(12)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 868 of 2010

Tuesday this the **5th** day of April, 2011

"Hon'ble Mr. Justice Janardan Sahai, Member (J)
Hon'ble Lt. Gen. P.R. Gangadharan, Member (A)"

Bapu Ranga Salunke
Son of Sri Ranga Salunke
(Formerly Hav. No.1365015 (MSN) 109
Rapid(s) Engineering Regiment
C/o 56 APO
Now undergoing sentence in Sagar Central
District Jail, Sagar (M.P.) ..... Applicant

By Legal Practitioner Sri J.L.Agnihotri

Versus

1. Union of India through Secretary to
Govt. of India, Ministry of Defence
New Delhi - 110001

2. The Chief of Army Staff,
Army Headquarters New Delhi

3 The General Officer Commanding
Summery Court Martial
109 Rapid(s) Engineering Regiment
C/o 56 APO

4- Col. K.Thammaya Udupa
Presiding Officer, Summery Court Martial
109 Rapid(s) Engineering Regiment
C/o 56 APO

----------Respondents

By Legal Practitioner Shri R.N. Singh Govt
Counsel for the Central Government.

ORDER

"Hon'ble Mr. Justice Janardan Sahai"

1. The applicant Bapu Ranga Salunke , Havildar in the Indian Army, was issued a charge-sheet dated 02-7-2001 containing two charges under section 63 of the Army Act, which were as follows:

First Charge: An Act prejudicial to Good order & Mil. Discipline

Army Act Section- 63
In that he at Saugor on 19-7-2000 was found in possession of 5 bottles of Whisky Mc. Dowell No.1 drawn from the Unit run Canteen which had transported to Teen Batti area of the said city for improper disposal.

Second Charge Army Act Section- 63

In that he at Sangor on 19-7-2000 was improperly found in unauthorized possession of 35 bottles of liquor of the under-mentioned description

(a)	Mc Dowell Whisky No.1	15
(b)	Mc Dowell rum No.1	02
©	Blue Riband Gin	01
(d)	Old Monk Rum	01
(e)	Prestige Whisky	08
(f)	Bag Piper Whisky	02
(g)	Caribay rum	01
(h)	Contessa Rum	01
(i)	Golkunda Brandy	04

02- On the basis of these charges a Summary Court Martial was held on 07-7-2001. Originally the applicant pleaded not guilty to charge no.1 and guilty of charge no.2. The Commanding Officer on perusal of the summary of evidence was of the opinion that the applicant did not understand the effect of the plea of guilty in respect to charge no.2 and he converted the plea to not guilty in view of Rule 116(4) of the Army Rules. Thus the applicant pleaded not guilty to both the charges.

03- The prosecution supported its case by examining eight prosecution witnesses namely:

1- PW1- Subedar Trilochan Singh

2- PW2 Mahesh Kumar Jain

3- PW3 Naib Subedar Charanjeet Singh Sekhon

4- PW4 Naib Subedar C.A.Patil

5- PW5 Subedar Surjeet Singh

6- PW6 Subedar R.K.Dahiya

7- PW7 Havildar Bhagwat Manik

8- PW8 Havildar Rajendra Singh

The applicant did not examine any defence witness. In his Defence under Rule 118 he made following statement

> "A child was born to me after 23 years of marriage on 01-4-2000 so the persons of the Regiment asked me to give a party. I used to get my quota of six Bottles of liquor every month. I would consume one odd peg on some days and the balance I had stocked with me. I collected liquor from some others too, some of whom have been heard as prosecution witnesses. All this liquor was for the party as I had planned to call almost 350

people. On 18-7-2000 I told the Coy Sub about the party around 1600 hours or so and invited him also. He said he would find out from the Coy. Cadre since I had planned to serve liquor too. Around 1800 hours or so the Coy. Cdr who had directed that not a drop of liquor was to be served, so I did not issue any liquor during my party on 18th July 2000. I had planned to return the liquor to those from whom I had taken it and to CQMH after asking the Company Commander"

The applicant was then questioned by the Court as required under Rule 113. The question put to the applicant by the Court and answer given by him is reproduced below:

Question to the accused:

On 19th July 2000 were there five bottles of liquor in the side box of your motorcycle when you went to Saugor City in the evening and were apprehended by persons of 36 Inf. Division FS Section.

Answer:

Yes, there were five bottles of liquor inside the side box. Actually they were there because I had forgotten about them and had not realized that I had carried them along with me."

04- The Summary Court Martial found the applicant to be guilty of charges and awarded him punishment to suffer six months RI and dismissal from service. The applicant filed a Petition under section 164 of Army Act on 21-8-2001. It is stated that the petition under section 164 was rejected on 13-9-2001 The reviewing authority (GOC 36th Inf. Division) in exercise of power under section 163 of the Army Act recorded the following finding:

"1- The SCM proceedings in respect of Ex No.1365015L Hav/ MSN, BR Salunke have been perused by the General Officer Commanding (GOC) 36 Inf. Division and counter signed at

Saugor or 13th Sept.2001. The countersigning authority has directed that the sentence of Rigorous imprisonment fox six months in Civil Jail and to be dismissed from service.

2- Under the powers vested in GOC 36 Inf. Division vide Army Act, Section 163 read with Army Act. Section 179 the countersigning authority has substituted the findings arrived by the Court; "in respect of the first charge with a finding of guilty subject to the exception of the words "whisky Mc Dowell No.1" averred therein and further substitute the findings in respect to the second charge with a finding of Guilty subject to the exception of the words averred therein viz. of liquor of the under-mentioned description:

(a) Mc. Dowell Whisky No.1	15
(b) Mc Dowell Rum No.1	02
(c) Blue Riband Gin	01
(d) Old Munk Rum	01
(e) Prestige Whisky	08
(f) Bag Piper Whisky	02
(g) Caribay rum	01
(h) Contessa rum	01
(i) Golconda brandy	04

3- This is for your information please"

05- The GOC although had substituted the finding recorded by Summary Court Martial, has yet found the applicant guilty and has maintained the sentence. The applicant then filed Writ Petition No.2792 of 2002 in the High Court of Madhya Pradesh at Jabalpur, in which he prayed for quashing of the punishment awarded to him. The papers of the writ petition have been transmitted to the Armed Forces Tribunal, Regional Bench Lucknow in view of provision of Section 34 of the AFT Act, 20078.

06- We have heard Sri J.L.Agnihotri, assisted by Sri Neeraj Begur, learned counsel for the applicant and Sri R.N.Singh, Sr. Standing Counsel for the respondents.

07- Learned counsel for the applicant submits that in view of substituted findings of the GOC Reviewing Authority the charges actually stand not proved and the finding of guilty recorded by the GOC is inconsistent with the body of substituted findings. We find merit in the contention of learned counsel for the applicant. Sub- section (1) of Section 163 Army Act provides that where a finding of guilty recorded by a Court Martial is found to be invalid or not supported by evidence the authority mentioned in that section can substitute a new finding. Section 163(4) of the Army Act reads as under:

> " **163(4)- Any** finding substituted or any sentence passed under this section shall, for the purposes of this Act and the rules made thereunder, have effect as if it were a finding or sentence, as the case may be, of a Court Martial."

The finding of the Reviewing Authority would be treated to be the finding of Court Martial. If the substituted finding of the reviewing authority is read in juxtaposition with the charges what has been found proved in respect of charge no.1 is that he was found in possession of five bottles drawn from the unit run canteen which he had transported to Teen Batti area for improper disposal and in respect of charge no.2 that he was improperly found in unauthorized possession of thirty five bottles. The effect of substitution of the finding is that there remains no finding that the applicant was in possession of liquor bottles. Mere possession of bottles without any further description about their contents is not enough for conviction of the applicant on either of the two charges..

08- Reliance has been placed by the learned counsel for the applicant on a decision of the Principal Bench of the Tribunal at Delhi in T.A.No.246 of 2009 . *In that case the applicant* had been chargesheeted under section 5 of the Explosive Substance Act, 1908. The Tribunal held as under:

> ".....We fail to understand the wisdom of the Court Martial authorities that when the subject matter of the offence was the possession of a hand grenade which is said to be an explosive substance and that reference of hand grenade is deleted from the charge, then the truncated charge will reads as under:
>
> > At Delhi Court on 1st December 1984 was in possession of Hand Grenade(.....), an explosive substance, under suspicious circumstances."
>
> This does not make a sense at all. The allegation was that he was in possession of a particular substance and that substance was hand grenade No. HE 36 Lot No.610H KF- 77. When that hand grenade itself is taken out from the charge sheet then, what was that explosive substance for which the accused can be found guilty. The net result is the finding is totally defective. That means, defective in the sense that when the accused is not found guilty for possession of the hand grenade HE 36 Lot No.610H KF-77 then no offence pertaining to this hand grenade is stand proved. The gravamen of charge is possession of a particular explosive substance when that explosive substance is not established the whole charge fails on the face of it. This goes to the root of the matter and the whole prosecution fails on this account."

We are of the view that the aforesaid decision is fully applicable to the present case also. In fact the present case stands on a much better footing in favour of the applicant on

facts, for the reason that while it may be arguable that possession of an explosive substance a hand grenade may by itself be an offence but the possession of mere bottles with unknown contents is not an offence.

09- The second submission made by learned counsel for the applicant is that under Rule 118 Army Rules the Court is required to question the accused on the case for the purposes of enabling him to explain any circumstances appearing in his statement or in the evidence against him. The submission is that the applicant was not put all material circumstances occurring in the evidence against him in respect of charge no.1 and that the Court did not question the applicant at all in respect to charge no.2. We have already reproduced the question put by the Court under Rule 118 and the answer given by the applicant. One of the material allegations of charge no.1 was regarding improper disposal of liquor, but no question has been put to the applicant in respect of any circumstance in this regard. We also find that in respect to charge no.2 no question regarding any circumstances appearing in the evidence have been put to the applicant at all. In our opinion the provisions of Rule 118 of the Rules have not been complied with. In respect of similar provisio in Section 313 Cr.P.C. it has been consistently held that it is necessary for the court to question the accused in respect of circumstances appearing against him in the evidence. ~~but~~ However omission to draw his attention to any particular circumstance may not vitiate the trial if no prejudice is caused for him vide

Naval Kishore Singh Vs. State of Bihar A.I.R. 2004 SC 4421.

10- Learned counsel for the respondent submits that it is not mandatory for the court in the case of a Summary Court Martial to put questions in respect of circumstances appearing in the evidence against him and it is the discretion on the part of the court to put questions in this regard. It is submitted that this is evident from the difference in the language of Rule 58 which applies to GCM proceedings. We are reproducing Rule 118 and 58 of the Army Rules

> **"118-Procedure after plea of Not Guilty-**
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> After the plea of "Not Guilty" to any charge is recorded, the evidence for the prosecution, shall be taken. At the close of the evidence for the prosecution the accused shall be asked if he has anything to say in his defence, and may address the Court in his defence or may defer such address until he has called his witnesses. The Court may question the accused on the case for the purpose of enabling him to explain any circumstances appearing in his statement or in the evidence against him. The accused shall not render himself liable to punishment by refusing to answer such questions or by giving answers to them which he knows not to be true, but no oath shall be administered to the accused.
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> The accused may then call his witnesses including also witnesses to character."
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> **58- Evidence-**(1) **Examination of the accused and defence witnesses: (1)(a)** In every trial for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him, the court or the Judge advocate-
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> **(i)** may at any stage, without previously warning the accused, put such questions to him as considers necessary.
>
> (ii) shall, after the close of the case for the prosecution and before he is called on for his defence, question him generally on the case.

(b) No oath shall be administered to the accused when he is examined under clause (a)

(c) The accused shall not render himself liable to punishment by refusing to answer questions referred in clause (a) above or by giving answer to them which he knows not to be true;

(2) After the close of the case for the prosecution, the presiding officer or the judge advocate, if any, shall explain to the accused that he may make an unsworn statement, orally or in writing, giving his account of the subject of the charge(s) against him or if he wishes, he may give evidence as a witness on oath or affirmation, in disproof of the charge(s) against him or any person charged together with him at the same trial."

It is no doubt true that in Rule 58 the rule making authority has used the word "shall" in clause (ii) of sub- Rule 1 which indicates that compliance of the requirement to put questions to the accused regarding the circumstances appearing in the evidence against him is mandatory. However in Rule 118 the words are " the court may question..." and on this basis it is contended by the respondents that Rule 118 is not mandatory. On facts it is submitted in this regard by the respondents counsel that the applicant in his statement in defence has himself admitted that he used to get his quota of six bottles of liquor every month to give a party and would consume one odd peg on some days and would keep the balance with him and would collect liquor from others and all these were required for a party for 350 people. From this statement of the accused- applicant learned counsel for the respondent submits that in effect the applicant had admitted that he was found in possession of five bottles of liquor in respect of charge no.1

and 35 bottles in respect of charge no.2. We are afraid that this inference being drawn by learned counsel for the respondents is not borne out from the plain language used by the applicant in his defence which we have reproduced above. The test to determine whether the provision is mandatory or directory is not the use of the word "shall" or "may" but more importantly from the nature of the duty it imposes or the right it confers. The object of Rule 118 is to put to the accused such questions as may draw attention of the accused to the circumstances appearing against him in the evidence so that the accused may not suffer on account of any particular incriminating circumstance escaping his attention and thereby his losing the opportunity to explain it causing prejudice to him .The object of Rule 58 and 118 of the Army Rules and Section 313 of the Cr.P.C. is the same and in our opinion the use of the word "may" in Rule 118 would not mean that it is discretionary for the court to question or not the accused in respect of the circumstances appearing against him in the evidence. However, the omission to put any particular circumstance appearing in the evidence may not vitiate the trial if no prejudice is caused to the accused.

11- So far as this case is concerned we have already referred to the observations of the Commanding Officer himself that the accused could not understand the effect of guilty in respect of charge no.2 and had converted the plea of guilty into a plea of not guilty. In our opinion on the fact of this case the Court has erred in law in not putting to the accused all the material circumstances which had surfaced in the evidence in

respect of charge no.1 and in not putting any question at all relating to the circumstances appearing against him in charge no.2. The procedure is to the prejudice of the accused. However, it is not necessary to remit the case for giving opportunity to the applicant in view of the finding that after the substitution of the finding under section 163 the charges have not been proved.

12- For the reasons given above we are of the view that conviction of the applicant and sentence awarded to him cannot be sustained. We therefore set aside the conviction and sentence awarded to the applicant including the order of dismissal passed against him and acquit the applicant.

(Lt Gen P.R. Gangadharan)
Member (A)

(Justice Janardan Sahai)
Member (J)

IA/-