

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

RESERVED
(Court No. 2).**Transferred Application No. 339 of 2010**
Monday the 8th day of February, 2016“Hon’ble Mr. Justice Abdul Mateen, Member (J)
Hon’ble Lt. Gen. A.M. Verma, Member (A)”Ex Sower (ALD) Krishan Pal, Ex 51 Armd Regt, Presently lodged in Jail,
son of Shri Sardar Singh, Village and PO Nisarkha, District Bulandshahr.

.....Petitioner/Applicant

By Shri Rohit Kumar, learned counsel for the petitioner.

Versus

1. Chief of Army Staff, New Delhi.
2. GOC, 31 Armd Div., 56 APO.
3. Commanding Officer, 51 Armd Regt., C/o 56 APO.
4. Union of India through Secretary, Ministry of Defence, New Delhi.

.....Respondents

By Shri D.K. Pandey, learned counsel for the respondents, along with Capt.
Ridhishri Sharma.**ORDER**

1. This Civil Misc. Writ Petition No. 32264 of 2000 was received by this Tribunal on 21.6.2010 from the High Court of Judicature at Allahabad, Allahabad, and was registered as above.

Transferred Application No. 339 of 2010

2. In this writ petition the petitioner has prayed that he be treated as having continued in colour service, to quash the DCM proceedings and the rejection order on his statutory petition.

3. The facts of the case, in brief, are that the petitioner was enrolled in the Indian Army on 22.1.1985 and was posted to 51 Armd Regt in the year 1992. On 17.10.1997 between 8.00 and 9.00 P.M. while the petitioner was in the Unit, he was forcibly taken away by 6-8 persons in combat dress and civil dress to Jhansi, where he was kept in a prison cell of a Unit. A Court of Inquiry was ordered during which the petitioner remained under close arrest. The tentative charge-sheet was heard under the provisions of the Army Rule 22 on 1.12.1997 where after Summary of Evidence was recorded. The respondents decided to try the petitioner by DCM and the relevant documents, i.e. charge-sheet and Summary of Evidence were given to the petitioner on 4.7.1998. The DCM concluded on 24.8.1998 wherein the punishment awarded to the petitioner was one year's R.I. and dismissal from service. The sentence was confirmed by the competent authority on 21.9.1998 and the petitioner was handed over to the District Jail, Jhansi. The statutory petition of the petitioner was rejected by the COAS, vide order dated 8.5.1999.

4. The case of the petitioner is represented by Shri Rohit Kumar, learned counsel. According to the petitioner he has been falsely implicated by Hav. Madhavan of CCLU and L/Nk Sashidharan of 7 Armd Workshop

and there were several infirmities in the process of investigation and trial in which the provisions of the Army Act and the Army Rules & Orders have been given a go by. According to the petitioner, Army Rule 22 has not been complied with. There are contradictions in the statements given by the prosecution witnesses during recording of Summary of Evidence. The petitioner's request for making available Major Prakash Chandra, OC, CCLU, Hav. Madhavan of CCLU, Sub. Roberts of 31 Armd. Divn. Pro-Unit and L/Nk Vinod Singh of Pro-Unit were not granted. According to the petitioner, an unnamed source informed Hav. Madhavan that the petitioner was about to sell country made pistol. The entire case, according to the petitioner, was based on being information given by this unnamed source. The petitioner says that he was not given a copy of the charge-sheet and Summary of Evidence in vernacular translation. He was medically not examined during trial by DCM and was not allowed to engage a Lawyer of his own choice. According to the petitioner, the manner in which the statements were recorded during DCM gave an impression that a story had been written without any emphasis on the Rules and Regulations. The petitioner states that the majority of the prosecution witnesses had not appeared in either the investigation or recording of Summary of Evidence. The cardinal principle of ascertaining the source or origin of the country made pistol was not ascertained. This being an offence under the Army Act, non-filing of FIR is in violation of statutory rules. There are several

contradictions in the deposition of the prosecution witnesses as also the name of Kishori has come up during the investigation and the DCM. This person, viz. Kishori, has not been examined during the Summary of Evidence or the DCM. The petitioner states that he was not in possession of the alleged weapon and ammunitions, recovered on 17.10.2007. The prosecution witness, who claims that he saw the petitioner handing over the weapon to L/Nk Sashidharan could not have seen the alleged transaction as it was dark at that time. The tentative charge-sheet stated that the petitioner was trying to sell an illegal country made pistol, whereas the weapon recovered, as claimed by the respondents, was a country made Revolver. The alleged recovery of the Revolver and four rounds of ammunitions from the person of L/Nk. Sashidharan was not shown to the independent witness, who was present at the spot. There is no seizure memo and the procedural safeguard under the Arms Act, 1959 was not followed. The petitioner also mentions about confessional statement, which has not been produced either by the respondents or by the petitioner for our perusal. The petitioner summarizes his case by stating that there was no Revolver and ammunitions recovered from him and these were planted by the LU and CMP authorities to hide their lapses which they had committed while abducting the petitioner. No FIR was lodged and the entire case is fabricated.

5. The respondents were represented by Shri D.K. Pandey, learned counsel for the respondents, along with Capt. Ridhishri Sharma. The case

of the respondents is that at about 2100 hours on 17.10.1997 about ten persons in civil clothes and combat dress forcibly caught hold of the petitioner and took him away from the Unit location without informing the CO. the respondents state that a scuffle took place while they were taking away the petitioner stating that they were from Intelligence Bureau. At about 2345 hours on 17.10.1997 the OC of the Pro-Unit was contacted and he informed that the petitioner was arrested by a team of 31 Armd Divn ProUnit, Det Central Command, Liaison Unit, Jhansi, and personnel of IS Group of Bhopal. A Court of Inquiry was ordered by HQ 31 Armd Divn which found the petitioner guilty of keeping a country made Revolver with four rounds of ammunitions illegally without any licence. The charge under the Army Rule 22 was heard, Summary of Evidence was recorded and thereafter Commander 27 Armd Brigade convened a DCM which concluded on 24.8.1998.

6. The respondents stated that the Court of Inquiry blamed the petitioner for keeping country made Revolver with four rounds of ammunition and the GOC, 31 Armd Divn directed disciplinary action against the petitioner for possessing country made Revolver and for trying to sale the same. During the hearing under Army Rule 22 since documentary evidence was available in the form of Court of Inquiry, no other prosecution witness was called. The respondents state that all provisions of Army Rule 23 had been complied with. A decoy, prosecution

witness L/Nk Sashidharan, was planted in order to establish the charge against the petitioner. Finger prints on the weapon were, admittedly, not taken. The statements of the personnel of the liaison Unit had not been recorded since, according to the respondents, the Intelligence Agency did not divulge the name of their source. The vernacular translation of the Summary of Evidence was handed over to the petitioner on 4.7.1998 and also the petitioner was examined every day by the Medical Officer before the proceedings. The respondents claim that the petitioner did not want a civil counsel and on his request Lt. Col. A.S. Ghuman was nominated as the Defending Officer. No FIR was lodged since the weapon had been recovered from a service personnel within the Cantonment Area and origin of the weapon was yet to be confirmed. The respondents admitted that the CO of the petitioner had not been informed in advance due to secrecy of the operation. The respondents in response to several issues raised by the petitioner denied those issues and stated that these would be explained during the DCM.

7. Heard both sides and examined the documents.

8. To begin with, the respondents informed us that the proceedings of the DCM were destroyed by a Board of Officers in May, 2009. We find it extremely intriguing considering the fact that the writ petition was filed before the Hon'ble High Court on 24.4.2001 and the counter affidavit was filed by the respondents on 13.7.2001. The respondents, therefore, being

well aware that this case is sub-judice destroyed the DCM proceedings in May, 2009. This is a very serious lapse on part of the respondents and adverse inference from it may be drawn as provided in Indian Evidence Act Section 114. In this we are also guided by the judgment and order of the Hon'ble Supreme Court passed in Civil Appeal No. 4418 of 2004 (Union of India & another v. Sudershan Gupta) decided on 20.5.2009; this case had been filed against the judgment of the Hon'ble Delhi High Court setting aside the order of convening the GCM. The relevant case note from the said judgment is quoted below :-

“Service – Production of records – Appeal filed against the judgment and order passed by the Division Bench of High Court setting aside quashing the order of convening the General Court Martial whereby records of the Convening Authority were not available as the same has been destroyed – Held, in view of non-availability of records no reasonable ground to interfere with the order of the Division Bench of the High Court – Legality and the validity of the order of Convening the General Court Martial cannot now be decided in the absence of the records – Hence, appeal dismissed accordingly. Disposition : Appeal dismissed”

9. Now, therefore, our decision has to be based only on the basis of Summary of Evidence, copy of which has been annexed by the petitioner in this writ petition.

10. The narrative that emerges is that Hav Madhavan of CCLU was informed by a source that the petitioner was selling illegal weapon. He contacted L/Nk Sashidharan, who took, as per his own statement, six months to associate with the petitioner and eventually a trap was laid by the LU to apprehend the petitioner while selling the weapon. On 15.10.1997 L/Nk Sashidharan met the petitioner in the evening. The petitioner, according to Sashidharan, showed him a weapon but said that he would hand over the weapon only once he was paid the cost of it. on 17.10.1997 Sashidharan went to OC, LU, at about 6.00 P.M. where he found that there were persons from CMP and LU present. Sub Roberts of CMP handed over Rs. 5,000/- to him to be given to the petitioner as cost of the weapon. Sashidharan thereafter went to the Unit of the petitioner and the petitioner rode his bike and asked Sashidharan to sit at the rear of the bike. They went to a secluded place. During the Summary of Evidence, the availability of light in that area was measured and it had been recorded that the nearest source of light was at a distance of 62 mts. There is an MI Room in which the verandah light was on which provided defused light at a distance of 30 mts. According to Sashidharan the petitioner asked for money which was given to him which he kept in his pocket without counting. Thereafter the petitioner handed over the Revolver and four rounds of ammunition to Sashidharan. As soon as he handed over these two items, L/Nk Vinod of Pro-Unit, who claims he had been following them and was hiding close by,

pounced on the petitioner, started beating him and Vinod was joined by other personnel of Pro and LU who were with him. The petitioner was forced to be pinned down on ground. The petitioner had started bleeding and all the personnel were beating him. At this stage, Sow D. Kamblesan of 51 AR happened to be passing close to that area when he heard the sound of this scuffle. He ran towards that direction and in his own words he described the scene as under :-

“On seeing and hearing this, I started shouting at them to leave the man and not beat him. Hearing me, one of them came to me and I saw he was a JCO. He told me he was from the CMP and it was a case of a theft and I should go away or I too will be implicated in the case. He then asked me to go to where our garages are and call his offr who is waiting there. I told him that I will not go but he himself can do so and use my cycle. In the meantime, the beating and shouting was going on. When this JCO was speaking to me two of the men who were also there came up and told the JCO that since I was so concerned I too should be implicated.”

11. While this was going on, more persons, viz. Laxmi Chand, Bahadur and Sher Din, also appeared, out of which Laxmi Chand and Bahadur were examined as PWs 2 and 3 in the Summary of Evidence. They corroborated the statements of Kamblesan, PW 1. PW 4 was RDM Ram Kishan, who also, on hearing the scuffle, reached there and found that one man is held

down by 7-8 persons in combat dress. The extracts of statement of PW 4 is as under :-

“At the rd junc in front of the Central MI Room I found seven to eight men who had pushed down one man by the side of the road. All of them were in combat dress. Dfr/Clk Lakhmi, Dfr/SKT Sher Din and Sow/Safai Kumblesan were also there. I found that these men were holding down one man who also was in combat dress. Dfr/Clk Lakhmi was trying to talk to them to release this man. I told these men to do son and we will take him to our Regimental Quarter Guard where we can sort out the matter. One of them told me to go away or we all will get implicated in this case. Till that time I had no clue as to what the case was about. Lakhmi Cnahd managed to see who the man was once the hand on top of his mouth was released. He said he is ALD Krishan Pal of C Sqn of my Regt. On hearing this, I again told these men to release this man and we will resolve the issue. I sent one man to call the RM from the JCO’s Mess. Dfr/SKT Sher Din was sent to ring up the Comdt. As this was going on, one open jeep and civ scooter also came there. One man in a civ dress showed me an I-Card and said he was from the IB, however it was too dark to see. He told us to let them do this job or we all will get involved in the case. I told him to wait as I had already sent for the RM. This man who had showed something like his I-Card told the other to put ALD Krishan Pal in the jeep

and take him away. Despite my speaking, the man took away ALD Krishan Pal in the Jeep and then this man too left in the scooter”.

12. The petitioner was forcibly taken away by the persons of CMP and Pro Unit and thereafter the investigation and the DCM proceeded.

13. The testimonies of the witnesses in Summary of Evidence indicate that the place where the alleged exchange of weapon and ammunition took place was dark. Whether or not an eye witness could see the exchange is a point that needs to be looked into. Also, the fact that the JCO, i.e. Sub Roberts threatened Kamblesan and Ram Kishan of getting implicated points towards the fact that the petitioner to was being implicated.

14. The petitioner has also annexed a list of exhibits, annexed as Annexure ‘RA-1’, that were produced during the DCM. We find that there is no mention of any seizure memo in the list of exhibits. This list includes confessional statement of the accused. However, no copy of this confessional statement has been produced by the respondents.

15. There are several contradictions in the statements given by the various witnesses during recording of Summary of Evidence, e.g. there is some difference of blind folding the petitioner, the jeep stopping between Babina and Jhansi, number of personnel who came to arrest the petitioner. The important issue, however, is whether or not the petitioner was in possession of the weapon at the time of his arrest.

16. The petitioner stated that no weapon or ammunition was recovered from him. The only eye witness to this transaction of alleged weapon is L/Nk Vinod, who was examined as PW 7 in the Summary of Evidence. He has stated that he followed Sashidharan and the petitioner when they were going on a by-cycle and states that he clearly saw the transaction of weapon between the petitioner and Sashidharan. He states that he was at a distance of 16 mts. from the place where transaction took place. Considering the state of light, as described in the recording of Summary of Evidence as also the fact that this whole operation being conducted in total secrecy we find it hard to believe that the actual transaction of weapon between the petitioner and Sashidharan could have been seen by this eye witness. The Hon'ble High Court of Patna in Criminal Appeal (DB) Nos. 778, 824, 853,895, 933, 937, 953, 956, 962 of 2006; 89 of 2007 (Jai Prakash and another v. State of Bihar), decided on 22.2.2012, has held as under :-

“Therefore, it might be clarified that examination of witnesses led to conclusion that evidence of eye witnesses was not reliable and could not have identified Accused persons – Hence, order of conviction passed against all Accused was liable to be set aside – Appeals allowed.”

17. We hold similar view that the so called eye witness account of L/Nk Vinod is not reliable. Going by the statement of the prosecution witnesses during recording of the Summary of Evidence, it is clear that the petitioner was not in possession of the weapon and ammunitions when he was

arrested. The weapon and ammunitions were recovered from L/Nk Sashidharan and not the petitioner. Also, according to Sub Roberts, who was examined as PW 8 in the Summary of Evidence, the money was recovered not from the petitioner but it was lying on the ground. Thus, neither the alleged weapon and ammunitions nor the money that had been paid to procure the weapon and ammunitions were recovered from the petitioner. We come back to the question whether or not the petitioner was in possession of the alleged weapon and ammunition at the time of arrest. It has been established by L/Nk Sashidharan himself as also the testimony of Sub Roberts during Summary of Evidence that the weapon and ammunition were recovered by the CMP personnel from Sashidharan and not the petitioner. No fingerprints had been taken so as to establish that this weapon was ever held by the petitioner. No seizure memo was prepared. The money which was allegedly paid by Sashidharan to the petitioner also not recovered from the possession of the petitioner but was found lying on the ground. In light of the above facts, the factum of the petitioner being in possession of the weapon is highly suspect. Whether the petitioner was selling the weapon to Sashidharan or Sashidharan was trying to plant the weapon on the petitioner is also in doubt. This doubt is further strengthened by the fact that Sub Roberts of CMP told Sow Kamblesan that he too would be implicated, meaning thereby that the petitioner was being implicated in this case. Also, RDM Ram Kishan was told by the CMP personnel that he,

i.e. Ram Kishan, would get implicated. This leads us to draw the inference that the allegation on the petitioner being in possession of a weapon and trying to sell it is not clearly established. Also, the tentative charge-sheet stated that the petitioner was trying to sell the weapon, whereas actual charge-sheet did not mention this fact. The respondents

18. The Hon'ble Supreme Court in the case of **Union of India and others v. L.D. Balam Singh** reported in (2002) 9 SCC 73 has held that *“Armed Forces – Army Act, 1950 – Ss. 69 and 109 – Trial under S. 69 for offence punishable under provisions of another Act, being in the nature of “civil offence” – Thereby, that Act in its entirety would become operative and as such procedural safeguards, if any, provided therein would also be attracted”* which brings us to the charge on which the petitioner was tried. We have only Hindi translation of the charge-sheet which states that the petitioner was tried under Section 69 of the Army Act contrary to Section 25 read with sub-section (1B) of the Arms Act. Section 20 of the Arms Act provides that a where any person is found carrying or conveying any arms etc. under suspicious circumstances may be arrested without warrant and such arms and ammunition may be seized.

19. Section 37(a) of the Arms Act reads as under :-

“all arrests and searches made under 4 this Act or under any rules made thereunder shall be carried out in accordance with the

provisions of the [Code of Criminal Procedure, 1973 (2 of 1974)], relating respectively to arrests and searches made under that Code;”

20. According to the provisions of Arms Act, recovery of the Revolver should have been recorded in the form of seizure memo and the person arrested should have been informed immediately the charges on which he has been arrested under the provisions of the Code of Criminal Procedure. Section 50 of the Code of Criminal Procedure, thus, reads as under :-

“50. Person arrested to be informed of grounds of arrest and of right to bail.- (1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.”

21. In the instant case we find that there is no seizure memo and there is no record of the petitioner having been informed by the persons who arrested him have made no mention of Kishori while pleading their case.

22. Considering the above, we are of the view that the prosecution has not been able to fully establish the fact that the petitioner was in possession of the country made Revolver and ammunition as also his attempt to sell it.

Since DCM proceedings are not available, we are of the view that the petitioner deserves the relief that he has asked for. He, however, cannot be reinstated in service at this stage.

23. Accordingly, all the facts, circumstances, the manner in which the petitioner had been arrested, as also destruction of DCM proceedings knowing fully that the case of the petitioner is sub-judiced, we give the benefit of doubt to the petitioner and allow this petition. The DCM proceedings and the rejection order on the petitioner's petition by the COAS are hereby quashed. The petitioner will be held to be notionally in service till he attains the service which entitles him to pension, where after he shall be granted all the retiral benefits including pension. The respondents are directed to implement this order within a period of three months from today. No order as to costs.

(Lt. Col. A.M. Verma)
Member (A)

(Justice Abdul Mateen)
Member (J)

PG.