

**A.F.R.**  
**Court No. 2**  
**Reserved Judgment**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**

**Original Application No. 40 of 2016**

**Tuesday this the 14<sup>th</sup> day of November, 2017**

**Hon'ble Mr. Justice S.V.S Rathore, Member (J)**  
**Hon'ble Lt. Gen. Gyan Bhushan, Member (A)**

Nitu Kumar ( No 15776940X Ex Gunner)  
Son of Shri Joginder Singh,  
Village – Dalampur Delaro, PO: Dalampur,  
District – Meerut PIN – 250205 (UP)

..... **Applicant**

By Legal Practitioner: Shri R Chandra, Advocate learned  
counsel for the applicant.

Versus

1. Union of India through the Secretary, Ministry of Defence, Government of India, New Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarters, New Delhi-110011.
3. General Officer Commanding, HQ Southern Command, Pune (Maharashtra)
4. The Officer-In-Charge Air Defence Records.
5. Commanding officer, 323 Air Defence Regiment PIN- 926323, C/o 56 APO.

..... **Respondents**

By Legal Practitioner: Dr Shailendra Sharma Atal, Learned  
Standing Counsel for the Central Govt  
assisted by Maj Rajashri Nigam,  
Departmental Representative.

**ORDER**

**Per Hon'ble Mr. Justice S.V.S. Rathore, Member (J)**

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, whereby the applicant has claimed following reliefs:-

*“(i) To quash the summary Court martial Proceedings held on 22/02/2014 (Annexure No A-1) and order dated 07/10/2014 (Annexure No A-2).*

*“(ii) To direct the respondents to re-instate the applicant in the service w.e.f. 22/02/2014 with all consequent benefits including arrears of salary and continuity in service along with interest at the rate of 24 percent per annum.*

*“(iii) Any other appropriate order or direction which the Hon'ble Tribunal may deem just and proper in the nature and circumstances of the case.”*

2. This O.A. was preferred after expiry of the period of limitation. The delay in filing the O.A. has already been condoned vide order of the Coordinate Bench dated 04<sup>th</sup> February 2016. By means of this O.A., the applicant has challenged the punishment inflicted on him by the Summary Court Martial (herein after referred to as the 'SCM'). The applicant was charge-sheeted as under :

**CHARGE SHEET**

The accused No. 15776940X Rank Gunner (Store Holder General Duty) Name Nitu Kumar of 323 Air Defence Regiment is charged with :-

**FIRST CHARGE**

**ARMY ACT**  
**SECTION 69**

**COMMITTING A CIVIL OFFENCE THAT IS TO SAY USING**  
**CRIMINAL FORCE CONTRARY TO SECTION 352 OF THE**  
**INDIAN PENAL CODE**

In that he,

At Vadodara, at 2230hrs on 07 Oct 13, used criminal force to Mr Robert Antony, a civilian by slapping him on his face with his bare hand.

**SECOND CHARGE**

**ARMY ACT**  
**SECTION 69**

**COMMITTING A CIVIL OFFENCE THAT IS TO SAY,**  
**FALSELY PERSONATING A PUBLIC SERVANT, CONTRARY**  
**TO SECTION 170 OF THE INDIAN PENAL CODE.**

In that he,

At Vadodara, at 2230hrs on 07 Oct 13 falsely personated as a police personnel before Mr Robert Antony, a civilian.

**THIRD CHARGE****ARMY ACT  
SECTION 69****COMMITTING A CIVIL OFFENCE THAT IS TO SAY,  
ROBBERY CONTRARY TO SECTION 392 OF THE INDIAN  
PENAL CODE**

In that he,

At Vadodara, at 2230hrs on 07 Oct 13, robbed Mr Robert Antony, a civilian, of his mobile phone.

Station: Vadodara  
Dated 15 February 2014(V Radhakrishnan)  
Colonel  
Commanding Officer  
323 Air Defence Regiment

To be tried by Summary Court Martial.

**Signed at Vadodara on this 15<sup>th</sup> day of February 2014 FIRST CHARGE**Station : Vadodara  
Datred : February 2014(Rajiv Srivastava)  
Brigadier  
Commander  
617(I) Air Defence Brigade.

3. In brief the facts of the case are that the applicant was enrolled in the Indian Army on 24 December 2001. In the year 2013 he was posted with 323 Air Defence Regiment. On 07.10.2013 after completing his assigned task, he went to see Garba celebrations at MS University Kamatibaug near Kala Ghoda Chowk. The allegation against the applicant is that at around 2215 hours, applicant alongwith another person Lance/Naik Alok Kumar impersonated as police personnel and asked the complainant Mr Robert Anthony as to why he was sitting there. On such asking, some altercation took place and they abused him. He was beaten and his mobile was snatched by the applicant. Mr Robert Anthony informed about this incident at 2230 hours to the police on duty, who was present near the place of incident. The police came there and arrested Lance/Naik Alok Kumar and on inquiry, the identity of the applicant was disclosed by Lance/Naik Alok Kumar. The applicant was brought to Sayaji Ganj Police Station on 08.10.2013 by Subedar Devi Ram of his unit at about 1200 hours. On that day, both the accused persons were produced before the Magistrate, Civil Court, Vadodara and thereafter under the orders of the Magistrate, he was taken into custody. Thereafter on 09.10.2013 an application was submitted by Colonel V Radhakrishnan, Commanding Officer, 323 Air Defence Regiment to hand over both the accused to Army for their trial by the Army. The applicant and Lance/Naik Alok Kumar were handed over to the Army authorities on 09.10.2013 vide

order of the Senior Civil Judge dated 09.10.2013. From 3 December 2013 to 06 December 2013, summary of evidence was recorded. Charge sheet was prepared on 15.02.2014 and was served on the applicant. SCM commenced on 22 February 2014 at 10:15 hours and at 1300 hours it was completed and was sentenced to suffer Rigorous Imprisonment for seven months and to be dismissed from service. On 22.04.2014, the Commanding Officer, 323 Air Defence Regiment gave a letter to the applicant for petition, in which it was said that he could address his petition against the SCM to Chief of The Army Staff (COAS) or any other superior in command to the officer who has held the SCM. On 27.06.2014 the applicant preferred statutory complaint against the SCM before the COAS. On 12.12.2014 the applicant gave a reminder to decide his statutory complaint at the earliest. The General Officer Commanding-in-Chief, Southern Command rejected his statutory complaint.

4. In this case, both the parties have filed their written arguments and have also addressed the Court at length.

5. It has been argued by the learned counsel for the applicant that the applicant had pleaded not guilty to all the charges. The most important witness in this case would have been Lance/Naik Alok Kumar, but he has not been examined by the prosecution. Therefore, the sole testimony of the complainant Mr Robert Anthony cannot be treated to be gospel truth as no independent witness has been examined in support of the charges. It has also been pleaded that Rule 118 of Army Rules, 1954 has not been complied with. There was no promulgation of the sentence passed by the SCM. The mobile which is alleged to have been looted by the applicant was not produced during the SCM. In the alternative, it has been argued that keeping in view the nature of the offence, the punishment of dismissal from service was disproportionate.

6. **Per contra**, learned counsel for the respondents has argued that promulgation, as required under Rules was done on the same day. The mobile was recovered by the police authorities during the initial investigation. He has also argued that the complainant Mr Robert Anthony was also an independent witness and he is the aggrieved person

and there is nothing on record as to why his evidence should not be believed. His evidence stands fully corroborated by the evidence of the other witnesses. He has also argued that the procedure prescribed under the Army Rules and Army Act has been duly complied with and the applicant could not show any prejudice which has been caused to him by any irregularity of procedure, if any. He has also argued that in this case the applicant in his statement during summary of evidence has admitted the case and his identity stands established during the SCM proceedings, therefore, the SCM has rightly found him guilty and has awarded sentence against him. It has also been argued that keeping in view the serious nature of offence committed by the applicant, the sentence of dismissal from service cannot be said to be disproportionate.

7. We first take up the argument of the learned counsel for the applicant, whereby he has challenged that in this case, there was no promulgation of the order passed by the SCM. The basis of this submission is a photocopy of the sentence passed by the SCM annexed at page 25 of the O.A., wherein the remarks column of the Reviewing Officer and no order of promulgation is there on this sheet. On the strength of this paper, it is submitted that there was no promulgation.. To verify this fact, we have examined the original record. A perusal of the original record shows that the order of promulgation was passed on the same date, but on a different sheet. Record also establishes that copies of SCM proceedings alongwith copies of all exhibits were given to the applicant. Receipt to this effect was executed by the applicant himself. Reviewing officer has signed it on 23.02.2014 while copy of it was given on that date itself, therefore, that column is left blank at that time. When the applicant has challenged that there was no promulgation then his such plea must be substantiated by the original record. Review of the proceedings was done on 23.02.2014 under Army Rule 133 after promulgation. So on 22 Feb the said column was blank. Hence there was due promulgation as is provided under the rules. Learned counsel for the applicant has argued that since the copy of the said promulgation order has not been provided to him, therefore, the Tribunal cannot take into consideration the said order of promulgation. So far as the argument on this point is concerned, the respondents have specifically mentioned in the

counter affidavit that the order passed by the SCM was duly promulgated and the said fact stands proved by the original document. So we do not find any substance in this argument.

8. Learned counsel for the applicant has also argued that in this case no Court of Inquiry was conducted. A Court of Inquiry is provided under Chapter (iv) of the Army Rules 1954. A perusal of this Chapter clearly indicates that the purpose of Court of Inquiry is only to ascertain certain facts. Virtually it is a fact finding enquiry. In the facts of this case, the Army took over the case from the Court of Magistrate for trial by Army. There was an FIR against the applicant and the applicant was admittedly in custody at that point of time. There was also written statement of the complainant in the form of FIR against the applicant. Therefore the fact as to who has committed the offence, was prima facie established and there was no need to hold Court of Inquiry to fix the liability in the peculiar facts of this case.

9. Before proceeding further, we would like to reproduce the FIR which was lodged in this case by Mr Robert Anthony at PS Sayajiganj District Vadodara on 08.10.2013 under Sections 394, 170, 114 IPC, which reads as under : (It is English translation of F.I.R. Original was in Gujrati).

*“My name is Robert Anthony, Aged: 18, Occupation : Study, Resi. At : Makarpura Road, G.I.D.C. Marutidham Society, Parth Bhumi Vibhag-2, Building No.90/893, Vadodara City, Mobile No.:78780 37329.*

*On asking in presence I dictate the fact of my complaint that I live at above mentioned address with my family and I have been studying in first year of Automobile Engineering in K.J.I.T. Engineering College situated in Savli and my father runs shop near Jupiter Char Rastas on G.I.D.C. Road and earn livelihood for him and us.*

*On last 7/10/13 I had gone to Fategunj to see Garba during Navratri and I was sitting on bench near middle gate of Karmatibaug and at that time at night at about half past ten hour two persons came to me and informed me that we are police and why you are sitting here and abused me and they gave me two heavy blows and they snatched away my mobile phone from pocket of my shirt and threatened me to leave the place and they left the place and I saw them going inside Kamatibaug and I left the place and I came to M.S. University and near Arts College some police persons were standing and I informed them regarding the said fact therefore police persons came with me to Kamatibaug to make inquiry where out of two persons, one person was caught and other person had run away and in my presence police asked the person who was caught regarding his name and he showed his name as Alokumar Mahendrasinhyadav, Resi. At ; Makarpura Tarsali, Visshalnagar Society Building No. 267, Vadodaara city and on asking about the person who ran away and he showed his name as*

*Nitusing alias Suraj and he informed that he does not know the name of his father and his surname. And the caught person informed that he was serving in EME as soldier in Unit 623 and on asking regarding the person running away he informed that Nitu Singh was also serving in EME and lived in Fategunj in Unit 623 and they looted my mobile of Max company bearing Model No. A-35 worth Rs. 3,000/-*

*Therefore the said two persons namely (1) Alokumar Mahendrasnh Yadav, Resi. At Vishalnagar Society B. No. 267, Tarsali, Vadodara and (2) Nitusing alias Suraj and the name of his father and surname is not known and both are serving in EME and they both came to me and identified themselves as police and threatened and gave me two heavy blow and snatched away mobile from my pocket therefore I have filed my complaint to do legal inquiry against them. My evidences are those who may be found during investigation.*

*Such is my complaint fact which are true as dictated by me.”*

10. On the basis of this FIR, the police came into action mobile was also recovered by the police. Thereafter on the next day i.e. 09 October 2013, the Commanding Officer, 323 Air Defence Regiment wrote a letter to the Judicial Magistrate having jurisdiction over the matter to transfer this case to the Army Authorities under Section 475 Cr.P.C. and also under Section 125 of the Army Act read with Para 418 of the Army Regulation 1987. On this application, the Magistrate passed the order on the same day and directed that the accused persons alongwith all necessary documents be handed over to the Army authorities and also directed the Investigating Officer to submit the original complaint of the complainant alongwith all relevant and all investigation papers to the Court Martial and thereafter further proceedings were taken up by the Army authorities. In the summary of evidence, statement of accused was taken down and before proceedings further, we would like to reproduce the statement of the accused which reads as under :

**“Statement of the Accused**

61. *The accused No 15776940X Gunner(SHGD) Nitu Kumar is enquired, Do you wish to make any statement? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.*

62. *The accused having elected to make a statement, the same is recorded as hereunder.*

63. *I, No 15776940X Gunner(SHGD) Nitu Kumar am serving with 623 Air Defence Regiment located at Vadodara for past five years and have completed 12 years of service. I was residing in the single living accommodation at Outram Lines Gatehganj when the incidence took place. I am a permanent resident of A/32, Patpad ganj, Pandav Nagar, New Delhi. My wife Smt Meena is from Village Kakodi, Zila Hapur (Uttar Pradesh) and is staying at the New Delhi address with my son-Deepanshu who is four years old.*

64. I am posted at Army Cantonment, Makarpura, Vadodara and was performing station administrative duty at Outram Lines Fatehganj for the last 20 days before the incident. On 07 Oct 2013, after completing my task for the day I had my dinner at 2030 hours and left my living area to witness Garba celebrations at MS University near Kala Ghoda chowk. Before I left the place I enquired from the other off duty personnel if anybody was interested in going out the market for shopping, to which everybody declined. At around 2130 hours. I met No 15778886N Lance Naik Alok Kumar of my unit who had also come to watch Garba. So we went together to watch the Garba at the Faculty of Fine Arts, MS University. After watching Garba for some time we walked down to Kamatibaug where No 15778886N Lance Naik Ashok Kumar had parked his motorcycle near the centre gate. We reached the centre gate of Kamatibaug at around 2210 hours. We then decided that we can spend some more time together so we went inside the Kamatibaug premises from the centre gate where we saw a young boy sitting on the bench. We walked up to him and enquired him as to why was he sitting alone impersonating as police personnel. We also asked him as to what all was he carrying on him. On this, he started arguing with us. We slapped him to run away from the place. After this incidence we both went further inside the Kamatibaug. After some time I saw the same person coming towards us with some police personnel. I took advantage of the darkness and ran away from the place however No 15778886N Lance Naik Alok Kumar was nabbed by the police.

65. On 08 Oct 2013, I was informed by the unit staff that a police case has been lodged against me and so I was asked to report to my Battery Commander, IC-62810L Maj Jobin George. Thereafter I was sent to the Sayaji Ganj Police Station for identification and was remanded in the police custody till 1700 hours of 09 Oct 13 and was finally handed over to the unit authorities on 09 Oct 13 at 1930 hours.

66. The above statement has been read over to me on Hindi, the language I understand and I sign it as correct.

Sd/- X X X X  
No 15776940X Gunner(SHGD)  
Nitu Kumar

Sd/- X X X X  
IC-300704H Subedar (TIFC)  
Maman Singh)  
Independent Witness  
Summary of Evidence

Sd/- X X X X  
(IC-59153F Lieutenant Colonel)  
Amandeep Singh)  
Officer Recording  
Summary of Evidence

Place : c/o 56 APO  
Date : 06 Dec 2013”

11. During summary of evidence, PW1 Mr Robert Anthony s/o Satyaraj Bhaskaran was examined, who has supported the incident and has also stated that Gunner Nitu Kumar snatched his mobile from the pocket of his shirt. PW2 is Lalji Bhai, who has identified the applicant. This witness is the Asstt. Sub Inspector of Police. On the date of incident, he was busy in the Navratri security arrangement alongwith other police staff near the Faculty of Fine Arts, MS University, Kamatibaug from 08:00 PM hrs onwards. He has stated that Robert Anthony came to him and informed him about the incident. He immediately went with other police constable to Kamatibaug alongwith Robert Anthony, who identified one of the accused, who was present near the site of the incident. They nabbed him and he disclosed his name as Lance/Naik Alok Kumar. He also informed that the other person had fled away and also disclosed his identity as Nitu



Kumar. The accused was given an opportunity to cross examine the witness, but he declined to cross examine him. The prosecution witness No.3 is Shri Uday Singh, who is also a police constable. His evidence is also similar to the evidence of PW2. The accused was also given an opportunity to cross-examine this witness, but he declined to cross-examine. PW4 is Shri Anirudh Singh. His evidence is also to the same effect as PWs 2 and 3. PW5 is Shri Rakesh Bhai. This witness has identified the applicant Nitu Kumar. This witness was working as Security Supervisor with Sisa Security Office, 22 Chitrakoot Apartment, Vadodara. His job is to look after the security of Kamatibaug and his duty hours on the date of incident were 1600 hrs to 0001 hrs on 08 October 2013. He has corroborated the evidence given by the PWs 2, 3 and 4. This witness has been cross examined by the accused. PW 6 Shri Shiva Bhai, is also serving as a security guard in the office of Chitrakoot Apartment. He has also corroborated the evidence that he went inside Kamatibaug in search of two men and Robert Anthony spotted one of the accused near the incident site. PW7 is Havildar (Gunner) Naresh Chand Gujar, who has identified the accused Nitu Kumar and has stated that he was on the guard duty on the main road of Outram Lines, Fatehganj and he saw the applicant moving out of the Outram Lines, Fatehganj from the main gate and after some time, he came back and asked whether any one is interested to go for shopping with him. At about 0015 hrs, he was informed that Gunner Nitu Kumar has come back.

12. Thus in the summary of evidence, all the witnesses who were examined by the prosecution, have corroborated the case of the prosecution. Robert Anthony has given the direct evidence and there is corroborating evidence of independent witness i.e police personnel and security guards.

13. After framing of the charge, SCM recorded the statement of PW1 Robert Anthony, who has identified the applicant Nitu Kumar before the SCM and has given evidence in support of the prosecution case and this witness has been cross examined by the accused. In the cross examination, this witness has stated that applicant Nitu Kumar snatched his mobile from his pocket. In reply to the next question, this witness has

stated that you were wearing T-shirt and jeans. In the cross examination, this witness has also stated about the colour of the T-shirt and jeans. He was also asked when he had snatched the mobile, why it was not recovered from him. In reply to this question, this witness has replied that applicant has snatched the mobile phone from him and he was not aware to whom it was subsequently given., but about a month back, he received his mobile back from Sayaji Ganj Police Station. The next prosecution witness examined during SCM was ASI Lalji Bhai, who has also corroborated the evidence of PW1 that he was informed by PW1 about the incident immediately after the incident. This witness was again cross examined by the applicant. He has also stated that it was Lance/Naik Alok Kumar, who disclosed that applicant was accompanying him. The next witness was Shri Rakesh Bhai, the Security Supervisor. He has also corroborated the prosecution evidence. The applicant was also given an opportunity to cross examine this witness, but he declined to cross examine. Thereafter, the accused was asked whether he intends to call any witness in his defence. The accused denied to produce any witness in his defence and thereafter the SCM passed the verdict.

14. A perusal of the record shows that on the same day i.e. 22 February 2014, the promulgation order was passed which was signed by V Radhakrishnan, Colonel, Commanding Officer, and Lt Col Ashok Shah, SM, Independent witness. Thus, the evidence on record clearly establishes that there was sufficient evidence of Robert Anthony against the applicant, which stands fully corroborated by the evidence of other two witnesses examined during the SCM proceedings.

15. The submission of the learned counsel for the applicant is that there was violation of provisions of Rule 23(1) of the Army Rules, 1954 in recording the summary of evidence. It is not the summary of evidence on which the finding of guilt or sentence has been passed. Therefore, that will not invalidate the subsequent proceedings. On this point, Hon'ble Apex Court in the case of in the case of **Major G.S. Sodhi vs. Union of India** (1991) 2 SCC 382), the Hon'ble Supreme Court has observed as under :

*“It must be noted that procedure is meant to further ends of justice and not to frustrate the same. It is not each and every kind of defect preceding the trial that can affect the trial as such.”*

At this juncture, we would like to quote Rule 149 of the Army Rules, which reads as under :

**“149. Validity of irregular procedure in certain cases,—**Whenever, it appears that a court-martial had jurisdiction to try any person and make a finding and that there is legal evidence or a plea of guilty to justify such finding, such finding and any sentence which the court-martial had jurisdiction to pass thereon may be confirmed, and shall, if so confirmed and in the case of a summary court-martial where confirmation is not necessary, be valid, notwithstanding any deviation from these rules or notwithstanding that the charge-sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer or notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender, and where any finding and sentence are otherwise valid they shall not be invalid by reason only of a failure to administer an oath or affirmation to the interpreter or shorthand writer; but nothing in this rule shall relieve an officer from any responsibility for any willful or negligent disregard of any of these rules.”

16. A perusal of the aforesaid rule shows that the Court Martial would not be held to be invalid, even if there was an irregular procedure where no injustice was caused to the accused. During course of argument, learned counsel for the applicant has nowhere argued that the applicant’s defence has been prejudiced by any such irregularity in the procedure. Hon’ble Supreme Court in the case of **Union of India vs Major A.Hussain [1998 (1) SCC 537]** has also observed as under :

*“ When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court martial unless it is shown that accused has been prejudiced or a mandatory provisions has been violated. One may usefully refer to Rule 149 quoted above.”*

Keeping in view the above mentioned settled legal position, we do not find any substance in the submission of the learned counsel for the applicant.

17. The next submission of the learned counsel for the applicant is regarding the non compliance of the provision of Army Rule 118 of the Army Rules 1954. The provisions of Army Rule 118 are akin to the provisions of Section 313 Cr.P.C. The provisions of Section 313(1)(b) of the Cr.P.C. is mandatory while the provisions of Rule 118 of the Army Rules, 1954 give a discretion to the Court to question the accused on the case for the purpose of enabling him to explain any circumstances

appearing in evidence against him. It is true that in this case the circumstances appearing in evidence against the applicant were not put to him, but a plain reading of Rule 118 makes it clear that the said provision has not been couched in mandatory language, word may has been used in that context. Even with regard to Section 313 Cr.P.C. where word shall has been used, it has been held by the Hon'ble Apex Court in the case of **Gian Chand vs State of Haryana** [2013 (14) SCC 420] that such compliance cannot vitiate the trial only when the accused can establish that prejudice has been caused on was likely to have been caused. So even if there is any irregularity in recording the statement under Section 313 Cr.P.C., even then the same shall not vitiate the trial by itself. During course of arguments, learned counsel for the applicant has not brought to our notice as to how the applicant was prejudiced in his defence, because of such non compliance of the Rule 118. He could not bring to our notice, anything during the entire lengthy arguments, which the applicant could have brought to the notice of the SCM to disbelieve the evidence of the witnesses. Statement of accused given at the end of evidence is only his stand and not evidence. On this point reference may be made to the pronouncement of Hon'ble Apex Court in the case of **Devendra Kumar Singla v Baldev Krishna Singla** [2005 (9) SCC 15 (para 11)]. When the accused had declined to furnish any defence, then how he can say that he was prejudiced and to give any statement or he had any stand in his defence. On the contrary in his statement recorded in summary of evidence, he has admitted the prosecution story.

18. Regarding the evidence of the witnesses, the arguments of the learned counsel for the applicant is three folds; (i) looted mobile was not produced, (ii) no independent witness was examined and (iii) evidence of the complainant Robert Anthony cannot be considered to be gospel truth.

19. Now we consider the submissions of the learned counsel for the applicant. The third charge was regarding the loot of the mobile, which was contrary to Section 392 IPC. The applicant was not charged under Section 412 IPC, In order to prove the offence of robbery, the recovery of the looted property is not a *sine quo non*. Admittedly, in this case, the

mobile was recovered by the police and subsequently as per the evidence of the complainant himself, it was handed over to him by the police. The charge against the applicant was that he snatched the mobile and this fact was fully supported by the prosecution witnesses. Thus, in this background of this case, non production of the mobile phone before the SCM, cannot be said to be fatal. Had the charge been under Section 412 IPC with regard to possession of stolen property, then it would have been a different position. The law is settled on the point that in order to prove the robbery, the recovery of the looted articles is not necessary. The fact of robbery can be proved by oral evidence. In this case, we find that there was reliable evidence of Robert Anthony on the point of robbery which stands corroborated by the evidence of other two witnesses. On this point we may refer to the pronouncement of Hon'bleThe Apex Court in the case of **Birendra Rai and Ors v State of Bihar** [2005] (9) SCC 719 (para 14).

20. The next argument of the learned counsel for the applicant is that in this case, no independent witness has been examined. Only the complainant and the police witness and security guard have been examined. Admittedly, in this case, the complainant had no enmity with the applicant. He was not even acquainted with the applicant. Even the name of the applicant was not known to him. The name of the accused was disclosed by co-accused Lance/Naik Alok Kumar. It is nowhere the case of the applicant that Lance/Naik Alok Kumar had any enmity with him or he has falsely named him as the person involved in this incident. The police personnel and the guard of Kamatibaug are also independent witnesses, who have given the evidence regarding the subsequent incident, which fully corroborates the evidence of Robert Anthony. During the course of arguments, learned counsel for the applicant could not bring to our notice any circumstances which shows that Robert Anthony was in any manner interested in the prosecution of the applicant. Robert Anthony is the victim of the offence. It is nowhere the case of the applicant that Robert Anthony has falsely implicated him. On the contrary, a victim of the offence would not let the guilty escape. The SCM has found the evidence of Robert Anthony to be wholly reliable.

The sole testimony of the complainant, who was the victim of the offence, cannot be discarded only on the ground that other witnesses have not been examined. Law is settled on the point that conviction can be based on the testimony of a sole witness, if found wholly reliable. On this point, we would like to refer the pronouncement of the Hon'ble Apex Court to the following cases :

(i) Chaudhari Ramji Bhai v State of Gujarat (2004) 1 SCC 184 (para 4).

Law is well settled on the point that it is not the number of witnesses, but the quality of evidence that matters. No particular number of witnesses are required to prove a fact. If a fact is proved by reliable evidence of one witness, then there is no need to examine more witnesses on that point. Reference may be made to Sec. 134 of the Indian Evidence Act also.

21. Learned counsel for the applicant in support of his submission has placed reliance on the pronouncement of a Coordinate Bench of this Tribunal in T.A.No.48 of 2011 decided on 6 day of July 2017, where the applicant was exonerated in view of the doubtful recovery. We have gone through the said judgment. The allegation against the applicant, in that case, was that he accepted illegal gratification as a motive for procuring enrolment of a person in the Army. During the Court of Inquiry, amount of Rs.10,000/- was recovered from the petitioner by Col Ashok Kumar. The seizure memo was prepared, the numbers of the notes recovered were also mentioned. In that perspective, the Court disbelieved the said recovery on the ground that there was difference in numbers of currency notes, alleged to have been recovered and produced before the GCM and reduction of amount of Rs.10,000/- to Rs.3400/- at the time of production before the GCM. But in the facts of the instant case, the allegation is of robbery and not of the recovery of the looted articles and the fact of robbery of mobile stands established by the evidence on record. Therefore, because of the difference in facts, the applicant is not entitled to the benefit of this case law.

22. The next submission of the learned counsel for the applicant is that the other independent witnesses were not examined. It is an admitted case of the prosecution that the complainant was sitting away from the place

where Garba was going. We cannot overlook the tendency of the public that the people avoid to become a witness in any case. Initially the investigation of the case was taken up by the police and if any independent person avoids to become a witness, then it by itself cannot be a ground to discard otherwise reliable evidence of a witness who has come before the Court. On this point, we may refer to the following pronouncements of the Hon'ble Apex Court in the case of **Mohammad Mia v State of U.P.** [2011(2) SCC 721 (para 21) and also in the case of **Appa Bhai v State of Gujrat** AIR 1988 SC 696 (relevant para 17).

23. It has also been argued that the best witness in this case was Lance/Naik Alok Kumar, who was not examined. Virtually Lance/Naik Alok Kumar was an accomplice in this case. As per the original record, he was also to be tried by the SCM. Neither the applicant nor the respondents could bring to our notice the out-come of the SCM proceedings which was conducted against Lance/Naik Alok Kumar. It was open to the accused to examine Lance/Naik Alok Kumar in his defence, if in his opinion, his evidence was sufficient to prove his innocence. Such an opportunity was given to him during SCM proceedings which has not been availed by him. Even otherwise, keeping in view the facts of the case, Lance/Naik Alok Kumar was an accomplice and as per Section 114 (b) of the Evidence Act, an accomplice is unworthy of credit unless he is corroborated in material particulars. without corroboration on material particulars.

24. In view of the discussions made above, we do not find any illegality in the finding of the SCM, because the applicant has impersonated himself as a policeman, misbehaved with Robert Anthony, abused him, slapped him and snatched his mobile phone. Therefore, the finding of guilt recorded in the SCM proceedings, cannot be said to be illegal, irregular or suffering from manifest procedural illegality.

25. It has also been argued by the learned counsel for the applicant that the sentence provided under Section 392 IPC is of fourteen years and SCM is not competent to inflict the sentence of imprisonment of fourteen

years. So the applicant ought to have been tried by the GCM. The powers of SCM has been narrated in Section 120 of the Army Act which reads as under :

*“120. Powers of summary courts-martial.— (1) Subject to the provisions of sub-section (2), a summary court-martial may try any offence punishable under this Act.*

*(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made 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, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the sections 34,37 and 69, or any offence against the officer holding the court.*

*(3) A summary court-martial may try any person subject to this Act and under the command of the officer holding the court, except an officer; Junior commissioned officer or warrant officer.*

*(4) A summary court-martial may pass any sentence which may be passed under this Act, except a sentence of death or (imprisonment for life) or of imprisonment for a term exceeding the limit specified in sub-section (5).*

*(5). The limit referred to in sub-section' (4) shall be one year if the officer holding the summary court-martial is of the rank of lieutenant-colonel and upwards, and three months if such officer is below that rank,”*

The applicant was only a Gunner, therefore, the restriction contained in sub-section (5) of Section 120 of the Army Act would not apply to him. Therefore, the SCM was competent to inflict any sentence, other than the sentence of death or imprisonment for life. Here we would like to quote Section 392 of the IPC, which provides sentence for robbery, which reads as under :

*“392. Punishment for robbery.—Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.”*

A perusal of this Section shows that no minimum sentence has been provided by this Section. It is only defines the maximum sentence that can be inflicted in different conditions specified therein. This Section does not provide for a minimum sentence of imprisonment for life and, therefore, we do not find any substance in the submission of the learned counsel for the applicant that the applicant ought to have been tried by the GCM and not by the SCM.

26. Now we come to the question of sentence. The alternative argument of the learned counsel for the applicant is that sentence awarded to the applicant was disproportionate to the offence committed by him.



27. We have gone through the order of punishment awarded to the applicant. The competent authority has observed that the applicant has rendered sufficient years of service and, therefore, he is well versed with the discipline of the Army and the offence committed by him is of serious nature. Therefore, the sentence of dismissal from service and imprisonment has been inflicted against him.

28. We have examined this aspect of the case. In this case, it is nowhere the case that there was any violation of the Army Order by the applicant, nor he was negligent in the performance of his Army duty. It is not a pre-planned offence. The manner in which the incident has taken place, clearly establishes that it has taken place on the spur of moment and it was not a pre meditated act of the applicant. The submission of the learned counsel for the applicant has force that the applicant has rendered only 12 years of service and dismissal from service would render him ineligible for future employment.

29. Keeping in view the fact that the offence committed by the applicant was not a pre meditated offence, we consider it appropriate to modify the sentence of dismissal from service to discharge from service. The applicant is not entitled to any other relief.

30. Accordingly, this O.A. is **partly allowed**. The findings of the SCM are confirmed. The sentence awarded against the applicant is hereby modified only to the extent that his dismissal from service is hereby converted into discharge from service.

31. No order as to costs.

(Lt Gen Gyan Bhushan)  
Member (A)  
Dated: November , 2017.

(Justice S.V.S.Rathore)  
Member (J)

PKG