

**AFR**  
**RESERVED**

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

**COURT NO. 1**

**Transferred Application No. 635 of 2010**

Thursday, this the 11<sup>th</sup> day of January, 2018

**Hon'ble Mr. Justice Devi Prasad Singh, Member (J)**  
**Hon'ble Air Marshal B.B.P. Sinha, Member (A)**

No. 15367865-L Ex Nk Anil Joshi  
Son of FD Joshi, Ex 4 Corps Engineer  
Sig Regt. 99 APO - Petitioner

Versus

1. Chief of the Army Staff  
New Delhi.

2. GOCU.P. Area,  
Bareilly.

3. Brigadier B.S. Jaswal  
Brigade Incharge, Administration  
HQ 4 Corps, C/o. 99 APO.

4. Col R.K. Sharma  
Commandant,  
Sikh Light Infantry Regimental Centre,  
Fatehgarh.

5. Commanding Officer,  
4 Corps Engineering Sig Regt. 99 APO

6. Union of India  
Through Secretary,  
Ministry of Defence, New Delhi - 110011

- Respondents

Learned counsel appeared  
for the petitioner

- Shri Rohit Kumar, Advocate

Learned counsel appeared  
for the respondents

- Shri Namit Sharma, Advocate,  
assisted by Maj Piyush Thakran  
OIC Legal Cell

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

1. Being aggrieved with the impugned order of punishment dated 06.07.2002, whereby petitioner has been discharged from service in pursuance of Army Rule 13(3), Item No.III (v) of Army Rules, 1954, he preferred a writ petition, bearing No. 4038 of 2004 in the Hon'ble High Court of Judicature at Allahabad, which has been transferred to the present Tribunal in pursuance of Section 34 of the Armed Forces Tribunal Act, 2007 and registered as T.A. No. 635 of 2010.
2. We have heard learned counsel for the petitioner Shri Rohit Kumar as well as learned counsel for the respondents Shri Namit Sharma, assisted by Maj Piyush Thakran, OIC Legal Cell and perused the record.
3. The brief facts borne out from the arguments advanced by the learned counsel for the parties and pleadings on record, show that the petitioner was enrolled in the Indian Army on 04.11.1988 and after completion of training, attested on 24.01.1989. He was taken on the strength of 6 Technical Training Regiment from 23.05.1989. The record shows that the petitioner was patient of fistula and admitted for treatment from 23.05.1991 to 29.09.1997 in military hospitals.
4. On 06.07.2002 SCM on the allegation that at field in the year 1995 while serving with 11Corps Engineering Signal Regiments, he was found to be in possession of a country made pistol given to him by one Mohd Zafar Signalman of the same Unit without a licence, in contravention of Section 3 of the Arms Act, 1959. He allegedly was in temporary possession of the country made pistol, which was later on handed over to Mohd Zafar, the

original owner. He remained in custody for about 150 days. According to the respondents, petitioner committed an offence under Section 69 of the Army Act, 1950, which comes in the category of a civil offence i.e. possession of firearm without licence in violation of Section 3 of Arms Act, 1959. As per case set up by the respondents, they came to know of temporary possession of firearm by the petitioner only on 01.03.2000. During SCM proceedings, petitioner pleaded not guilty of the charges but later on re-assembling of summary court martial on 06.07.2002 he pleaded guilty and in consequence thereof he was convicted by reduction in rank with three months' R.I. in Military custody and later on discharged under Army Rule 13(3), Item No.III (v) of Army Rules, 1954. The summary of evidence was recorded on 23.09.2000 by Lt Col C.B. Khatri in presence of Lt GS Mankotia and Subedar Teerath Singh.

5. A tentative charge sheet was framed against the petitioner on 23.09.2000 under Section 69 of the Army Act, 1950. The same is reproduced as under :-

"Annexure-1 to Appx 'A' to AO 24/04

#### TENTATIVE CHARGE SHEET

The accused NO 15367865K L/NK Anil Joshi of 4 Corps Engineering Signal Regiment, attached with Administrative Battalion, The Sikh Light Infantry Regimental Centre, is charged with :-

**ARMY ACT SECTION 69 COMMITTING A CIVIL OFFENCE  
THAT IS TO SAY HAVING  
POSSESSION OF ARMS IN  
CONTRAVENTION OF SECTION  
25(1- B)(A) POF THE ARMS  
ACT,1959**

In that he,

At Jalandhar, on or about 04 September 1995, while serving with 11 corps Engineering Signal Regiment, was found in possession of a country made pistol in the unit

lines, procured from No. 15367922A Signaller Mohammad Zafar of 19 Infantry Division Signal Regiment (then serving with 11 Corps Engineering Signal Regiment), in contravention of Section 3 of the Arms Act, 1959.

Station: Fatehgrah (U.P) (L. B. Khattri)  
 Dated : 23 September 2000 Lt. Col  
 Commanding Officer  
 Administrative Battalion  
 The SIKH Light Infantry  
 Regimental Centre.”

6. Since the provisions of Section 3 of Arms Act are relevant in the present controversy, as the allegation against the petitioner is of possession of firearm without licence, in violation of Section 3 of Arms Act, 1959, for convenience Section 3 of Arms Act is reproduced as under :-

“3. Licence for acquisition and possession of firearms and ammunition.-

(1) No person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder:

Provided that a person may, without himself holding a licence, carry any firearm or ammunition in the presence, or under the written authority, of the holder of the licence for repair or for renewal of the licence or for use by such holder.

(2) Notwithstanding anything contained in sub-section (1), no person, other than a person referred to in sub-section (3), shall acquire, have in his possession or carry, at any time, more than three firearms:

Provided that a person who has in his possession more firearms than three at the commencement of the Arms (Amendment) Act, 1983, may retain with him any three of such firearms and shall deposit, within ninety days from such commencement, the remaining firearms with the officer in charge of the nearest police station or, subject to the conditions prescribed for the purposes of sub-section (1) of section 21, with a licensed dealer or, where such person is a member of the armed forces of the Union, in a unit armoury referred to in that sub-section.

(3) Nothing contained in sub-section (2) shall apply to any dealer in firearms or to any member of a rifle club or rifle association licensed or recognised by the Central Government using a point 22 bore rifle or an air rifle for target practice.

(4) The provisions of sub-sections (2) to (6) (both inclusive) of section 21 shall apply in relation to any deposit of firearms under the proviso to sub-section (2) as they apply in relation to the deposit of any arm or ammunition under sub-section (1) of that section."

7. A plain reading of Section 3(1) of Arms Act (supra) shows that no person shall acquire or may have in possession or carry any firearm or ammunition unless he possesses a licence to carry any firearm or ammunition in the presence or under the written authority of the holder of licence for repair or for renewal of licence or for use by such holder, meaning thereby on a written consent of the licence holder, other person may retain the possession for repair, for renewal or for use of such firearm.

### **Summary of Evidence**

8. The Summary of Evidence was recorded on 1.11.2000 in pursuance to convening order date 24.10.2000. Signalmn Mohd Zafar was prosecution witness no.1. He admitted that during leave period in the end of March, 1995 he purchased a country made pistol and brought the same alongwith him after termination of leave in May, 1995, he had never shown it to anyone, even to Anil Joshi but handed over to him in a packet to keep it with him.

9. Witness No.2 was Nk HCS Rautela. His evidence is totally hearsay. It does not seem that he had seen the possession of country made pistol with Anil Joshi. To quote his statement:-

“Witness No. 2 HCS Rautela

19. In 1995, the month I don't remember now, there was some mention of a country made pistol by N0.15367865K L/NK Anil Joshi. The details of the conversation is now not remembered by me. I, No 15365548K NK HCS Rautela had never seen any county made pistol with N0.15367865K L/NK Anil Joshi during our stay together at 11 Corp Engr Sig Regiment.\

20. NO.15367865K L/NK Anil Joshi got posted out to 4 Corp Engr Sig Regt in Jan 1996 and after that I had no communication or meeting with him till 31 Oct 1999 when we both got attached to SIKH LI Regimental Centre, Fatehgarh (U.P)”

10. During summary of evidence Anil Joshi in his statement dated 01.11.2000 stated that he has never seen country made pistol in his life. He seems to possess bright service record and was also selected for Foreman of Signal Course. To reproduce relevant portion of his evidence as under:-

“26. I had known both of them as we were posted in the same one company RR Section.

27. I had never taken or seen any country made pistol during my tenure at 11 cop Engr Sig Regt. Most of the time in 11 corp Engr Sig Regt I used to be busy with my trade work and studies. I was also selected for Foreman of Signal Cours at MCTE,Mhow which I was undergoing with effect from 23 March 1993 when I was attached to Sikh Li Regimental Centre, Fatehgarh in Oct 1999.”

11. It appears that from the summary of evidence no incriminating material on the basis of deliberate commission or omission on the part of the Joshi seems to have brought out on record to prosecute him. After one and half years, it was on 02.06.2002 an additional summary of evidence of Nb Sub Rajinder Singh was recorded. It was Nb Sub Rajinder Singh, who during additional summary of evidence is alleged to have produced petitioner’s confessional statement in 8 hand written pages. To quote relevant portion of statement of Nb Sub Rajinder Singh during additional summary of evidence as witness no.1 as under :-

“Witness No 1 Rajinder Singh

5. I hereby produce the confessional statement (Eight hand written pages in all) of NO.15367865K L/NK Anil Joshi of 4 corps Engr Sig Regt, att with the SIKH LI Regimental Centre, Fatehgarh (UP)

6. The bd of officers recording the Addl Summary of Evidence examined the confessional statement (Eight hand written pages in all)

given by NO.15367865K L/NK Anil Joshi of 4 Corps Engr Sig Regt, att with the SIKH LI Regimental Centre, Fatehgarh (UP) and the same is att as exhibit 2 to these proceedings.

7. The accused declines to cross examine the witness.”

12. The statement of Nb Sub Rajinder Singh is at page-39 of original record and after his statement the statement of I/Nk Anil Joshi was recorded, who stated that he was never given such pistol for safe custody during his stay at 11 Corps. Thus, it appears that during second additional summary of evidence on 04.06.2002 alleged confessional statement of Anil Joshi was placed on record by Nb Sub Rajinder Singh, whose statement has been recorded to the effect that 8 hand written statement, alleged to be confessional statement of Anil Joshi was recorded during additional summary of evidence on 04.06.2002 and placed on record by him, which was marked as Ex-2 .

13. Strange enough the alleged confessional statement or more precisely admission of the allegation is of 11.08.1999 in writing. The original record, which has been submitted to the Tribunal, contains Ex-2, the alleged statement of Anil Joshi of 11.08.1999, the first and second pages of which are photo stat copy of the hand written text and rest are original hand written texts. The overall reading of the petitioner’s statement does not seem to make out a case for intentional or deliberate commission of any offence. It shall be appropriate to quote the alleged offending portion of the hand written statement of the petitioner dated 11.08.1999 (in Hindi). The entire 8 hand written pages of statement are reproduced as under :-

“STATEMENT OF L/NK ANIL JOSHI OF 4 FESR Now in MCTE FOR FS Course

Eksjk tUe lu~ 1972 viszSy ekg dh 16 rk0 dks  
fiFkkSjkkxM ftys ds MhMhgkV rglhy esa gqvk

FkkA tc esjh mez 2 lky Fkh rHkh gekjk ifjokj  
 uSuhrky ftys ds [kVhek rglhy esa LFkkukUrfjr  
 gks x;kA esjh izkjfEHkd f'k{kk Hkh [kVhek ds  
 jktdh; bUVj dkyst esa gq;h A tc eSa 12oh esa  
 iM jgk Fkk lu~1988 esa fn0&04Nov 88 dks Hkkjrh;  
 lsok dh flxuy dksj esa HkrhZ gks x;k  
 eq>s¼2STC½

ds fy;s Hkst fn;k x;k tgkW eSaus 13 twu 1991  
 rd izf'k{k.k izkIr fd;k ftlesa fefyV~zh  
 V~zsfuax o rduhdh V~zsfuxa nksuks 'kkfey gS]  
 eq>s ogkW ls ¼2STC½ ls 11CSSR esa iksfLVWx  
 Hkstk x;k eSa 11CSSR esa 10 july 91 dks igqWpk 10  
 fnu ckn gh eq.s 1 dEiuh vkj0 vkj lsDlu esa  
 iksfLVWx dj fn;k x;k A ml le; gekjs dEiuh  
 vks0lh0 Maj J S Virk lkgc FksA mUgksus 20 fnu ckn  
 eq>s O;kl vkj vkj MsV esa fn;k A ogkW ij eSa  
 55¼1½Inf Bdi ds lkFk jgk vksj ASCON-Node Beas Eksa  
 M~;wVh djrk jgkA ogkW 04 eghus jgus ds ckn  
 eSa NqV~Vh tkus ds fy;s ;wfuV esa vk;k A  
 ;wfuV esa ml le; Batra Troffy dh rS;kjh py jgh  
 FkhA esjh ekrk th dh rfc;r [kjk gksus ds  
 dkj.k eq>s 62 days A/L Hkstk x;k A eSa fnlEcj ds  
 vfUre lIrk g esa ;wfuV esa igqWpkA vkSj eq>s  
 06 JAN1992dks tfUM;kyk xw: uked txg tgkW ij I  
 inf div Sig Regt FkhA ogkW Hkstk x;kA eSa ogkW ekspZ  
 92 rd jgk vkSj A/L ds fy;s ;wfuV cqyk;k x;k  
 eSa vizSy ebZ ds efgus esa lu~1992 esa A/L  
 x;kA A/L ls vkdj eq>s isesUV dh xkMh ds lkFk  
 thjk Hkstk x;k tgkW ij fd 55¼1½Inf Bdi Fkk A  
 eSa Capt Darsan Kumar lkgc ds lkFk thjk ds fy;s  
 esgrk pkSd gksrk gqvk x;k tgkW fd 2 Sector RR dk  
 yksds'ku Fkk A eSgrk pkSd esa Ms< ?kUVs :duk  
 iMk A gekjh isesUV ikVhZZ ftlds dek.Mj Capt  
 Darsan Kumar lkgc Fks geus ogkW [kkuk [kk;k ikuh  
 dk bUrtke S/M izdk'k ds th us fd;k A S/M izdk'k  
 ds th us [kkuk [kkus ds ckn ;g dgk fd vktdy  
 rks S/M tkQj Double zero ≤00≥ dial djrk gSA ml le;  
 mlus ;g Hkh dgk fd ;gkW ij STF ykbu gS A esjh  
 le> esa ;g ugha vk;k fd Double zero (00) fdl fy;s  
 Qkby gksrk gSA vkSj rc rd gekjh xkMh Bhd gks  
 x;h Fkh vkSj eS thjk MSV ds fy;s pyk x;k A



eSSaus viuk lkeku xkMh ls mrkjk vkSj Det esa vk x;k A yxHkx nks ekg ckn eq>s euksgj dgkfu;kW uked eSxthu ds foKkiu ls ;g irk pyk fd Double zero (00) fons'k ds fy;s Qkbu gksrk gSa A rc rd eq>s ;g Kk ugha FkkA 14 August 1992 dks gesa gekjs Det dks vkns'k feyk fd gesa yqf/k;kuk ls RR Det tkyU/kj ds fy;s establish djuk gSA eSa vksj esjs lkFkh RR Veb ds lkFk yqf/k;kuk igqWp x;s vkSj 65Inf Bdi Sig Coy esa attach gks x;s A eSa yqf/k;kuk esa Oct 92 rd jgk vkSj eSa 10fnu C/L dkVdj ;wfuV okil vk;k rc dqN fnu eSa ;wfuV esa jgk A eSus 12<sup>th</sup>ds exam dh permission 55½1½Inf Bdi ds Maj Rangnekar lkgc ls yh Fkh blh vk/kkj ij eq>s 1993 ds 12<sup>th</sup> dh ijh{kk dh NqV~Vh feyh eq>s Feb/March esa A/L NqV~Vh tkuk iMk vkSj eSaus ijh{kk nh esjk ijh{kk ifj.kke vk x;k vkSj eSa ikl gks x;kA blh nkSjku eq>s gfjds vkj0 vkj0 Det esa esa Hkstk x;k ogkW ls eq>s flrEcj1993 esa ;wfuV esa cqyk;k x;k vkSj tSls gh eSa ;wfuV esa igqWpk eq>s UEI Course SRC7-114 ds fy;s iape<h Hkstk x;k A ogkW eSaus 03 eghus dk UEI Course fd;k vkSj eq>s Ä"Grading izkIr gq;h A ;wfuV esa vkdj eq>s gekjs CO lkgc Col Saini lkgc us njckj esa lEekfur fd;k A eSaus iape<h ls 15 fnu A/AL ekWxh Fkh] tks C O lkgc us eq>s iznku dh vkSj eSa fnlEcj ds vfUre lIrkq esa 29Dec 93 esa ;wfuV igqWpkA 1994 dh 'kq:vkr esa] eSa ;wfuV esa jgk Qjojh ekpZ 1994 esa eq>s dksj ;q)kH;kl ds fy;s diwjFkkyk ogkW ls eksxk Hkstk x;k tgkW ij 7 Inf Div Fkk (7Inf Div) FkkA ogkW 7Inf Div ds lkFk eSa djhc 1 eghuk jgk vkSj vizsZy ds eghus esa okil ;wfuV igqWpk eSaus rRi'pkr 47 days Balance A/L dkVh vkSj okil ;wfuV vk;k A ;g NqV~Vh eSaus April1994 esa dkVh A blds ckn tSls gh eSa ;wfuV esa igqWpk] eq>s Kkr gqvkd fd esjk uke PT Course ds fy;s fn;k x;k gS vkSj eq>s vxLr ds eghus PTCourse ds fy;s f'keyk Hkstk x;k A ogkW PT School Simla esa eSaus 02 ekg dk PT Course fd;k vkSj ;wfuV okil vk x;k A f'keyk ls vkus ds ckn ,d ckj S/M tkQj us eq>ls 1000 :0 dtZ

fy;s vkSj isesUV feyrs gh 1000:0 eq>s ykSVk  
 fn;s A ;g iSls mlus vius ?kj Hkstus ds fy;s  
 ekWxs Fks A Oct 94 essa eSa ;wfuV okil vk;k  
 vkSj ;wfuV esa gh jgk A Feb 1995 esa eSa A/L 62  
 days x;k vkSj vizsSy 1995 esa okil vk;k ;wfuV  
 esa vkrs gh eq>s dksj ;q)kH;kl ds fy;s  
 fQYkSj ds ikl yMksoky uked txg Hkst fn;k  
 x;k tgkW ij 11 Corp Engg Sig Regt dk ykds'ku Fkk  
 yMksoky ls eq>s dlkSyh vkj0 vkj0 Det esa  
 Hkst x;k ogkW ij gekjs Qksj eSau Nb/Sub gd  
 lkgc Fks] vkSj esjs lkFk S/M S K Pathak , S/M Vijay  
 Kumar vkSj S/M M Zafar Hkh FksA ogkW ij ge lHkh  
 20 fnu jgs vkSj S/M Vijay Kumar dks dlkSyh Det esa  
 NksM dj okil ;wfuV vk x;s May 95 esa ge ;wfuV  
 esa vk x;s A blh nkSjku S/M M Zafar NqV~Vh x;k  
 Fkk A vkSj NqV~Vh ls vkus ds ckn mlus twu ds  
 izFke lIrkgs esa eq>s diMs esa iSd dqN lkeku  
 fn;k vkSj dgk ^tks'kh bls vius ikl j[k ns  
 fdlh dklkeku gS ?kj ls yk;k gWw A^ eSaus  
 lka;a ds 1800hrs ij mldk diMsa esa iSd lkeku  
 vius ykdj esa j[k fn;k A lqcg tc 11nd Markar  
 0800 cts dk le; gqvk djhc 7-30 cts S/M M Zafar  
 us eq>ls dgk bl lkeku dks ykdj ls dksbZ ys  
 ysxk vr% bls vius ckDl esa j[k nsA eSaus  
 mldk og lkeku vius ckDl esa j[k fn;k vkSj  
 eSa ekjdj esa pyk x;k tSls gh eSa vkj0 vkj0  
 store esa igqWpk Sub Umanandan R lkgc us eq>s  
 vkns'k fn;k fd eSaus lqjkuqlh vkj0 vkj0 Det  
 esa tkuk gS A eSa Det esa tkus dh rS;kj esa  
 tqV x;k rHkh yxHkx 1100hrs ij S/M tkQj dgha ls  
 vk;k vkSj eq>ls cksyk tks lkeku eSaus rq>s  
 fn;k gS mlesa dV~Vk (country made pistol gS A ;g  
 lqudj eSa ?kcjk x;k eq>s ;g ekywe u Fkk fd  
 tks iSdsV mlus eq>s fn;k gS mlesa bruh  
 [krjukd oLrqr gks ldrh gS A eSa viuk dkk;Z  
 djrk jgk vkSj S/M Zafar ogkW ij ls pyk x;k eSaus  
 Radio Set xkMh esa yksM fd;s vkSj lqjkuqlh ds  
 fy;s 1400hrs dh xkMh tks fd supply piont ls pyrH  
 Fkh mlesa lqjkuqlh R R Det esa yxk x;k A ogkW  
 ij gekjs Qksj eSu Nb Sub Hansraj lkgc Fks A eSa 1  
 fnu ogkW jgk Fkk rHkh eq>s rst cq[kkj vk x;k

vksj eSa ordinance Depo ds MI Room esa fld fjiksVZ  
 x;k ogkW ij MkDVj lkgc ugha Fks vr% uflZxa  
 vflLVsUV ugha eq>s nokbZ nh fQj Hkh esjh  
 rfc;r Bhd ugha gq;h 03 fnu rd eSa R R Det essa  
 chekj gkyr esa jgk vksj pkSFks fnu Nb Sub Hansraj  
 lkgc us eq>s ;wfuV okil Hkst fn;kA ;wfuV esa  
 igqWprs gh lcls igys eSaus S/M M Zafar dks  
 [kkstk og ;wfuV esa ugha Fkk dgha ckgj (T D)ij  
 Fkk A vc eSa S/M Zafar dk bUrtkj djrk jgk A ¼tc  
 ls S/M tkQj us eq>s crk;k fd og tks lkeku  
 rqEgkjs ikl gS dV~Vk gS rc ls ysdj vkt rd  
 eSaus dsoy L/Nk H C S Rautela dks gh ;g crk;k fd  
 esjs ikl tkQj us dV~Vk j[kk gS tks fd eSaus  
 vius ckDl esa j[kk gS½ vc eSa S/M Zafar ds vkus  
 dk bUrtkj djrk jgk og 04 fnu ckn ;wfuV esa  
 vk;k rc eSaus lcls igys tkQj dk diMs essa  
 isD og Country made pistol S/M Zafar dks ns fn;k A dqy  
 12 fnu rd ;g country made pistol esjs ckDl esa jgk A  
 eSus bl ?kVuk ds rqjUr ckn vius OC lkgc Maj S P  
 Srivastava lkgc ls course cum posting dh vuqefr ekWxh  
 D;ksafd esjh iksfLVWx 4C ESR eas vk;h FkhA  
 vksj dkslZ ds fy;s 21 August ls CL11 esa uke  
 vk;k Fkk A OC lkgc us esjh request not sanctioned  
 dj nh eq>s fQj blh ;wfuV esa jguk iMk vkSj  
 blh nkSjku esjk CLD dkslZ june 95 esa dSafUly  
 gks x;k 39 Inf div vyhoky uked txg ij vk;kA rHkh  
 eq>s 39inf Div ds lkFk R R Det ysdj Hkstk x;k vkSj  
 eSa 39inf div ds lkFk 12 fnu rd jgk tc ykSV dj  
 ;wfuV vk;k dqN fnu ckn yxHkx nks eghus ckn  
 eq>s O P Alert ds fy;s48inf Bdi ds lkFk fQjkstiqj  
 ds ikl Hkstk x;k A ogkW eSa Oct 1995 rd jgk  
 vkSj ykSVdj ;wfuV vk;k vc eSa Ascon Node Jalandhar  
 esa shift duty esa tkrk Fkk A ogh als M~;wVh ds  
 ckn eSa N K U S Chauhan ds DokVj esa tksfd Govt.  
 Quarter Fkk eSa N K U S Chauhan ds cPps dh tUe fnu  
 ikVhZ esa Hkh x;k Fkk vc esjk nqckjk dkslZ  
 esa uke vk pqdk Fkk tksfd 3T T T V (2STC) Goa esa  
 Fkk vksj 08Jan 96 ls `kq: gksuk Fkk eq>s 01 Jan  
 1996 dks 11 CESR ls dkslZ de iksfLVWx Hkst  
 fn;k x;kA eSaus 2STC(Goa) esa 06 July 96 rd  
 V~zsfuxa dh vkSj 66daysA/L czsd tuhZ ds lkFk

eSaus 24 Sep 96 dks 4CESR rstiqj esa fjiksVZ dh A  
 dkSlZ esa izFke LFkku vkus ds dkj.k C O lkgc  
 us eq>s lEekfur fd;k vkSj eSsus mlh fnu  
 fu'p; fd;k fd eSa QksjeSu cuwxkW eSaus FS 96  
 o FS-97 ds test ds fy;s QkeZ Hkjka ijUrq og  
 fjdkMZ esa igqWp x;k Fkk vkSj eSaus 26 Sep 97  
 dks written test flyhxqMh (33 C O S R) esa fn;k A  
 eSa mlesa ikl gksdj 20Jan 98 dks tcyiqj ekSf[kd  
 ijh{kk ds fy;s x;k A mlesa Hkh ikl gksdj  
 eq>s 15 March 1998 dks 07July A/L ds lkFk dkSlZ ds  
 fy;s tcyiqj Hkst fn;k x;k tcyiqj esa dkSlZ  
 dk 1<sup>st</sup> Phase iwjk djds eSa 10 fnu C L x;k vkSj  
 Oct 98 ds izFke lIrkG esa gekjs S O D dks  
 MCTE(Mhow) Hkst fn;k x;k MCTE ls 20 Jan 99 dks  
 30 fnu A/L x;k vkSj ?kj ls viuh wife rFkk cPph  
 (Daughter) dks MCTE ds Govt Quarter easa ys vk;k 10  
 July 99 ls 24 July 99 rd 15 fnu C/L dkVh vkSj 03 Aug  
 99 dks vpkud Dykl ls cqykdj eq>s ;gkW (C C S R  
 )Hkst fn;k x;k vkSj 04Aug 99 dks ge ;gkW igqWpsA  
 rFkk 05 Aug 99 dks CCLU esa fjiksVZ dh A

vKkurko'k eq>ls ;g xYrh gks x;h Fkh A ;fn  
 gks lds rks eq>s {kek dhft;sxk A vU;Fkk  
 eSaus vius Hkfo"; dks lq/kkjus ds fy;s tks  
 esgur dh gS vkSj dkSlZ dj jgk gWw og O;FkZ  
 gks tk;sxk a

;g c;ku eSa gks'kksgokl ds lkFk fcuk fdlh  
 ncko ;k Mj ls ns jgk gWwA

Date -11-08-99

No. 15367865K

L/NK Anil Joshi

11-08-99"

14. A reading of the aforesaid statement of the petitioner, whether prima facie makes out a case of Arms Act, is the question which shall be dealt with hereinafter. Whether the bright career of a member of Indian Army, like petitioner has been dumped, for some unforeseen reason during summary of evidence?

15. Thus, through SCM petitioner was convicted to undergo rigorous imprisonment of three months (supra). Later on a notice dated 06.01.2004 relying upon the proceeding of Court of Inquiry was issued to the petitioner stating that he being an associate of Signelman Mohammad Zafar, who was convicted by a General Court Martial for various offences, including those affecting national security under the Official Secrets Act was served as to why his services may not be terminated under the Army Rule 13(3), Item No.III (v) of Army Rules, 1954, calling his reply. The copy of the show cause notice has been filed as Annexure no.2 to the T.A. Paras- 1 and 2 of the show cause notice dated 06.01.2004 are reproduced as under :-

“1- A Court of Inquiry was ordered by Commander Lucknow Sub Area on 09 August 1999 to enquire into the alleged acts of espionage of Army No 15367922A Signal Man Mohammad Zafar, deserter from 19 Infantry Division Signal Regiment, as also to enquire into the suspected involvement, in acts of espionage, by other Army personnel, including you.

2- On perusal of the proceedings of the said Court of Inquiry the General Officer Commanding 4 Corps has found you blameworthy for being an ‘associate’ of No 15367922A Signal Man Mohammad Zafar, who was convicted by a General Court Martial for various offences, including those affecting national security under the Official Secrets Act. Hence, your conduct, as emerged from the whole investigation, renders your further retention in service as undesirable. In pursuance thereof, he has directed administrative action to be taken against you.”

16. After receipt of show cause notice petitioner submitted his reply dated 20.01.2004 denying the allegations with an elaborate ground, inviting attention to the reply submitted by him in his statutory complaint dated 31.08.2003, under Section 164(2) of the Army Act, 1950. However, after receipt of reply to show cause notice petitioner has been dismissed from service.

17. During summary court martial Nb Sub Rajinder Singh appeared as witness no.1, who had handed over the alleged letter of the petitioner, during additional summary of evidence as Ex.1. The letter is dated 04.06.2002, allegedly submitted by the petitioner in writing in the form of confessional statement, in 8 hand written pages. However, Anil Joshi, petitioner had made a statement on 04.06.2002 during additional summary of evidence as under :-

9. After recording the evidence of the prosecution witness, the accused N0.15367865K L/NK Anil Joshi of 4 Corps Engr Sig Reg att with the SIKH LI Regimental Centre Fatehgarh ( U.P.), is cautioned in presence of JC-508361W Nb Sub Jagir Singh, an independent witness as under:-

10. "Do you wish to make a statement? You are not obliged to say anything unless you wish to say anything, but whatever you will say will be taken down in writing and given in evidence."
11. I, N0.15367865K L/NK Anil Joshi of 4 corps Engr Sig Regt, att with The SIKH LI Regimental Centre Fatehgarh (U.P.)state as under :-
12. I was posted to one company RR section of 11 Corps Engr Sig Regt in July 1991. K never saw any country made pistol during my entire tenure at 11 Corps Engr Sig Regt, neither was I ever given any such pistol for safe keeping by any one during my stay with 11 Corps Engr Sig Regt. I used to be engaged in my trade work and studies during my tenure with 11 Corps Engr Sig Regt. I was undergoing foreman of signal course at MCTE wef. 23 Mar 1998, when I was attached in Oct 1999 to The SIKH LI Regimental Centre Fatehgarh (U.P.).
13. The above statement has been read over to the individual (accused) in English & Hindi, the languages he understands, and he signs it as correct.

Sd/ xxx  
JC-508361W Nb Sub  
Jagir Singh  
Independent Witness

Sd/ xxx  
No 15367865K L/NK  
Anil Joshi  
The accused

Station: Fatehgarh (U.P.)  
Dated :04June 2002

14. I certify that I had cautioned the accuse in terms of Army Rule 23(3). He voluntarily made the above statement which I have recorded verbatim and he has signed it in my presence and in the presence of independent witness JC-508361W Nb Jagir Singh ,

Station: Fatehgarh (U.P.)  
Dated :04 June 2002

Sd/ s x x  
IC-36761W Maj S K Joshi  
Officer Recording Addl S of E

15. "Certified that provisions of Army 3 (1),(2),(3),(4) and (5) have been complied with."

16. The fore going Additional summary of Evidence which consists of five manuscript pages and two exhibits; ie Exhibit 1( One page) and exhibit 2 (Eight hand written pages); has been taken down by me in the presence and hearing of the accused on 04 June 2002 at Fatehgarh (U.P.)

Station: Fatehgarh(U.P.)  
Dated :04 June 2002

Sd/ s s s  
IC-36761W S K Joshi  
Maj  
Officer Recording"

18. It appears that the statement of the petitioner was treated as confessional statement, which is in the form of letter/ statement without on oath recorded during additional summary of evidence on 04.06.2002.

19. Summary Court Martial was held on 17.06.2002 at Fatehgarh U.P. in Sikh Light Infantry Regimental Centre Troops under Col RK Sharma, subsequent to additional summary of evidence. During summary of evidence on 04.06.2002 (supra) petitioner pleaded not guilty. On 13.06.2002 petitioner was served with charge sheet under Army Act under Section 69 with the allegation for an offence under Section 3 of the Arms Act (supra). For convenience the charge sheet is reproduced as under :-

#### "CHARGE SHEET

The accused, No.15367865K Signalmn (Lance Naik) Anil Joshi, 4 Corps Engineering Signal Regiment, attached with the Sikh Light Infantry Regimental Centre, Fatehgarh ( U.P.), is charged with:-

Army Act Section 69 COMMITTING A CIVIL OFFENCE, THAT IS TO SAY POSSESSING A FIREARM WITHOUT LICENCE, CONTRARY TO SECTION 25(1b)(a), OF THE ARMS ACT,1959 .

In that he,

at field, during 1995, which came to the knowledge of the authority competent to initiate action on 01March 2000, while serving with 11Corps Engineering Signal Regiment, has in his possession a country made pistol given to him by No 15367922A Signalman Mohd Zafar of the same unit, without a licence, in contravention of section 3 of the Arms Act, 1959.

Place : Fatehgarh(U.P.)

(R K Sharma)

Colonel

Officer Commanding Troops

The Sikh Light Infantry

Regimental Centre.”

Dated: 13 June 2002

20. The proceeding was adjourned on 17.06.2002 and fixed for 06.07.2002. During course of summary of evidence it has been endorsed that the petitioner has pleaded guilty. The proceeding dated 06.07.2002 regarding plea of guilty is reproduced as under :-

“Proceeding dt.06-07-2002

B-3

To procure the availability of essential of witnesses pertaining to be case in the ends of justice, court decided to adjourn Sine-Die at 1000hr on 17 Jun 2002

-----

1. At 1100h on 06 July 2002, the Court-re-assemble, pursuant to the adjournment, present the same members as on 17 Jun 2002.
2. At this stage the accused No.153678865 K Signalman (L/NK) Anil Joshi of 4 Corp Engineering Signal Regt att with Sikh LI Regt Centre submits that he has reconsidered his earlier plea of Not Guilty and wish to withdraw the same voluntarily in terms of Army rule 117. He further submits that he tenders plea of Guilty to the charge.

Sd/-

Accused

Sd/-

The Court

06 July 2002”



21. The record shows that for the purpose of compliance with Army Rule 115(2), it has been recorded that the accused was informed the effect of plea of guilty. To reproduce the proceedings :-

“B-4

The Court

Before proceedings the plea of guilty offered by the accused the court explained to the accused the meaning of the charges to which he had pleaded guilty and ascertained that the accused has understood the nature of the charge to which he had pleaded guilty. The court also informed the accused the general effect of the pleas and the difference in the procedure which will be followed consequent to the said pleas. The court having satisfied itself that the accused understood the charges and the effect of his pleas of guilty accepts and record the same. The provisions of Army Rule 115(2) are thus complied with.

Sd/-

The Court

No 15367865K  
Rank L/Nk  
Name- Anil Joshi”

22. The perusal of record shows that the plea of guilty is at page B-3 of the SCM proceedings whereas compliance of Army Rule 115(2) (supra) is at page B-4.

23. Thereafter the petitioner is alleged to have stated as under :-

“I am sorry for committing mistake and request that a lenient view may please be taken.”

24. The finding of guilty was recorded on same day i.e. 06.07.2002 with reduction in rank and 3 months' rigorous imprisonment in military custody. However, the confirming authority set aside the portion of the sentence with regard to reduction to rank awarded by the Summary Court Martial, being invalid sentence dated 18.09.2002.

25. Feeling aggrieved, the petitioner submitted a statutory complaint dated 31.08.2003 under Section 164(2) of the Army Act, which was dismissed by the Chief of Army Staff, vide order dated 14.05.2004. The copy of the statutory complaint dated 31.08.2003 has been filed as Annexure No.1 to the T.A. The order of the Chief of the Army Staff seems to be cryptic and unreasoned without considering petitioner's plea raised in his statutory complaint dated 31.08.2003, filed as Annexure No.1 to the T.A. While filing the statutory complaint, petitioner has denied the statement of guilt and stated that Signalman Mohd Zafar admitted his guilt that he purchased the pistol and not the petitioner. He had never said that he had given a country made pistol to the petitioner in a packet and the offence was committed in January, 1999, hence is barred by time. It shall be appropriate to reproduce the relevant portion from the petitioner's statutory complaint as under :-

#### “Statutory Complaint

(c) That based on the aforesaid, a Summary of Evidence was ordered to be recorded by IC-49729-A Major Mahinder Singh by the of IC-33310-L Col AVS Hanuman, as Deputy Commandant. The Sikh Light Infantry Regimental Centre vide convening order No. 1305/JM/AG dated 2 June 2002, wherein PW-1 appearing was No.15367922-A Sigman Md. Zafar of 19 Inf Sig Regt, who was supposed to be the prime accused, wherein the said PW-1 in para 8 to 10 deposed that the Applicant/ Petitioner was not even aware of possession of the country made pistol by Md Zafar, as such leveling of a charge against the Applicant/Petitioner was mischievous. Extract of paras 8 to 10 of the Summary of Evidence in re pw-1 are as under:-

(8) In the end of March 1995 I, No. 15367922A Sigman Mohd Zafar went on leave to my village in Bhind (MP). There I purchased one country made pistol and brought it along with me after the termination of my leave in May 1995.

(9) I had brought this country made pistol for No.15364510W L/Hav (then Sep) Navabudin on his request. This pistol was kept in my trunk under lock and key.

10. I, No. 15367922A Signalman Mohd Zafar had never shown or given this country made pistol to No. 15367865K L/Nk Anil Joshi. In fact I was afraid that if No 15367865K L/Nk Anil Joshi would have seen the country made pistol in my possession he would have reported it to his superior officer.

(d) That similarly PW-2 appearing therein happened to be No 15365548-K Nk HCS Rautela of 108 Mtn Bde Sig Coy attached with Sikh Li who has as well asserted that the Applicant/Petitioner was a simple man, engaged in his studies in his spare time, and that the PW-2 had never seen any country made pistol with the applicant/petitioner as well adding that the offence alleged was supposed to have been committed in January 1996 and the issue has now come up at the end of the year 1999, thereby the case becoming.

(i) Firstly, time barred.

(ii) Secondly, discovery of a country made pistol was required to be intimated to the police by way of FIR.

(iii) Thirdly, once the charge has been leveled under Section 69 of the Army Act, 1950 read in conjunction with Section 25 of the Army Act, Section 120 (2) of the Army Act was well as Section 69 barred trial by a Summary Court Martial.

#### FOLLOWED BY

Ordering of Additional Summary of Evidence by IC-33031-A Col R.K. Sharma, as Deputy Commandant, the Sikh LI Regt Centre vide convening order No 1305/JM/AG dated 2nd June 2002 and this time recorded by another officer , IC-36761W Major SK Joshi, wherein PW-1 was JC-508680H Nb Sub Rajinder Singh who had stated that he had brought the confessional statement of the applicant/petitioner/accused who in para 3 of 6 of Addl S of E has stated that addl S of E was being recorded by a Board of Officers.

#### WHICH WAS AGAINST

Rule 23 of Army Rules 1954,

#### AS WELL AS IN

Para 12 of the Addl. S of E the applicant's deposition recorded is as under:-

"I was posted to 1 Company RR Section of 11 Corps Engineering Sig Regt in July 1991.

I had never saw any country made pistol during my tenure at 11 Corps Sig. Neither I was ever given any such pistol during my tenure.

I used to be engaged in trade and studies. I was also selected for foreman of Signal Course at MCTE, Mhow w.e.f. 23 March

1998, I was attached to Sikh Li Regt Centre, Fatehgarh, in October 1999.”

Copy of S of E and Additional S of E filed as Appendices A & B with this Statutory petition.

(e) Pertinent to place it on record that based on concocted S of E and Addl S of E recorded by two different officers.

#### WHEREIN

Two accomplices were shown used as PWs without having dealt with was against the law on the subject as well Army Rule 35 got infringed.

(f) As well the charge having been leveled under section 69 of the Army Act read with Section 25 of Arms Act could not be dealt with by SCM, as may be evident from Section 69 and 120 of the Army Act, 1950.

(g) Similarly the confessional statement obtained from the undersigned under threat, duress and coercion-nay-III the grace period, copy given now after Hon'ble High Court in contravention (but copy of Appendix-A and Annexure-I forming part of Appendix-A to Army Order 34/94 not given even now-except in the case of L/Hav B.P. Singh).

#### COUNT NOT BE USED

As may be evident from the judgment dated 11 Sep 1998 delivered by Hon'ble High Court in Civil Misc. Writ Petition No 1037 of 1983 as well Nazirs reported in AIR 1995 S.C. 980, 2001 SC 1512 forbade such misdemeanor.

YET SCM WAS  
maliciously documents”.

#### **Possession of Firearm**

26. Alleged possession of firearm by the petitioner does not seem to constitute an offence under sub para (1) of Section 3 of the Arms Act for the reason that possession of firearm itself does not constitute an offence as two conditions are required to be fulfilled by a person, (1) the firearm should have a licence, and (2) the licensee has handed over the firearm for repair or for renewal of the licence or for use by such holder. Use of

licensed firearm is wide enough and authorizes a person to keep and use it in the event of necessity within four corners of law.

27. Admittedly, the firearm in question is alleged to have been handed over to the petitioner in a packet without informing him what was therein. The petitioner was not aware that the packet which was given to him by Mohd Zafar contains firearm. Under usual relationship being member of Army he kept it in his box. Later on when he came to know that the packet contained unlicensed firearm he felt disturbed till it was handed over to Mohd Zafar. This fact has been admitted by Mohd Zafar while appearing as witness during course of summary of evidence.

28. For the constitution of an offence under the Arms Act, it is necessary that a person must have knowledge that the firearm does not have licence and secondly the packet which was handed over to him (accused), contains a firearm. Both the conditions seem to be missing.

29. The factum of lacking of mens rea is also missing from the own admission of the petitioner in his statement dated 01.11.2000 wherein he stated that he has never seen pistol in his tenure and was busy in his own trade and studies. His service shows that the petitioner Anil Joshi has bright service career. At no stage or from the material on record it appears that he voluntarily or deliberately or intentionally or knowingly kept the country made pistol in his trunk with any oblique motive. In view of above, there appears to be complete absence of mens rea to constitute an offence. In these circumstances, petitioner does not seem to be guilty of an offence under Section 3 (1) read with Section 25 of the Arms Act.

30. Mens rea is one of the important conditions which is required to be fulfilled in every criminal offence to establish an offence. In the present

case it seems to be missing. Petitioner Anil Joshi seems to be not aware of the fact that the packet contains firearm when it was handed over to him by Mohd Zafar. Mohd Zafar admitted in his statement that it was he, who had purchased the country made pistol while he was on leave and handed over it to the petitioner, who kept it in the trunk under lock and key. HHe stated in his statement , to quote:-

“Prosecution Witness No.1

- 1- No 15367922 A Sig Man Mohammad Zafar of 19 Inf Div Signal Regiment attached with Rajput Regimental Centre, Fatehgarh (U.P.) states.
- 2- I identify No 15367865 K L/NK Anil Joshi of 4 Engr Sig Regt, attached with Sikh Regimental Centre Fatehgarh (U.P) who is present here accused.
3. I No 15367922 A Sig Man Mohammad Zafar s/o Shri Mohd Yunis, resident of Mohalla Saroj Nagar house number 26/226 near Bhawanipura temple, Khatikaon wali Gali, Bhind (U.P.). I got enrolled in the Army on 17 Nov 1988. On termination of my technical training at Goa . I was posted to 11 Corp Engr Signal Regt in Jun 1991.
4. I No 15367865 K L/NK Anil Joshi reported to 11 Corp Eng Signal Regiment in July 1991. He was posted to one company R R Section to which I was also posted at that time .
5. As we both were in the same company we were known to each other. But most of the we were posted to various R R dets located at different places.
6. In 1995, after the corp exercise in the month of May, we happened to stay in the same position of the barrack of one company R R Section. The bed of No 15367865 K L/NK Anil Joshi was next to my bed.
7. No 15367865 K L/NK Anil Joshi was a very simple and hardworking man. Most of the time when he was free and in the barrack I could see him studying his course books. His impression in the company and in the living barrack was of a simple and honest man. As we were in the same company and also our beds were next to each other we were known to each other.
8. In the end of March 1995 I No. 15367922A Sig Man Mohd Zafar went on leave to my village in Bhind ( U.P). There I purchased one

county made pistol and brought it along with me after the termination of my leave in May 1995.

9. I had brought this country made pistol for No 15364510W L/Hav (then sep) Narasuddin on his request . This pistol was kept in my trunk under lock and key.

10. I No 15367922A Sig man Mohd Zafar has never shown as given this country made pistol to No 15367865 K L/NK Anil Joshi. In fact I was afraid that if No 15367865 K L/NK Anil Joshi would have reported it to his superior officer.

11. The accused declines to cross examine the witness.

12. The above statement has been read over to the him in Hindi, the language he understands and he sign it as correct.

No 15367865 K

No 15367922A

L/NK Anil Joshi

Sig man Mohd Zafar

The accused

The witness

Stn Fatehgarh

JC-508496X

Date 01Nov 2000

N/Sub Cham Kaur Singh

Independent witness”

31. A plain reading of the statement of Mohd. Zafar (supra) exonerates the petitioner from the charges which were leveled against him, even if whole allegation is presumed to be correct.

32. By catena of judgment of Hon'ble Supreme Court mens rea has been defined with its importance in the matter of criminal jurisprudence. Hon'ble Supreme Court in a case reported in AIR 1991 SC 515, ***Murarilal Jhunjhunwala vs. State of Bihar*** deprecated the frivolous and vexatious prosecution by the State in the absence of any mens rea and material evidence and the trial has been held to be vexatious and frivolous. In the present case petitioner's trial seems to be unjustified on the face of record on its every aspect. Neither the petitioner has taken out from Golden Temple Amritsar 4 electronic items nor he had kept these items for his own use. There is no

material on record which may indicate petitioner's intention to keep the 4 electronic items with him. Whatever has been done, it was under the command and control of Lt Col K.M.G. Pannikar, the Commanding Officer. In the absence of any mens rea or intention, that too under the teeth of the fact that the items were not recovered from petitioner's house and decision was taken at the Unit level, trial of the petitioner and punishment awarded thereon seem to be suffering from the vice of arbitrariness.

33. In (2014) 8 SCC 918, ***Richhpal Singh Meena vs. Ghasi***, Hon'ble Supreme Court held that accused must have knowledge of the consequences of one's intentional actions. In one another case reported in (2011) 1 SCC 601, ***CCE vs. Pepsi Foods Ltd***, Hon'ble Supreme Court has set aside the punishment, where action of the accused was not suffering from any malafide intention but evaded payment of duty, in the absence of mens rea to commit the crime. In a case reported in 1966 SC 955 ***Collector of Customs vs. Sitaram Agarwala***, their Lordships of Hon'ble Supreme Court considered knowledge and intention and held a person who knowingly purchases smuggled goods from an importer cannot have an intention to evade a prohibition against import, for the prohibited goods have already been imported. A person who receives goods with the knowledge that they are stolen goods cannot possibly have an intention to commit theft, for the theft has already been committed, though he may have the intention to receive the stolen goods. Knowledge of an offence cannot be equated with an intention to commit the offence. Such a construction effaces the distinction



between the two distinct elements of mens rea, knowledge and intention, laid down in the clause.

34. In view of above, in case the present controversy is considered in the light of judgment of Hon'ble Supreme Court, there appears to be no doubt that in no way allegations as are on record under the teeth of statement of Mohd Zafar constitute an offence against the petitioner for want of mens rea for the alleged offence.

### **Confession**

35. Apart from the statement of Signal Man Mohd. Zafar during additional summary of evidence, the alleged confessional statement was brought on record by witness no.1 Rajinder Singh, which are said to be written in eight hand written pages. A close reading of the summary of evidence shows that the alleged confession was not made before the Presiding Officer or Member of the body constituted to record summary of evidence, hence it may not be held to be confessional statement made before the appropriate authority, authorised to record it. Where the statement was given and how the hand written script was prepared and noted are not borne out from the counter affidavit or record produced before the Tribunal. Witness no.1 Rajinder Singh has merely stated that he filed alleged confessional statement as Ex-2 during summary of evidence.

36. The script of alleged statement in 8 pages was brought on record through additional summary of evidence and it appears that the additional summary of evidence was recorded only for the purpose to bring the alleged confessional statement on record through the statement of Rajinder Singh. In such a situation an adverse inference may be drawn that the prosecution tried to fill up the lacuna to establish the case against the petitioner through additional summary of evidence.

37. No reason has been assigned as to why and under what circumstances the additional summary of evidence was recorded and why Rajinder Singh has not made the statement and brought on record Ex-2 in the original summary of evidence recorded on 01.11.2000. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party. In the circumstances since no reason has been assigned for recording additional summary of evidence, it may be safely concluded that the prosecution is not expected to fill up the lacunas. This principle has been laid down by Hon'ble Supreme Court in catena of decisions, including **U.T. of Dadra and Nagar Haveli & Anr vs. Fatehsinh Mohansinh Chauhan**, reported in 2006 (7) SCC 529 and **Iddar & Ords vs. Aabida & Anr**, reported in AIR 2007 SC 3029. In a recent decision of Hon'ble Apex Court in **Sheikh Jumman vs. State of Maharashtra - (2012) 9 SCALE 80**, the above principle of law has also been followed.

38. In view of the above, we feel that an attempt was made to blame the petitioner by bringing on record the alleged confessional statement through additional summary of evidence. How and when it was recorded is not borne out either from counter affidavit or from other records, hence it cannot be relied upon.

39. The manner in which the additional summary of evidence was recorded without assigning reason, raises serious doubt over the fairness of the proceedings.

40. Apart from the above, respondents treated the alleged statement recorded in 8 pages as confessional statement, which seems to be not correct. The Hon'ble Supreme Court in a case reported in (2005) 11 SCC 600, **State (NCT of Delhi) versus Navjot Sandhu alias Afsan Guru**, held

that the confessions are considered highly reliable because no rational person would make an admission against his interest unless prompted by his conscience to tell the truth. For convenience, relevant portions of the judgment are reproduced as under:

“27. We start with confessions. Under the general law of the land as reflected in the Evidence Act, no confession made to a police officer can be proved against an accused. “Confession” which is a terminology used in criminal law is a species of “admissions” as defined in Section 17 of the Evidence Act. An admission is a statement, oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. While Sections 17 to 23 deal with admissions, the law as to confession is embodied in Sections 24 to 30 of the Evidence Act. Section 25 bars proof of a confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate. Section 24 lays down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the court that the making of the confession was caused by any inducement, threat or promise, proceeding from a person in authority, the confession is liable to be excluded from evidence. The expression “appears” connotes that the court need not go to the extent of holding that the threat, etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonable probable that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to the magistrate or person

other than a police officer. Confession leading to discovery of a fact which is dealt with under Section 27 is an exception to the rule of exclusion of confession made by an accused in the custody of a police officer. Consideration of a proved confession affecting the person making it as well as the co-accused is provided for by Section 30. Briefly and broadly, this is the scheme of the law of evidence vis-à-vis confession. The allied provision which needs to be noticed at this juncture is Section 162 Cr.P.C. It prohibits the use of any statement made by any person to a police officer in the course of investigation for any purpose at any inquiry or trial in respect of any offence under investigation. However, it can be used to a limited extent to contradict a witness as provided for by Section 145 of the Evidence Act. Sub-section (2) of Section 162 makes it explicit that the embargo laid down in the section shall not be deemed to apply to any statement falling within clause (l) of Section 32 or to affect the provisions of Section 27 of the Evidence Act.

28. In the Privy Council decision of *Pakala Narayana Swami v. Emperor* (AIR 1939 PC 47) Lord Atkin elucidated the meaning and purport of the expression “confession” in the following words (AIR p. 52)

“[A] confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession...”

29. Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. “Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law.” (Vide Taylor’s *Treatise on the Law of Evidence*, Vol. I.) However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of

advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of the confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession, be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognising the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Evidence Act has excluded the admissibility of a confession made to the police officer.”

41. In view of above, written statement of the petitioner may not be treated as confessional statement being not recorded before the Court or Authority, authorised by law, hence it is not a substantive statement. In case it is treated as an admission on the part of the petitioner on some stage and somewhere, then its contents should have been proved like other evidence, which seems to be missing.

42. Even otherwise, if the admission dated 11.08.1999 is looked into with close scrutiny, it does not seem to constitute an offence. Petitioner's statement that Mohd Zafar had handed over the packet, which he kept in trunk does not show that any intentional or deliberate thing was done by him to commit an offence or for his commission and omission he repented. In his statement he has stated that he had informed L/Nk H.C. Rautela that Mohd Zafar had handed over a packet to him to keep it in safe custody and

later on he came to know that it is a country made pistol. The packet was in his temporary custody only for a period of 12 days and later on he handed over it to Mohd Zafar. It appears that being frightened with the conduct of Mohd Zafar he himself requested Maj S.P. Srivastava to relieve him to join in 4 CESR. Such temporary possession without knowing the contents at the time when it was delivered to him, does not seem to make out an offence (supra).

43. Ex-2, in view of law settled by the Hon'ble Supreme Court may not be treated as confessional statement, relying upon which petitioner has been convicted.

#### **Signalman Mohd Zafar**

44. It appears that the respondents were impressed from the fact that the applicant retained the packet, containing country made pistol without applying the mind to the evidence on record that without any information it was handed over to the petitioner to keep it in safe custody, that too only for a period of 12 days and later on it was handed over back to Mohd Zafar. Admittedly, Mohd Zafar was convicted in a GCM proceeding for different offences, affecting national security under the Official Secret Act. Spying and counter spying is now a routine matter all over the world. The entire evidence pin points to Mohd Zafar, who admitted to have purchased the country made pistol and for giving it for short duration of 12 days to the petitioner in a packet. There is no link evidence to establish that the petitioner was in active connivance with Mohd Zafar who later on became deserter from 19 Inf Div Sig Regiment. There is no iota of evidence which may establish that the petitioner's close association or even association with Mohd Zafar with a modus operandi to involve him in a commission of

offence or misconduct not suited to the members of Army. The finding of undesirability to continue in Army must be based on some close link and an essence with mens rea to commit an offence seems to be must. The armed forces must take care and ensure that innocent members of their services having bright service record should not be tried and punished on unfounded grounds. Every member of Unit of the Army knows each other. They are associated with each other. In case one of them is punished for spying activities or on any other ground, merely because that person was known to another should not be presumed as an association for the purpose of commission of crime, unless there is an active participation in the commission of offence.

#### **Common Object**

45. In the present case there is no evidence that the petitioner was in active participation or he used to meet Mohd Zafar to commit crime. In view of missing link, it may not be inferred that the petitioner was having any association with Mohd Zafar for the purpose of commission of crime. He does not seem to be an undesirable person, on account of which he may not be permitted to serve the nation. Mohd Zafar seems to be alone guilty for the offence in question and not the petitioner.

46. Apart from the above, while submitting statutory complaint under Section 164(2) of the Army Act on 31.08.2003 petitioner very eloquently stated the facts with regard to alleged possession of firearm and possession thereof and pleaded himself to be innocent. A perusal of the order passed by the Chief of Army Staff dated 14.05.2004 shows that he did not apply his mind while rejecting the statutory complaint. No weightage has been given by him to the statement of Mohd Zafar in the alleged

commission of offence or guilt, which does not seem to constitute an offence. He has not recorded any finding with regard to petitioner's contention that Mohd Zafar has never shown or given the country made pistol to the petitioner. It was incumbent on the Chief of the Army Staff while rejecting the statutory complaint to have assigned reasons for its rejection.

47. Reason is the pulse of constitutional ethos engraved in Article 14 of the Constitution.

### **Reasoned Order**

48. In view of what has been discussed above, order passed by the Chief of Army Staff is cryptic and unreasoned in nature and the same does seem to be sustainable in the eyes of law, which has resulted in gross injustice to the petitioner and vitiates the order of punishment.

49. Now the administrative law has travelled long way and it is well settled that the authority, whether judicial or quasi- judicial should act fairly by passing a reasoned or speaking order and not cryptic one. It is settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order. In ***Kumari Shrilekha Vidyarthi vs. State of Uttar Pradesh***, AIR 1991 SC 537: AIR SCW 77: JT 1990 (4) 211, the Hon'ble Supreme Court has observed as under :-

*“Every State action may be informed by reason and it follows, that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is the trite law that “be you ever so high, the laws are above you.” This is what a man in power must remember always.”*



50. In **LIC of India vs. Consumer, Education & Research Centre**, (1995) 5 SCC 482: AIR 1995 SC 1811: 1995 AIR SCW 2834, Hon'ble Supreme Court has observed that the State or its instrumentality must not take any irrelevant or irrational factor into consideration or appear arbitrary in its decision. "Duty to act fairly" is part of fair procedure envisaged under articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the public interest. Same view has been reiterated by the Hon'ble Supreme Court in **Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation**, AIR 1993 SC 935: 1992 AIR SCW 3629: (1993) 2 SCC 279; and **Union of India vs. M.L. Capoor**, AIR 1974 SC 87: (1974) 1 SCR 797: 1974 Lab IC 338. In **State of West Bengal vs. Atul Krishna Shaw**, AIR 1990 SC 2205: (1990) Supp 1 SCR 91, Hon'ble Supreme Court observed that "giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review." In **Krishna Swami vs. Union of India**, (1992) 4 SCC 605: AIR 1993 SC 1407: (1992) 4 SCR 53, Hon'ble Supreme Court observed that the rule of law requires that any action or decision of statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed that "reasons are the links between the material, the foundation for these erections and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusion reached. Lest

it may not be arbitrary, unfair and unjust, violate article 14 or unfair procedure offending article 21. Similar view has been taken by the Hon'ble Supreme Court in ***Institute of Chartered Accountants of India vs. L.K. Ratna***, AIR 1987 SC 71: (1986) 4 SCC 537: (1987) 61 Com Cas 266; ***Board of Trustees of the Port of Bombay vs. Dilipkumar Raghavendranath Nadkarni***, AIR 1983 SC 109: (1983) 1 SCC 124: (1983) 1 SCWR 177, followed by Rajasthan High Court in ***Rameshwari Devi vs. State of Rajasthan***, AIR 1999 Raj 47: 1998 (2) Raj LR 263: 1999 (1) Raj LW 398. In ***Vasant D. Bhavsar vs. Bar Council of India***, (1999) 1 SCC 45, Hon'ble Supreme Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based. Similar view has been reiterated in ***Indian Charge Chrome Ltd. Vs. Union of India***, AIR 2003 SC 953: 2003 AIR SCW 440: (2003) 2 SCC 533 and ***Secretary, Ministry of Chemicals & Fertilizers, Govt. of India vs. CIPLA Ltd.***, AIR 2003 SC 3078: 2003 AIR SCW 3932: (2003) 7 SCC 1.

51. In the case reported in (2010) 4 SCC 785, ***CCT vs. Shukla and Brothers*** their Lordships held that reason is the very life of law. When the reason of law once ceases, the law itself generally ceases. Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, particularly, hamper the proper administration of justice. These principles are not only applicable to

administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements.

52. The concept of reasoned judgment has become an indispensable part of the basic rule of law and, in fact, is a mandatory requirement of the procedural law. In one other case, reported in ***Assistant Commissioner, Commercial Tax Department, Works, Contract and Leasing, Quota vs. Shukla and Brothers***, JT 2010 (4) SC 35 Hon'ble Supreme Court held that it shall be obligatory on the part of the judicial or quasi-judicial authority to pass a reasoned order while exercising statutory jurisdiction.

53. One of the important things, which we have noticed is that the respondents proceeded after 7 years against the petitioner with regard to temporary possession of firearm by him for 12 days, handed over to the petitioner by Mohd Zafar in a packet. When they had come to know regarding the possession of firearm by the petitioner in the year 1995, that too for the period of 12 days, the respondents have not applied mind at any stage to find out the correctness of allegation under the teeth of the statement given by Mohd Zafar, who was later on convicted. It is sorry state of affairs as we feel that an innocent person of the Indian Army has been punished without any intention to commit an offence. Army must ensure that while involving its own man in uniform in any crime as an associate of the main accused of spying, all efforts should be taken by separating the grain from chaff to ensure that an innocent member of the Army is not held guilty and punished merely on hearsay evidence or alike circumstances.

Petitioner Anil Joshi having bright service record as an NCO seems to have been dragged in the present case by mechanical dealing of the subject matter, wherein he seems to have suffered for no fault on his part.

54. In the present case the Summary Court Martial was held on 17.06.2002 with regard to charges that the petitioner was in possession of firearm licence in the year 1995. Under Section 123 of the Army Act, 1950 petitioner could not have been tried after a lapse of three years from the date when the authority came to know that the petitioner has committed offence. Section 123 of the Army Act is reproduced as under :-

**“ 123. Liability of offender who ceases to be subject to Act. (1)**  
Where an offence under this Act had been committed by any person while subject to this Act, and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject.

(2) No such person shall be tried for an offence, unless his trial commences within a period of three years after he had ceased to be subject to this Act; and in computing such period, the time during which such person has avoided arrest by absconding or concealing himself or where the institution of the proceeding in respect of the offence has been stayed by an injunction or order, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

Provided that nothing contained in this sub-section shall apply to the trial of any such person for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in section 37 or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a court-martial.

(3) When a person subject to this Act is sentenced by a court-martial to (imprisonment for life)<sup>1</sup> or imprisonment, this Act shall apply to him during the term of his sentence, though he is cashiered or dismissed from the regular Army, or has otherwise ceased to be subject to this Act, and he may be kept, removed, imprisoned and punished as if he continued to be subject to this Act.

(4) When a person subject to this Act is sentenced by a court-martial to death, this Act shall apply to him till the sentence is carried out.”

55. Keeping in view the fact that the proceedings against the petitioner was initiated after lapse of 7 years, that too under the teeth of the fact that

controversy was well within the knowledge of officer/ authority concerned and action was taken against other accused, it appears that the trial of the petitioner beyond the statutory period of limitation (supra) was without jurisdiction.

### Army Rule 180

56. It is vehemently argued by the petitioner's learned counsel that against all accused persons, namely, sigmn Md Jaffar, Lk J. Mansuri, CHM M.K. Navi, L/Hav Nawabuddin Gori, L/Nk Anil Joshi, Hav U.S. Chauhan, L/Hav B.P. Singh, Nk H.C.S. Rautela and Sgmn K.K. Singh a single Court of Inquiry was held with follow up action. The report of Court of Inquiry filed with the counter affidavit in the present case shows that at one place all the accused have signed but the record does not indicate that in due compliance of Army Rule 180 petitioner was permitted to remain present during the whole proceeding of Court of Inquiry or cross examine each and every witness whenever examination-in-chief was recorded.

57. The Court of Inquiry filed alongwith the counter affidavit also does not indicate that opportunity was given to all accused to lead evidence in their defence. This has been done in flagrant violation of Army Rule 180. For convenience Army Rule 180 is reproduced as under :-

**“180. Procedure when character of a person subject to the Act is involved. —** Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his rights, under this rule.”

58. It is well settled proposition of law that the provisions contained in Rule 180 must be complied with during Court of Inquiry. In **Maj. Gen. Inderjit Kumar Vs. UOI & Ors.** (1997) 9 SCC 1 Hon'ble Supreme Court reiterated that Army Rule 180 gave adequate protection to the person affected even at the stage of Court of Inquiry. In 2008(3) SLR in the matter of **Surendra Kumar Sahni Vs Chief of Army Staff (Delhi)** a division bench of Hon'ble High Court maintained that compliance to the requirements of Rule 180 is mandatory.

59. In view of above, since Army Rule 180 has not been complied with, all subsequent actions i.e. trial and punishment vitiate. The combined effect of factual and legal position, discussed herein above is that O.A. deserves to be allowed.

### **ORDER**

60. O.A. is allowed. The impugned Summary Court Martial proceedings commenced on 17.06.2002 and thereafter from time to time, show cause notice dated 06.01.2004 and order dated 14.05.2004 passed by the Chief of Army Staff rejecting the statutory petition of the petitioner are set aside with all consequential benefits. Petitioner shall be deemed notionally in service on the rank which he was holding at the time of dismissal and shall be entitled for continuity of service of the rank which he was holding with all consequential benefits, including pension, arrears of salary and wages. However, keeping in view the facts and circumstances of the present case, we confine arrears of salary to 50% but he shall be entitled to full pension

in accordance with the rules immediately from the date of notional retirement of service of the rank which he was holding.

Let the order be complied with and all consequential benefits be paid to the petitioner within six months from today, failing which petitioner shall be entitled for interest @ 10% per annum.

No order as to costs.

**( Air Marshal B.B.P. Sinha)**  
**Member (A)**

Dated 11<sup>th</sup> January, 2018

JPT

**(Justice Devi Prasad Singh)**  
**Member (J)**