

**RESERVED**  
**Court No.1**

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

**O.A. (A) No. 98 of 2014**

Thursday, this the 30<sup>th</sup> day of May, 2019

**Hon'ble Mr. Justice SVS Rathore, Member (J)**  
**Hon'ble Air Marshal BBP Sinha, Member (A)**

**Ex-Lt Colonel Subhash Chandra Pandey (IC-50906F)** of Proof Detachment of Senior Quality Assurance Establishment (SQAE) (Ammunition), Khamaria, Jabalpur, son of Sri Balram Pandey, Mohalla- Rameri, District Hamirpur (U.P.).

.... Appellant

Ld. Counsel for the: **Col (Retd) R.N. Singh, Advocate.**  
Appellant

Versus

1. Union of India, through the Secretary, Ministry of Defence, New Delhi.
2. Chief of Army Staff, Integrated Headquarters of the Ministry of Defence (Army), South Block, New Delhi–110011.
3. General Officer Commanding-in-Chief, Central Command, Lucknow Cantt.
4. General Officer Commanding, Madhya Bharat Area, Jabalpur.
5. Commandant Central Ordnance Depot (COD), Jabalpur.

....Respondents

Ld. Counsel for the: **Shri Kaushik Chatterjee, Advocate.**  
Respondents.

**ORDER****“(Per Hon’ble Mr Justice SVS Rathore, Member (J))”**

1. By means of this appeal preferred under Section 15 of the Armed Forces Tribunal Act, 2007, the appellant has challenged the punishment awarded to him by the General Court Martial (GCM), which was promulgated on 15.03.2014. The appellant was punished with cashiering and 07 years of rigorous imprisonment. The appellant during pendency of this appeal was granted bail on 27.05.2014 and released from jail on 07.06.2014.

2. In brief the facts necessary for the purpose of the present appeal may be summarised as under:

The appellant was commissioned as 2<sup>nd</sup> Lieutenant in the Army Ordnance Corps (AOC) on 14.12.1991. On 16.12.2004 he was promoted as Lt Colonel. On 21.02.2011 he was posted as OIC Proof Detachment Senior Quality Assurance Establishment (Ammunition) SQAЕ (A) Khamaria, Jabalpur M.P. As per the claim of the appellant he was working directly under the IHQ of MoD (Army) and was not reflected in the IAFF – 3008 Monthly Strength Return of Central Ordnance Depot Jabalpur as Commander Ammunition Sub Depot, hence the Commandant was neither I.O. nor R.O. nor S.R.O. of the appellant. On 17.05.2011 as per the version of the appellant he was illegally appointed Cdr ASD by COD Jabalpur. On 16.12.2011 he was illegally attached with 506 Army Base Workshop (ABW) Jabalpur while he could have been attached by IHQ of MoD Army as per Army Instructions 30/1986.

On 20.12.2011 hearing of charge under Army Rule 22 on eight tentative charges was held. From 21.12.2011 to 21.02.2012 summary of evidence was recorded and thereafter four charges were framed against the appellant and copy of the duly approved charge-sheet was made available to the appellant on 03.07.2012, whereas GCM commenced on the same day. On 10.03.2014 the proceedings of GCM were confirmed by GOC-in-C Central Command Lucknow and the same were promulgated on 15.03.2014. A pre-confirmation petition was filed by the appellant on 11.01.2013, which was rejected by GOC-in-C Central Command on 24.12.2013. Post-confirmation petition was filed by the appellant on 14.03.2014 which was also rejected by the competent authority on 31.07.2015.

3. The appellant was tried for the following charges:-

**“ CHARGE SHEET”**

The accused IC 50906F Lieutenant Colonel Subhash Chandra Pandey of Central Ordnance Depot, Jabalpur, attached with 506 Army Base Workshop, an officer holding a permanent commission in the regular Army, is charged with:-

**First Charge SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f)  
Army Act OF SECTION 52 OF THE ARMY ACT WITH INTENT  
Section 52(f) TO DEFRAUD,**  
in that he,

at Jabalpur, between 01 and 15 November 2011, with intent to defraud, created surplus quantity 2194 pieces of Tungsten penetrators, a metal scrap residue of 125 mm FSAPDS/T Soft Core 2A which is retrieved by burning the tracer thereof, by fictitiously making Laboratory Work Orders (LWOs) and Workshop Completion Notice (WCNs) as under and showing the said quantity of the Tungsten penetrators to have been demolished, whereas the same was lying in the Ammunition Sub Depot of the Central Ordnance Depot, Jabalpur

- (a) Qty 600 - LWO No 110159 daed 01 Sep 2011 and WCN No 110159/ Demo/F/ATA dated 02 Nov 2011
- (b) Qty 108 - LWO No 110168 dated 13 Sep 2011 and WCN No 10168/Demo/F/ATA dated 02 Nov 2011
- (c) Qty 807 - LWO No 110169 dated 13 Sep 2011 and WCN No 110169/Demo/F/ATA dated 02 Nov 2011
- (d) Qty 679 - LWO No 110170 dated 13 Sep 2011 and WCN No 110170/Demo/F/ATA dated 03 Nov 2011.

**Second Charge**

**Army Act      **SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f)**  
**Section 52(f)   **OF SECTION 52 OF THE ARMY ACT WITH INTENT**  
****TO DEFRAUD,****  
                          in that he,****

at Jabalpur, on 15 Nov 2011, with intent to defraud, illegally disposed of quantity 1480 pieces of Tungsten penetrators referred to in the first charge, weighing 5032 Kgs, valued at Rs 41.26 lacs, the property of the Govt.

**Third Charge   **WHEN SIGNING A DOCUMENT RELATING TO**  
**Army Act       **UNSERVICEABLE AMMUNITION, FRAUDULENTLY**  
**Section 58(a)   **LEAVING IN BLANK A MATERIAL PART FOR**  
****WHICH HIS SIGNATURE IS A VOUCHER,****  
                          in that he,******

at Jabalpur, on or about 15 November 2011, Jabalpur, when signing the Demolition Diary of the Ammunition Technical Area in his capacity as the Officer in-charge Demolition of the Central Ordnance Depot, fraudulently left the entry, wherein the details and total quantity of unserviceable ammunition taken out of the said Depot for demolition was to be entered blank.

**Fourth Charge   **AN ACT PREJUDICIAL TO GOOD ORDER AND**  
**Army Act       **MILITARY DISCIPLINE,**  
**Section 63******

in that he,

at Jabalpur, on or about 15 November 2011, with a view to keep his act of illegal disposal of 1480 pieces of Tungsten penetrators referred to in the second charge, under wrap, improperly, distributed Rs 5000/- each to approximately 27 civilian labourers through pit incharges of the Central Ordnance Depot, Jabalpur.

Place: Jabalpur (MP)

Date : 02 Jun 2012

(Sanjay Dawar)  
Brigadier  
Commandant  
506 Army Base Workshop"

4. During GCM the appellant pleaded not guilty and the evidence was recorded and after conclusion of the evidence the appellant was punished as above, hence the instant appeal.

5. Since it is an appeal, therefore, before proceeding further we would like to deal with the powers of the Armed Forces Tribunal while dealing with an appeal under Section 15 of the Armed Forces Tribunal Act, 2007. Section 15(4) of the Armed Forces Tribunal Act reads as under:-

**Section 15 in the Armed Forces Tribunal Act, 2007**

“15. Jurisdiction, powers and authority in matters of appeal against court-martial. —

(1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable under this Act in relation to appeal against any order, decision, finding or sentence passed by a court-martial or any matter connected therewith or incidental thereto.

(2) ...

(3) ...

(4) The Tribunal shall allow an appeal against conviction by a court-martial where—

(a) the finding of the court-martial is legally not sustainable due to any reason whatsoever; or

(b) the finding involves wrong decision on a question of law; or

(c) there was a material irregularity in the course of the trial resulting in miscarriage of justice,

but, in any other case, may dismiss the appeal where the Tribunal considers that no miscarriage of justice is likely to be caused or has actually resulted to the appellant:

Provided that no order dismissing the appeal by the Tribunal shall be passed unless such order is made after recording reasons therefor in writing.”

Thus, a bare perusal of Section 15 shows that the sub-clause (4) mandates that an appeal has to be allowed on certain

contingencies, which are enumerated in sub- clause (4). Sub- clause (4) is couched with strong words, which are quite different from the corresponding law in the Cr.P.C.

6. The argument of the learned counsel for the appellant in the instant case is that there are certain procedural lacunas which have vitiated the trial and apart from it there is no evidence to prove the charge levelled against the appellant and therefore the findings recorded by the GCM are invalid. Though several irregularities have been mentioned in the written submissions also but main thrust of the learned counsel for the appellant in this case is on non- compliance of Rule 34(1) of the Army Rules, 1954 and also on not holding of any investigation or Court of Inquiry. It has been argued that the minimum period required to commence the GCM as provided under Rule 34(1) was not given to the appellant which has caused great prejudice to him.

7. Perusal of the charge sheet shows that all the offences with which the appellant was charged were committed between 01.11.2011 to 15.11.2011. In order to prove the charges against the appellant during GCM PW1 Subedar (Ammunition Technician) Hiranmay Dutta, was examined, who has stated that on 31.08.2011 the appellant was the Commander, Ammunition Sub Depot, Jabalpur and Officiating Officer-in-Charge, Ammunition Technical Area. He has reported to him on 31.08.2011. He has stated that in the morning time between 0800 hrs to 10000 hrs labourers used to come for burning of 125 mm FSAPDS/T

Combustible Cartridge, which is carried out by 08 to 10 labourers under the direction of the Commander, Ammunition Sub Depot and Officiating Officer-in-Charge, Ammunition Technical Area. In this regard a draft Part-I Order was published on 24.08.2011. This witness was on balance annual leave from 03.10.2011 to 03.11.2011. From 08.11.2011 till 11.11.2011 this witness went to Barela, Demolition Ground alongwith Major Tila Whista, Officer-in-Charge, Ammunition Technical Area for demolition of various stores. This witness could not narrate exact stores demolished during that period. Thereafter he again stated that on 14.11.2011 the appellant was the demolition Incharge and normally after demolition they used to take rest and never used to go to the office. They used to come back approximately by 1400 hrs to 1500 hrs after demolition. On 14.11.2011 when this witness was taking rest in his room between 1700 hrs to 1715 hrs, he heard somebody knocking on his door. On opening the door he saw Subedar AM Rao and Naib Subedar Upadhyay. When he asked them what is the matter then Subedar AM Rao told him that Lt Col Subhash Chandra Pandey has called him and Naib Subedar Upadhyay to his office. This witness asked Subedar Rao the reason for which he was called. Then Subedar Rao told him that tomorrow one vehicle has to go for demolition of 125 mm FSAPDS/T Soft Core 21 Ammunition to Barela, Demolition Ground. This witness asked when the said ammunition has been burnt then why it has to be taken again for demolition. Subedar AM Rao smilingly said that something is fishy with Sahab. On

inquiry he said that it has to be handed over to somebody. Then this witness told both the Junior Commissioned Officers that it is wrong and asked them as to why both of them did not tell Sahab but he said that it is the direction of the higher authority. On 15.11.2011 between 0615 hrs to 0630 hrs they gathered at gate for going to Demolition Ground, Barela and after completing the formalities between 0630 hrs to 0730 hrs two vehicles loaded with ammunition stores left the Ammunition Sub Depot gate. One vehicle contained demolition explosives and the same vehicle had 120 mm Mortar which was a unserviceable ammunition loaded in it which was wrong. Another vehicle was loaded with 125 mm FSAPDS/T Soft Core 2A. Both the vehicles were marched off by Subedar AM Rao from the gate. Total three vehicles were out for demolition. One vehicle had come directly from Mechanical Transport (Internal Transport). The two vehicles mentioned above were loaded and in third vehicle Havildar GSS Reddy, Subedar AM Rao and this witness were sitting in the cabin of the vehicle. During that period Subedar AM Rao received a call on his mobile and when this witness asked about the person who called him he replied that it was the telephone of the appellant. When they were one kilometre short of Demolition Ground, Barela on the side of the road a small vehicle similar to that of Tata 407 and eight to nine civilians were seen sitting in the vehicle. Subedar AM Rao got down from the vehicle and spoke to the people who were sitting on front seat of the vehicle. Subedar AM Rao guided both the vehicles i.e. military vehicle and civil vehicle. The vehicles



were taken away from main road for approximately 100 meters inside a forest and with the help of civilians, the unloading of the ammunition boxes on the ground started from the military vehicles. After four to five minutes Subedar AM Rao again received call on his mobile and when this witness asked Subedar Rao about the person who called him then he told him that it was Lt Col Subhash Chandra Pande. Subedar Rao told this witness that Lt Col Pandey has told him to take the vehicle after unloading to Police Station Barela for some work. Thereafter this witness asked Subedar AM Rao will this vehicle not go to Demolition Ground, Barela then Subedar Rao replied that it will not go. This witness told Havildar GSS Reddy to pick up the breakfast material from the vehicle and then both of them reached Demolition Ground, Barela on foot. Subedar AM Rao, Military vehicle and the driver remained there where the unloading from the Military vehicle was being done. Between 0930 hrs to 1000 hrs Lt Col Subhash Chandra Pandey reached the Demolition Ground, Barela. This witness reported to the appellant regarding the demolition which was being carried out on that day in the Demolition Ground, Barela. Thereafter they returned approximately at 1400 hrs. In the afternoon around 1500 hrs to 1515 hrs this witness received a call on his mobile from Subedar AM Rao, who gave him a message that Lt Col Subhash Chandra Pandey has called all Ammunition Technical Area staff to Officer-in-Charge, Ammunition Technical Area office at 1530 hrs. This witness reported there in time. When he reached there, Subedar

AM Rao, Naib subedar MK Upadhyay, Naib Subedar Sajiv CS, SSS Mr MK Chatterjee and three to four Non Commissioned officers were already present there. Thereafter the appellant also reached there but because of shortage of space he sent Non Commissioned officers outside. The appellant while sitting on his office chair said that he is fully responsible, do not get scared, he has spoken with Additional Director General on line just now, if anybody asks then tell them that the Ammunition which had gone for demolition, has been demolished. If anything else has to be asked then ask it from the appellant and thereafter these persons left his office. Next day i.e. 16.11.2011 this witness reached Demolition Ground, Barela for demolition. After labourers distribution they were not ready to go for their respective work. They were talking amongst themselves. This witness asked about the problem. Twenty seven labourers were standing together, they said that they want to say about yesterday's incident but the labourers said that they want to talk with the appellant. When the appellant reached the Demolition Ground between 0930 hrs to 1000 hrs, this witness gave him the report of this fact. The appellant told him that the money has to be given to those labourers and if he himself gives the money then more people will gather together. Thereafter the appellant called all the Ammunition Technicians turn by turn and gave five hundred notes to everybody for handing over it to the labourers. Officer-in-Charge, Ammunition Technical Area Maj Tila Whista joined the office on 22.11.2011.

8. The second witness for prosecution was Col Bg, Colonel Administration of 506 Army Base Workshop (PW2). This witness has produced the posting order dated 21.02.2011, draft daily order Part I dated 17.05.2011, draft daily order Part I dated 18.06.2011 and also draft daily order Part I dated 24.11.2011. He has also filed Instruction- 204 issued by Directorate General of Ordnance Services Technical Instructions. Thus this is not the witness of fact but he has produced certain orders. He has also filed the Demolition Diary of Central Ordnance Depot, Jabalpur opened on 01.01.2011 till 15.12.2011 alongwith Inspection sheet and also produced daily Manpower Distribution Register of Ammunition Technical Area of Central Ordnance Depot, Jabalpur. He has only produced several documents.

9. PW3 is Brigadier Giri Raj Singh. This witness has said that he will not be able to tell all the names of officers who were performing the duties of Commander, Ammunition Sub Depot but the names which he remembers are Major Bansal, Major Paramjit, Major Punia and Lt Col Subhash Chandra Pandey. Lt Col Subhash Chandra Pandey was performing the additional duties of Commander, Ammunition Sub Depot. He was given these additional duties once during the month of May, 2011 and thereafter during June, 2011, which he performed upto November, 2011. When the additional duty was given, both the times daily orders Part I were published. This witness has also proved DVD audio recording of 04.12.2011. Reliance has been placed by the

prosecution on this DVD recording as extra judicial confession of the appellant. Conversation between this witness and the appellant was recorded on personal Sony Blackberry Mobile phone of this witness by Maj Umeed Thapa of the same brigade and transcript of the Audio recording was also taken on record of the GCM. Admittedly it is recorded secretly.

10. The prosecution next produced PW 4 JC-724355 Subedar (Ammunition Technician) AM Rao of Central Ordnance Depot Jabalpur as PW4. This witness during GCM stated that as Ammunition Technician in the Ammunition Technical Area, whatever documents, including ISC, DRS, Laboratory Work orders were given for inspection, it was being done by him. From September 20, 2011 to October 20, 2011, 125 mm FSAPDS/T Soft core 2A burning was carried out in the Burning Area of Ammunition Technical Area. He used to go for the said burning sometimes in the morning and sometimes as reliever. The said burning used to take place under Officer-in-Charge, Ammunition Technical Area and during this burning Major Tila Whista was Officer Incharge, Ammunition Technical Area for some days and for some days Lieutenant Colonel Subhash Chandra Pandey performed the duties for Officer Incharge, Ammunition Technical Area. After burning of 125 mm FSAPDS/T Soft Core 2A, the Sabots recovered were partly deposited in Returned Empties and Ammunition Area and balance were kept in Ammunition Workshop Shed (AWS) 5 and 6 as well as in Ammunition

Technical Area. On 11.11.2011 around four or quarter to four in the evening, Col Subhash Chandra Pandey came to the Ammunition Technical Area and ordered this witness that the Laboratory Work Order, which is made for demolition of 125 mm FSAPDS/T Soft Core 2A be prepared. Therefore he told Lt Col Subhash Chandra Pandey that the same was already burnt and this should go to Returned Empties and Ammunition Area. After that Lt Col Subhash Chandra Pandey told this witness that the recoveries will be deposited in Returned Empties and Ammunition Area, the Laboratory Work Order is lying long outstanding, hence, prepare the Workshop Completion notice. Lieutenant Colonel Subhash Chandra Pandey told this witness that "I will be signing on the Workshop Completion Notice so what is your problem." After this, witness got the Workshop Completion Notice prepared and on the same day he put up the said Workshop Completion Notice for signatures. Thereafter on 14.11.2011 in the morning around 1030 hours Lieutenant Colonel Subhash Chandra Pandey sent a message on telephone that the vehicle which will return with Empty Packages from Demotion Ground, Barela, in the same vehicle, load the boxes of 125 mm FSAPDS/T Soft Core 2A which are kept in Burning Pit Area of Ammunition Technical Area. After this, this witness told Lieutenant Colonel Subhash Chandra Pandey, "Sir, this is already burnt and it is required to be deposited in Returned Empties and Ammunition Area and should not go out." To which Lieutenant Colonel Subhash Chandra Pandey told this witness, "These are the orders from higher ups

including Additional Director General, hence do what I tell you and rest I will tell you in the evening.” This witness went on to state that Lieutenant Colonel Subhash Chandra Pandey ordered him to come to the Demolition Ground, Barela next day in the vehicle loaded with Penetrators of 125 mm FSAPDS/T Soft Core 2A and hand over the same to a civilian who will be meeting me (the witness) on the left side of the road short of Demolition Ground Barela. I once again told Lieutenant Colonel Subhash Chandra Pandey that these are already burnt and should be deposited in Returned Empties and Ammunition Area and should not go outside and this is wrong. Naib Subedar MK Upadhyay also told him that this is wrong, to which Lieutenant Colonel Subhash Chandra Pandey ordered that these are the orders from top and also the order of Additional Director General Ordnance Services. This witness than told Subedar Hiranmay Dutta that we had told Lieutenant Colonel Subhash Chandra Pandey that this is wrong but Lieutenant Colonel Subhash Chandra Pandey ordered that these are the orders from top and also the orders of Additional Director General of Ordnance Services, hence this job will have to be done. The witness went on to state that around one kilo meter short of Demolition Ground Barela the Civil Vehicle was standing there and one civilian was slowly walking towards them. The civilian told this witness that he had spoken to Lieutenant Colonel Subhash Chandra Pandey, who had asked him to collect the stuff from this witness. Thereafter the labourers brought by the civilian unloaded the boxes from the vehicles and kept them on the

ground. At that time some civilians had opened two to three boxes and checked with a magnet the boxes containing 125 mm FSAPDS/T Soft Core 2A Penetrators. Thus there is contradiction in his testimony because PW 1 says that the vehicle was taken one kilometre inside the forest and thereafter it was unleaded. The boxes contained 125 mm FSAPDS/T Soft Core 2A Penetrators. At approximately 1600 hours Lieutenant Colonel Subhash Chandra Pandey came to the Ammunition Technical Area Office and called Subedar Hiran May Datta, this witness, Naib Subedar MK Upadhyay, Naib Subedar Sanjiv Kumar SSS, Mr NK Chatterjee and told all of them, "Whatever incident has happened today it was on my orders and these are also the orders from the higher ups including orders of Additional Director General Ordnance Services." All the ammunition has been demolished. Lieutenant Colonel Subhash Chandra Pandey called this witness to the side of Gypsy and handed over him a bundle of FIVE HUNDRED RUPEES NOTES and told him to distribute Five Thousand Rupees each to the labourers of the pit. As per the evidence of PW 1 the money was given to him for distribution. On 15.11.2011 Lieutenant Colonel Subhash Chandra Pandey called said persons including this witness to the office when the witness asked Lieutenant Colonel Subhash Chandra Pandey, "Sir you are telling that these are the orders of higher ups but the stores which have gone out today, after talking to the Commandant deposit the same back in the Depot to which Lieutenant Colonel Subhash Chandra Pandey said that the Commandant has no knowledge of this and

the Additional Director General Ordnance Services (TS) had given the orders.

11. No 6936133H Nk (Dvr/MT) GC Basak of Central Ammunition Depot Pulgaon has been produced as PW-5. He has stated that on 15.11.2011 he was asked by Military Transport Havildar to reach the Ammunition Sub Depot Gate, when he reached there he saw two vehicles inside the gate, one was TATA 10 Tonner 09D 181781P which was already loaded along with which another vehicles was also standing. Subedar Hiranmay Datta told him that his vehicle will go for demolition after arrival of Subedar AM Rao while in route Subedar AM Rao received a call and asked this witness to stop the vehicle on the left side of the road. After 20-25 minutes one civil truck crossed. This witness was asked to pass the vehicle to the left side of the Demolition Ground, Barela. He saw two civilian labourers unloading the steel boxes from his vehicle. At that time Subedar AM Rao was standing there. Thus this witness also does not say that the vehicle was taken about 1 Km in forest and it was unloaded there. When all the boxes were unloaded this witness asked Subedar AM Rao as to what was happening to which he was told not to apply his mind as these were high level issues. This witness nowhere in his statements has said about the involvement of appellant in any manner whatsoever in the incident in question. In his cross-examination this witness has also stated that he did not go to Barela, Demolition Ground on 15.11.2011.



12. From the perusal of the evidence of PW6 Havildar (Ammunition Technician) GSS Reddy, it appears that he was a chance witness. As per his testimony he was asked to bring breakfast for the demolition party going to Demolition Ground, Barela. As per his evidence the said area is at quite a long distance from the place where the breakfast was to be served. This person could not provide breakfast to the party members as he got delayed in getting the breakfast, therefore, he was not scheduled to go to the Demolition Ground, Barela but he is only a chance witness. Apart from it his testimony is based on what Subedar AM Rao told him. Regarding the involvement of the present appellant he has given only hearsay evidence. He has stated that when he reached the gate to go for demolition, he saw a 10 ton vehicle standing there. Inside the said vehicle Subedar Hiranmay Dutta and Subedar AM Rao were sitting. He also went and sat in the said vehicle alongwith breakfast. The vehicle marched for Demolition Ground, Barela. He has stated that he was sitting in the cabin and after covering about half of the distance, when he looked back into the body of the vehicle, he could see 125 mm FSAPDS/T written on the steel box. When he asked as to whether 125 mm FSAPDS/T is being demolished today, Subedar AM Rao replied in affirmative. Apart from it in the cross- examination this witness in his evidence has made certain material improvements. His attention was drawn towards his statement recorded during Summary of Evidence. His attention was also drawn towards his other earlier statements, which were

admitted by him. He has also stated that on or after 15.11.2011 he did not give any report to Col Harindra Tripathi, Officiating Commandant, Lt Col Sachin Sachdev, Administrative Officer-cum-Chief Security Officer, Maj Tila Whista, Shri Sikdar, Security Officer or any other Army, Defence Service Corps or civilian official that Subedar AM Rao had delivered some stores to a civilian in route to Demolition Ground, Barela.

13. The evidence of PW7 No.6943594P Havildar T.P. Yadav of Central Ordnance Depot, Jabalpur is also to a large extent is of the same effect.

14. P.W.8 is Major Tila Whista of 15 Corps, Zonal Workshop. This officer was Officer-in-Charge of Ammunition Technical Area and for this appointment a Daily Part I Order was also published. This witness in her examination-in-chief has stated that in the 01<sup>st</sup> week of August, 2011 before carrying out the burning of ammunition she was asked by the then Ammunition Sub Depot Commander, Lt Col Subhash Chandra Pandey (appellant) to put up a brief as to how to carry out burning of the said ammunition. This witness has virtually given out the detailed procedure as to how to carry out the burning of the ammunition. This witness was on 30 days' part of annual leave w.e.f. 16.08.2011 to 11.09.2011 and rejoined on 15.08.2011. She has stated that she came to know that a quantity of 750 of 125 mm FSAPDS/T Soft Core 2A has already been burnt with effect from 06.09.2011 to 15.09.2011 and this burning was done under the supervision of Officer-in-

Charge, Ammunition Technical Area, Lt Col Subhash Chandra Pandey (appellant). She has also stated that certain laboratory work orders were already floated by the appellant for disposal demolition of the ammunition. It is clear from the evidence that the burning register was being maintained and this witness used to sign the burning register after inspection of the same on day today basis. It also transpires from the perusal of the evidence of this witness that she has identified the signatures of the appellant on Laboratory Work Orders on the basis of presumption. She has nowhere stated that at any point of time any type of irregularity was committed by the present appellant.

15. A perusal of the entire evidence of this witness shows that she has given her statement only on the basis of her inferences, which she has drawn on the basis of documents and she is not the witness of any fact. She has also stated that on the date of alleged demolition she was asked by the Commandant to go Gopalpur for missile firing on temporary duty though she was reluctant but subsequently she agreed and when accused was coming from the office of Commandant she told it to him. After her posting on temporary duty her work was assigned to the appellant. It shows that on the date of demolition the present appellant has absolutely no concern with it and it was only when PW8 was sent on temporary duty for missile firing, then he was assigned the said duty. It is hard to believe that a person who was given a duty on such a short notice can make arrangement of

labourers and shall complete all the work under alleged conspiracy on that day only. This aspect of the matter proves the suggestion of the accused that the said work was got completed by some other higher ups involved in this work and he has been made only an escape goat. A perusal of the entire evidence of this witness shows that it is only on the basis of hearsay. She has also admitted that no operation- sheet was prepared for burning of said ammunition in Ammunition Technical Area. She has also stated that Subedar PW1 Subedar (Ammunition Technician) Hiranmay Dutta told her first regarding the details of incident of 14.11.2011. Thus, whatever information she got was told to her by Subedar Hiranmay Dutta and this is not her own evidence. She has also admitted that Page- 21 to 26 of the demolition diary were missing. It is no where the case of the prosecution that any inquiry to know as to who was responsible for the missing of the said pages was conducted while these papers were very important for the present case and also as to who is responsible for the loss of the said important documents. She has also admitted in her cross-examination that on her return from temporary duty she inquired from Subedar AM Rao that why he did not inform him on 14.11.2011, when that day he knew next days' plan, that he told me that Lt Col Subhash Chandra Pandey told him not tell the same to Major Tila Whista. She has also stated that she did not inquire from Subedar Hiranmay Dutta the way she enquired from Subedar AM Rao. She has admitted in her cross-examination that she was present for the burning of unserviceable ammunition as

mentioned in the documents. She has carried out burning from 16.09.2011 to 31.10.2011 and went on part of annual leave from 13.08.2011 to 14.09.2011 and she was not present for the burning, though it is written on the documents that burning of unserviceable ammunition will be carried out in Ammunition, Burning Area under the directions and supervision of Major Tila Whista. This document also shows that the burning between 01.08.2011 to 31.08.2011 was carried out under the supervision of this witness while during the said period she was on leave. This statement makes it abundantly clear that on the basis of these documents no just and correct inference could have been drawn. In spite of this statement of this witness, which is based on the basis of a document, her testimony was accepted by the GCM.

16. PW9 Lt Col Sachin Sachdev, Administrative Officer, Central Ordnance Depot, Jabalpur is responsible for overall Administration, Security and Fire Fighting. The evidence of this witness shows that he has stated that some civilian employees told him that some extra ammunition has gone for demolition on 16.11.2011. He has stated that no other information was given by them to him and thereafter he inquired into the matter. He has also admitted that he does not remember those civilian employees or any other person who had made the complaint. From his cross examination it emerges out that there is variation in his evidence on the point of number of civilians. He has also admitted in his cross-examination that during the tenure of Lt Col Subhash

Chandra Pandey in Ammunition Sub Depot, he did not get any report from any employee of Ammunition Sub Depot whether Combatant or civilian of any irregularity or discrepancy in Ammunition or Scrap between 21.05.2011 to 15.11.2011. This witness has also admitted in his cross-examination that he cannot say as to why in November, 2011 Major Tila Whista an inexperienced Officer was sent as Ammunition Technical Officer for missile testing to Gopalpur when eight more Ammunition Technician qualified Officers, including Lt Col Aman Yadav, Major Rameshan, Col M.S. Chauhan and he was available and present. This witness has also admitted in his cross-examination that he did not make an interrogation of Subedar Hiranmay Dutta, Subedar AM Rao, SSS M.K. Chatterjee, Defence Security Corps Junior Commissioned Officer on duty at Ammunition Sub Depot Gate on 15.11.2011 morning, Naik TP Yadav, Sepoy Gyan Singh of Defence Security Corps, Havildar GSS Reddy and Naik GC Basam. He had only inquired about the documents of dispatch of Ammunition from the Defence Security Corps Junior Commissioned Officer on duty on 16.11.2011. It has also come in the cross-examination of this witness that Red Gate Register was missing and no Court of Inquiry was made regarding the loss of said register. This witness has again admitted in his cross-examination that during the period between 21.05.2011 to

15.11.2011 he did not receive any report/complaint from any Army Duty Officer of the week/staff of Central Ordnance Depot, Jabalpur pointing out any discrepancy/ deficiency/surplus/anomaly in the demolition or moving out of Ammunition for demolition by Ammunition Technical Area or held by Ammunition Sub Depot/ Ammunition Technical Area. This witness has also admitted that Central Ordnance Depot, Jabalpur did not take up the case with the Head Quarters, Madhya Bharat Area for ordering Court of Inquiry into disappearance of the alleged Tungsten Penetrators on 15.11.2011. He has admitted the suggestion given by the accused that it is correct to suggest that I am not an eye witness of the incident nor I am aware of the four charges levelled against the accused. This admission shows that he was not an eye witness and his evidence is also a hearsay or on the basis of his own inferences. Attention of this witness has also been drawn to Army Regulation 317, which shows that it is obligatory on each Army personnel to bring to the notice of higher officer any irregularity or illegality committed or likely to be committed in the Unit. But it has also come in evidence that this incident was in the knowledge of the Army personnel working there but no one has brought this fact into the notice of any higher authority.

17. PW 10 is Shri Madhav Kumar Chatterjee. He has given evidence with regard to incident which has taken place on 11.11.2011. However, there is no charge with regard to the said incident. He has also stated that on 14.11.2011 he received a

phone call from the appellant, who told him that “these were the orders from top and he is not telling it for himself.” He also told him to get the 120 mm HE Mortar loaded in the second vehicle. Regarding the incident of 15.11.2011 this witness has stated that on 15.11.2011 when he went to his duty in the morning then the labourers of Ammunition Area who go for demolition asked him why did he stopped them from going for demolition. He told them that he has not told anyone to convey to anybody not to go for demolition. He told them to go and enquire from Mr K.C. Gupta, Incharge of Ammunition Area. Subsequently this witness himself enquired from Mr K.C. Gupta on telephone as to who had stopped these labourers from going for demolition to which he told him that yesterday i.e. on 14.11.2011 Subedar AM Rao had called him and conveyed that the labourers of Ammunition Area will not go for demolition on 15.11.2011. Thus, evidence of this witness shows clear cut involvement of Subedar AM Rao but it is surprising that no action, whatsoever, has been taken against Subedar AM Rao. This witness has admitted that he was Incharge of Explosive Stores which are required to be sent for demolition. He has also stated that he had gone to Commandant on 22.11.2011 and made him a verbal statement. He has also stated that he did not see what was loaded inside the 139 boxes and 60 boxes on 14.11.2011. The submission of the learned counsel for the appellant is that this witness under pressure of Brig Giri Raj Singh has given the false statement because his son had applied for appointment of Fireman and Lower Division Clerk in the



Central Ordnance Depot, Jabalpur and this fact is admitted to this witness that he had gone to meet Brig Giri Raj Singh in this regard. He has also stated in the cross-examination that Junior Commissioned Officer Incharge, Ammunition Technical Area had calculated explosives required to be taken to Demolition Ground on 15.11.2011 and 16.11.2011 and record was kept with Ammunition Technician Junior Commissioned Officer. But subsequently he said explosives were not calculated for two days i.e. 15.11.2011 and 16.11.2011. The explosives were calculated for the entire week. He has admitted in his cross-examination that he is not aware whose duty was it to maintain Demolition Diary. This witness in the cross-examination has admitted that "It is correct to suggest that if my senior ask me to do some illegal activity then I am ready to do that. The witness voluntarily states that one has to do it under pressure. Seniors give orders and say that they are answerable for the orders given by them and if anybody has any query about the same they will answer." This witness has stated that on 15.11.2011 he did not report to Col Harindra Tripathi, Officiating Commandant, Lt Col Sachin Sachdev, Administrative Officer-cum- Chief Security Officer, Maj Tila Whista, Shri Sikdar, Security Officer or any other Army, Defence Security Corps or civilian official that Subedar AM Rao had delivered some stores to a civilian in route to Demolition Ground, Barela and his vehicle had not reached Demolition Ground Barela. He has also stated that it is correct to suggest that he has stated at Summary of Evidence that on 14.11.2011 at

around 0930 hours after labour distribution Subedar AM Rao of Ammunition Technical Area said “Yeh jo metal scrap burning pit mein hai, yeh load hoga demolition ke liye.” Several important contradictions on this point in his evidence during Summary of Evidence were brought to his notice and the same were admitted by him. He has also stated that when Subedar AM Rao took Mr Shakeel and three labourers to Burning Pit room on 14.11.2011, I was present in the store where article-in-use are kept and he has never seen with his own eyes 139 steel boxes of AMK 340 Ammunition lying in the Burning Pit room.

18. A perusal of the evidence of this witness goes on to show that Subedar AM Rao was present at the site, who was involved in the entire incident and the involvement of the present appellant has been made on the basis of phone call received by the appellant. Even if for the sake of argument it is taken to be true that the appellant made a phone call then the evidence of the witnesses also shows that whatever was asked to be done it was on the basis of instructions of the higher ups. But the prosecution took notice of the fact that the appellant has made phone call without considering the fact that as to what was stated by the appellant on the said phone call. This witness has admitted that it is correct to suggest that what he has stated before the Court is on the basis of what Naik TP Yadav had told him and he had not personally witnessed the same with his own eyes. The witness voluntarily stated that Naik TP Yadav had taken convoy note from

him and whatever he has told it was on the basis of what he was told by Naik TP Yadav. This witness has also stated that in the Exhibit-42 full nomenclature of 125 mm FSAPDS/T is not written and in one package how much quantity is contained is also not written. Total 139 packages are written. It is also correct to suggest that full nomenclature of 120 mm HE is also not written and 60 packages is written but how much quantity is contained in one package is not written. This witness in his cross-examination has admitted that it is correct to suggest that I did not depose in my statement before the Court in Summary of Evidence that Lt Col Subhash Chandra Pandey told all of us that "whatever has been done by all of you is my responsibility." This statement of the witness shows that whatever he has stated in GCM is an improvement on the point, which has to be considered in the light of other evidence available on record. It is really surprising when all these facts had come to his notice then why he did not report it to Brig Giri Raj Singh and Major Tila Whista about the incidents of 14.11.2011 and 15.11.2011 specially so when the officer i.e. the appellant is not a normal part of the officer team of the Depot. He is a fill in officer who has been detailed to do this duty for a limited time. Thus, what transpires from the entire evidence of this witness is that whatever he has stated is hearsay evidence. He has also made material improvements in his evidence, which makes his evidence unworthy of credence. On the point of hearsay evidence reference may be made to the judgment of Hon'ble Apex Court in the case of **Kalyan Kumar Gogoi vs.**

**Ashutosh Agnihotri and another** reported in (2011) 2 SCC 532, which deals the point of hearsay evidence. Para-37 of aforesaid judgment reads as under:-

“21. Here comes the rule of appreciation of hearsay evidence. Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. The phrase "hearsay evidence" is not used in the Evidence Act because it is inaccurate and vague. It is a fundamental rule of evidence under the Indian Law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than a witness in giving evidence and a statement contained or recorded in any book, document or record whatever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated. An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. That this species of evidence cannot be tested by cross-examination and that, in many cases, it supposes some better testimony which ought to be offered in a particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind of a Judge about the existence of a fact, and the fraud which may be practiced with impunity, under its cover, combine to support the rule that hearsay evidence is inadmissible.”

19. PW 11 Major SK Punia, is Incharge, Ammunition Technical Area. This witness took over his duty on 15.03.2011. He has taken over the charge from the appellant on 20.11.2011 and assumed the appointment on 21.11.2011. He has stated that the appellant told him that “there is an issue about 125 mm Sabot lying in Ammunition Workshop Shed 6”. Then he asked him “what is the solution as you are quite experienced” to which he did not

reply. I again asked him "there must be some way to handle it", to which he said in a low voice while he was moving out that "handle it if you can." After both of them, went out of Ammunition Sub Depot Office. He has also stated that on 21.11.2011, he assumed appointment of Commander, Ammunition Sub Depot and Officer-in-Charge Ammunition Technical Area, Major Tila Whista, who had also joined and from her I came to know that some unauthorised move of NIAMK 125 mm FSAPDS/T Soft Core 2A Ammunition has taken place on 15.11.2011. Later on, he alongwith, Major Tila Whista met Commandant and informed him about the information received to which he said I am already aware of the issue, you check the concerned documents for the demolition of NIAMK 125 mm FSAPDS/T Soft Core 2A Ammunition and put up the documents to me. Thereafter, he alongwith Major Tila Whista moved out of the office and she told him about the other information received as she was getting the input from various persons. Thereafter on 21.11.2011 there were celebrations in Unit for Best Central Ordnance Depot and the Depot was closed. On 22.11.2011 when Major Tila Whista came to the office of Commander, Ammunition Sub Depot, he told her to check for the documents for demolition of 125 mm FSAPDS/T Soft Core 2A Ammunition from Ammunition Technical Area and Ammunition Area. Thereafter, he asked for the concerned similar documents for the demolition of 125 mm FSAPDS/T Soft Core 2A Ammunition from Control Branch. Meanwhile Major Tila Whista also brought documents concerning demolition of said

Ammunition and various other concerned documents of Ammunition and various other concerned documents for move of Ammunition on 15.11.2011, 16.11.2011, 02.11.2011 and 03.11.2011. They both went through the documents and confirmed it with Control Branch and could find out that out of total unserviceable quantity 2225 of NIAMK 204 was held in Ammunition Sub Depot after breakdown. This evidence of the witness shows that appellant himself has brought this fact to the notice of the person to whom he had handed over the charge. This conduct of the witness shows that even if anything was done by the appellant it was done under pressure of higher ups. During course of his evidence an objection was raised that the evidence of this witness is hearsay evidence. However, this objection was over ruled. It also shows that at the time of raising this objection it was argued by the prosecution counsel that whatever his officials informed him is being quoted by him in form of narration. The witness is only explaining and deposing those facts which he imbibed by scrutinising the documents and by speaking to officials under his command. Thus, this reply to the objection of the appellant shows that whatever the witness has stated it is based on his own inferences on the basis of documents or what information he has gathered from other persons. This witness has also admitted in his cross-examination that on 22.11.2011 he had shown to Brig Giri Raj Singh the documents and handed over the same to him after asking him "Sir, do I need to report in writing." Then Brig Giri Raj Singh replied that he had already reported and

I am aware of the case. Admittedly in this case no departmental inquiry or Court of Inquiry was ordered by Brig Giri Raj Singh. This witness has also fairly stated that it is correct to suggest that between 01.08.2011 and 19.11.2011, he was in no manner whatsoever, involved in the preparation and maintenance of documents including Registers, Laboratory Work Orders and Workshop Completion Notices, Burning and Demolition of Ammunition, Distribution of Industrial Personnel and Ammunition Technicians for different jobs, Receipt, issue, handling and accounting of Ammunition and Scrap and depositing of retrieved Scrap held on the charge of Officer in Charge, Ammunition Technical Area or Officer in Charge, Returned Empties and Ammunition Area or Officer in Charge, Ammunition Area and Command and Control of personnel working in any of the Sub Group or Section or Branch of Ammunition Sub Depot.

20. PW 12 is Col Harindra Tripathi, Central Ordnance Depot, Jabalpur. This witness has stated that on 15.11.2011 the Commandant proceeded on Temporary Duty to Kolkata and in addition to his own duties he was also to look after as Officiating Commandant. He continued his Officiating Commandant responsibility from 15.11.2011 till 21.11.2011. This witness has stated that on 19.11.2011 at about 1300 hours few civilians came to him and informed him that there was some Ammunition which was taken out. Thereafter he alongwith Administrative Officer went there. At the same time he also called the appellant. He

described the input to him which he had received. The appellant took them to Ammunition Workshop Shed 6 and after verifying the Ammunition Workshop this witness in the presence of Administrative Officer spoke to Commandant on his Mobile and informed him that this matter needs investigation. The Commandant also permitted this witness that the appellant be permitted to proceed on leave as his leave has already been sanctioned because of illness of his father. This witness has also stated that on 06.12.2011 he went to the office of Commandant and told him that the appellant wants to talk him something relating to the incident. Thereafter the appellant was permitted by the Commandant to come to his office and the Commandant put his Record Device on, one was his own Blackberry Mobile and second was some other device regarding which this witness was not aware. The other person was asked to go out. The case of the prosecution is that during the course of his interview with the Commandant the appellant has confessed his guilt and which was duly recorded by Brig Giri Raj Singh.

21. PW 13 is Lt Col Aman Yadav. He was performing the duty of Commandant and Officer-in-Charge Modernization. The evidence of this witness is not very material. This witness has also deposed on the basis of documents that the last column in remarks column indicates the surplus quantity of explosive held on ground as compared to the ledger balance. This witness has also been cross examined. This witness has admitted that he has not made any



statement pertaining to this case before any authority in writing or which was reduced to writing, prior to 14.09.2012.

22. PW 14 is Naib Subedar MK Upadhyay. This witness has stated that on 12.08.2011 he saw Laboratory Work Order for 10 rounds in which it was mentioned disposal by demolition. He told Major Tila Whista, Officer-in-Charge, Ammunition Technical Area that the Laboratory Work Order for 125 mm FSAPDS/T Soft Core 2A should have been taken out for burning. Appellant was present there and he said, "it does not matter, it is being shown in demolition but while preparing Workshop Completion Notice, show it in burning." "Koi Bat Nahin, demolition mein show ho raha hai, uska Workshop Completion Notice banate samay, burning mein show karana" and this witness carried out the demonstration of burning of these 10 rounds. He has further stated that he told the appellant that for burning lay out is complete and ready. The appellant came around quarter to eight on Scooty. Within five to ten minutes propellant was burnt and thereafter the appellant left. Then with the help of TFF water was put. It is pertinent to mention that this witness is stating about the incident dated 12.08.2011 while there is no charge for that period. That time other Junior Commissioned Officer Ammunition Technician and Non Commissioned Officer Ammunition Technician came. We had come before, so we left. After coming back he saw Sabot has been separated and the Penetrator in which tracer component is there has been kept in a box in the Burning Pit. Thus, this witness

has stated that certain documents pertaining to burning have been shown demolished in the month of August, 2011. He has further stated that the appellant told Subedar AM Rao that "whatever has been loaded you have to take it." "There also I told Lt Col Subhash Chandra Pandey that "this is wrong." Subedar AM Rao also told that "it is wrong." Appellant said that "these are the orders of higher ups. These are the orders of Additional Director General, hence you will have to do it." Thereafter the appellant left. Then Subedar AM Rao went to the appellant's office and came and told him that this will have to be told to Subedar Hiranmay Dutta. Then around 1715 hours we went to Subedar Hiranmay Dutta and Subedar AM Rao knocked at his door, Subedar Hiranmay Dutta came out. Subedar AM Rao told Subedar Hiranmay Dutta that "there is something fishy about the appellant. He has got the shots of 125 mm FSAPDS/T loaded and he is telling me that I have to take it. Subedar Hiranmay Dutta asked did not you people told appellant that this is wrong. Subedar AM Rao said that "we had told him that this is wrong." I told Subedar Hiranmay Dutta that I have refused doing this work to Lt Col Subhash Chandra Pandey.

23. This witness in the cross examination has admitted that it is correct to suggest that as per the record of In/Out maintained in the Red Gate Register for Combatants Junior Commissioned Officers/Other Rank on the relevant page pertaining to 06.09.2011 there is no entry with regard to him. The witness voluntarily states

that on 06.09.2011, he had entered the Depot during non working hours and he might have forgotten to enter the details in the Register. He has also stated that he did not make any statements pertaining to this Ammunition prior to 15.09.2012. He has also admitted that one has to make entry in the Register at the Gate before reaching Internal Transport Section and I did not visit the said Section on 15.09.2011. This witness has admitted that on 14.11.2011 in the evening or on 15.11.2011 in the morning he did not report to Brig Giri Raj Singh, Commandant, Col Harindra Tripathi, Deputy Commandant, Lt Col Sachin Sachdev, Administrative Officer-cum- Chief Security Officer, Shri Sikdar, Security Officer. He has also stated that on 15.11.2011 from return from Demolition Ground, Barela I did not report to any of the aforesaid officers. This witness has admitted in his cross-examination that burning and demolition is the team work. This witness in his cross-examination has also stated that on 15.11.2011 when he met Subedar AM Rao, he told him to take the vehicle of labourers, go to Police Station, Barela and obtain the signatures and get the Pit prepared. He is not aware if Subedar AM Rao told the Defence Security Corps staff present at Gate about the contents of the Ammunition boxes. I had not given any information to Defence Security Corps staff because when Lt Col Subhash Chandra Pandey had told to me and Subedar AM Rao that these are the orders of higher ups, these are the orders of Additional Director General, after hearing this I had got scared.

24. After recording the evidence of the witnesses in detail the appellant was asked to reply to explain the incriminating circumstances that emerged out of evidence against him. Thereafter the Court examined three witnesses as Court witnesses. First witness for the Court is Lt Col Naushad Akhtar. The Court asked this witness to show them the location, route and stores which they want to see and thereafter the other details of all these locations.

25. CW 2 is Col PK Malaker of Military Hospital, Jabalpur. He has given evidence that Lt Col Tapan Chakrabarty was suffering from Carcinoma and he was referred to Army Hospital, Delhi.

26. Before proceeding further to evaluate the evidence in the light of the settled judicial principles, we prefer to deal with procedural irregularities which have been argued on behalf of the appellant.

27. In this case it is pertinent to mention that earlier the arguments of the learned counsel for the parties were heard but before pronouncement of judgment an application for re-hearing of the matter was moved by the learned counsel for the respondents to bring on record certain documents and to show that the copy of the charge-sheet was provided to the appellant much before commencement of the GCM. The said document in the interest of justice was taken on record but on behalf of the appellant it has been argued that although the copy of the charge sheet was provided to the appellant in the month of June, 2012

but in fact it was not the actual charge sheet but only a proposed charge sheet. Proposed charge sheet becomes actionable only after its approval by the GOC because only after its approval the GOC directs that the accused be tried for the charges levelled against him. Therefore no GCM can take place on such unapproved charge sheet. Thereafter the appellant again prayed for copy of the charge sheet after the approval of the GOC, which has admittedly been provided to the appellant in July 2012. The argument of the learned counsel for the appellant is that the charge sheet which was provided in the month of June, 2012 does not come within the ambit Rule 34(1) of the Army Rules, 1954 and it becomes the charge sheet only after its approval by the GOC and direction of the GOC to try the accused by GCM and therefore the time period provided by Rule 34(1) shall commence only after its due approval by GOC. Army Rule 34 reads as under:-

**“34. Warning of accused for trial.—** (1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses or whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly. The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused person is on active service less than twenty-four hours.

(2) The officer at the time of so informing the accused shall give him a copy of the charge-sheet and shall if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language which he understands, a translation thereof shall also be given to him.

(3) The officer shall also deliver to the accused a list of the names, rank and corps (if any), of the officers who are to form the court, and where officers in waiting are named, also of those officers in courts-martial other than summary courts-martial.

(4) If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with this rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced.”

28. A bare reading of Rule 34 (supra) shows that it contemplates the commencement of the GCM and also talks about defence witnesses to be produced. But unless and until the competent authority approves the charge sheet, no GCM can take place. During the course of arguments learned counsel for the respondents has fairly conceded that unless and until the charge sheet is approved by the competent authority and directs that the accused be tried by GCM, the trial by GCM cannot commence. It is also conceded that it is within the power of the approving authority to approve or not to approve any or all the charges. When any or all the charges are approved and direction for trial by GCM is given only after such direction GCM can take place. Therefore, our conclusion is that the period provided under Rule 34(1) (supra) has to be calculated from the date when actionable charge sheet is provided to the appellant. The actionable charge sheet was admittedly provided to the appellant by a covering letter dated 03.07.2012. The forwarding letter reads as under:-

“

Confidential

506 Army Base Wksp  
PIN 901 124

21201/SCP/PC/HQ  
 IC- 50906F Lt Col  
 Subhash Chandra Pandey,  
 COD Jabalpur  
 Att with 506 Army Base Wksp  
 Jabalpur

c/o 56 APO  
 03 Jul 12

FORWARDING OF ORIGINAL CHARGE SHEET

An original copy of Charge sheet dt 04 Jun 12 duly signed by Commandant 506 Army Base Wksp (as CO of accused) and signed by GOC, MB Area with remarks in r/o IC-50906F Lt Col SC Pandey of COD Jabalpur att with 506 Army Base Wksp is fwd herewith.

Sd/- BG Jagadeesh  
 Col  
 Offg Comdt

Encls:- (Two)

Copy to :-

HQ MB Area (DV)	-	for info wrt your letter No 065/14/
Pin- 901 124		COD/DV(SC Pandey) dated 03 Jul
C/o 56 APO		12 pl."

29. Thus, in this forwarding letter itself the respondents have referred the charge sheet dated 04.06.2012 duly signed by the competent authority is being forwarded. "04.06.2012" is the date, when the GOC has approved this charge sheet and directed that the appellant be tried by GCM. Therefore, the respondents have referred the charge sheet as dated 04.06.2012 in the forwarding letter. Hence, we are of the considered view that the date on which the charge sheet has been approved by the approving authority shall be relevant date for the purpose of charge sheet (4.6.2012) and Rule 34(1) (supra). Our this conclusion stands fortified by the date of charge sheet mentioned in the forwarding letter dated 03.07.2012 and therefore we are of the view that in the instant case the provisions of Rule 34(1) (supra) have not

been complied with and non-compliance of this mandatory provision by itself shall vitiate the trial. Such procedural non-compliance of mandatory provision would vitiate the trial as has been held by Hon'ble Apex Court in the case of **Union of India vs. A.K. Pandey** (2009) 10 SCC 552. In the facts of that case the accused had pleaded guilty in spite of that on the ground non-compliance of mandatory provision of Army Rule 34 the GCM was set aside.

30. The second point before us is that in the facts of the instant case Court of Inquiry was must but no Court of Inquiry was ordered and without collecting any evidence entire liability was fixed on the appellant who was primarily an officer who was not part of the officer strength posted to the Depot for functional purposes. He was only a fill in officer for part time duties in Depot.

31. On behalf of the respondents reliance has been placed on the pronouncement of Hon'ble Apex Court in the case of **Union of India and others vs Maj A. Hussain, (1998) 1 SCC 537**, wherein it has been held that Rule 177 of Army Rules, 1954 does not mandate that a Court of Inquiry must invariably be set up in each and every case prior to recording of Summary of Evidence for convening a Court Martial. On the basis of aforementioned pronouncement, it has been held that to hold a Court of Inquiry is not a condition precedent and so it will not result in vitiating the Court Martial.



32. We have carefully examined the pronouncement of the Hon'ble Apex Court relied upon by the respondents. A plain reading of the aforesaid case shows that holding a Court of Inquiry is not necessary in each and every case. The conclusion that follows is that whether a Court of Inquiry is necessary in a particular case, it depends upon the facts and circumstances of each case. During the course of arguments on behalf of the respondents it was argued that the modus operandi of the appellant was that he connived with several other army personnel and thereafter he has committed this offence. During course of arguments we put a question to the learned counsel for the respondents that when several persons were involved in the matter then how only the appellant was picked up and why other persons involved in the conspiracy were left out by the respondents ? We have also put a question to the learned counsel for the respondents that when in such a case where obviously involvement of several persons is admitted under a conspiracy, how a single person can be held responsible for the said conspiracy excluding all others. No satisfactory reply came forward on behalf of respondents to these queries.

33. Before proceeding further, we would like to reproduce Army Rule 177, which reads as under:-

**“177. Courts of Inquiry.—**(1) A court of inquiry is an assembly of officers or of junior commissioned officers or of officers and junior commissioned officers, warrant officers or non-commissioned officers, directed to collect evidence, and

if so required to report with regard to any matter which may be referred to them.

(2) The court may consist of a Presiding Officer, who will either be an officer or a junior commissioned officer, and of one or more members. The Presiding Officer and members of court may belong to any Regt or Corps of the service according to the nature of the investigation.

(3) A court of inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps.”

Thus, the purpose of Court of Inquiry is to collect evidence and to report with regard to any matter which may be referred to it.

34. In the instant case it has come in the evidence that the appellant made a phone call to Subedar AM Rao, who told about the same to Subedar Hiranmay Dutta and some other to do the alleged demolition work but this fact was duly qualified by the words that it is under the directions of the higher ups including ADG. When from the allegations and from information received by others it was clear that some higher ups were involved in the matter, then in our considered opinion it would have been most appropriate for the authority to hold a Court of Inquiry. It has also come in evidence that when officiating Commandant reported the matter to the Commandant PW 3 Giri Raj Singh then he has also recommended for investigation but even thereafter neither the investigation nor Court of Inquiry was held in the matter. Rather Brig Giri Raj Singh avoided to receive any written information about the incident from his subordinates. It has also come in evidence that Subedar AM Rao and several others have actively taken part in this incident. Apart from it there were serious lapses

on the part of other persons also who were involved in the safety of the Ammunition Depot and in supply of man power to it as they have committed several irregularities in the performance of their duties but in spite of the same the appellant only was pin pointed and he was made accused in this case. The allegation against the appellant was that he sold the unserviceable ammunition to some civilian which was worth more than Rs.41.26 lacs. But it shocks the conscience of a man of ordinary prudence that absolutely no effort was made to trace out the said civilian or to recover the allegedly sold army property. Perusal of the evidence shows that the said civilian was seen by several witnesses. But no effort was made to trace out his identity. Had he been traced out then he was the best person to disclose as to who contacted him for sale of such property and also how much money was paid by him to whom and who was the real culprit. We find substance in the submission of learned defence counsel that it was deliberately not done, just to hush up the matter against the higher ups.

35. It has also been argued that Regulation 903 of the Defence Service Regulations, 1987, Volume II deals with loss of stores, procedure for reporting and investigation and when stores are lost, destroyed, found to be deficient through wastage, or damage by fire or otherwise, the officer commanding Unit or formation shall immediately start preliminary investigations, whereafter necessary investigation will be taken. Holding of Court of Inquiry is necessary when the loss exceeds Rs.50,000/-in value. In the

present case, as mentioned in the second charge the alleged loss is valued at Rs.41.26 lacs but in spite of that no Court of Inquiry was conducted. The argument of learned counsel for the appellant is that deliberately a Court of Inquiry was not conducted only under the apprehension that the true facts would emerge from the same, which may bring into light the involvement of several higher ups in the light and therefore bypassing the Court of Inquiry the accused has been made an escape goat. At this stage we would like to quote Regulation 903 of Army Regulations, which reads as under:-

**“903. Loss of Stores, Procedure for Reporting and Investigation.-** When stores are lost, destroyed, found to be deficient through wastage, or damage by fire or otherwise, the officer commanding unit or formation shall immediately start preliminary investigations, after completion of which the following action shall be taken :-

(a) If the investigations reveal that the loss has not been due to fire, unusual occurrence, theft, fraud or neglect and the same does not require the sanction of the Government of India, and a court of inquiry is not considered necessary, the result of the investigations shall be communicated to the competent financial authority through 'A' Staff channels, who shall take necessary action to write off the loss in consultation with his financial adviser. The holding of a court of inquiry in such cases will be at the discretion of the Competent Financial Authority. **But, when the, loss exceeds R.s. 50,000 in. value .concurrence of the Govt. of India will be necessary if it is considered that the holding of a court of inquiry should be dispensed with.**

(b) If the investigations reveal that the loss :-

(i) is due to theft, fraud or neglect, or

(ii) is due to fire or any unusual occurrence or

(iii) requires the sanction of the Central Government being the competent authority to write off the loss (i.e. in cases involving loss of stores exceeding Rs. 15,000 in value in respect of sub-para (i) above and Rs. 1 lakh in value in respect of sub-para (ii) above) the officer commanding unit/formation shall immediately report the occurrence to the Station or Sub Area or Brigade Commander. In the case of units or establishments of the following arm or service or corps a report shall also be submitted direct to the authorities specified against each:-

(1) HQ Div Engineer and Engineer Stores Depot/Parks. Engineer in-Chief, Army HQ

(2) Ordnance and EME units/Establishment- GOC-in-C Command

(3) Remounts Veterinary- Director of Remounts and Veterinary

(4) Military Farms - Director of Military Farms

(5) ASC Units Army Headquarters- Director of Supplies and Transport Army headquarters

(6) Base Depot Medical Stores/Depot Medical Stores/ DMS (Army) Sub Depot Medical Stores.

(7) Establishments of the Research and Development CC R & D Organisation

(8) Establishments of the Director General of Inspection CGIP

(c) Report on losses by fire will also be repeated by-signal to higher formations, according to the financial limits mentioned against each:-

up to Rs. 20,000/- HQ Sub-Area/Cde

up to Rs. 50,000/- HQ Area/Div

up to Rs. 75,000/- HQ Corps.

up to Rs.1,00,000/- HQ Command

More than 1,00,000/- Army HQ, (Q-1)

(d) The Station/Sub Area/Brigade Commander shall convene a court of inquiry immediately on receipt of the preliminary investigation report in the cases referred to in

paragraph (b). In addition to preliminary investigation reports, quarterly progress reports stating the current position i.e. the progress of the case as on the last day of each quarter together with reasons for delay, if any, in finalising the proceedings of the courts of inquiry and disciplinary action, will be submitted by the Station or Brigade or equivalent HQ concerned to the Branch or Head of Service concerned at Army HQ to reach by the 15<sup>th</sup> January, April, July and October. Nil reports are not required. Such reports will also simultaneously be sent to intermediary formation HQ. Preliminary investigation reports and quarterly progress reports will be submitted by the Branch or Head of Service concerned to their respective controlling Sections in the Ministry of Defence for information. Where the court of inquiry clearly brings out that disciplinary action against Army personnel is involved, the papers relating to the disciplinary aspect will be passed by the Branch or Head of the Service to AG's Branch (DVI). The holding of a Court of Inquiry may be dispensed with at the discretion of competent financial authority in cases where the investigations reveal that the loss of the stores is less than Rs.5,000. A Court of inquiry may be dispensed with in respect of losses/damages to defence stores exceeding Rs.500 in value, which may occur while the stores are in transit by sea or while they are held by the Port authorities, provided a Marine Survey is held before the stores are taken over by the Embarkation or other Defence authorities concerned. In all other cases, court inquiry will invariably be convened. Where the loss exceeds Rs.15,000 in value, in respect of sub-para (b) (i) above and Rs.1 lakh in value in respect of sub-para (b)(ii) above, concurrence of the Government of India will be necessary, if for any reason, it is considered that the holding of a court of inquiry should be dispensed with. The court of inquiry shall consist of experienced and adequately trained officers. It will also include an officer of the same service as the store holding establishment. Assistance will also be obtained from the Defence Accounts Department where considered necessary.

(e) Where the staff court of inquiry is concerning losses due to fire, a representative of Fire Service Inspection Organisation will invariably attend.

(f) As soon as the court of inquiry is completed and the convening officer/Sub Area or equivalent Commander has recorded his opinion on the proceedings, the following action shall be taken:-

(i) If the opinion is that the loss has not been due to theft, fraud or neglect, immediate action to write off the loss shall be initiated through 'A' Staff channels, by the officer-in-charge of the stores lost.

(ii) If the opinion is that the loss has been due to theft, fraud or neglect, the proceedings shall be forwarded without delay through staff channels, to the competent financial authority. Disciplinary action against any person/ persons found to be responsible for the loss will be initiated simultaneously. The court of Inquiry Proceedings shall not be held up for disciplinary action to be taken or loss statement to be prepared. They shall be accompanied by :-

(aa) A statement as to disciplinary action taken or contemplated and persons involved.

(ab) An estimate, however rough, of the losses of stores and buildings.

(ac) A certificate that loss statements are being prepared and shall be forwarded through 'A' staff channels.

The officer-in-charge of the stores lost shall be furnished with a complete copy of the proceedings on receipt of which he shall prepare the loss statements with the utmost despatch. He shall also be responsible for obtaining a loss statement in respect of any building destroyed, from the Garrison Engineer and forward it with the loss statements for the stores lost through the Controller of Defence Accounts concerned to his superior officer along with the proceedings and other relevant papers in original.

(iii) The procedure stated above will also apply to cases where loss is due to fire or any unusual occurrence. However in case of losses due to fire exceeding Rs.1,00,000 in value, an advance copy of the proceedings of the Court of Inquiry will be forwarded immediately on conclusion of investigations

to Army HQ, QMG's Branch, Qi(D), by the convening officer. Two copies of such proceedings, complete in all respects, will be forwarded through 'A' staff channels in the normal course to Army HQ, QMG's Branch, Qi(D) for information and concurrence of the Chief of the Army Staff and the Ministry of Defence.

(g) When losses of the value of Rs.5,0000 and above occur due to suspected theft, fraud, fire (and all cases of suspected sabotage, irrespective of the value of loss) which have been departmentally investigated and the investigation does not reveal facts as to the cause thereof or/and the persons responsible for the said theft, fraud, fire or sabotage, such cases will be reported to the civil police for investigation. The local formation commander will exercise discretion in determining at what stage the case should be handed over to the police, keeping in view the fact that police investigation will be increasingly handicapped with the lapse of time. All concerned will render assistance to the police authorities once the case is handed over to them. A formal investigation report will be obtained from the police authorities in all such cases.

The provisions of this clause will not apply where it is not possible to avail of police assistance for investigation, e.g. on ships at sea or in the forward areas.

(h)...  
 (j)....  
 (k)... ”

36. Thus the perusal of the aforementioned regulation shows that the investigation was a must and after completing the Court of Inquiry steps ought to have been taken as mentioned in sub-para 903 (f) of Army Regulations, 1987, Volume-II.

37. Admittedly in this case neither investigation nor any Court of Inquiry was held. In reply to these procedural irregularities, on behalf of the respondents, reliance has been placed on Rule- 149 of Army Rules, 1954, which reads as under:-



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

38. A perusal of aforesaid Army rule shows that a procedural irregularity shall not matter a lot unless and until the appellant is able to show that his defence has been prejudiced or prejudice has been done to him. In the instant case, we are of the considered opinion that non-holding of investigation and Court of Inquiry must be presumed to have adversely affected the defence of the appellant because the investigation and Court of Inquiry would have brought on record the true facts and the appellant would have been able to defend himself in better way or he might not be found guilty. The argument of learned counsel for the appellant is that these steps have not been taken deliberately to save the higher ups involved in the matter. Additionally we have specially taken note of the fact that the appellant was not a part of

the regular officer team of the Depot. He was stationed at Depot but for some other work. He was performing the task of a Depot officer only as a fill in officer for short durations and as part time work.

39. It is also really surprising that no effort was made to trace out the 27 civilian labourers to whom money is alleged to have been given by the appellant. Only those persons could have told the name of person by whom they were called or under whose direction they were working and whether they received any money as alleged in the charge sheet.

40. Learned counsel for the appellant has drawn our attention towards Para 317 of the Regulations for the Army, which reads as under:-

**“317. Obligation to Bring Dishonesty to Notice.-** It is the obligatory duty of every person in military employ to bring at once to the notice of his immediate superior, or the next superior where the immediate superior officer is involved, any case of dishonesty, fraud or infringement of orders that may come to his knowledge.”

41. As per this Para (supra), it is the bounden duty of every person in Army to inform any illegality/irregularity which comes to his notice to his superiors.

42. In view of the seriousness of the allegations and the submissions of the learned counsel for the appellant that there was absolutely no legally admissible evidence against the

appellant to connect him with the offence, we think it appropriate to consider the evidence available on record.

43. Admittedly in this case several persons, such as Subedar AM Rao, Subedar (Ammunition Technician) Hiranmay Dutta and others have aided in the commission of the alleged offence, therefore, such conduct of these persons assumes great importance in view of Para-317 of the Regulations for the Army (quoted in the preceding paragraph of the judgment). It has also come in evidence that Commandant Giri Raj Singh in all 'Barakhanas' has drawn the attention of all Army personnel present there towards this regulation and asked them to report to higher ups any irregularity or illegality, which ever comes to their notice. But in spite of such instructions and Army rule these persons have not reported this incident to the higher authorities and instead they took active part in the alleged offence as have been admitted by them and have appeared as witnesses in GCM. Thus, their position cannot be said to be better than an accomplice. This objection was raised several times during cross-examination but it was not allowed. Where a person only remains present at the time of commission of offence without his active participation or performing any part of offence and does not report the matter, he may not be called an accomplice. But the person who actually participates in the commission of offence and there is evidence to that effect, then his position is not better than an accomplice. Witnesses can be broadly categorised in three

categories viz. (1) wholly unreliable, (2) partly reliable and (3) wholly reliable. In case of 1<sup>st</sup> type of witness, his evidence cannot be relied and in case of second category of witness his evidence has to be corroborated on material particulars from other independent evidence. With regard to third type of witnesses their evidence can be acted upon without seeking any corroboration.

44. Reference on this point may further be made to the pronouncement of Hon'ble Apex Court in the case of **C.M. Sharma vs. State of Andhra Pradesh** reported in (2010) 15 SCC 1, wherein Hon'ble Supreme Court has observed in Para-18 as under:-

“18. Seeking corroboration in all circumstance of the evidence of a witness forced to give bribe may lead to absurd result. Bribe is not taken in public view and, therefore, there may not be any person who could see the giving and taking of bribe. As in the present case, a shadow witness did accompany the contractor but the appellant did not allow him to be present in the chamber. Acceptance of this submission in abstract will encourage the bribe taker to receive illegal gratification in privacy and then insist for corroboration in case of prosecution. Law cannot countenance such situation.”

45. Thus from a perusal of the aforesaid observation of the Hon'ble Supreme Court it is clear that there is no problem in acting upon the evidence of wholly reliable witnesses and not to act upon the testimony of wholly unreliable witnesses. Only the testimony of partly reliable witnesses requires corroboration by independent evidence, depending on the facts and circumstances of each case.

46. Law is also settled that several partly reliable witnesses cannot corroborate each other and their evidence on a particular point can be relied upon only when it is corroborated in material particulars by independent evidence. It appears from the findings given by the GCM that the evidence of these witnesses who have taken active part in the incident has been relied upon as same having been corroborated by other similarly situated witnesses. It appears from the perusal of evidence that these witnesses who have taken part in the offence have specifically stated that the appellant told them that it is being done under the instructions of the higher ups including ADG. It has nowhere come in evidence of these persons that at any point of time appellant threatened them to face consequences in case they do not obey his direction. It has come in the evidence of these witnesses that they took active part in the incident under pressure of the appellant and on the strength of this statement it appears that they have been exonerated and the appellant has been pin pointed. Therefore, a different yard stick has been adopted regarding the appellant to make him the sole accused in this case. When these Army personnel could have acted under the pressure then for the argument sake only why the appellant, who as per evidence on record was also working under the direction of his superiors, including ADG, could not have worked under pressure. The perusal of entire evidence shows that there are two types of witnesses in this case, one set of the evidence is of those witnesses who have taken active part in the active commission of

alleged offence and other witnesses are those who have not seen any part of the incident but they have given their statement on the basis of their own inferences or derived from the documents. Therefore there was no other evidence to lend corroboration on material particulars to the witnesses who have actively taken part in the alleged offence as they come within the purview of accomplice.

47. On the point of consideration of evidence of an accomplice Hon'ble Apex Court in (1994) 4 SCC 478 **Shankar alias Gauri Shankar and others vs. State of Tamil Nadu** has held in Para-14 as under:-

“14. Section 133 and Illustration (b) to Section 114 of the Evidence Act deal with the law relating to evidence of an accomplice. An accomplice namely a guilty associate in crime is a competent witness. Section 133 lays down that the conviction based on the uncorroborated testimony of an accomplice is not illegal, but the rule of guidance indicated in Illustration (b) to Section 114 has resulted in the settled practice to require corroboration of evidence of an accomplice and which has now virtually assumed the force of a rule of law. The word 'accomplice' has not been defined by the Evidence Act and it is generally understood that an accomplice means a guilty associate or partner in crime. An accomplice by becoming an approver becomes a prosecution witness. In interpretation of Section 133 and Illustration (b) to Section 114, the courts have laid down that an approver's evidence has to satisfy a double test: (1) his evidence must be reliable and (2) his evidence should be sufficiently corroborated. It is enough if we refer to some of those decisions. (See Sarwan Singh Rattan Singh v. State of Punjab, Lachhi Ram v. State of Punjab and Mohd Husain Umar Kochra v. K.S. Dalipsingji.”

48. In this case PW 3 Giri Raj Singh, Commandant has secretly recorded the conversation of the appellant while he had come for an interview to his office and it has been used by the prosecution as the confession of accused. The perusal of the finding recorded by the GCM shows that much reliance has not been placed on the said confession and it has rightly been done so because law is settled on the point that conviction cannot be made solely on the basis of a confession in heinous offences.

49. Even if the alleged recording done by PW 3 Giri Raj Singh is taken as a confession, for argument sake only, even then the appellant during trial has totally denied it and has not pleaded guilty to the charges levelled against him and therefore the said confession can be treated only as retracted confession. Whether a person can be punished on the basis of such a retracted confession is the point involved in this case for consideration. Hon'ble Apex Court in **Arjuna Lal Misra vs. State** reported in AIR 1953 SC 411 has held that retracted confession cannot be acted upon unless and until it is corroborated in material particulars.

50. Apart from it at no point of time before recording such conversation, the appellant was warned that in case he makes such statement then the same may be used against him which is the requirement of law. Therefore we are of the considered view that such recording has no legal sanctity. We are really surprised that the appellant has also been alleged to have distributed Rs.5,000/- each to 27 labourers. It has no where come in

evidence that the appellant himself has distributed such money. One of the witnesses has stated that on the asking of the appellant he has distributed the money. Best evidence on this point would have been the evidence of those labourers who have received the money because only those persons could have said that as to who has actually engaged and paid the money to them.

51. We find substance in the submission of the learned counsel for the appellant that Major Tila Whista, who was Officer-in-Charge of Ammunition, Technical Area was all of sudden deputed on Missile firing duty ignoring nine other senior officers present in the Unit and PW3 Commandant Giri Raj Singh also proceeded on temporary duty to Kolkata w.e.f. 15.11.2011 to 22.11.2011 and Officiating Commandant Col Harindra Tripathi looked after his duty. The charge of Major Tila Whista was given to the appellant w.e.f. 14.11.2011, while the appellant had to proceed on pre-sanctioned leave w.e.f. 22.11.2011 with the prior approval of Commandant Giri Raj Singh on the ground of illness of his father. We find substance in the apprehension of learned counsel for the appellant that this chain of incident shows that it was a pre-plan to get the appellant implicated in this case at higher level as the appellant was from a different Unit and was not a part of the officers who were posted to work in the Depot.

52. It is really surprising that a huge surplus quantity of ammunition is alleged to have been prepared which was not entered in the relevant records. It is also surprising that no effort



was made to take such surplus quantity in custody, which was very important material evidence to prove the 01<sup>st</sup> charge. The allegation against the appellant was of causing loss of Government property worth Rs.41.26 lacs, which was allegedly sold by him to some civilian but it is really surprising that no effort was made to trace out said civilian, who may be a very important witness in this case. If the said civilian would have been traced out then he could have disclosed as to who was actually involved in this offence, he would have disclosed the identity of the person or persons with whom he entered into such contract and to whom the money was paid by him. Thus, avoiding any investigation or Court of Inquiry in the matter has caused great prejudice to the appellant.

53. Now to sum up it may be observed that:-

(I) In the instant case there was total non-compliance of Rule 34 of the Army Rules, 1954 which was mandatory and in view of the pronouncement of Hon'ble Apex Court such non-compliance is fatal to the prosecution case.

(II) In this case apart from those witnesses who played active role, some of the witnesses have given their evidence on the basis of documents or registers and their evidence can be categorised only a hearsay evidence and law is settled on this point that hearsay evidence is not admissible in evidence.

(III) Non- holding of any Court of Inquiry or any investigation in spite of the fact that the officiating Commandant had recommended for investigation and especially in view of Regulation 903 of the Defence Service Regulations, Volume-II has resulted into gross injustice to the appellant as for want of correct facts he has been prejudiced in his defence or such Court of Inquiry or investigation might have found him innocent and not involved in the commission of this offence.

(IV) Several witnesses during trial have stated that appellant said that the works in question are being done under the directions of higher ups, including ADG but non-holding of the inquiry to test the correctness of these statements shows that in order to hush up the matter, for the reasons best known to the respondents no inquiry or investigation was conducted in the matter. This fact also adversely affect the correctness of the trial and adversely prejudiced the appellant.

(V) The respondents are also not entitled to the benefit of Army Rule 149 because irregularities mentioned above has resulted into injustice to the appellant as his defence has been materially prejudiced because of such non-compliance.

(VI) The evidence of the persons who were directly involved in the commission of offence has been relied upon without any independent corroboration in material particulars and this approach is not in consonance with the settled principles of criminal trial and the Evidence Act. Inferences only on the basis of

documents cannot be made basis for conviction in absence of any admissible evidence while it is clear that certain entries in the documents and registers were wrong as discussed in Para-15 of the judgment and several relevant pages of demolition register and one relevant register was also missing. No steps were taken to find out who was responsible for such loss of record. Even otherwise the perusal of entire evidence, even if fit is taken ignoring the legal flaws, even then it may only raise a suspicion against the appellant and law is settled on the point that suspicion howsoever strong cannot take place of proof.

54. In view of the above, this appeal deserves to be allowed, findings of GCM and punishment awarded deserves to be set aside. Accordingly the appeal is hereby **allowed**. Conviction and punishment of the appellant for all the charges levelled against him is hereby set aside. Appellant is on bail. His bail is cancelled and sureties are discharged. He need not surrender. Since the conviction of the appellant has been set aside, therefore, his service has to be restored. Accordingly, we hereby direct that if the appellant has serviceable age left then he shall be reinstated forthwith to the rank/post which he was holding at the time of his punishment in 2014 with all consequential benefits. In case he has no period of service left and he has attained the age of superannuation for the last rank held then he shall be notionally treated to be in service till the date he would have remained in service and he shall be entitled to all post retiral benefits in

accordance with law. The appellant shall also be entitled to 50% of back wages for the period during which he remained out of service due to punishment inflicted by GCM. The respondents are further directed to comply with the remaining part of the order within a period of four months positively from the date of production of a certified copy of this order. Default will invite interest at the rate of 9%.

55. No order as to costs.

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

Dated: May 30, 2019

JPT

**(Justice SVS Rathore)**  
**Member (J)**