

## ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

**Court No. 3**  
**Judgment Reserved**

**Transfer Application No. 603 of 2010**

**Tuesday the 22<sup>nd</sup> day of July, 2015**

“Hon’ble Mr. Justice Abdul Mateen, Member (J)  
Hon’ble Lt. Gen. A.M. Verma, Member (A)”

Ex. No. 14474560-L L/Nk Rajendra Singh Son of Sri Ram Singh R/o  
Village and Post Timron, District; Jalaun at Orai.

..... Applicant

By Shri P.K. Shukla, counsel for the applicant.

Versus

1. The Union of India through Secretary, Ministry of Defence, South Block, New Delhi.
2. The Chief of the Army Staff, Army Headquarters, DHQ Post Office, South Block, New Delhi.
3. General Officer Commanding, 26 Infantry Division, C/O 56 APO.
4. Commanding Officer, 12 Field Regiment, C/o 56 APO.

..... Respondents.

By Shri Rajesh Kumar, counsel for the respondents, along with Col J.G. Manhas and Capt. Ridhishri Sharma, Departmental Representative.

**ORDER**

1. Civil Misc. Writ Petition No. 21708 of 2006 was received from Allahabad High Court on 17.05.2010 and was renumbered as Transferred Application No. 603 of 2010.

2. The petitioner has sought the following reliefs:-

- “a. Issue a writ, order or direction in the nature of certiorari quashing the order dated 10.02.2006 passed by respondent No.2 (Annexure 7 to the writ petition)*
- b. issue a writ, order or direction in the nature of certiorari, quashing the order dated 28.5.1994 passed by respondent No.4 (Annexure 3 to the writ petition).*
- c. issue a writ, order or direction in the nature of mandamus directing the respondents to reinstate the petitioner in service.*
- d. issued a writ, order or direction in the nature of mandamus direction the respondents to pay the petitioner arrears of pay and allowance till date and restore the seniority of the petitioner.*
- e. issue any other writ, order or direction, which this Hon’ble Court may deem fit and proper in the circumstances of the case.*
- f. Award the cost of the petition to the petitioner.”*

3. Facts of the case are that the petitioner was enrolled in the Army on 11.08.1981 and was serving in 12 Field Regiment in 1994. He was on guard duty on 27.03.1994 which was the day of ‘HOLI’. After playing ‘HOLI’ he slept and when he woke up at about 1600hrs he found that his moustache had been trimmed while he was asleep. He was angry and asked the Guard Commander the name of the person who had trimmed his moustache. On getting no answer he fired at the Guard Commander without causing any injury. He was eventually disarmed and subsequently a Summary of Evidence was recorded followed by Summary Court Martial on 28.05.1994 in which

he was awarded the sentence of 6 months Rigorous Imprisonment and dismissal from Service on the following charge:-

**“CHARGE SHEET**

*The accused, No 14474560L Gunner (Lance Naik) Rajendra Singh of 80/12 Field Regiment is charged with:-*

<u>Army Act</u>	<u>USING CRIMINAL FORCE TO HIS</u>
<u>Section 40 (a)</u>	<u>SUPERIOR OFFICER</u>

*in that he,*

*at field, while on guard duty at headquarters  
26 Artillery Brigade Ops Room on 27 March 94  
at about 1800h fired one round at No  
14452621X Havildar (General Duties) Narotam  
Singh, the Guard Commander of the same  
Regiment, with 7.62mm SLR Regd No X 0093  
but missed him.”*

4. The sentence was promulgated on 28.05.1994 itself and he was sent to civil imprisonment on the same day. The Court Martial Proceedings were sent to Officiating GOC, 26 Infantry Division who under the authority vested in him under Army Act Section 163, amended the charge and the section of the Army Act under which the trial had been conducted in that Army Act Section 40 (a) was changed to Army Act Section 65. This was done on 29.06.1994. The sentence awarded to petitioner remained unchanged. The amended Section of the Army Act and the charge were re-promulgated on 29.07.1994 and on this petitioner's signature was obtained. The petitioner filed a civil writ petition No. 31585 of 1994 in Allahabad High Court. On 01.04 2005, the High Court dismissed the petition with

remark that in case appeal under Army Act Section 164 (2) was filed by the petitioner within six weeks, the appellate authority may decide such appeal within 6 months. The petitioner filed an appeal under Army Act Section 164 (2) on 28.04.2004 which was not decided within 6 months and the petitioner filed a Contempt Application No. 146 of 2006. The appellate authority i.e. COAS decided the appeal and finding it lacking in merit rejected it which was intimated to the petitioner vide letter dated 15.02.2006 where upon petitioner filed the writ in Allahabad High Court which was transferred to this Armed Forces Tribunal.

5. Mr. P.K. Shukla, Learned Counsel for the petitioner stated that there were infirmities in the Summary Court Martial Proceedings in that the charge was illegally framed under Army Act Section 40(a). Also, according to the petitioner the provisions of Army Rule 115 (2) were not complied with. The proceedings were sent to GOC, 26 Infantry Division, who, when countersigning the proceedings amended the charge and the Section under which the charge had been earlier framed without any authority. Learned counsel for the petitioner stated that the Officiating GOC had no authority under Army Act Section 163 to amend the charge or the Section under which the charge had been framed. The Learned Counsel for the petitioner, therefore, prays that the relief sought by the petitioner be granted.

6. The Respondents represented by the Government Counsel Shri Rajesh Kumar assisted by Departmental Representatives Col J.G. Manhas and Capt. Ridhishri Sharma stated that the petitioner was on guard duty on 27.03 1994. While he was asleep Gunner

Tarlochan Singh playing a joke trimmed his moustache. When the petitioner woke up he ran amok shouting and abusing everyone with a loaded rifle in his hand. He asked the Guard Commander the name of the person who had trimmed his moustache. When he got no answer he fired at the Guard Commander. He was eventually overpowered and disarmed by Havildar Maniknandan V.

7. The charges were heard under the provisions of Army Rule 22 and the Summary of Evidence was recorded following which he was tried by Summary Court Martial on 28.05.1994 and thereafter was awarded the sentence as stated in Para 4 above. He was sent to Jail on 28.05.1994. The proceedings when reviewed by GOC, 26 Infantry Division who amended the Section of the Army Act and language of the Charge. The findings of guilty and sentence remain unchanged. The charge was changed from **“USING CRIMINAL FORCE TO”** to **“ATTEMPTING TO USE CRIMINAL FORCE TO”** and Section of the Army Act was amended from **‘Section 40(a)’** to **‘Section 65’** under the provisions of Army Act Section 163. The Respondents during the verbal hearing stated that the Officiating GOC had authority to make such amendments in the proceedings. The Respondents pleaded that the Summary Court martial Proceedings were valid in all respect as also the review was also legally valid and therefore the Transferred Application be dismissed lacking in merit.

8. Heard both sides and scrutinized the original documents of the case.

9. The trial was held on 28.03.1994 in which the petitioner pleaded guilty and also stated ***“I have made a mistake, please forgive me.”*** He was thereafter awarded the sentence as stated above. The

promulgation was done the same day and he was sent to District Jail, Rajouri on 28.05.1994. The Court Martial Proceedings thereafter were sent to HQ, 26 Infantry Division and Officiating GOC 26 Infantry Division countersigned and made the following remarks on 29.06 1994:-

**“REMARKS OF OFFG GOC 26 INF DIV (A.A. SEC 163)**

1. *Countersigned.*

2. *In exercise of the powers vested in me under the provns of AA Sec 163, I set-aside the finding of ‘guilty’ arrived at by the Court and hereby find the accused ‘guilty ‘ of the said charge with the variation that the statement of offence appearing in the charge sheet, be amended to read as ‘ATTEMPTING TO USE CRIMINAL FORCE TO HIS SUPERIOR OFFR AND IN SUCH ATTEMPT DOING AN ACT TOWARDS THE COMMISSION OF THE SAME’, and also the Army Act section 40(a) mentioned in the margin of the charge sheet, be amended to read as Army Act Section 65.*

*Signed at Field this Twentyninth day of June 1994.”*

Thereafter the sentence was re-promulgated and extracts taken on 29.07.1994 and signature of the petitioner obtained thereon.

10. Section 163 of the Army Act reads thus:-

**“163. Alteration of finding or sentence in certain case. –**

*(1) Where a finding of guilty by a court-martial, which has been confirmed, or which does not require confirmation, is found for any reason to be invalid or cannot be supported by the evidence, the authority which would have had power under section 179 to commute the punishment awarded by the sentence , if the finding had been valid, may substitute a new finding and pass a sentence for the offence specified or involved in such finding:*

*Provided that no such substitution shall be made unless such finding could have been validly made by the court-martial on the*

*charge and unless it appears that the court-martial must have been satisfied of the facts establishing the said offence.*

*(2) Where a sentence passed by a court-martial which has been confirmed, or which does not require confirmation, not being a sentence passed in pursuance of a new finding substituted under sub-section (1), is found for any reason to be invalid, the authority referred to in sub-section (1) may pass a valid sentence.*

*(3) The punishment awarded by a sentence passed under sub-section (1) or sub-section (2) shall not be higher in the scale of punishment than, or in excess of, the punishment awarded by, the sentence for which a new sentence is substituted under this section.*

*(4) Any finding substituted, or any sentence passed, under this section shall, for the purpose of this Act and the rules made thereunder, have effect as if it were a finding or sentence, as the case may be, of a court-martial.”*

11. This Section gives power to the authority who under Section 179 of the Army Act can commute the sentence to substitute a new findings and pass a sentence for the offence. No where in this Section it has been mentioned that the authority so empowered may amend the charge or the Section under which the charge had been framed .

12. The Chief of the Army Staff while considering the petition under Army Act Section 164(2) did take cognizance of the amendments to the Army Act Section and language of the charge and then rejected the petition. Inference that may be drawn is that he held the amendments to be legally valid.

13. The Army Act Section 163 empowers the authority having powers under Army Act Section 179 to substitute a new finding and pass the sentence for the offence involved in such findings. In the instant case the reviewing authority i.e. GOC 26 Infantry Division has not substituted any new finding or has not passed any sentence. The

reviewing authority has amended the language of the charge and the Army Act Section of the charge which, in our view is legally not sustainable. The reviewing authority could have sent the proceedings back to the Court for re-trial of the petitioner. It was not done. The COAS too could have directed that the accused be re-tried. That too was not done. We would have remanded the case for re-trial but that is not a practicable proposition since a lot of time has passed since 1994. Therefore we are of the view that entire Summary Court Martial Proceeding as also the review and the rejection by the COAS are liable to be set-aside, being legally not sustainable.

14. Accordingly, the Petition is partly allowed. The Summary Court Martial Proceedings held on 27.03.1994, reviewed by the reviewing authority on 29.06.994, re-promulgated on 29.07.1994 and rejection order by the Chief of the Army Staff dated 10.02.2006 are directed to be quashed. The punishment of Rigorous Imprisonment undergone by the petitioner cannot be undone. We hereby grant relief to the petitioner by directing the respondents to NOT count the period of Rigorous Imprisonment as absence or gap in service. Accordingly, the petitioner will be treated to be notionally in service with effect from 28.5.1994 till he attains the service which makes him eligible for pension and he shall be paid his pension and all consequential benefits. No order as to costs.

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

(Justice Abdul Mateen)  
Member (J)

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