

A.F.R.
RESERVED
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
TRANSFERRED APPLICATION NO 156 of 2010

Wednesday, this the 9th day of August 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Ex Gunner Babu Lal Yadav (convict) C/O The Superintendent,
Central Jail, Varanasi, Uttar Pradesh.

....Petitioner

Learned . Counsel for the: **Shri P.N. Chaturvedi**, Advocate
Petitioner

Versus

1. Union of India, Through Secretary Ministry of Defence, New Delhi-110011.
2. Chief of Army Staff, Through Adjutant General (AG/DV3) Army Headquarters, New Delhi-110011.
3. The Supdt, Central Jail, Varanasi, Uttar Pradesh.

...Respondents

Learned . Counsel for the : **Shri Asheesh Agnihotri**, Central
Respondents. Govt Counsel assisted by
Maj Salen Xaxa, OIC, Legal Cell.

ORDER**“Per Hon’ble Air Marshal Anil Chopra, Member ‘A’”**

1. The petitioner being aggrieved with punishment dated 14.07.2005 awarded by Summary General Court Martial sentencing the petitioner to suffer rigorous imprisonment for 14 years and dismissal from Army service preferred Writ Petition No 2973 of 2007 in the High Court of Delhi which upon establishment of the Tribunal has been transferred to this Tribunal in view of provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and has been re-numbered as T.A. No. 156 of 2010.

2. The fact necessary for adjudication of the case, in nut shell are that the petitioner was enrolled in the Army on 27.08.1996 as a Gunner in the Regiment of Artillery. He was posted to 32 Rashtriya Rifles on 07.08.2000 from 163 Med Regt. While serving in 32 Rashtriya Rifles, on 16.10.2002 it is alleged that the petitioner stole one AK-47 Rifle. On rejoining from leave on 14.11.2002 the petitioner confessed having stolen the weapon while proceeding on 20 days casual leave on 16.10.2002 to the Commanding Officer. The weapon was recovered from the home of the petitioner but keeping in view the confession made by the petitioner with regard to

stealing of said AK-47 Rifle, the petitioner was awarded 'severe reprimand' and 14 days pay fine. In view of the recovery of weapon HQ Counter Insurgency Force directed HQ 8 Sector RR to take action. Accordingly another court of inquiry was convened by HQ Counter Insurgency Force vide letter dated 04.02.2003 to investigate into the recovery of AK-47 and ammunition and to pin point responsibility with regard to the incident.

3. The petitioner being an essential witness for the Court of Inquiry was issued a movement order to move to 118 Infantry Battalion Territorial Army (Inf Bn TA) from 163 Med Regt. It appears that the petitioner did not report to 118 Inf Bn (TA). A Log Message was received from 118 Inf Bn (TA) that the petitioner did not report there, consequently signal No A-0064 was initiated regarding non reporting of the petitioner to 118 Inf Bn (TA). On 24.04.2003 apprehension roll was issued and on 10.12.2003 Part II Order notifying desertion of the petitioner was published by 163 Medium Regiment (Med Regt).

4. On 18.03.2003 Light Machine Gun (LMG) Registration No 1508623, Butt No. 22 drawn and issued in the name of Rifleman Chhabi Lal Chhetri and pouches belonging to Gunner Lok Bahadur K.C. containing 11 Magazines with 336 rounds were found missing from the Quick Reaction Team (QRT) barrack of 32 RR. A detailed

search for the weapon and ammunition was carried out inside the barrack and adjoining areas during the night and morning of 18.03.2003 and when the LMG as well as the ammunition could not be searched out, the matter was ultimately reported to Headquarters 31 Sub Area. For the recovery of the LMG and ammunition search was also carried out in the entire Badami Bagh Cantt area, living barracks and even the companies of 32 RR located outside Badami Bagh Cantt but the weapon and the ammunition could not be searched. The convoy proceeding to Jammu on 18.03.2003 was also checked on orders of the Formation Headquarters. All the other Kotes of the unit and other units of Badami Bagh Cantt were also checked by team detailed by formation headquarters. FIR was lodged in Police Station, Ram Munshi Bagh, Srinagar on 18.03.2003. A Court of Inquiry was ordered by HQ 31 Sub Area vide convening order dated 20.03.2003. HQ 31 Sub Area Provost Unit as well as HQ 15 Corps Provost Unit also carried out investigation and process for regularization of loss was also processed with Controller of Defence Accounts, Northern Command.

5. On 25.01.2004 the Army officers came to know through media that an individual named Babu Lal Yadav was arrested near Varanasi by police. On inquiry by 39 Gorkha Training Centre

located at Varanasi it was ascertained that the individual arrested by the police was No. 1420524M Gunner Babu Lal Yadav of 163 Med Regt.

6. Sub Inspector Ajay Kumar Chaturvedi of Uttar Pradesh Police, Special Task Force, Lucknow was examined as PW-19 during Summary Court Martial. He stated that as per routine, the Surveillance Team of Special Task force was tapping calls of notorious criminals of Uttar Pradesh. While tapping calls of a specific criminal, it was known that an Army jawan whose name he stated was Babu Lal Yadav, was negotiating a deal for sale of a Light Machine Gun with said criminal. Sub Inspector P.K. Misra, an officer of Special Task Force informed that on 24.01.2004 the said Jawan would again communicate with said criminal. On getting above inputs, the Deputy Superintendent of Police along with PW-19 and five constables of the Special Task Force laid a trap. The Surveillance Team of Special Task Force of police tapped a call emerging from a Public Call Office (PCO) located in village Gurera regarding negotiation of a LMG. The caller communicated that he would make another call on 24.01.2004 in the evening. The police placed a trap and apprehended the culprit (petitioner) when he came out of the PCO after making the call. The petitioner introduced himself to be Babu Lal Yadav. On interrogation by the

police, the petitioner agreed to lead the police party for the recovery of the LMG which he informed to have been kept by him at the house of his maternal uncle Mundir Prasad Yadav within the circle of Police Station Dhudwa. The petitioner led the police party to the house of his maternal uncle Mundir Prasad Yadav. The petitioner asked Mundir Prasad Yadav to hand over the Light Machine Gun to the police which he had kept in his house. After ventilating initial ignorance, ultimately Mundir Prasad Yadav led the police party to the southern room of the rear house and dug out two gunny bags. The gunny bags were opened on the spot. One gunny bag contained a Light Machine Gun with foldable bipod and from the second gunny bag eleven Magazines of Light Machine Gun, 322 live rounds of 7.62 MM Ball CTN and 21 fired cartridges of 7.62 MM Ball CTN were recovered. *Fard Baradmagi* (recovery memo) was prepared. The *Fard Baradmagi* and the recovered articles were deposited in Police Station Chaube Pur and first information report (case crime no. 17/04) under section 3/25/27 Arms Act and case crime No. 18/04 under sections 3/4/20/21/22 of Prevention of Terrorists Act were lodged.

7. Sub Inspector Ajay Kumar Chaturvedi was examined as PW-2 in Sessions Trial No 795 of 2014 (case crime No 17 of 2004 under Section 3/7/25 (1) ka of the Arms Act) and Session Trial No 796 of

2004 (case crime No 18 of 2004) under Section 411 IPC of P.S. Chaubepur, District Varanasi. In his statement before the Additional District and Session Judge Varanasi he stated with regard to manner of arrest of the petitioner as well as discovery of the Light Machine Gun and ammunition from the house of Munder Prasad Yadav, maternal uncle of the petitioner.

8. On 25.01.2004 at 0800 hours Maj Madhav Jha, Coy Cdr of 39 Gorkha Training Centre, Varanasi received a call from Comdt Gorkha Training Centre, Varanasi that a Light Machine Gun had been seized by Chaubepur Police Station, Varanasi bearing Butt number and Registration number of the Light Machine Gun belonging to 32 RR. He was directed to check from the Police Station if the recovered LMG was of 32 RR and the individual arrested by the police was of 32 Rashtriya Rifles. He reached police station Chaubepur and on inspection of the Light Machine Gun found it tallying with the Butt number and the Registration number of the Light Machine Gun given to him by the 32 RR.

9. Major Vivek Kumar Sunkari of 39 Gorkha Regimental Training Centre was directed by Adjutant 39, Gorkha Regimental Training Centre on 25.01.2004 to take remand of the accused (petitioner) and if possible to also take over the Light Machine Gun, Magazines and Ammunitions. He took over custody of the petitioner from the

Central Jail, Varanasi. Prior to handing over the petitioner, the petitioner was medically examined by the doctor of the jail.

10. A Court of Inquiry was held to investigate the circumstances under which the Light Machine Gun., ammunition and magazines were lost and later on recovered vide convening order dated 27.01.2004. Commander, 31 Sub Area directed during Court of Inquiry proceeding for taking over the case from Civil Court and for trial by Court Martial. Disciplinary action against the petitioner and five other individuals was initiated. Major JS Mangat along with escort party was sent to Varanasi on 21.10.2004 to take charge of petitioner. On 27.10.2004, the Magistrate concerned passed orders for transfer of the case to the military. The escort party returned to 32 RR location on 02.11.2004. The petitioner on directions of 15 Corps was lodged in Quarter Guard of 15 Corps Operating Signal Regiment.

11. The petitioner was charged sheeted on two counts; firstly, under Section 38 (1) of the Army Act, 1950 for desertion, and secondly under Section 52 (a) of the Army Act, 1950 for committing theft in respect of property belonging to the Government. The charges are quoted as under:-

<u>First Charge</u>	<i>DESERTING THE SERVICE</i>
<i>Army Act</i>	
<i>Section 38 (1)</i>	<i>in that he,</i>

At Fielearned , on 17 March 2003, while on active service, when under orders for attachment to 118 Infantry Battalion (Territorial Army) absented himself enroute, until apprehended by the Civil Police at Varanasi on 26 Jan 2004.

X	X	X	X
<i>Second Charge</i>	<i>COMMITTING THEFT IN RESPECT OF PROPERTY BELONGING TO THE GOVT.</i>		
<i>Army Act Section 52 (a)</i>	<i>in that he, When absenting himself as mentioned above in first charge at place and on the day aforesaid, committed theft by dishonestly taking with him one Light Machine Gun 7.62 mm (LMG) Regd No. 15086232, Butt No. 22, along with Magazines of Light Machine Gun 7.62 quantity 11 (eleven) and cartridge 7.62 mm Ball carton (CTN) quantity 336 (Three hundred thirty six) of 32 Rashtriya Rifles, total value Rs. 1,45,584/- (rupees One lakh forty five thousand five hundred and eighty four only) the property belonging to the Government.”</i>		

12. Summary General Court Martial was convened in pursuance of order dated 19.04.2005. During Summary General Court Martial the petitioner was defended by a counsel. Both the charges were read over to the accused to which he pleaded not guilty. The counsel for the petitioner prayed for time to interact with the accused (petitioner) which was acceded to and the proceedings were postponed. Subsequently, the Summary Court Martial proceeded.

Statements of 20 prosecution witnesses were recorded during Summary General Court Martial. The petitioner did not produce any defence witness. Upon appraisal of the evidence on record, the petitioner was found guilty and was inflicted the impugned punishment.

13. The petitioner was handed over to the civil police Baramula on 29.09.2005 and was lodged in Central Jail Varanasi to serve out the sentence of imprisonment imposed upon him by the Summary General Court Martial in pursuance to para 511 and 512 of Regulations for the Army, 1987. It is worth mentioning here that General Officer Commanding vide order dated 03.05.2014 under the powers conferred upon him under Section 179 (a) of the Army Act, read with Army Rule 204 (b) and para 474 of Regulations for the Army, 1987, being competent authority under Section 179 of the Army Act remitted 1/4th of the punishment out of 14 years rigorous imprisonment awarded on 14.07.2005 to the petitioner on being convicted by Summary General Court Martial. It has been submitted by learned counsel for the petitioner that the petitioner after undergoing sentence of rigorous imprisonment awarded to him minus the remitted period of imprisonment has been released from jail. Submission is that the matter the petitioner has already undergone the sentence awarded to him in accordance to rules.

14. The petitioner preferred appeal under Section 164 (2) of the Army Act, 1950 which was rejected by the Central Government vide order dated 06.11.2006; hence the present T.A.

15. We have heard Shri P.N. Chaturvedi, Learned . Counsel for the petitioner and Shri Asheesh Agnihotri, Learned . Counsel for the respondents assisted by Maj Salen Xaxa, OIC Legal Cell and perused the records.

16. During Summary General Court Martial proceedings the prosecution examined twenty witnesses. PW-1 Gunner Gopal Singh of 'B' Coy 32 RR stated that on 18.03.2003 at 01.30 hrs he was awoken by Rfn C. Chhetri and inquired as to whether he had given the Light Machine Gun to anyone to which this witness replied in negative. This witness stated that all members of the Quick Reaction Team (QRT) were woken up and search for the weapon and ammunition but the same could not be found.

17. PW-2 L/Nk Dil Bahadur Lama was on line sentry duty on 17.03.2003. He had gone to attend Sainik Sammelan leaving QRT barrack unattended without being locked. This witness stated that in the barrack there were two Light Machine Guns, one Rocket Launcher and 04 round of 84 MM HE (Highly Explosive) and 04 AK-47 Rifles.

18. PW-3 Hari Bahadur Thapa of B Company of 32 Rashtriya Rifles stated that at 1745 hrs prior to stand to, all QRT team members gave report about status of weapons. At 01.15 hrs Rfn C. Chhetri inquired about the Light Machine Gun to which he denied having any knowledge. This witness stated that Light Machine Gun issued to Rfn C. Chhetri bearing Butt No. 22 Registration No 1508632, 11 magazines and 336 rounds of 7.62 mm ball carton were missing from the barrack.

19. PW-4 L/Nk Lok Bahadur K.C. of 'F' Coy 32 RR stated that he was woken by Rfn Dhan Bahadur Khand for night duty at 0110 hrs on 18.03.2003 and upon checking of weapons by him he found that one Light Machine Gun, 11 magazines and 336 rounds of 7.62 mm ball carton were missing. He asked Rfn C. Chhetri to report the matter to QRT Commander. This witness further stated that the missing Light Machine Gun and the ammunition were issued to Rfn C. Chhetri.

20. PW-5 Rfn C. Chhetri of 'F' Coy of 32 RR was the person whom the lost Light Machine Gun was issued with 12 magazines and 336 rounds of 7.62 mm ball carton. He stated that he used to keep the LMG on the vacant bed. He emphatically stated that on 17.03.2003 he had last seen the Light Machine Gun at 1900 hrs. He made a search for it but could not find it.

21. PW-6 L/Naik Vijau Kumar Sahu of B Company, 32 Rashtriya Rifle had made a search for the missing weapon and ammunition, but could not find it.

22. Lt Col JS Mangat (PW-7) took over the custody of the petitioner from civil authorities along with Capt Vivek Sunkari of 39 Gorkha Training Centre. This witness proved order of the Chief Judicial Magistrate Varanasi (Exhibit-4) and letter of Central Jail Varanasi by means of which the petitioner was handed over to the Army (Exhibit-6). This witness stated that at the time of taking over the accused he was medically examined by the Medical Officer of Central Jail Varanasi who certified that the petitioner was medically fit, fully conscious and co-operative. Subsequently the petitioner was also medically examined by the Regimental Medical Officer of 39 Gorkha Training Centre on 26.10.2004 and was found in good mental and physical health. He proved medical certificate on the record of Summary General Court Martial as Exhibit-7. Relevant portion of the medical report given by Regimental Medical Officer of 39 Gorkha Training Centre is reproduced as under:

*“Gnr Babulal Yadav
S/o Nathun Yadav
Medically examined by me on 26/X/04 at
1930 hrs clinically and found to be medically
fit. His vital parameters are within normal
limits. On clinical examination no Abnormality
was detected.”*

This witness after taking over the petitioner from the jail authorities inquired from him as to why he did such a thing to which the petitioner replied that he did not think about the consequences of his act and repented for what he had done.

23. PW-8 Havildar Sriram Thapa of C Company, 32 Rashtriya Rifles was the incharge of Kot. He testified that the weapon and the ammunition were issued to Rflman C Chetri and proved Daily Arms and Ammunition Issue Register as Exhibit-8.

24. PW-9 Sub Major (Clerk) Dil Bahandur Chhetri certified that out of 55 Light Machine Guns issued to 32 Rashtriya Rifles, Light Machine Gun Registration No. 15086232 existed on Voucher No. CI-54748 dated 17.09.1994. He stated that Light Machine Gun Registration No. 15086232 was missing and FIR was lodged at police station Ram Munshi Bagh, Srinagar on 18.03.2003.

25. PW-10 Major K.C. Yadav stated that in order to check whether the petitioner had reported to Srinagar Transit Camp, a unit representative was sent there but no entry indicating that the petitioner had reported at Srinagar Transit Camp was found existing in the record. This witness stated that there was a RP Gate in the 32 Rashtriya Rifles but individuals could enter from places other than R.P Gate. He further stated that earlier also a disciplinary case

proceeded against the petitioner with regard to taking away of weapon of another individual while going on sanctioned leave in the year 2001-2002.

26. Captain Pulak Adak, PW-11 was the Regimental Medical Officer (RMO) at 32 Rashtriya Rifle. He stated that as per official record of 32 Rashtriya Rifle the petitioner did not have any history of any illness or ailment. On 11.11.2004 he medically examined the petitioner and found him to be mentally and physically fit. He proved sick report book of 32 Rashtriya Rifles along with photo copies of page No. 93 wherein the entry of medical examination of petitioner was endorsed (Exhibit-15). During cross examination by defence counsel, this witness stated that he had interacted with the petitioner and found him to be in sound mental and physical health. No medicine was prescribed to the petitioner by him.

27. PW-12 Lt Col Pankaj Kulshreshtha of 118 Infantry Battalion Territory Army (Grenadiers) in his stated recorded during the course of Summary General Court Martial affirmed that in the month of April 2003 movement order was received in the Unit in respect of the petitioner from 163 Medium Regiment mentioning therein that the petitioner was struck of strength from 163 Medium Regiment on 17.03.2003 and was ordered to report to 163 Medium Regiment but the accused did not report at 118 Infantry Battalion (Territory Army)

on due date, therefore, on 23.04.2003 this witness sent a log message for 163 Medium Regiment/1633 Battery, HQ 8 Sector Reshtriya Rifle and 68 Mountain Brigade informing that the petitioner had not reported to 118 Infantry Battalion (Territory Army). The log message book produced by him was marked Exhibit-16. On 23.04.2003 this witness again sent a signal informing that the petitioner had not reported to 118 Infantry Battalion (Territory Army). On query made by Court, he stated that the petitioner could have taken maximum two days time to the location of 118 Infantry Battalion (TA).

28. Captain Amit Karnal, Officiating Battery Commander 'Romeo' Battery of 163 Medium Regiment was produced as PW-13 in the Summary General Court Martial. He stated that since the petitioner did not report at 118 Infantry Battalion in compliance of movement order, apprehension roll dated 24.04.2003 was issued (Exhibit-22). Court of Inquiry was convened and the petitioner was declared deserter. He further stated that letter dated 25.01.2004 was received on 30.01.2004 that petitioner was apprehended by civil police at Varanasi while trying to sell the Light Machine Gun Registration No. 15086232, eleven Magazines, 322 live rounds and 21 empty cartridges. He categorically stated that the petitioner had

not reported to the place of duty till he was apprehended by the civil police Varanasi.

29. PW-14 Lt Col Raghunathan Nair of DGMO Headquarters was posted during the relevant period at 32, Rashtriya Rifles located at Badami Bagh Cantt. Srinagar. He stated that on 24/25.01.2005 he had seen a news clipping on Television informing that an army deserter was apprehended with a Light Machine Gun at Varanasi. He got in touch with 32 Rashtriya Rifles and asked the officers to contact 39 Gorkha Training Centre at Varanasi and to ascertain details about the Light Machine Gun seized by the police. On the same evening, 32 Rashtriya Rifles informed him the name of the individual arrested by the police at Varanasi to be Gunner Babu Lal Yadav (petitioner). He was further informed that the Butt number of the Light Machine Gun was tallying with the Butt number of the Light Machine Gun missing from 32 Rashtriya Rifles.

30. PW-15 Major Madhav Jha, Company Commander 'Charlie' of 1/9 Gorkha Rifles on direction contacted the police authorities at Varanasi. He checked the Light Machine Gun produced by the police and found it to be matching with the Butt number and Registration number of the Light Machine Gun of 32 Rashtriya Rifles. This witness had interaction with the petitioner at the police station where the petitioner stated from 32 Rashtriya Rifles he went

back to his unit 163 Medium Regiment from where he was ordered to proceed to some Territorial Army Battalion. The petitioner stated that he came to Srinagar leaving his suitcase in Transit Camp and then went back with his bed-holder to Badami Bagh Cantt. He came near a Baniya Canteen and observed the Quick Reaction Team Barrack of 32 Rashtriya Rifle. Between 1700 to 1930 hrs he found the Barrack unattended. He spent the night behind Baniya Canteen. On 18.03.2003 he took lift in a vehicle of 92 Base Hospital and reached 216 Transit Camp. He boarded a Tata Sumo and reached Jammu.

31. PW-16 Hav Clerk Sunit Kumar of 216, Transit Camp submitted that there was no unit entry in the Transit Camp of the accused between 15.03.2003 to 22.03.2003.

32. PW-17 Major Vivek Kumar Sunkari of 39 Gorkha Regimental Training Centre asserted that he was present when the accused was handed over to army authorities. The petitioner was medically examined and found fit.

33. PW-18 Lance Naik Liladhar Chettri proved the FIR and challan collected from District & Sessions Court, Varanasi as Exhibit-34 and Exhibit-35.

34. PW-19 Sub Inspector Ajay Kumar Chaturvedi, U.P. Police Special Task Force, Lucknow is the star witness of the prosecution.

He stated that he was part of Special Task Force who apprehended the accused while he was making a deal to sell the weapon. He made search at the house of maternal uncle of the petitioner Mundir Prasad Yadav and discovered the weapon and ammunition in question. He identified Material Exhibits 1, 2 and 3 as weapon and ammunition during Summary Court Martial. It is worth noticing that this witness was also produced as PW-2 during trial of accused Mundir Prasad Yadav. FIR was lodged against petitioner as well as Mundir Prasad Yadav, maternal uncle of the petitioner under Sections 3/7/25 (1) ka of the Arms Act and Section 411 of the Indian Penal Code at Police Station Chaubepur, Varanasi. Since the petitioner was handed over to the military authority, criminal case (Sessions Trial No 795 of 2004 and 796 of 2004) proceeded against Mundir Prasad Yadav alone. The Court of Additional Sessions Judge (Court No 1) Varanasi while reproducing the evidence of the PW-2 has observed, thus, to quote:-

“रास्ते से डी एस पी श्री एस के सिंह ने एस ओ बलुआ श्री एस बी शुक्ला को भी मय फोर्स तलब कर लिया था | ग्राम गुरईरा में हम पुलिस वालों ने उस पी सी ओ की आवश्यक सुरक्षात्मक घेराबंदी कर ली और शाम करीब 7:30 बजे जैसे ही इस पी सी ओ से वार्ता कर एक व्यक्ति पी सी ओ से बाहर आया कि इलेक्ट्रानिक निगरानी के आधार पर पुष्टि होने पर हमने इस व्यक्ति को पी सी ओ के सामने सड़क पर ही पकड़ लिया | पकड़े गए व्यक्ति से उसका नाम पता पूछा तो उसने अपना नाम बाबू लाल यादव पुत्र नत्थू बताया | एल एम जी के बारे में पूछताछ की गई तो पहले तो उसने इनकार

किया लेकिन बाद में जब उसे निगरानी की रिकार्डेड वार्ता के बारे में बताया गया तो उसने स्वीकार किया , जून 2003 में मैं अपनी यूनिट से एक एल एम जी व 300 के लगभग कारतूस चुरा लाया था इसी को बेचने का सौदा मैं कर रहा था | इस समय यह एल एम जी मय मैगजीन व कारतूस मैंने अपने मामा मुंदर प्रसाद के मकान पर जो ग्राम लूवा जो थाना चौबेपुर में स्थित है, छिपा कर रख रखी है | मुझे साथ लेकर चले तो मैं यह एल एम जी बरामद करा सकता हूं | एल एम जी बरामदगी की उम्मीद से बाबूलाल यादव को हमने अपने साथ लिया और एस ओ बलुआ के द्वारा बाबूलाल यादव के पारिवारिक जनों को सूचना भेजवा दी गई | बाबूलाल की निशानदेही पर मुंदर प्रसाद के मकान पर पहुंचे एवं उपलब्ध पुलिस वालों से मकान की घेरा बंदी कराई और बाबूलाल यादव से आवाज दिलवा कर मुंदर प्रसाद को बुलवाया | समय करीब 3:30 बजे मकान का दरवाजा खोलकर जो व्यक्ति बाहर आया उसे देख कर बाबूलाल ने बताया की यही मुंदर मामा है | इस मुंदर नामक व्यक्ति ने बाबूलाल के साथ जैसे ही हम पुलिस वालों को देखा तो उसने मकान का दरवाजा बंद करना चाहा कि दरवाजा बंद करने का मौका न देते हुए हम लोगों ने इस मुंदर नामक व्यक्ति को मकान के दरवाजे पर ही पकड़ लिया गया | हमारे सामने बाबूलाल ने मुंदर प्रसाद से कहा मामा जो एल एम जी मैंने लाकर आपके पास रखी है , वह इन पुलिस वालों को देनी है, पहले मुंदर प्रसाद ने इंकार किया तब हम लोगो ने मुंदर से बताया कि अब तुम्हारे मकान की तलाशी लेगे, गवाही के लिए अपने पड़ोस से अपनी तबीयत के लोगो को गवाही के लिए बुला लो , इस पर मुंदर प्रसाद ने इंकार किया , तब हम पुलिस वालों ने समक्ष बाबूलाल व मुंदर प्रसाद आपस में एक दूसरे की जामा तलाशी उन्हे दी थी, तब जब मुंदर प्रसाद को यकीन हो गया की अब उसके मकान की तलाशी हो ही जाएगी तो आपस में मुंदर व बाबूलाल ने बात की और फिर कहा कि चलिए हम आपको एल एम जी देते हैं और फिर मुंदर व बाबूलाल ने एक साथ आगे-आगे चलकर मुंदर प्रसाद के पक्के मकान के पीछे वाले कच्चे मकान के पीछे वाले मकान में हम पुलिस वालों को ले गए एवं कच्चे मकान मे प्रवेश कर स्वयम आगे आगे चल कर इस कच्चे मकान के दक्षिणी कमरे से भूसे के ढेर से निकाल

कर प्लास्टिक की बोरी की दो बण्डल दिये | मकान के अंदर ही उन्हें खोलकर देखा तो एक बंडल से टार्च व लालटेन की रोशनी में एक अदद एल एम जी जिसकी एक पुस्त पर गन मशीन 7.62 एम एम एस ए ए 1989 लिखा था और दूसरी पुस्त पर नंबर 15086232 एवं बट पर पेंट से डबल 2 (22) लिखा था , बरामद हुयी एवं दूसरे बंडल से एल एम जी के 11 अदद मैगजीन 322 जिंदा कारतूस व 21 खोखा कारतूस 7.62 बोर के बरामद हुए |”

(Emphasis supplied)

35. From the statement of this witness, it is proved to the hilt that the petitioner was arrested by the civil police from Varanasi and was handed over to the Army. He disclosed to the police that he had stolen a Light Machine Gun and about 300 cartridges from his unit and was trying to strike out a deal for selling it. The trial Court, on an appraisal of the evidence on record, found his accomplice, Mundir Prasad Yadav, his maternal uncle, guilty of the charges and convicted and sentenced him. Relevant portion of the judgment and order of the trial Court is reproduced as under:—

“निष्कर्षतः सत्र परीक्षण संख्या 795/2004 में अभियुक्त मुंदर प्रसाद यादव के विरुद्ध धारा-7/25 (1) क आयुध अधिनियम का आरोप तथा सत्र परीक्षण संख्या- 796/2004 में अभियुक्त मुंदर प्रसाद यादव के विरुद्ध धारा 411 भा दं सं का आरोप संदेह से परे सिद्ध करने में अभियोजन पक्ष पूर्णतया सफल रहा है | अतः अभियुक्त मुंदर यादव को सत्र परीक्षण संख्या 795/2004 में धारा-7/25 (1) क आयुध अधिनियम तथा सत्र परीक्षण संख्या- 796/2004 में धारा-7/25 (1) क आयुध अधिनियम तथा

सत्र परीक्षण संख्या-796/2004 में धारा 411 भा दं सं का
दोषी सिद्ध किया जाता है |

XX XX XX XX XX

दोष -सिद्ध अभियुक्त मुंदर प्रसाद यादव को सत्र परीक्षण
संख्या- 795/2004 में धारा-7/25 (1) क आयुध
अधिनियम के अंतर्गत दोष सिद्ध किया जाता है |
एतदद्वारा अभियुक्त मुंदर प्रसाद यादव को धारा 7/25 (1)
क आयुध अधिनियम के अंतर्गत 5 (पाँच) वर्ष के कठोर
411 के अधीन 3 (तीन) वर्ष के कठोर कारावास के दण्ड से
तथा रुपये 10,000/- (दस हजार रुपये) अर्थदण्ड से
दण्डित किया जाता है | अर्थदण्ड अदा न करनेपर
अभियुक्त मुंदर प्रसाद यादव को छः माह के अतिरिक्त
कठोर कारावास की सजा भुगतानी पड़ेगी |”

36. PW-3 Sub Inspector Daya Nath Mishra during Summary General Court Martial stated that he had assisted the police party in searching the house of Mundir Prasad Yadav. He categorically stated that the stolen Light Machine Gun and ammunition were recovered from house of said Mundir Prasad Yadav.

37. A careful perusal of the statements produced during Summary General Court Martial lead us to the one conclusion that it was the applicant and none else who had stolen the Light Machine Gun and the ammunition from 32, Rashtriya Rifle with the intention to sell it to some criminal.

38. It has been consistently laid down by the Supreme Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The well settled principles for construing circumstantial evidence have oft been reiterated by the Supreme Court. In a recent decision of the Supreme Court in the case of ***State of Goa v. Sanjay Thakran***, (2007) 3 SCC 755: (2007) 2 SCC (Cri) 162 the Hon'ble Supreme Court after considering several earlier decisions in this regard reiterated the tests that must be satisfied when the case rests upon circumstantial evidence as follows:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

39. Admittedly, no one had witnessed the factum of stealing of the Light Machine Gun and the ammunition by the petitioner. However, it is also a fact that the petitioner was posted at 163 Medium Regiment from where he was ordered to move to 118 Infantry Battalion (TA). Prior to his posting at 163 Medium Regiment, he served for two years at 32 Rashtriya Rifles. On account of his association and acquaintances with Army personnel posted with 32 Rashtriya Rifles he was having connections with Army persons posted there. He was also well versed with the topography of the location as well as the place and manner in which the weapons and ammunitions were kept in the unit for eventualities and resultant quick action. He was issued movement order on 17.03.2003 and it is established that he did not report to 118 Infantry Battalion (TA); rather he deserted the Army and from 17.03.2003 till his arrest on 24.01.2004 by the civil police at Varanasi, and during the intervening period his whereabouts were not known. It is also established during surveillance by the Special Task Force that he was trying to

strike out a deal with a notorious criminal to sell the Light Machine Gun with ammunition. The petitioner himself on being arrested had divulged to the police that he had kept the stolen Light Machine Gun and the ammunition in the house of his maternal uncle co-accused Munder Prasad Yadav within the circle of Police Station Chaubepur and District Varanasi. The stolen Light Machine Gun and the ammunition were discovered from the house of said Munder Prasad Yadav. It is also an established fact that the petitioner on a previous occasion was found guilty of taking away an AK-47 Rifle to his residence and after Court of Inquiry was saddled with punishment of 'severe reprimand' and fourteen days pay fine. The prosecution has established the factum of stealing of the Light Machine Gun with ammunition (supra) beyond all shadow of doubt and learned counsel for the petitioner could not point out any reasonable ground which would disprove the factum of stealing of the weapon and ammunition, desertion of the petitioner from 17.03.2003 to 24.01.2004 and his involvement in striking out a deal to sell the weapon and ammunition to a dreaded criminal. The prosecution has also proved beyond doubt discovery of the Light Machine Gun bearing Registration No 1508623, Butt No. 22 drawn and issued in the name of Rifleman Chhabi Lal Chhetri and pouches belonging to Gunner Lok Bahadur K.C. containing 11 Magazines with 336 rounds

which were found missing from the Quick Reaction Team (QRT) barrack of 32 RR from the house of petitioner's maternal uncle who was tried by the criminal court and was convicted and sentenced for the offence of concealing the stolen Light Machine Gun and ammunition of 32 Rashtriya Rifles. The petitioner himself had disclosed the fact that the weapon and the ammunition were kept in the house of Munder Prasad Yadav, his maternal uncle. It was the petitioner who himself had disclosed the address of said Munder Prasad Yadav and his relationship with him and had also escorted the police party to his house and asked Munder Prasad Yadav to hand over the weapon and the ammunition to the police. The facts and circumstances established by the prosecution unerringly point towards the guilt of the accused. The factum of discovery of Light Machine Gun and ammunition from the house of his maternal uncle is conceded. The circumstances, taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

40. Learned counsel for the petitioner could not point out any illegality in the Summary Court Martial proceedings. He could not point out any inconsistency or material illegality in the prosecution

evidence which could disprove the prosecution case. Arguments advanced by learned counsel for the petitioner rest on two grounds.

41. The first limb of submission of learned counsel for the petitioner is that the petitioner was issued movement order to join at 118 Infantry Battalion Territorial Army (Inf Bn TA) from 163 Med Regt on 17.03.2003. The Light Machine Gun and the ammunition were stolen from 32 Rashtriya Rifles. It is submitted that since the petitioner was not attached to 32 Rashtriya Rifles, as such he could not enter the precincts of 32, Rashtriya Rifles, thus, there was no occasion for him to steal the Light Machine Gun and the ammunition. Learned counsel for the respondents submitted that in/out register maintained at 32 Rashtriya Rifles does not bear any entry with regard to petitioner having entered the 32 Rashtriya Rifles on 17.03.2003 or 18.03.2003. This argument of learned counsel for the petitioner has no legs to stand for the reason that learned counsel for the respondents has submitted that as a general practice persons belonging to the Army can enter in the unit by establishing his identity on production of Identity Card. Learned counsel for the respondents drew attention of the Tribunal to evidence of PW-14 who stated during the Summary General Court Martial that an individual can enter into unit area of 32 Rashtriya Rifles through the fencing or from the Pani Mandir Side without

using the RP gate of 32 Rashtriya Rifles. During Summary General Court Martial proceeding on this vital issue on question suggested by the defence counsel this witness had made a categorical statement that for an Army personal for entering the Badami Bagh Cantt, Corps Operating Signal Regiment one had to show his Identity Card. No entry was made in the register for Army personnel though for civilians entry was made in the register kept for the purpose. Thus once the applicant could have entered the unit area after showing his Identity Card being an Army personal who was earlier posted to 32 Rashtriya Rifles.

42. Learned counsel for the petitioner next submitted that the petitioner had developed mental disease while proceeding to 118 Infantry Battalion (TA). He submitted that the petitioner was unaware as to where the 118 Infantry Battalion (TA) was located. The petitioner lost his senses and did not remember where he went or what he did. Sometime in Nov/Dec 2003 some unknown person left the accused at his village in irrational state. His father took him to a private clinic where he remained under treatment from 02.11.2003 to 29.12.2003. Since father of the petitioner was an illiterate man he was not aware of the necessity of taking the petitioner to a Military Hospital. This argument of learned counsel for the petitioner miserably fails for the reason that while being

handed to the Army the petitioner was medically checked by the Jail doctors who found him to be in a fit physical and mental condition. The Regimental Medical Officer (RMO) had also medically examined him on 26.10.2004 and had certified him to be medically fit with vital parameters within normal limits. The doctor did not detect any abnormality. Learned counsel for the respondents strenuously argued that even during the time of his incarceration after being lodged in the Central Jail, Varanasi no mental or physical abnormality was detected by jail doctor who examined the petitioner. Learned counsel for the respondents further submitted that the petitioner has not placed on record any medical document establishing his mental sickness from 17.03.2003 till he was apprehended by civil police at Varanasi.

43. No other point was raised by learned counsel for the petitioner.

44. As mentioned above, the sentence of 14 years rigorous imprisonment was remitted by the Army authorities and as stated by the learned counsel for the petitioner, the petitioner has served out the remainder of sentence and has been released from jail.

45. For the reasons mentioned above we are of the considered opinion that the respondents have proved the guilt against the petitioner beyond shadow of doubt. The chain of circumstantial

evidence is so interwoven that it leads to no other conclusion but the guilt of the petitioner.

46. In the result, the T.A. deserves to be dismissed, hence **dismissed.**

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

Dated: 9, August 2017

anb