

**A.F.R****RESERVED**

ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW

COURT NO. 2

**T.A. No. 1271 of 2010**

**Friday, this the 14<sup>th</sup> day of October, 2016**

**"Hon'ble Mr. Justice D.P.Singh, Judicial Member  
Hon'ble Air Marshal Anil Chopra, Administrative Member"**

No. 6376812 L Rank Hav (SHT) Raj Kumar, son of Shri Ganga Dayal presently resident of 149/61/3-B, Suter Khana, District Allahabad..... **Petitioner**

Versus

1. Chief of the Army Staff through OIC Legal Cell (Army) HQ Allahabad Sub Area, Allahabad.
2. Lt Gen Surjeet Singh, GOC-in-C Western Command, C/O 56 APO
3. Maj Gen K.K.Khanna, GOC 14 Inf Div C/O 56 APO
4. Commandant-cum-CRO ASC Centre (S) and School, Bangalore.
5. Commanding officers (a) Col HKEM Panikker (b) Col Sunil Khosla, 514 ASC Bn, C/O 56 APO.
6. C.C.D.A (Pensions) Draupadi Ghat, Allahabad.

**...Respondents**

**Ld. Counsel appeared for the  
Petitioner**

**- Shri P.N.Chaturvedi  
Advocate**

**Ld. Counsel appeared for the  
Respondents  
Assisted by OIC Legal Cell**

**- Dr. Chet Narain Singh  
C.G.S.C  
Maj Soma John**

**Order**

**(Per Se Hon'ble Mr Justice Devi Prasad Singh, Member (J))**

1. This Petition has come up before us by way of transfer under Section 34 of the Armed Forces Tribunal Act, from Hon'ble the High Court at Allahabad and it has been renumbered as Transferred Application No. 1271 of 2010.

2. Present petition stems from impugned orders whereby the Petitioner was convicted in the Court Martial proceedings by General Court Martial and was visited with the punishment of dismissal from service, reduction in rank as well as sentenced to undergo six months' R.I.

3. It would transpire from the record that aggrieved by the punishments aforesaid, the petitioner, to begin with, preferred a writ petition in the High Court of Judicature at Allahabad being Writ Petition No 39832 of 2003, which, on establishment of the Armed Forces Tribunal, stood transferred to it in pursuance of section 34 of the Armed Forces Tribunal Act 2007 (In short the 'Act').

4. The facts in nutshell are that the petitioner, who was enrolled in the Indian Army on 28.04.1982 was serving at the relevant time in 516 ASC Battalion of the Indian Army. In the month of August 1999, the Unit in

which the petitioner was deployed, marched to Bhatinda in Punjab for yearly training. On 16<sup>th</sup> August 1999, it is alleged, the petitioner alongwith Sepoy Driver S.Borah, Jeep Driver, V.Mani, NK/SHT K. Kamraj were commanded by their officers Commanding Sub Area to load four barrels of diesel in the Four ton vehicle of the 11 composite platoon which was to be unloaded at the 4<sup>th</sup> Guard Location. It is alleged that on way back, when these four personnel were unloading diesel meant to be delivered at 4<sup>th</sup> Guard Location, personnel of Military Police happened to be there and caught them red handed while unloading 4 barrel of diesel over to a Civilian Tractor Trolley. They were accordingly charged for offence of selling the 4 barrels of diesel to a civilian. As a consequence of it, a court of inquiry was held on 18<sup>th</sup> Oct 1999 followed by disciplinary action.

5. In the instant case, separate tentative charge-sheets were framed against all the accused persons including petitioner for joint trial. For ready reference, tentative charge sheet framed against the petitioner is reproduced below.

**"TENTATIVE CHARGE SHEET"**

AA SEC 63

**AN ACT PREJUDICIAL TO  
GOOD ORDER AND MILITARY  
DISCIPLINE***In that he,*

*At Bathinda on 16 August 99 at 2000h, while performing duties with 11 Comp Pl, compiled with an illegal order by JC- 213826 W Sub/SKT A Das, officiating OC 11 Comp Pl, to unload four barrels of diesel into a civil tractor from 4 Ton vehicle, knowing that the same was being misappropriated.*

Sd/-

(HKEM Panniker)

Colonel

Commanding Officer"

Station : C/o 56 APO  
Dated : 11 Jan 2000

6. Summary of evidence was recorded against the petitioner and other co-accused between March 20,2000 to Nov 20,2000 and the petitioner alongwith other co-accused were committed to trial by General Court Martial on revised charge sheet dated 16/17 April 2001. The revised charge sheet is quoted below.

***"CHARGE SHEET***

*The accused JC- 213826W Sub/SKT A.Dass, (Accused no. - 1), No. 6376812L Hav/SHT Rajkumar (Accused no.-2) and No.- 6383361Y Nk./SHT K.Kamraj, (Accused no.-3), all of 514 ASC Bn. Are charged with:*

*WP© No. 7132/2001 Page 3 of 10 Army Act COMMITTING THEFT OF PROPERTY Section 52(a) TO THE GOVERNMENT (read with IPC Section 34) in that they together, at Bhatinda, on 16 Aug 99, committed theft in respect of four barrels of diesel*

*containing 816(eight hundred and sixteen liters of diesel, the property of the government).*

*Place : Dehradun*  
*Dated : 16 Apr 2001*

*Sd/-*  
*(Sunil Khosla)*  
*Colonel*  
*Commanding Officer*  
*514 ASC Bn*

*To be tried by the general court martial*

*Place : Dehradun*  
*Dated : 17 Apr 2001*

*Sd/-*  
*(KK Khanna)*  
*Maj. Gen.*  
*(General Officer*  
*Commanding)*  
*14 Infantry Division"*

7. The trial by General Court Martial culminated in petitioner being pronounced guilty on 19<sup>th</sup> June 2001 alongwith other co-accused and visited with the punishment of reduction in rank, dismissal from service and each of them were also sentenced to six months' rigorous imprisonment.

8. A pre-confirmation petition submitted under section 164 (1) of the Army Act was considered and rejected on merit by the competent authority and the General Court Martial proceedings were confirmed on 22.08.2001 by Maj Gen K. K. Khanna, AVSM, General Officer Commanding, 14 Inf Division.

9. It may be noted that co-accused A. Das and K.Kamraj preferred their respective petitions in Uttrakhand High Court at Nainital and Delhi High Court at Delhi vide writ petition No 2443 of 2001 and Writ

Petition No 7123 of 2001. Both the writ petitions were dismissed by respective High Courts. To be precise, writ petition filed by co-accused A Das was dismissed by Uttranchal High Court while the writ petition filed by K.Kamraj was dismissed by Delhi High Court. The judgment and order passed by Delhi High Court in the writ petition filed by K.Kamraj on 8<sup>th</sup> Feb 2008 has been placed on record. Both the High Courts affirmed the punishments and sentences recorded and awarded by General Court Martial.

10. It may be noted here that the Unit in which the petition was deployed had been assigned the task of collecting ration and fuel, oil and lubricants from Supply Depot, Bhatinda attended with the task to deliver the same to the Units of 58 Armoured Brigade. It is alleged that during this period, Sub A Das (co-accused) struck a deal to sell four barrels of diesel to a civilian. The crux of the charge is that a conspiracy was hatched by Sub A Das, Raj Kumar and K.Kamraj to sell the above quantity of diesel and in a run-up to above conspiracy, four barrels of diesel were loaded in four ton vehicle which arrived at a pre-decided place at the canal and the diesel to the above quantity was unloaded in the trolley of the tractor belonging to a civilian and it was in the process of unloading that all the accused persons

were apprehended by the Military Police. Admittedly, all the accused persons were tried jointly by General Court Martial.

11. We have heard learned counsel for the Petitioner and also learned counsel for the respondents ably assisted by Maj Soma John OIC Legal Cell.

12. The first and foremost argument advanced across the bar by learned counsel for the Petitioner is that trial and consequent conviction recorded against the petitioner hinges on unfounded grounds and the prosecution has failed to bring home the guilt to the accused/petitioner. In connection with the above argument, it is further submitted that Rule 22 of the Army Rules has not been observed in compliance and that in the absence of any evidence worth the name, he could not have been convicted.

Coming to the first limb of argument that Rule 22 has not been observed in compliance, Rule 22 being relevant, is reproduced below.

***"(22. Hearing of Charge.-(1) Every charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence:***

*Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).*

*(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with:*

*Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.*

*(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time-*

*(a) dispose of the case under section 80 in accordance with the manner and form in Appendix III; or*

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

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

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

*Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a*



*summary general court-martial for the trial of the alleged offender unless-*

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

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

From the statement of Col HKEM Panikker who appeared on the request of the accused-petitioner, it is volubly eloquent that Rule 22 of the Army Rule was fully complied with inasmuch as no substantial illegality could be pointed out in its observance by the Army Authorities. The case of the Respondent Army is luculent and clear and there is no hinge or loop to hang a doubt on it. It is admitted fact that Subedar A Das co- accused had given order to Driver S.Borah to go to 4<sup>th</sup> Guard Location alongwith four ton vehicle loaded with four barrels of diesel. The petitioner and other co-accused were sitting in the vehicle. The vehicle had not gone to 4<sup>th</sup> Guard Location and on way, it was diverted towards Bibiwala village where unloading was done over to Trolley of a Civilian tractor. It would thus appear that the petitioner and other co-accused collectively committed the crime with common intention and knowledge attracting section 34 of the Indian Penal Code. The fact that four barrel of diesel

was unloaded at a pre-designated place, stands corroborated from the statement of Sepoy MT V.Mani who was examined as PW 1 by the prosecution. The statement of Sepoy MT V.Mani was further supplemented and supported by Naib Sub B.R.Sharma, who was examined as PW 2 by the prosecution.

13. In the facts and circumstances and the material evidence led by the prosecution, it leaves no manner of doubt that mens rea and common intention on the part of the petitioner and other co-accused is fully established. The defence set up by the petitioner that it was done at the behest of Commanding officer is unavailing and falls to the ground for the reason that the petitioner or any other co-accused had not raised any objection as to why the vehicle was diverted to the Village Bibiwala or at the scene of occurrence and why the four barrels of diesel was being loaded over to the trolley of a civilian tractor. The Delhi High Court while dismissing the writ petition of co-accused K.Kamraj observed as under:

*"12. All these facts and circumstances clearly establish mens rea and common intention on the part of the petitioner. The petitioner's argument that he was doing at the behest of the Commanding Officer is of no consequence. He should have raised the objection as to why the vehicle had come at an unknown place and why*

*the unloading was being done in the trolley of the civilian tractor. All these facts adequately attribute knowledge on the part of the petitioner. The facts of this case speak for themselves. The petitioner has no defence to make."*

14. *In the case of Afrhim Sheikh, AIR 1964 SC 1263, Hon'ble Apex Court observed as under:*

*"No doubt, a person is only responsible ordinarily for what he does and section 38 ensures that; but the law in section 34 (and also section 35) says that if the criminal act is the result of a common intention, then every person who did the criminal act with the common intention would be responsible for the total offence irrespective of the share which he had in its perpetration."*

In *Noor Mohammad Mohd Yusuf Momin*, reported in AIR 1971 SC 855, the Apex Court observed as under:

*"So far as section 34, Indian Penal Code is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention, participation in the commission of the offence in furtherance of the common intention invites its application."*

15. The crux of section 34 is to deal with situation or circumstances in which it may be difficult to distinguish between the act of individual members of a party or to prove exactly what part was played by each of them.

The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support and protection to the person actually committing the act.

16. Once it is found that a criminal act was done in furtherance of common intention of all, each of such persons is liable for criminal act as if it were done by him alone. The primary object underlying section 34 IPC is to prevent miscarriage of justice in cases where all are responsible for the offence which has been committed in furtherance of common intention. It may be noted that section 34 is restricted to common intention and does not embrace any knowledge. It does not require proof that any particular accused is responsible for commission of actual offence. It may well be applied to cases in which an offence is committed by only one or two, or three persons who all had a common intention (vide *Bharwad Mepa Dana* AIR 1960 SC 289).

17. A plain reading of the language used in section 34 of the IPC reveals that essence of section is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot. The common intention must be to commit

particular offence. The common intention of one must not only be known to other but must also be shared by him (vide Lallan Rai (2003) 1 SCC 268 and Hardev Singh AIR 1975 SC 179)

18. If the offence in question is considered keeping in view the aforesaid proposition of law, then it leaves no manner of doubt that the common intention of all these accused was writ large and it was to sell the diesel to a civilian and fetch/earn ill-gotten money. By this reckoning, all are equally liable. As stated (supra), the two High Courts have already dismissed the respective petitions of co-accused. We have been taken through the judgments of the Delhi High Court and we are in full agreement with the findings recorded by the High Court while upholding the findings recorded by General Court Martial.

19. At the last leg of arguments, learned counsel for the Petitioner commiseratingly submits that the punishment awarded to the Petitioner is disproportionate to misconduct. In connection with the above submission, we may refer to broader principles laid down by Hon'ble Apex Court with regard to quantum of punishment and it is that the Court or Tribunal may interfere "**in case the punishment shocks the conscience of Court**". In the present

case, the petitioner alongwith other co-accused were caught "**flagrante delicto**" by the Military Police while selling four barrels of diesel to a civilian. This act of the petitioner and co-accused cannot be said to be not deliberate, or intentional. In fact, the act of selling diesel meant for military use to a civilian is an unforgiveable crime against the Nation and the Military authorities rightly visited the petitioner and other co-accused with the punishment of dismissal. The petitioner and co-accused were the military personnel, who bear the responsibility to secure the country. The Delhi High Court in its judgment dated Feb 8, 2008 aptly observed that those who indulge in outlawry should know how to stand gaff. In such cases punishment should have deterrent effect on the potential wrong doers commensurate with the seriousness of the offence. The crime committed by the petitioner and co-accused errs on the side of gravity and as such, the punishment awarded fits in with the crime and is commensurate with the seriousness of the offence. Hence the petitioner's fight with the windmills fails.

20. In the result, the T.A lacks merit and is accordingly dismissed.

**(Air Marshal Anil Chopra)**  
**Member (A)**

**(Justice D.P. Singh)**  
**Member (J)**

**Dt. Oct 2016.**

**MH/-**