

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW****O.A. No. 123 of 2010**Friday, this the 05<sup>th</sup> day of January, 2018**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Air Marshal BBP Sinha, Member (A)**

Smt Durgawati Singh w/o Shri Y.P. Singh, mother of late Capt Vivek Anand Singh, resident of L-II/79 Sec-H, Aliganj, Lucknow-24.

.... Applicant

By Legal Practitioner **Shri V.A Singh**, learned counsel for the applicant.

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi-110011.
2. Chief of the Army Staff, Integrated HQ of MoD (Army) New Delhi-01
3. Capt (then) Yuvraj Singh Rathore of military intelligence then posted to 21 Ciu.
4. Col AS Randhawa then CO 16 Garhwal Rifles.
5. Maj Gen Ranbir Singh then GOC 09 Infantry Division.
6. Col PN Mahapatra then Deputy Brig Commander, Brigade.
7. IC-59797F Maj Qayoom Khan of 510 ASC Corps Bn.

..... Respondents.

By **Shri G.S. Sikarwar**, learned Central Govt Standing Counsel assisted by Maj Salen Xaxa, OIC Legal Cell.

**ORDER (Oral)**

1. We have heard Shri V.A.Singh, learned counsel for the applicant and Shri G.S. Sikarwar, learned Central Government Standing Counsel, assisted by Maj Salen Xaxa, OIC Legal Cell and perused the record.

2. Present before us is a case wherein a bereaved mother, applicant Durgawati Singh, has knocked the door of this Tribunal seeking justice and peace to the soul of her beloved son late Capt Vivek Anand Singh, who left for heavenly abode. She has claimed that her son appears to have been made a scapegoat by the respondents to save the skin of some guilty persons and ultimately he has suffered to the extreme by losing his life owing to a conspiracy hatched against him and also suffered highhandedness of those on whose shoulders rested the responsibility to do justice to him.

3. The original applicant late Capt Vivek Anand Singh had preferred this O.A. *inter alia* with the prayer for setting aside the Court Martial proceedings against him. However, after his death, the reliefs sought were amended. Now the reliefs prayed for are as under:

*“8(a) issue/pass an order or direction to the respondents to declare the CHARGE-SHEET dated 02 MARCH 2009 and 19 JAN 2010 as being totally illegal and without jurisdiction,*

*8(b) issue/pass an order or direction to Respondents to institute a fresh CoI to find out all facts of the criminal conspiracy which resulted in death of the Applicant’s son,*

*8(c) To issue/pass an order or direction to the respondents to restore all service benefits of the Applicant’s son including his Rank, all monetary consequential benefits be restored,*

*8(d) To issue/pass an order to the respondent to initiate departmental proceedings against all the respondents,*

*8(e) To issue/pass an order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case,*

*8(f) To allow this Original Application with the cost of rupees 5,00,000/- which may kindly be deducted from the pay and allowances of respondent number 02 to 07.”*

4. It shall be appropriate to have a brief sketch of the controversy involved in the present case. The applicant's son Capt Vivek Anand Singh was commissioned under Short Service Commission of Indian Army on 02.03.2002 for five years and posted to 16 Garhwal Rifles Battalion. On expiry of his five-year term, he was given extension for another five years upto 01.03.2012, In March 2007, while he was posted in Meerut Cantt holding the rank of Captain, he was referred to Base Hospital at Delhi Cantt for treatment of his right knee injury and was admitted there. Alongwith the applicant's son, one Major Qayoom Khan was also admitted in the said Hospital and was undergoing treatment. According to material and pleadings on record, one Capt Yuvraj Singh Rathore of 21 CIU posted at Udhampur, gave an intelligence input, which was received on 09.04.2007, to the effect that Major Qayoom Khan had approached some civil businessman from Rajasthan with an intention to sell a pistol. In view of the said intelligence input, the Intelligence Unit of the Indian Army raided the Base Hospital at Delhi Cantt at about 07-30 p.m on 09.04.2007. At the time of raid, Capt Vivek Anand Singh was in common TV room and watching TV and waiting for dinner. He was requested by one of the persons of Intelligence Unit to come outside the TV room and accompany him to room No. 8 of the Hospital where he was admitted. Capt Vivek Anand Singh accompanied him and reached outside the verandah with the

help of walking medical-stand. It is alleged that Capt Vivek Anand Singh was caught red-handed with a suitcase, videography of which was also done. It was followed by recovery of an illegal weapon i.e. pistol kept in a suitcase. He is said to have been selling the said weapon to an outside person and was involved in an Arms racket. His mobile phone as well as mobile phone of his Sahayak Rifleman Pankaj Purohit were snatched away and he was forced to confess his guilt. According to the applicant, the confessional statement of her son late Capt Vivek Anand Singh was recorded by Two-Member Board of Officers (BOO), namely, Lt Col Ashish Singh of HQ 60 Inf Bde and Capt Bhaskar Pillai. The recovered weapon (pistol) was taken in possession by the respondents.

5. According to the applicant, late Capt Vivek Anand Singh was shifted to another room with his Sahayak Rifleman Pankaj Purohit, where he was kept under detention for 40 days and was not allowed to meet anyone.

6. It is further alleged that on the aforesaid intelligence input given by Capt Yuvraj Singh of 21 CIU about Maj Qayoom Khan, who was admitted alongwith the applicant's son in Officers' Ward, the Intelligence Unit of the Army had gone to Base Hospital at Delhi, but Major Qayoom Khan was not there. He had been permitted to go outside during night with full knowledge and permission of the authorities of the Base Hospital. Major Qayoom Khan was made co-accused in the case.

7. Pursuant to the above incident, a Court of Inquiry (CoI) was convened from 20.05.2007 to 07.09.2007. This CoI was common for the applicant as well as co-accused Major Qayoom Khan and it was presided

over by Lt Col Amarjeet Vasudev. Findings of CoI are reproduced hereinunder:

“FINDINGS OF THE COURT

1. SS-39666P Capt VA Singh was commissioned into 16 GARH RIF on 02 Mar 2002 (Witness No 1).
2. SS-39666P Capt VA Singh served with his unit in ‘OP RHINO’ and was deployed in Nalbari, ASSAM from May 2003 to Oct 2006. Unit moved to Meerut thereafter. (Witness No 1).
3. Capt VA Singh had taken admission in LLB classes in Law College Nalbari in 2005 (Witness No 1).
4. Capt VA Singh claims that he had taken permission to take admission in LLB classes but unit has no proof. (Witness No 1 & Exhibit 9).
5. Capt VA Singh took 27 days PAL from 15 Jan 07 to 10 Feb 07 to appear in 2<sup>nd</sup> year exam at Nalbari Law College. (Exhibit 18).
6. Lve address during 27 days PAL from 15 Jan to 10 Feb 07 was A-2 Pratap Bagh (Opp New Hanuman Temple) Aliganj, Lucknow Tele No : 0522-2382255, Mob No: 9415920538 (Exhibit No 18).
7. Offr stayed in 4 SIKH LI during the lve period (Witness No 1).
8. On 24 Jan 2007 when Capt VA Singh was moving out of exam hall at Law College, Nalbari, one of his acquaintance saw him and told him that ULFA cadre had seen him and were planning to kidnap Capt VA Singh (Witness No 1).
9. On fourth day of exam Capt VA Singh met another person, who was the source of the unit. Source informed that ULFA cadre are planning to target Capt VA Singh so he should leave ASSAM (Witness No 1).
10. Capt VA Singh on requesting to leave ASSAM was handed over a weapon, a pistol and 08 (eight) rounds and two magazine on 28/29 Jan 2007. (Witness No 1).
11. Offr refused to divulge the name of the source who handed over the weapon and magazine (Witness No 1).

12. *The offr did not check about the license of the weapon. (Witness No 1).*

13. *Offr did not return the weapon back to his source before moving out of ASSAM on 08 Feb 07 because he could not contact his source (Witness No 1).*

14. *Capt VA Singh did not inform his seniors or his unit officers about the weapon on reaching back after leave (Witness No 1).*

15. *Capt VA Singh got admitted in Base Hosp, Delhi Cantt for treatment of his right knee. Offr was admitted in hospital from 16 Mar 07 to 18 May 07. Capt VA Singh had kept the weapon in his briefcase and got it with him to Base Hospital, Delhi Cantt in the same briefcase. (Witness No 1).*

16. *Offr did not info hosp auth about the pistol in his possession. (Witness No 1).*

17. *Capt VA Singh met IC-59797F Maj Qayum Khan of AHQ Tpt Coy ASC while being admitted in Base Hospital, Delhi Cantt as both were admitted in same ward. Maj Qayum Khan was admitted in Base Hospital for treatment of his knee.*

18. *Maj Qayum Khan informed Capt VA Singh about his martial dispute. (Witness No 1 & 2).*

19. *Maj Qayum Khan come to know of the pistol during his interaction with Capt VA Singh. (Witness No 2).*

20. *Capt VA Singh informed Maj Qayum Khan about the source of Weapon. (Witness No 1 & 2).*

21. *Capt VA Singh wanted to get rid of the weapon in a safe way, i.e. it should not go in wrong hand (Witness No 1).*

22. *Maj Qayum Khan asked for the weapon from Capt VA Singh between 18-22 May 2007, when both were admitted in same ward in Base Hospital, Delhi Cantt. (Witness No 1 & 2).*

23. *Maj Qayum Khan did not offer any price for the weapon. (Witness No 2).*

24. *Maj Qayum Khan was discharged from hospital on 30 Mar 2007. (Witness No 2).*

25. *Maj Qayum Khan repeatedly asked for the weapon from Capt VA Singh. Maj Qayum Khan threatened Capt VA Singh that he will info the police. (Witness No 1 & 2).*

26. Capt VA Singh requested Maj Qayum Khan to arrange for selling of the weapon. (Witness No 2).

27. Maj Qayum Khan contacted Mr Ransher Singh son of retd Offr for the sale of pistol (Witness No 2).

28. On 09 Apr 2007 IC-65257Y Capt YS Rathore alongwith team from AHQ LU came as a decoy to purchase weapon from Capt VA Singh. (Exhibit No 8).

29. Capt VA Singh was caught by team of AHQ LU in possession of a pistol, 08 (eight) rds of amn and magazine at about 2145 h on 09 Apr 2007 at Base Hospital, Delhi Cantt. (Exhibit No 8).

30. Capt VA Singh was under the impression that he can keep a weapon without licence. (Witness No 1).

31. Capt VA Singh was discharged from Base Hospital. (Exhibit No 21).

32. In his confessional statement Capt VA Singh admitted that he wanted to sell of his wpn for lust of money. (Exhibit No 19).”

Capt Vivek Anand Singh was served with a tentative charge-sheet dated 07.05.2008 by Commanding Officer, 16 Garhwal Rifles. For convenience, the same is reproduced as under:

“TENTATIVE CHARGE SHEET

The accused, SS-39666P Capt Vivek Anand Singh, 16 Garh Rif having short service commission in the regular Army, is charged with:-

<i>First Charge</i>	<i>COMMITTING A CIVIL OFFENCE, THAT IS TO IN POSSESSION OF A FIRE ARM, IN CONTRARY TO</i>
<i>Army Act Section-69</i>	<i>SECTION 38 OF THE ARMS ACT, 1959 &amp; SECTION 25 (1-B) (a) OF THE ARMS ACT, 1959.</i>
	<i>in that he,</i>

*at Delhi, on 09 April 2007, was found in possession of items, without having a licence, in contravention of Sec 25 of the Arms Act, 1959:-*

- (a) *Pistol (semi automatic)* -01  
*Bearing machine No 7602953.*  
 (b) *Magazine (pistol)* -01  
 (c) *Live ammunition pistol* -01  
*(unknown calibre)*  
 (d) *Live ammunition 9 mm ball* -01  
*(Lot No KF-96)*

*Second Charge*  
*Army Act Section-69*

*COMMITTING A CIVIL OFFENCE, THAT IS SELLING OF FIRE ARM INCONTRAVENTION OF THE ARMS ACT, 1959, CONTRARY TO SECTION OF THE ARMS ACT, 1959.*

*in that,*

*at Delhi, on 09 Apr 2007, found selling pistol (semi automatic) bearing machine No 7602953, without having a licence, in contravention of section 5 of the Arms Act, 1959.”*

8. Summary of Evidence (SoE), presided over by Col A.S. Randhawa, CO, was recorded by Recording Officer Lt Col R. Sharan from 14.05.2008 to 04.09.2008 at Meerut Cantt. It may be noted that though the CoI was common for both the persons i.e. late Capt Vivek Anand Singh and Maj Qayoom Khan, but SoE was separate for the said two accused.

9. It is vehemently submitted by learned counsel for the applicant that in CoI, the statement of Rifleman Pankaj Purohit was also recorded, according to which no case was made out against Capt Vivek Anand Singh. It is further submitted that the SoE of co-accused Maj Qayoom Khan was held in 14 Grenadiers in the presence of Capt Yuvraj Singh Rathore of 21 CIU, who had given intelligence input. However, a perusal of the record shows that Capt Yuvraj Singh Rathore declined to identify Maj Qayoom



Khan and his involvement in the case. The statement of Capt Yuvraj Singh Rathore is reproduced hereinunder:

“Witness No 1

*I, IC-65257Y Maj Yuvraj Singh Rathore, Officer Commanding 21 Counter Insurgency Intelligence Unit Unit having been duly cautioned states:-*

*I do not identify/recognize the accused sitting IC-59797F Major Qayum Khan who is in front me.*

*I have no statement to make because I don't recognize him i.e. IC-59797F Major Qayum Khan.*

*The accused IC-59797F Major Qayum Khan declines to cross examine the witness No 1, IC-6525Yy Major Yuvraj Singh Rathore.*

*The above statement has been read over to the witness in the language he understands and states it as correct.*

*Sd/- x xxxx  
(IC-59797F Major Qayum Khan)  
17.05.2008*

*Sd/- x xxx  
(IC-65257Y Major Yuvraj Singh Rathore)  
17.05.2008”*

10. Capt Vivek Anand Singh was served with a charge-sheet dated 02.03.2009 by CO, 16 Garhwal Rifles. For convenience, the said charge-sheet in its totality is reproduced as under:

“CHARGE SHEET

*The Accused SS-39666P Captain Vivek Anand Singh, 16 Garhwal Rifles, as officer holding a short service commission in the regular Army, is charged with:-*

**FIRST CHARGE**

*Committing a civil offence, that is to say, selling a Fire Arm contrary to Section 25 (1) (a) of the Arms Act, 1959,*

*Army Act Section 69 in that at New Delhi on 09 April 2007, was found selling a pistol (semi automatic) bearing machine No 7602953, without holding in this behalf a Licence to IC-65257Y Capt Yuvraj Singh Rathore of counter insurgency intelligence unit.*

**SECOND CHARGE**

*Committing a civil offence, that is to say, being in possession of a fire arm and ammunition,*

*Army act  
Section 69*

*contrary to Section 25 (1-B) (a)  
of the Arms Act 1959,*

*in that he,*

*at Delhi on April 2007, had in his  
Possession the following without holding a valid  
licence:-*

*(a) Pistol (semi automatic) bearing  
No 7602953 -01.*

*(b) Magazine (pistol) -01*

*(c) live ammunition pistol (unknown calibre)-07*

*(d) live ammunition 9 mm Ball (Lot No KF-96) -  
01.*

*Station : Meerut Cantonment      sd/- x x x x  
DATED: 02 Mar 2009                (AS Randhawa)  
Colonel  
Commanding Officer  
16 Garhwal Rifles*

*To be tried by general court martial*

*Station : meerut cantonment      sd/- x x x x illegible  
DATED: 02 Mar 2009                (Satish Kumar Vijeshwar)  
Major General  
GOC  
9 Infantry Division”*

11. A perusal of the charge-sheet reproduced above, indicates that the allegation against late Capt Vivek Anand Singh was that he was found selling a pistol bearing machine No 7602953.

12. After framing of charge, the statements of following witnesses were recorded:

1. PW-1 IC-59797 F Major Qayum Khan 510 ASC Battalion
2. PW-2 IC-53160F Lt Col Ashish Singh HQ 60 Inf Brigade
3. PW-3 IC-50977H Lt Col MV Joshi Indian Ordnance Factory
4. PW-4 SC-00010K Maj SP Shukla 16 Garhwal Rifles

5. PW-5 WS 01023N Capt Reeti 4 Corps IIT
6. PW-6 No. 4087068N Rfn Pankaj Purohit 48 Rashtriya Rifles
7. PW-7 IC-52418X Lt Col RP Pandey HQ 10 Corps
8. PW-8 JC-810511Y Sub Ram Dhari Yadav of IHQ of MoD (Army) CIU
9. PW-9 IC-65257Y Maj Yuvraj Singh Rathore of 812 IFSU (Intelligence Field Security Unit)

13. General Court Martial (GCM) proceedings were held against Capt Vivek Anand Singh from 28.03.2009 to 14.10.2009. It has come on record that the pistol produced before the GCM was a different pistol bearing machine No. 4602953 and not the pistol bearing machine No 7602953. The proceedings of GCM were kept in abeyance on the plea of jurisdiction raised on behalf of late Capt Vivek Anand Singh. However, again vide order dated 21.06.2010, another GCM was ordered to be convened, against which Captain Vivek Anand Singh preferred the present O.A before this Tribunal. The Tribunal stayed the proceedings of GCM vide order dated 29.07.2010.

14. During pendency of the present case, on 02.03.2011 the alleged incident took place. It is said that late Capt Vivek Anand Singh was riding a motorcycle alongwith a civilian pillion rider Mr. Ashok Kumar, son of Shri B. Singh and he collided with a stray cattle. According to the applicant, it was a cock and bull story cooked up by the respondents while the fact is that since the GCM was likely to culminate in exoneration of late Capt Vivek Anand Singh and the guilt of some officers of the Army was likely to be exposed, hence a conspiracy was hatched against him and he was removed from their way in a purported accident.

15. In respect of the above incident, CoI was instituted on 01.04.2011. The applicant assails the CoI on the ground that it was held outside the Terms of Reference without calling the material witnesses including NOK. Further, according to the applicant, Rifleman Pankaj Purohit, who was Sahayak and remained with late Capt Vivek Anand Singh, was not called to give his statement. A copy of the Terms of Reference is attached with the OA. For convenience, the same is reproduced as under:

*“Terms of Reference (TOR)”*

*A C of I should confine itself solely to the actual issues of a case and matters strictly relevant thereto. For this purpose, the convening authority must specify the Terms of Reference (TOR) of the Court of Inquiry, stating in detail the character of investigation required and prescribing the nature of any report to be made in the findings. The objectivity of an inquiry will depend on the care taken to draft and comply with the TORs.*

*The TOR refer to the investigative charter assigned to the C of I by the convening authority and lay down the scope of the investigations to be carried out by a C of I they must specify the following:-*

- (I) The matters, the facts relating to which the C of I is to investigate and report upon and*
- (ii) Any matter about which the C of I is required to make recommendation or on which it is required to express an opinion*

*The convening authority is duty bound to give all possible guidance and directions to the C of I means of detailed and explicit TOR. Where it is likely that the TOR will be lengthy or classified in nature, the same should be made the subject to a separate letter of instruction to the presiding officer and any other member if required.”*

16. According to the Terms of Reference, as reproduced above, it was necessary for the CoI to record a finding as to how late Capt Vivek Anand Singh had gone outside his room and how the incident took place, but the

CoI did not record the specific finding in accordance to the Terms of Reference.

17. It has been argued by learned counsel for the applicant that the members of CoI have not acted as required by the Terms of Reference; they never visited the spot where the incident had taken place and they had not recorded the statement of material witnesses. It is further argued that according to CoI, helmet put on by Capt Vivek Anand Singh was not found at the place of occurrence though a finding has been recorded that he was driving a motorcycle with helmet on his head. There is nothing to show as to where the helmet had gone. It is also submitted that Capt Vivek Anand Singh had suffered two injuries on right side of his head in the said accident but the finding recorded by CoI shows that he sustained one injury when his motorcycle collided with a stray cattle on road. For convenience, the report of CoI is reproduced as under:

*“The offr was going on his motorcycle alongwith a civ friend Mr Ashok as pillion rider. The motorcycle collided with a stray cattle on road Kashimpur near Shisewala Gurudwara at Meerut Cantt (UP). The offr sustained head injury and lying on the road. He was evac to MH Meerut at 2240 hrs by Maj Ankur Kulin of 138 Med Regt who was passing through at that time. The offr was further transferred to Army Hosp (R&R) Delhi Cantt and despatched at 0500 hrs on 24 Mar 2011 under med supervision.”*

18. Further submission of learned counsel for the applicant is that the family members of late Capt Vivek Anand singh were not intimated immediately after the occurrence in accordance to the provisions contained in Para 28 of the Policy Letter of the Army Headquarters, issued in July

2013 for conduct of Courts of Inquiry. The very composition of Court of Inquiry itself was in violation of the said Policy letter as no expert was involved as one of its Members to give his opinion nor such an expert was summoned as a witness. The Court of Inquiry was held beyond the Terms of Reference. For convenience, Para 28 of the said Policy Letter is reproduced as under:

**“28. Examining Ladies, Minors and Families including NOK of Service Personnel.**

*In cases where the Court considers it necessary to receive evidence from members of a serviceman’s family in general, or from NOK in particular, care should be taken to ensure they are dealt with compassionately. Initial arrangements for them to attend the C of I should be made by the Convening Authority through the unit of the service personnel. This will ensure that the particular circumstances of the family member/NOK are taken into account. Where it is apparent at the outset of the inquiry that the family member/NOK will be required to attend as a witness it might be helpful to broach this matter with them early at their initial briefing on the inquiry. The Court should consider the most appropriate way for the family member/NOK to give evidence such as the inquiry travelling to the family member/NOK or asking them to give evidence in writing. The family member/NOK may find it difficult and potentially distressing to give evidence and when hearing oral evidence it will be necessary for the court to exercise tact and sympathy when asking questions.”*

19. In response to the arguments advanced on behalf of the applicant, Shri G.S.Sikarwar, learned counsel for the respondents, assisted by Major

Salen Xaxa, OIC Legal Cell does not dispute that no FIR was lodged with regard to the recovery of weapon in question from the possession of Capt Vivek Anand Singh. The confession of Capt Vivek Anand Singh was recorded by two officers constituting the BOO.

However, it is also not disputed that at the time the statement of late Capt Vivek Anand Singh was recorded in the presence of BOO and recovery was allegedly made by the Intelligence Unit of the Army, no civilian or any independent witness was called to witness the recovery. No seizure memo was prepared nor the article alleged to have been recovered was sealed at the time of recovery. In the absence of any seizure memo, it is not possible to verify the presence of any independent witness during the course of recovery.

20. Learned counsel for the respondents further submits that the change of weapon does not matter at this stage for the reason that still the GCM was going on and unless the same had been completed, no final conclusion could be drawn. Further submission is that during the course of treatment in Military Hospital at Meerut, late Capt Vivek Anand Singh was invalided out from Army on account of medical ailment.

21. Learned counsel for the respondent vehemently argued that so far as the incident of 23.03.2011 is concerned, it has been duly inquired into by the CoI with due communication to the family members of late Capt Vivek Anand Singh. It is also submitted that the inquiry was held in Terms of Reference made by the competent authority.

22. We have considered the arguments advanced by learned counsel for the parties at length and perused the record. We proceed to record our findings point to point as hereinunder.

**F.I.R.**

23. Admittedly, no FIR was lodged against late Capt Vivek Anand Singh. The argument advanced by learned counsel for the respondents is that lodging of FIR does not affect the merit of the case for the reason that the GCM convened and held by the respondents was a substitute of police investigation as well as FIR. It is also submitted that lodging of FIR was not mandatory.

24. Section 154 of the Cr.P.C deals with the lodging of FIR, which is applicable in the present case also. For convenience, the same is reproduced as under:

***“154. Information in cognizable cases.***

*(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*

*(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.*

*(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information*



*discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.”*

25. A perusal of aforesaid Section 154 Cr.P.C indicates that for all cognizable offences, FIRs should be lodged. The provision is mandatory, as held by the Hon'ble Supreme Court in catena of decisions. In a case reported in (2014) 2 SCC 1 **Lalita Kumari vs. Government of Uttar Pradesh and others**, the Constitution Bench of Hon'ble Supreme Court held that the provisions contained in Section 154 of Cr.P.C are mandatory and the contents of cognizable offence must be recorded. Non-compliance of Section 154 Cr.P.C amounts to violation of procedure established by law. For convenience, Paras 83 to 86 of the aforesaid judgment of **Lalita Kumari** are reproduced as under:

*“83. The object sought to be achieved by registering the earliest information as FIR is inter alia two fold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment etc., later.*

*84. Principles of democracy and liberty demand a regular and efficient check on police powers. One way of keeping check on authorities with such powers is by documenting every action of theirs. Accordingly, under the Code, actions of the police etc., are provided to be written and documented. For example, in case of arrest under Section 41(1)(b) of the Code, arrest memo along with the grounds has to be in writing mandatorily; under Section 55 of the Code, if an officer is deputed to make an arrest, then the superior officer has to write down and record the offence etc., for which the person is to be arrested; under Section 91 of the Code, a written order has to be passed by the concerned officer to seek documents; under Section 160 of the Code, a written notice has to be issued to the*

*witness so that he can be called for recording of his/her statement, seizure memo/panchnama has to be drawn for every article seized etc.*

*85. The police is required to maintain several records including Case Diary as provided under Section 172 of the Code, General Diary as provided under Section 44 of the Police Act etc., which helps in documenting every information collected, spot visited and all the actions of the police officers so that their activities can be documented. Moreover, every information received relating to commission of a non-cognizable offence also has to be registered under Section 155 of the Code.*

*86. The underpinnings of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also to ensure 'judicial oversight'. Section 157(1) deploys the word 'forthwith'. Thus, any information received under Section 154(1) or otherwise has to be duly informed in the form of a report to the Magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary."*

26. Though the aforesaid Constitution Bench judgment in the case of **Lalita Kumari** was rendered by the Apex Court in 2014, but the principle of lodging of FIR in pursuance to the provisions contained in Section 154 Cr.P.C have been reiterated by it in number of cases even prior to the present incident. In the absence of F.I.R, the appropriate authorities shall not be able to infer the factum of crime and the manner in which the incident occurred. In view of above, we are of the view that since the weapon was a civil and non-military weapon, hence the possibility of involvement of other civilians in the matter cannot be ruled out. Thus, by not registering an F.I.R with regard to the recovery of alleged weapon, the respondents have committed a gross illegality by proceeding against Capt Vivek Anand Singh straightaway with the GCM.

27. Apart from above, Sections 25 and 26 of the Arms Act also deals with the manner in which the cases under the Arms Act may be proceeded with for trial. For convenience, Sections 25 and 36 of the Arms Act are reproduced as under:

**“25. Punishment for certain offences—**

*(1) Whoever—*

*(a) manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer, or has in his possession for sale, transfer, conversion, repair, test or proof, any arms or ammunition in contravention of section 5; or*

*(b) shortens the barrel of a firearm or converts an imitation firearm into a firearm in contravention of section 6; or*

*(d) bring into, or takes out of, India, any arms or ammunition of any class or description in contravention of section 11, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.*

*(1A) Whoever acquires, has in his possession or carries any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than five years, but which may extend to ten years and shall also be liable to fine.*

*(1AA) Whoever manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer or has in his possession for sale, transfer, conversion, repair, test or proof, any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.]*

*(1AAA) ] Whoever has in contravention of a notification issued under section 24A in his possession or in contravention of a notification issued under section 24B carries or otherwise has in his possession, any arms or ammunition shall be punishable with imprisonment for a term which shall not be less*

*than [three years, but which may extend to seven years] shall also be liable to fine.*

*(1B) Whoever—*

*(a) acquires, has in his possession or carries any firearm or ammunition in contravention of section 3; or*

*(b) acquires, has in his possession or carries in any place specified by notification under section 4 any arms of such class or description as has been specified in that notification in contravention of that section; or*

*(c) sells or transfers any firearm which does not bear the name of the maker, manufacturer's number or other identification mark stamped or otherwise shown thereon as required by sub-section (2) of section 8 or does any act in contravention of sub-section (1) of that section; or*

*(d) being a person to whom sub-clause (ii) or sub-clause (iii) of clause (a) of sub-section (1) of section 9 applies, acquires, has in his possession or carries any firearm or ammunition in contravention of that section; or*

*(e) sells or transfers, or converts, repairs, tests or proves any firearm or ammunition in contravention of clause (b) of sub-section (1) of section 9; or*

*(f) brings into, or takes out of, India, any arms or ammunition in contravention of section 10; or*

*(g) transports any arms or ammunition in contravention of section 12; or*

*(h) fails to deposit arms or ammunition as required by sub-section (2) of section 3, or sub-section (1) of section 21; or*

*(i) being a manufacturer of, or dealer in, arms or ammunition, fails, on being required to do so by rules made under section 44, to maintain a record or account or to make therein all such entries as are required by such rules or intentionally makes a false entry therein or prevents or obstructs the inspection of such record or account or the making of copies of entries therefrom or prevents or obstructs the entry into any premises or other place where arms or ammunition are or is manufactured or kept or intentionally fails to exhibit or conceals such arms or ammunition or refuses to point out where the same are or is manufactured or kept, shall be*

*punishable with imprisonment for a term which shall not be less than [one year] but which may extend to three years and shall also be liable to fine: Provided that the Court may for any adequate and special reasons to be recorded in the judgment impose a sentence of imprisonment for a term of less than 6[one year].*

*(1C) Notwithstanding anything contained in sub-section (1B), whoever commits an offence punishable under that sub-section in any disturbed area shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine. Explanation.—For the purposes of this sub-section, “disturbed area” means any area declared to be a disturbed area under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order, and includes any areas specified by notification under section 24A or section 24B.]*

*(2) Whoever being a person to whom sub-clause (i) of clause (a) of sub-section (1) of section 9 applies, acquires, has in his possession or carries any firearm or ammunition in contravention of that section shall be punishable with imprisonment for a term which may extend to one year, or with fine or with both.*

*(3) Whoever sells or transfers any firearm, ammunition or other arms—*

*(i) without informing the district magistrate having jurisdiction or the officer in charge of the nearest police station, of the intended sale or transfer of that firearm, ammunition or other arms; or*

*(ii) before the expiration of the period of forty-five days from the date of giving such information to such district magistrate or the officer in charge of the police station, in contravention of the provisions of clause (a) or clause (b) of the proviso to sub-section (2) of section 5, shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to five hundred rupees, or with both.]*

*(4) Whoever fails to deliver-up a licence when so required by the licensing authority under sub-section (1) of section 17 for the purpose of varying the conditions specified in the licence*

*or fails to surrender a licence to the appropriate authority under sub-section (10) of that section on its suspension or revocation shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to five hundred rupees, or with both.*

*(5) Whoever, when required under section 19 to give his name and address, refuses to give such name and address or gives a name or address which subsequently transpires to be false shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to two hundred rupees, or with both.”*

**“36. Information to be given regarding certain offences.—**

*(1) Every person aware of the commission of any offence under this Act shall, in the absence of reasonable excuse the burden of proving which shall lie upon such person, give information of the same to the officer in charge of the nearest police station or the magistrate having jurisdiction.*

*(2) Every person employed or working upon any railway, aircraft, vessel, vehicle or other means of conveyance shall, in the absence of reasonable excuse the burden of proving which shall lie upon such person, give information to the officer in charge of the nearest police station regarding any box, package or bale in transit which he may have reason to suspect contains arms or ammunition in respect of which an offence under this Act has been or is being committed.”*

28. Keeping in view the provisions contained in Sections 25 and 36 of the Arms Act (supra), the condition precedent to proceed with a crime under the Arms Act is to lodge an FIR. The judgments of the Hon’ble Supreme Court including the Constitution Bench decision in the case of **Lalita Kumari** (supra) are binding on all courts within the territory of India under Article 141 of the Constitution and they being the law of the land, it is incumbent upon the Government including the Armed Forces to follow the same and they have no authority to violate them. In this view of the matter, the respondents should have lodged an FIR with regard to

recovery of weapon, if any, from late Capt Vivek Anand Singh, but that was not done.

29. Lodging of F.I.R in the present case was also necessary for the reason that under Section 38 of the Arms Act, every offence committed therein is a cognizable offence. For convenience, Section 38 of the Arms Act is reproduced as under:

*“38. Offences to be cognizable.—Every offence under this Act shall be cognizable within the meaning of the Code of Criminal Procedure, 1973 (2 of 1974).*

30. A plain reading of the aforesaid provision indicates that the offence committed under the Arms Act is a cognizable one under the Code of Criminal Procedure. The Arms Act is a special law and it refers to the Code of Criminal Procedure, 1973. Since charge against the applicant's son under was also framed under Section 25 of the Arms Act, it was incumbent upon the respondents to lodge an FIR keeping in view the provisions contained in Section 154 of the Cr.P.C read with Section 38 of the Arms Act. Keeping in view the facts and circumstances of the present case, an adverse inference may be drawn against the respondents since no FIR was registered against the applicant's son late Capt Vivek Anand Singh.

### **SEIZURE**

31. Admittedly no seizure memo was prepared by the Army authorities after recovery of arm in question from the possession of the applicant's son. Why the seizure memo was not prepared is not understandable. It

shows the gross negligence committed by the members of the Intelligence Unit of the Army by not preparing the seizure memo. Learned counsel for the applicant has invited attention of the Tribunal to a judgment of the Apex Court in **Appeal (Crl.) No. 1368 of 1999, Union of India and others versus L.D.Balam Singh**, decided on 24.04.2002. According to the decision of Apex Court in **L.D.Balam**'s case (sura), in case a person is charged under some special Act, then the provisions contained in such special Act must be complied with literally. The relevant portion of the said judgment in **L.D.Balam Singh**'s case is reproduced as under:

*“Turning attention on to the procedural aspect, be it noticed that Section 18 is an offence which cannot but be ascribed to be civil in nature in terms of the provisions of Army Act if Section 18 is to be taken recourse to then and in that event the provisions of the statute come into play in its entirety rather than piecemeal. The charge levelled against the respondent is not one of misdeeds or wrongful conduct in terms of the provisions of the Army Act but under the NDPS Act In the event, we clarify, a particular statute is taken recourse to, question of trial under another statute without taking recourse to the statutory safeguards would be void and the entire trial would stand vitiated unless, of course, there are existing specific provisions therefor in the particular statute. Needless to record that there were two other civilian accused who were tried by the Court at Patiala but were acquitted of the offence for non-compliance of the mandatory requirements of the NDPS Act. Once the petitioner was put on trial for an offence under the NDPS Act, the General Court Martial and the Army authorities cannot reasonably be heard to state that though the petitioner would be tried for an offence under Section 18 of the NDPS Act, yet the procedural safeguards as contained in the statutory provision would not be applicable to him being a member of the Armed Forces. The Act applies in its entirety irrespective of the jurisdiction of the General Court Martial or other Courts and since the Army authorities did not take into consideration the procedural safeguards as is embodied under the Statute, the question of*



*offering any credence to the submissions of Union of India in support of the appeal does not and cannot arise. There is no material on record to show that the authorities who conducted the search and seizure at the house of the respondent herein has in fact done so in due compliance with Section 42 of the statute which admittedly stand fatal for the prosecution as noticed above as a matter of fact, two of the civilians stand acquitted therefor.”*

32. In view of above, once late Capt Vivek Anand Singh had been tried under Section 25 of the Arms Act through GCM, then it was incumbent upon the respondents to follow the provisions contained in the Arms Act during the course of trial, but the same was not done. In the present case, as discussed hereinabove, even the article seized in pursuance to recovery was not produced during the proceedings of GCM. In this view of the matter, an inference may be drawn that the recovery made from late Capt Vivek Anand Singh was a sham and a farce.

33. Learned counsel for the applicant has invited our attention to a judgment of Armed Forces Tribunal, Principal Bench, Delhi in **T.A.No. 246 of 2009, Major SS Chillar versus Union of India and others**, decided on 01.04.2010 by the Division Bench, presided over by Hon'ble Mr. Justice A.K.Mthur, Chairperson, wherein it was held that when the subject matter for which the incumbent has been found guilty is not established, then, nothing remains in the charge. The relevant portion of the said judgment is reproduced as under:

*“..... When the subject matter for which the incumbent has been found guilty is not established, then, what remains in the charge. Therefore, without going to other details, as argued by learned counsel for the petitioner, the very fact that subject*

*matter for which the petitioner is found to have possessing that explosive substance is not there, then, nothing remains to be established.”*

34. Learned counsel for the applicant has invited our attention to the statement of PW-5 Capt Reeti. According to her, there is a seizure memo but on a query made by the accused, it was admitted that except the statement of Capt Reeti, no other material is available to establish that there was a seizure memo. It appears that the statement of Capt Reeti has been pleaded as seizure memo, but according to the settled procedure of law, the seizure memo is prepared in the presence of recovering authority with due signature of the accused. No such document in the form of seizure memo is available on record or is in possession of the respondents. This shows that no seizure memo was prepared. The statement of Capt Reeti recorded during GCM also indicates that not only the pistol but the briefcase too produced before the court was not the same as was alleged to have been recovered. The relevant portion of the statement of Capt Reeti recorded during GCM is reproduced as under:

*“Evidence I was shown a briefcase and I had stated, “I am not in a position to identify the briefcase kept in front of me to be the same which I carried from my unit to handover to the Presiding Officer of the Court of Inquiry, Lt Col Amarjeet on 16 Jun 2007.*

*I do not know as to who had taken over the briefcase from Delhi Area Provost Unit and on whose order.*

*I do not remember who all were posted at AHQ Liaison Unit with me in Jun 2007.*

*Col RC Chiller was the CO when I got posted to AHQ Liaison Unit.*

*Lt Col JDS Mann, Lt Col RP Pandey and Maj Amit Sharma were posted at AHQ Liaison Unit with me when I joined.*

*Col RC Chiller and Lt Col RP Pandey did not brief me on this case.*

*I was posted out from AHQ Liaison Unit in Apr 2009 to HQ 4 Corps Imagery Interpretation team.*

*I do not remember if the items taken out of the briefcase by Lt Col Amarjeet in my presence were sealed in separate packets or not.*

*It is correct to suggest that the contents of the receipt were not drafted by me.”*

35. In view of above, in the absence of seizure memo, that too under the teeth of the fact that weapon produced during the course of GCM was not the same as is alleged to have been recovered from the possession of the applicant's son, we have no option but to hold that the alleged recovery of pistol from the applicant's son is based on unfounded facts.

### **CONFESSION**

36. Admittedly, a confessional statement of the applicant's son is alleged to have been recorded in the presence of two members of the BOO, namely, Lt Col Ashish Singh and Capt Bhaskar Pillai. We have perused the said statement, according to which the applicant's son was in possession of unauthorised pistol and that he was involved in sale and purchase of pistol for the lust of money. The said statement, alleged to be the confessional statement of the applicant's son, recorded by the BOO in its totality is reproduced as hereinunder:

*“On 16 March 07 I SS-39666P Capt VS Singh was transferred from MH Meerut to MHDC. I got admitted in Offr ward-II*

*room No -9. There I met IC-.....Maj Kayum Khan. During our admission in MH Maj Kayum Khan told me regarding high-demand of wpnesp pistol in Delhi. He told that the cost is around 2-3 lakhs. On this pretext I got allured and subsequently I disclosed in regarding selling of wpn if he can arrange one. He told that he has contacted some businessman from Rajasthan and that he is ready to pay Rs 1.5 lakhs. Subsequently because of dire events the deal could not struck. Finally on 04 Apr 11 Maj Kayum Khan told (on mobile) that the party is ready to purchase. I urged him to come over but he told that he could'nt and that the party can be trusted upon. At 0930 at night a person called Mr Anil came over to me at my room and introduced himself as a businessman from Kota. We both sat outside and I called over my sahayak Rfn Pankaj Purohit so as to arrange coffee. Then I showed the pistol to Mr Anil and he agreed to pay Rs 1.75 lakh. On my request Mr Anil again called over to Maj Kayum Khan regarding the deal. Then I locked the pistol inside my suitcase and went with Mr Anil in his car to collect Rs 1.75 lakhs and caught by INT people for selling an unauthorised pistol. I was doing the sale of the star-pistol for lust of money.*

*Dated: 09 April 07*

*(Vivek Anand Singh)*

*SS-39666P”*

37. A plain reading of the above statement indicates that reference has been made to Major Qayoom Khan with whom the applicant's son had talked on phone. On the other hand, the evidence on record shows that Major Qayoom Khan was also admitted in the same hospital and in order to arrest him, the Intelligence Unit of the Army had gone there and raided the hospital in view of the intelligence input given by Capt Yuvraj Singh Rathore (supra). The statement further reveals that one Anil from Kota (Rajasthan) with whom the deal was struck to finalise the sale of pistol came in the hospital and Capt Vivek Anand Singh had gone outside the hospital to collect the money, though his right knee was operated and he was not in a position to go outside. In the circumstances, the statement at

the face of record does not inspire confidence for the reason that once the Intelligence Unit had come in the hospital to arrest Major Qayoom Khan, then how a disabled person (Capt Vivek Anand Singh) would do all this, more so when the amount of rupees 1.75 lacs as sale consideration was not recovered from him or from anywhere. Nothing has been brought on record to establish the aforesaid deal. The record also does not indicate any efforts having been made to trap or arrest Mr. Anil whose name figured in the alleged confessional statement of Capt Vivek anand Singh. Thorough investigation in the matter does not appear to have been done by the police or CBI after registering an FIR. The Hon'ble Supreme Court in a case reported in *(2008) 16 SCC 417, Noor Aga versus State of Punjab and another*, observed that while considering the case of confessional statement made before the Customs Department, the High Court should have considered the question having regard to the stand taken by the appellant. Only because certain personal facts known to him were written, the same by itself would not lead to the conclusion that they were free and voluntary. An inference that the appellant was subject to duress and coercion would appear from the fact that he is an Afghan National. Their Lordships held that in case the confessional statement is not supported by other evidence, the possibility of fabrication of confession by the officer concerned, cannot altogether be ruled out.

In another case, reported in *(2007) 8 SCC 254, Mohtesham Mohd Ismail versus Spl. Director Enforcement*, the Hon'ble Supreme Court held that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an

authority would require a closure scrutiny. It is furthermore now well-settled that the court must seek corroboration of the purported confession from independent sources.

In the present case, as discussed above, we do not find the corroboration of the alleged confessional statement of late Capt Vivek Anand Singh from any independent sources to establish that it was made without duress, threat or coercion. Otherwise also, the said confessional statement was recorded in pursuance to instructions issued by the officers constituting the BOO, who were sent to record it. The statement of PW-4 Maj S.P.Shukla indicates that the BOO firstly assembled in Delhi area for taking charge of items found on the person of Capt Vivek Anand Singh, 16 Garhwal Rifles and thereafter they had gone for recording of confessional statement. He further stated that he is not aware whether Indica car came to Base Hospital at 09-45 p.m and that when they reached the Base Hospital, the time was approximately 10-45 p.m and not 09-45 p.m as suggested by the defence. It is also stated by PW-4 Maj S.P.Shukla that he and BOO were made to wait for about 45 minutes saying that the things were not yet ready. It is also stated by PW-4 that pistol ME-1, seven rounds of unknown calibre ME-2, one round of 9mm ME-3 and two magazines ME-5 and ME-6 are similar to the ones which he had seen on 09.04.2007 but are not the same. It means that the pistol which was produced during the proceedings of GCM, was not the same which was allegedly recovered from the possession of the applicant's son. The reason why the officers of BOO were made to wait for about 45 minutes is not borne out from the record. When the accused was arrested, he should have

been produced before the appropriate authority to record his confessional statement if at all he desired to make it. In view of the settled proposition of law, before recording confessional statement, it was incumbent upon the officers concerned to inform the accused that they are proceeding ahead to record the statement which is voluntary and not under duress, threat or coercion. The Hon'ble Supreme Court in the case reported in (2011) 2 SCC 490, **Dara Singh versus Republic of India**, has laid down certain guidelines with regard to recording of confessional statement keeping in view the provisions of Section 164 Cr.P.C. The relevant portion of the said judgment is reproduced as under:

*“The following principles emerge with regard to Section 164 Cr.P.C.:-*

*(i) The provisions of Section 164 Cr.P.C. must be complied with not only in form, but in essence.*

*(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.*

*(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.*

*(iv) The maker should be granted sufficient time for reflection.*

*(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.*

*(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.*

*(vii) Non-compliance of Section 164 Cr.P.C. goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.*

*(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.*

*(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.*

*(x) Confession of a co-accused is a weak type of evidence.”*

The principles of law propounded in the case of **Dara Singh** (supra) have been followed by the Apex Court in catena of its subsequent decisions.

38. In view of above, we are of the opinion that since the confessional statement of late Capt Vivek Anand Singh has been recorded without following the safeguards in terms of the Hon'ble Supreme Court's judgment in the case of **Dara Singh** (supra), it cannot be relied upon for



the purposes of holding him guilty of the charges for which he was subjected to GCM proceedings.

### **RECOVERED ITEMS**

39. As is evident from the charge-sheet (supra), the charges against the accused was framed with respect to recovery of pistol bearing no. 7602953, whereas the weapon produced during the proceedings of GCM was bearing No. 4602953, as is also evident from the statement of PW-3 Lt Col MV Joshi, who allegedly recovered the incriminating article i.e. pistol. It would be relevant to quote relevant portion of the statement of said recovering officer, as under:

*“No, I did not recover any pistol bearing machine No 7602953 from the indica car where the accused was standing with the walker.*

*It is correct to suggest that you did not see the rest of the persons doing anything with your own eyes?*

*There were other persons present other than the ones specified in my answer. I did see them moving around the area of the officer's ward, Base Hospital but I did not see exactly what they were doing.*

*No, I did not see Int officers including Lt Col Mann searching the personal belongings of the accused on 09 Apr 2007.*

*It is correct to suggest that I did not see any Int officer carry out a physical search of the accused at the time of the operation.*

*Yes, on 14 Apr 2007, on my repeated requests I was given a convening order which was completely invalid for the reasons that it did not bear a date and the signature of GSO1 Int namely Lt Col RK Lamba did not to me seem to be genuine signature.*

*I did not accept this convening order and returned it to Lt Col RK Lamba and after that no convening order of any kind was given to me.*

*It is correct to suggest that the overall behaviour of the military Int official especially Lt Col JDS Mann was rough and abusive displaying distinct aggression in their body language and they were harsh in their language to the accused.*

*The reasons the pistol ME-1, seven rounds of unknown calibre ME-2, one round of 9mm ME-3 and two magazines ME-5 and ME-6 are similar to what I had taken on charge but I cannot say they are the same items which I had taken on charge because I and my BOO had not sealed the briefcase which contained these items and none of the exhibits shown had my mark or mark of any of the members of the BOO which could identify them as same.”*

.....

*“It is correct to suggest that I and my BOO were made to wait for about 45 minutes saying that things are not yet redy.*

*It is correct to suggest that the pistol ME-1, seven rounds of unknown calibre ME-2, one round of 9 mm ME-3 and two magazines ME-5 and ME-6 are similar to the ones which I had seen on 09 Apr 2007 but are not the same.*

*It is correct to suggest that BOO with me as Presiding Officer was prevented from supervising the activities of the Int officials for about 45 minutes while conducting the alleged sting operation.*

*It is correct to suggest that when I saw the accused on 09 Apr 2007 at the Base Hospital, Delhi his right knee was encased in a knee brace from the ankle to midway up the thigh.*

*It is correct to suggest that the BOO had not sealed the incriminating items at the officer’s ward itself.*

*It is correct to suggest that the BOO had not sealed the briefcase at the officer’s ward itself.*

*It was Lt Col JDS Mann who had told me, “This is the chap, Hold him. He has got the money”, Or words to that effect.*

*It is correct to suggest that while the alleged sting operation by military Int officials including Lt Col JDS Mann was going on I and my BOO were made to wait at the medical stores section of Base Hospital, Delhi.*

*It is correct to suggest that the walking distance between the medical stores section and the room of the accused was approximately 200 meters.*

*It is correct to suggest that the walking distance between the said distance of the medical stores section and the room of the accused the vision is blocked by trees and buildings.*

*It is correct to suggest that when I reached the officer's ward Base Hospital the alleged sting operation by Int official including Lt Col JDS Mann, in view of the contents of the CD (exhibit-33) was already over.*

*The witness voluntarily states that date and time stamp shown to him in the video clip was 0922 pm on 09 Apr 2009 whereas he and the BOO carried out their part in this operation only after approximately 0010 hrs on 10 Apr 2007. Therefore, it seems to me that the activity shown in the video clip occurred before I and BOO reached Base Hospital."*

.....

*It is correct to suggest that the overall behaviour of the military Int official especially Lt Col JDS Mann was rough and abusive displaying distinct aggression in their body language and they were harsh in their language to the accused."*

40. The statement given by PW-3 Lt Col MV Joshi is not only startling but indicates how the provisions of law have been abused while dealing with such a sensitive case where the allegation is of recovery of a pistol from a commissioned officer of the Indian Army holding the rank of Captain. The procedure adopted and the manner in which the accused has been dealt with by the Intelligence Unit and the authorities of Indian Army at the time of arrest, recovery and preservation of recovered material, appear to be based on unfounded facts. The statement of PW-3 Lt Col MV Joshi further indicates that while arresting the accused, he had got money

but there is no evidence in support to establish that the accused was in possession of any money. Keeping in view the fact that the charge framed against the accused was with regard to recovery of pistol No. 7602953 but the pistol produced before the court was different bearing No. 4602953, it may safely be held that the respondents have tried to prosecute the applicant's son on unfounded grounds. Non-production of recovered article is fatal to the prosecution in the facts and circumstances of the present case for the reason that the charges were not framed with regard to the pistol which was produced during the course of trial. It further shows how and to what extent sometimes the prosecuting officer goes ahead to involve an innocent person in a farce case, that too in the country of ours where the dignity of every citizen and his right to fair trial, equality of life and other facets of human life are protected by Article 21 of the Constitution. We have no hesitation in holding that the right of Capt ivek Anand Singh for fair trial was infringed in a most arbitrary and illegal manner for reasons best known to the respondents and he was subjected to GCM proceedings with a pre-determined mind.

**WITNESS NO. 6 RIFLEMAN PANKAJ PUROHIT**

41. It is vehemently argued by learned counsel for the applicant that Sahayak of late Capt Vivek Anand Singh, PW-6 Rifleman Pankaj Purohit stated that at the time of recovery, his mobile was taken in possession by the Intelligence Unit. He has stated that at about 09-30 p.m, he returned to the Base Hospital to make bed and give water etc to Capt VivekAnand Singh. When he returned, he saw some men in civil clothes standing near

Capt Vivek Anand who asked this witness as to who he was and on being told that he was Capt Vivek's Sahahak, they took his mobile from him. He further states that where the men in civil clothes were standing, there was an open VIP briefcase lying in which there was a pistol. Then four-five of the men took Capt Vivek to the dining hall and the rest three-four started asking this witness questions like "*Yeh pistol kiski hai aur yeh kahan se aayi?*" or words to the effect. They also threatened him to speak the truth lest they would send him to civil jail or court martial him. In his statement, he has specifically averred, "*It is correct to suggest that whenever I have been a sayak of Capt Vivek Anand Singh I have never seen any pistol, magazine or ammunition in his entire baggage including the briefcase.*"

The above statement belies the whole prosecution case and negatives the recovery alleged to have been made from Capt Vivek Anand Singh.

### **STAY BY TRIBUNAL**

42. During the course of GCM proceedings, Capt Vivek Anand Singh approached the Tribunal, pointing out that the Presiding Officer of the GCM had sent letters indicating that no case is made out against him and the GCM should be dropped but the General Officer Commanding, 9 Inf Div asserted that let the court martial proceeding continue. The applicant prayed for interim stay of the proceedings. Having heard the learned counsel for the parties, the Tribunal stayed the GCM proceedings, vide order dated 29.07.2010. For convenience, the said order is reproduced as under:

**“29.07.2010**

**Hon’ble Mr. Justice Janardan Sahai, Member (J)**  
**Hon’ble Lt Gen PR Gangadharan, Member (A)**

*Heard the Ld. Counsel for the applicant Shri P.N. Chaturvedi and Shri Alok Mathur, Sr. Standing Counsel of the respondents.*

*It was contended by Shri P.N. Chaturvedi, Ld. Counsel for the applicant that in the charge sheet dated 02.03.2009 issued to the applicant under section 25 of the Arms Act, the subject matter of the offence was a pistol no. 7602953, which was alleged to be in possession of the applicant and was found to be sold. Ld. Counsel for the applicant drew our attention to the letter dated 12.05.2009 of the GCM referring the matter to the convening authority that the pistol which was produced in Court was bearing no. 4602953, which is an anomaly and that the prosecution witness had produced two magazines in the Court. It is submitted by the Ld. Counsel for the petitioner that a second charge sheet dated 19.01.2010 was issued to the petitioner in which the number of the pistol is the same as that in the first charge sheet i.e. 7602953. The second charge sheet was issued after the order of the convening authority dated 13.05.2009, para three of which is as follows:-*

*3. The aforesaid reference has been duly considered by the convening authority and the directions thereon are as under:-*

*(a) At the outset, the aforesaid issues, as such, did not merit any reference and the Court was expected to deal with the same in terms of relevant provisions of Army Act and Rules.*

*(b) As regards the projected difference of Regd No of pistol as appearing in the particulars of both the charges and the one as appearing on the pistol produced by the prosecution witness, the Court must record the said observation in the proceedings and may deal with the same, based on the evidence led by the parties, in terms of Army Rule 62 (4) at the stage of consideration of findings.*

*(c) As regards production of two magazines by the prosecution witness before the Court as against one magazine as mentioned in the second charge, since the Court cannot enhance the number of magazine, as averred in the charge, the second magazine, produced before the Court as*

*Material Exhibit, may be kept out of the purview and consideration.*

*Ld. Counsel placed reliance upon the decision of the Principal Bench of the Tribunal in Maj SS Chillor vs. Union of India and others, T.A. No. 246 of 2009 in which the Principal Bench has set aside the conviction of Maj SS Chillor on the ground that while the subject matter of the charge against him was that he was having in possession an explosive substance, Hand Grenade No. HE-36 Lot No. 610H KF-77, but the charge was amended and the number of Grenade was deleted and in these circumstances, Maj SS Chillor could not be convicted when the particulars of the Grenade which was subject mater of the charge were deleted. Lt. Counsel submitted that the pistol produced in this case bears a different number from that for which the applicant has been charged and the trial would be a harassment.*

*Ld. Sr. Standing Counsel Shri Alok Mathur submitted that if there is any irregularity in the particulars of the charge, the same can be amended in the course of trial and he relied upon Rule 62, sub rule (4) and (5) of the Army Rules. He also submits that the decision of the Principal Bench in Maj SS Chillor's case is per in curium for on consideration of statutory provisions of Rule 62, sub rule (4) and (5). It is also contended that this Original Application itself is not maintainable in view of the fact that the convening order had earlier been challenged by the applicant and he did not raise this point in the earlier petition, which has been dismissed by an order dated 25.05.2010. The matter requires consideration. It is stated that the GCM is scheduled for 31.07.2010 and if no interim order is granted, this Original Application would become infructuous.*

*Shri Alok Mathur prays for and is granted two weeks time to file counter reply and the Ld. Counsel for the petitioner prays for and is granted one week's time thereafter to file rejoinder affidavit.*

*List this case on 26.08.2010.*

*Till that date, the proceedings in the GCM shall remain stayed."*

### **ACCIDENT**

43. Admittedly, the present petition was fixed for hearing on 23.03.2011 but in the same fateful night, the accident took place at Meerut Cantt. Capt Vivek Anand Singh succumbed to his injuries after more than a year of the

accident on 06.06.2012 while he was undergoing medical treatment. As we have discussed hereinabove, CoI was convened on 01.04.2011. The grievance of the applicant is that Rifleman Pankaj Purohit was not called by the Presiding Officer of CoI to lead evidence though he was a material witness. In response, the submission of learned counsel for the respondents is that Rifleman Pankaj Purohit was not a material witness and it was not necessary to call him to lead evidence during CoI. In our view, Rifleman Pankaj Purohit was a material witness, who would have deposed about the conspiracy, if any since he was very well from the beginning with Capt Vivek Anand Singh.

44. The next submission of learned counsel for the applicant is that the family members of late Capt Vivek Anand Singh were not intimated immediately after the occurrence in accordance to the provisions contained in Para 28 of the Policy Letter of the Army Headquarters, issued in July 2013 for conduct of Courts of Inquiry. According to him, the very composition of Court of Inquiry itself was in violation of the said Policy letter as no expert was involved as its Member to give his opinion nor such an expert was summoned as a witness. The respondents have refuted the above argument, submitting that a phone call was given to the wife of late Capt Vivek Anand Singh.

### **INVALIDMENT**

45. It is not disputed that late Capt Vivek Anand Singh was released by invaliding Medical Board. A show cause notice dated 06.02.2012 addressed to the wife of Capt Vivek Anand Singh was issued informing



her that her husband would be invalidated out from military service. Defending the action of the Army authorities, learned counsel for the respondents has vehemently argued that since late Capt Vivek Anand Singh was enrolled under short service commission, on expiry of the term of ten years he has rightly been discharged during the course of treatment in the hospital.

We fail to appreciate the ground on which such an argument has been advanced, more so when the show cause notice dated 06.02.2012 speaks otherwise. For convenience, the said show cause notice is reproduced as under:

“CONFIDENTIAL

*Tele Mil : 3399  
(CC)*

*Command Hospital*

*PIN-900450  
C/O 56 APO*

*401/1/MB/Offrs/2012*

*06 Feb 2012*

*Mrs Sandhya Singh  
Wife of SS-39666P Capt Vivek Anand Singh  
Officers Ward  
Command Hospital (CC)  
Lucknow*

INVALIDING MEDICAL BOARD : ISSUE OF SHOW CAUSE  
NOTICE

- 1. Refer to para 424 (c) (I) & (II) of RMSAF-2010 and AO 513/71 as amended.*
- 2. Your husband SS-39666P Capt Vivek Anand Singh of 16 Garh Rif is suffering from “SEVERE HEAD INJURY” and is presently in a persistent vegetative state and thus found unsuitable for further military service. Medical board of this hospital intends to place him in Medical Category SIH1A1P5E1.*

3. *After formal approval of the medical board proceedings from higher authorities, he will be invalided out from service.*

4. *Appeal, if any against the decision of the medical board may please be submitted to the Chief of the Army Staff through the President Medical Board, Command Hospital (CC) Lucknow within 15 days from the date of receipt of this letter.*

*Sd/- x x x  
(YK Arora)  
Brig  
President            Medical*

*Board  
Copy to*

*16 Garh Rif            -For info and further necessary action please."  
C/O 56 APO*

46. A plain of the aforesaid show cause notice shows that it was issued to Mrs Sandhya Singh, wife of Capt Vivek Anand Singh, pointing out that her husband SS-39666P Capt Vivek Anand Singh of 16 Garh Rif was suffering from "SEVERE HEAD INJURY" and was presently in a persistent vegetative state and thus found unsuitable for further military service. It was further mentioned in the notice that the Medical Board of the hospital intended to place him in Medical Category S1H1A1P5E1. After formal approval of Medical Board, invalidment of Capt Vivek Anand Singh was approved vide order/letter dated 29.02.2012 and he was ordered to be released w.e.f 01.03.2012 (AN) vide Annexure XVIII to the supplementary counter affidavit of the respondents dated 29.09.2016. The argument of learned counsel for the respondents that late Capt Vivek Anand Singh was enrolled under short service commission and he has been discharged on expiry of the term of ten years and not because of his unsuitability on medical ground, is, therefore, devoid of any substance.

47. Learned counsel for the applicant has also invited our attention to the highhandedness of the respondents while throwing the belongings of Capt Vivek Anand Singh and his pregnant wife from married accommodation, in respect of which specific averments have been made in paras 4.67 and 4.68 of the OA. For convenience, the same are reproduced as under:

*“4.66. That the conspiracy being detected in court, conspirators all of sudden harassed Applicant’s son by throwing his belongings from married accommodation alongwith his wife with no proper accommodation.*

*4.67. That the matter being listed for arguments, on 23 March 2011 applicant son was found lying along road side with fatal head injury and was rushed to MH Meerut by a passing by Army Officer.”*

However, while filing the counter affidavit, though the respondents have denied such an action taken against Capt Vivek Anand Singh, but the possibility of there being some compelling reasons and circumstances which drove the applicant to rush to the Court for stay of such action of the respondents cannot be ruled out. However, on grant of interim stay by the Tribunal, the respondents complied with the said order.

48. Lastly, an objection has been raised by the respondents that this OA has become infructuous as Capt Vivek Anand Singh died during the pendency of the OA. We have gone through the reliefs (supra) claimed by the applicant. So far as relief no. (a) is concerned, it may become infructuous, but as regards the other reliefs, the petition still survives. Otherwise also, it is necessary to set aside the GCM proceedings for two reasons:

(1) Recovery of an illegal weapon under the Arms Act is a cognizable offence. The Arms Act being the special law, the respondents did not lodge any FIR in respect of the same, but adverted to prosecute the applicant in GCM.

(2) The convening order passed against Capt Vivek Anand Singh, recovery of illegal weapon from him, recording of his confessional statement as alleged and the proceedings of GCM, all appear to be in contravention of the law settled by the Hon'ble Supreme Court and statutory provisions (supra).

49. Otherwise also, without setting aside the impugned orders/proceedings against Capt Vivek Anand Singh, no action may be initiated against the officers/officials, who were actually involved in sale of illegal weapon and against those too, in connivance of whom Capt Vivek Anand Singh had been falsely roped in, showing false recovery of alleged weapon from him. The allegation of the applicant that her son appears to have been removed from their way in a fake alleged accident, needs to be looked into. It is necessary that appropriate investigation may be done by the investigating authorities under Cr.P.C read with Section 125 of the Army Act with due trial of guilty in accordance to law.

50. In view of above, the OA deserves to be allowed and the convening order as well as the charge-sheets impugned in the petition are liable to be set aside.

51. At this juncture, learned counsel for the applicant submits that eligibility to family pension of applicant's son will originate from his

invalidation out; therefore, the applicant would not press for the relief of setting aside the invalidment of her son. Learned counsel for the respondents states that in this case, payment of pension cannot be denied. Accordingly, we refrain from quashing the invalidment order.

52. While parting with the case, our attention has been invited by learned counsel for the applicant to certain averments contained in para 5.3 of the unamended OA, raising allegations of professional misconduct against Shri P.N.Chaturvedi, Advocate, who was earlier appearing for the applicant. Para 5.3 of the unamended petition is reproduced as hereinunder:

*“5.3 Because, the charge sheet contains the wrong registration number of the alleged pistol as No 7602953 which is alleged to be in the possession of the applicant and he was allegedly found selling the same. However, pistol produced before the GCM by the prosecution witness bears the registration No 4602953 and this anomaly is incurable. Despite the fact that the reference was made by the GCM vide Annexure No A-8 but no legal and concrete action had been taken by the convening authority. Such aspect has been strongly criticized by the Principal Bench setting aside the GCM of Major SS Chillor on this account only.”*

53. The allegation raised by learned counsel for the applicant against Shri P.N.Chaturvedi is that he was hand in gloves with some persons associated with the respondents and he drafted the petition in such a way as to frustrate the claim of late Capt Vivek Anand Singh. In case Shri P.N.Chaturvedi has committed any professional misconduct, it is for the State Bar Council to look into the matter and proceed against him in accordance to Section 35 of the Advocates Act, 1961.

54. Accordingly, the **OA is allowed** with the direction/observation as indicated hereinunder:

- (1) The impugned convening order as well as the charge-sheets are set aside and late Capt Vivek Anand Singh is exonerated of all the charges levelled against him.
- (2) Since recovery of pistol and cartridges makes out a cognizable offence under Sections 25 and 36 of the Arms Act to lodge an FIR followed by investigation, it is the duty even of a common citizen aware of the commission of any offence under law to give information of the same to the officer in charge of the nearest police station or the magistrate having jurisdiction. Hence we direct the respondents/authorities concerned to lodge an FIR at Meerut or Delhi Cantt with regard to recovery of arm in question and investigation into the matter may be done by an appropriate independent forum in accordance to law.
- (3) The unit of late Capt Vivek Anand Singh is directed to lodge an FIR with regard to incident occurred on 02.03.2011 with follow up investigation. The authority concerned shall investigate as to whether the incident took place was normal or it was the result of any conspiracy hatched against late Capt Vivek Anand Singh.
- (4) The respondents are directed to grant invalid pension to late Capt Vivek Anand Singh upto his death and thereafter family pension to the NOK as per rules of invalidment pension. Arrears thereof shall be paid by the respondents to the NOK within three months from today, failing which they shall pay interest at the rate of 10% per annum on the amount due.
- (5) There shall be no order as to costs.

Let a copy of the present judgment alongwith a photostat copy of the OA be sent to the U.P.Bar Council to proceed against Shri P.N.Chaturvedi

under Section 35 of the Advocates Act, 1961 with due compliance of principles of natural justice. It is, however, clarified that we have not entered into the merits of the allegations raised against Shri P.N.Chaturvedi and and it is for the U.P.Bar Council to go into the merits of the matter, so that justice may be done not only to Shri P.N.Chaturvedi but also to the applicant/complainant who has raised the allegations against a counsel. We hope that the U.P.Bar Council, after thorough scrutiny, will take a decision in the matter within a period of a year from today.

**(Air Marshal BBP Sinha)**  
**Member (A)**

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

Dated: 05 January 2017  
LN/-