges were

unsafe and unsatisfactory, inter alia, because the summing-up did not contain a sufficient direction on what was meant by 'material particular'. The court should have been directed to the effect that to be material a particular must be such as would be likely to play a part in influencing the decision to allow or disallow the claim They felt able to say, however, that while mens rea might not be an element to be considered in all forms of conduct which could properly be said to be prejudicial to good order and military discipline, it was an important consideration in others. Whether it was could only be determined by the context of the particulars of the conduct alleged as set out in a charge under section 69.'

Now, so far as the charge levelled against the petitioner is concerned, all that it indicates is a contravention of the provisions governing disciplinary measures by directing his second-in-command to stop the liberty of Pathak and impose upon him extra duty. The argument is that by not taking recourse to the disciplinary provisions, the petitioner behaved as a law unto himself and thereby affected good order and naval discipline. In a given set of circumstances, circumventing of procedures may amount to a breach of good order and naval discipline. But here there is the evidence to show that Pathak was on a shopping spree of somewhat spacious proportions. The foreign exchange admissible to a sailor was 200 Dollars while the purchases made by Pathak in the course of the voyage were worth far more. If Pathak had been allowed to continue to making purchases, he would have been inviting trouble for himself when the ship reached Bombay Port. He would possibly be hauled up for the violation of the Foreign Exchange Regulation Act or the Customs Act. To prevent such a contingency taking place, curbs were placed on the movements of Pathak so that he could resist a temptation, which if succumbed to, would land him in trouble. The answer given by the respondent is that irrespective of what Pathak was doing, the petitioner could not take the law into his own hands and devise extra legal measures to check his propensity for building trouble for himself when the ship reached Bombay. It was argued that Section 74 does not make mens rea an essential ingredient of the offence incorporated therein. A person subject to the naval law who is guilty of an act, disorder or neglect to the prejudice of good order and naval discipline, becomes subject to the punishment prescribed by Section 74, irrespective of his motives or intentions for committing the act, disorder or neglect spoken of by the section. The

words 'good order and naval discipline' have to be read in a proper perspective. It was further argued that the members constituting the Court-Martial were acquainted with good order and naval discipline. However true this may be, it is to be remembered that they were laymen i.e. persons not instructed in the law. The prosecution had to prove, firstly, the occurrence of the behaviour alleged in the particulars of the charge, and next that it was prejudicial to good order and naval discipline. Here, the charge is that Pathak's liberty was stopped. The distinction between the words 'leave' and 'liberty' has to be remembered. Capt. Sinha has brought to our notice the meaning of these two words from the Webster's Third New International Dictionary of the English language, Vol. II, 1971 edition. One of the meanings given to the word 'leave' is 'authorised absence of vacation from military duty usually charged to the accumulated leave'. As distinct from 'leave', the meaning given to the word 'liberty' stated is 'a short authorised absence from naval duty usually for less than 48 hours'. Pathak is said to have been prevented from going ashore for near about 22 days when the ship had docked at different places in the course of the voyage from Riga to Bombay. He was not deprived of his leave and all that he was deprived of was liberty. Item 12 mentioned above from the Regulations of the Navy. Part II, do not deal with the stoppage of liberty. They deal with the stoppage of leave. The TJA in his summing up describes stoppage of liberty as being synonymous with stoppage of leave. This is not an incorrect direction for having seen the provisions in the Regulations dealing with the stoppage of leave, we cannot but agree that leave in this context is the same as liberty. Capt. Sinha submits that Pathak was deprived of liberty because of his not being able to resist the temptation to go on making purchases of costly articles, thus building up trouble for himself when the ship reached Bombay. The argument of the respondent that the element of mens rea is immaterial to Section 74 of the Act cannot be accepted. Section 74 itself speaks of a person subject to naval law being found guilty of (i) an act, (ii) disorder, (iii) neglect, and, all this to the prejudice of the good order and naval discipline. Mens rea seems to be implied in the words used, and, in any case it is not possible to infer an exclusion of the element of mens rea. In *Nathulal v. State of Madhya Pradesh*, : 1966 CriLJ71

'Mens rea is an essential ingredient of a criminal offence. A statute may exclude the element of mens rea; it is, however, a sound rule of construction which is

adopted in England and also accepted in India, to construe a provision which creates an offence in conformity with the common law rather than against it except where the statute expressly or by necessary implication excludes mens rea. Of the question whether the element of guilty mind is excluded from the ingredients of an offence the mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is not by itself decisive. Only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated that mens rea may, by necessary implication, be excluded from a statute. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof.'

Charge No. 2 in substance amounts to the ill-treatment of a subordinate at the behest of the petitioner Capt. Sinha argues that if there were any substance in this charge, the petitioner would have been ascribed the commission of an offence punishable under section 46 of the Act, which reads as follows :

'Every person subject to naval law who is guilty of ill-treating any other person subject to such law, being his subordinate in rank or position, shall be punished with imprisonment for a term which may extend to seven years or such other punishment as is hereinafter mentioned.'

It is well-settled that where a specific provision applies a catch-all provision like Section 74 should not be applied. The fact that the petitioner was not booked under section 46, is itself an indication that the prosecution did not seriously believe in the accusations of ill-treatment levelled against the petitioner by Pathak and incidentally his own second-in-command Nayak. On charge No. 2 also the verdict of the CM cannot be sustained.

11. This brings us to the 4th charge. The stand taken by Capt. Sinha is that the prosecution suppressed vital evidence before the CM which if had been produced, would have resulted in an exoneration of the petitioner. The vital evidence suppressed was a sheet on which had been jotted down the numbers found on the diesel engine found in the dicky of the car being driven by the petitioner. One of the numbers noted down at the direction of Commander Awasthi was '10133'. Now it is true that the sheet on which this number was jotted down was not made

available to the CM. In appraising the contention of suppression of vital evidence, we must not overlook the stand taken by the petitioner at the trial. It was not his case that the diesel engine found in his car was that which he had legally imported into India. His stand on the other hand was that there was no truth whatsoever in the story about his travelling in a car, the dicky whereof had a diesel engine. In fact Counsel representing him made the most of this argument by pleading that in the absence of the corpus delicti (as Counsel described it) it could not be said that the petitioner had attempted to smuggle into the country a diesel engine. Having taken that extreme stand, it does seem strange that the petitioner should now complain of some evidence said to favour him, having been kept back by the prosecution. Incidentally he cannot be heard to complain of non-production of the sheet containing the numbers when he was represented not only by a Naval person to assist him, but also a professional Counsel. It was open to either gentleman to complain of the keeping back of a vital paper from the evidence placed before the CM. The stand taken by the petitioner was made known to the CM and it is that set out in a letter dated 29th October, 1986 addressed by the petitioner to the Commanding Officer of the INS Kunjali. This letter in paragraph 2 speaks of the petitioner having purchased a second hand diesel engine in London in 1980. The engine is shown as bearing No. 10133. In paragraph 3, it is averred that the engine when fitted to his Ambassador make car was found to be giving trouble from the very inception. There were several defects in the machine and for that reason, the petitioner applied to the Chief Controller of Imports and Exports to import a replacement. Permission to do so was accorded with the result that a second hand diesel engine bearing No. 15 P/785A/D 3804 was imported and on 23rd February 1984, the said engine was cleared from the Bombay docks through Clearing Agents M/s. Jeena & Co. To prove this clearance, the petitioner annexed to the letter a receipt issued by the transporters as also another issued by the Clearing Agents. The Jeena & Co.'s octroi bill showed the import by the petitioner of car parts, and though this might sound strange, an engine bearing No. 10133. Counsel for the petitioner tried to explain this mention of an engine and its number as due to the fact that the engine had been brought in a broken-down condition. Even if it was in a broken-down condition, it continued to be a car part, thus rendering it unnecessary to separately describe it as an engine bearing a certain

number. We have been shown photographs of the engine and it must be conceded that one of the numbers appearing thereon is 10133. But then the stand taken by the petitioner as early as on 29th October 1986 was different. At that time it was averred that engine bearing No. 10133 had been imported in 1980 and found to be so defective as to compel the petitioner to apply for the import of a replacement. This replacement came in 1984 and after the same had been fitted into the Ambassador car, petitioner had not been experiencing any trouble. In other words, engine No. 10133 had become useless and was not being shifted from place to place. We say this because the photographs while have been placed before us are said to represent the engine even now installed in the car of the petitioner though the make of that car is a Contessa. Petitioner did make a reference to the keeping back of the jottings made of the numbers of the engine when his car was intercepted by the Naval Police. But that complaint was made quite late in the day. It was by way of a supplement to the judicial review petition and 7 days after the personal hearing given to him and his Counsel by the JAG. Belated submissions are like belated discoveries. They merely increase the scepticism in the say put forward to the refuting of a charge found proved against a person accused of any lapse. It is not as if the conclusion of the CM rested merely upon the numbers found on the diesel engine. Witnesses examined at the CM included those who had seen the engine being loaded into a bus engaged for sight-seeing by the Officers and Sailors of INS Karwar during the period the ship was anchored at La'Havre. Next, the witnesses included those who brought the diesel engine from the house of a relating of the petitioner and loaded it into the bus. The engine had to be taken out from the bus and loaded into the ship and those who witnessed the operation constituted the third set of witnesses examined. The engine was kept on the boat deck and it was covered up on directions given by the petitioner. Witnesses who saw the engine thus secured were examined. The last set of witnesses were those who were examined to establish the unloading of the engine from the ship after it reached Bombay. The engine was unloaded from the ship and placed in the dicky of a car brought by the petitioner. All this evidence was before the CM and it cannot be said that a mere withholding of one leaf containing some numbers so affected the very verdict as to result in the conviction of the petitioner. If the entire evidence was considered and

if on the basis thereof, the Court came to the conclusion that the petitioner had indulged in smuggling, they, as Court of facts, were entitled to do so. With such a verdict it is not possible for us to interfere. Therefore, on charge No. 4 no case for intervention of the writ Court has been made out by the petitioner.

12. To recapitulate, the conclusion recorded against the petitioner vis-a-vis charges 1 and 2 cannot be sustained. however, the conviction for charge No. 4 has to be and is hereby confirmed. In so far as the sentence is concerned, it will be open to the authorities to review the same in the light of what we have said above. This may be done suo motu or upon an application to be moved by the petitioner. Rule in the above terms made partially absolute, with parties being left to bear their own costs.

13. Order accordingly

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