

RESERVED
Court No. 1

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

T.A. No. 565 of 2010

Wednesday, this the 19th day of December, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal B.B.P. Sinha, Member (A)

Khima Nand son of Jay Dutt Tiwari, Resident of Village Bajyula,
P.O. Bajyula, District Bageshwar.

.... Applicant

Ld. Counsel for the: **Shri Parijaat Belaura**, Advocate.
Applicant

Versus

1. Union of India through the Defence Secretary, New Delhi.
2. Major General/Group Colonel, Army Headquarters,
Provost-Marshal, Sena Bhawan, New Delhi.
3. General Officer Commanding, Office of the North Block,
Udampur, District Udampur, Jammu and Kashmir.

... Respondents

Ld. Counsel for the: **Shri Arun Kumar Sahu**, Advocate.
Respondents.

ORDER

“Per Hon’ble Mr. Justice S.V.S. Rathore, Member (J)”

1. Initially Civil Misc. Writ Petition No. 22677 of 2000 was filed before the Hon’ble Allahabad High Court which was transferred to Hon’ble High Court of Uttarakhand at Nainital and renumbered as Writ Petition (S/S) No. 1014 of 2001. Vide order dated 23.04.2010 passed by the Hon’ble High Court of Uttarakhand at Nainital the instant Writ Petition was transferred to this Tribunal and was renumbered as T.A. No. 565 of 2010. By means of this T.A. the petitioner has prayed the following reliefs :-

- (i) *Issue a writ, order or direction in the nature of certiorari quashing the order dated 17th February, 1999 annexed as Annexure No. IV of the writ petition.*
- (ii) *Issue a writ, order or direction in the nature of mandamus commanding and directing the authorities concerned to dispose the representation of the petitioner.*
- (iii) *Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to pay him the balance of the salary as Lance Havildar from 17th Feb., 199 upto the date of his retirement and given all the pensionary benefits and other benefits considering that the petitioner is retired on the post of Lance Havildar.*
- (iv) *Issue any other writ, order or direction.*
- (v) *Award the cost of the petition to the petitioner.*

2. In brief the facts stated by the petitioner in his Writ Petition (now Transferred Application) may be summarised as under :-

3. The petitioner was enrolled in the Kumaun Regiment of Army in the year 1981. During his service period he was promoted to the rank of Naik (Lance Havildar) in Kumaon Regiment. Because of his good work and conduct he was permitted to work as Instructor for one year in the M.T. of the Kumaon Regiment in the year 1997. In the year 1998 the petitioner was directed to move from Poonch (Himanchal) to Jammu by road. During the period the petitioner was running 3 Ton Shaktiman vehicle but at the time of the movement he was handed over a Class -4 vehicle. In spite of the repeated requests that the vehicle cannot be moved due to the weather and defects in the vehicle, the petitioner was directed to run the said vehicle on the direction of the authorities. In spite of all these the petitioner reached Jammu with the said vehicle. After one month the petitioner was directed to take away the same defective vehicle from Jammu to Poonch and after facing so many difficulties the petitioner reached his Unit. On 12.02.1999 the petitioner was on his duty with the said defective vehicle and in the way the petitioner was stopped by the Adjutant of the Artillery. At that time one Sepoy Govind Singh was in the vehicle. He was warned by the officer concerned and the petitioner was also informed that his complaint should be made to his Adjutant and on 15.02.1999 the Summary Court Martial will be assembled against the petitioner for his offence alleged to have been committed under Section 48 and 63 of the Army Act. On 15.02.1999 the charge-sheet was issued to the petitioner in which charges were framed under Section 42(e) and 48 of the Army Act.

The evidence of Prosecution Witnesses 1 to 4 and petitioner was recorded on 14.02.1999 as summary of evidence which have been annexed with the Writ Petition. On 17.02.1999 Commanding Officer passed the sentence against the petitioner as under :-

(a) Reduce to Ranks and

(b) One month R.I. in military custody subject to the right to the petition.

4. Admittedly, the applicant has already served out the R.I. which was imposed on him. The petitioner moved representation to the superior authorities on 29.11.1999. No order was passed on the said presentation. It has been argued on behalf of the petitioner that the charges as framed were not made out against the petitioner. The petitioner never neglected to obey the special army order and was never found in intoxication and were never send to the Doctor for obtaining the report that during the running of the vehicle the petitioner was under intoxication. Thus on the strength of these factual background the submission of the Ld. Counsel for the applicant is that the Summary Court Martial proceedings suffers from procedural defects as the charges were framed after the summary of evidence because the summary of evidence was recorded on 14.02.1999 and charges were framed on 15.02.1999. It is thus submitted by the Ld. Counsel for the petitioner that there is violation of Rule 22 and 23 of the Army Rules, 1954. He has argued that the respondents have also violated Rule 34 of the Army Rules, 1954. Ld. Counsel for the petitioner in the alternative has argued that the punishment

awarded to the applicant is excessive keeping in view the offence committed by him.

5. On behalf of the respondents it is submitted that the applicant was driving 2 Ton vehicle after consuming liquor when he crossed the Jonga (vehicle) of the Adjutant then he was driving rashly at a very high speed. At that time Major S. Uttam was sitting in that. To save himself the driver drove the Jonga away from the Road and shouted to stop the 2 ton. Thereafter, the alarm was raised by the Adjutant and asked the driver to stop the vehicle, but, the petitioner continued to move the vehicle in the same rash manner. Thereafter, he was chased by the Jonga and was asked to stop by blowing the horn of Jonga but the petitioner continued to run the vehicle in the same manner and did not stop his 2 ton vehicle. Thereafter, he was overtaken by the Jonga and was forced to stop his vehicle. It was found that the petitioner was in a drunken state. Thereafter, on the complaint of the Adjutant and follow up of summary charge trial by C.O. the Summary of Evidence was recorded. It is submitted that in the Army the taking liquor is not a serious offence, but, when a person is driving a heavy vehicle after consuming the liquor, is a very serious offence as a driver is not expected to drive vehicle after taking liquor because it is not only harmful for the driver and government property but it is also likely to cause serious accidents which may prove fatal for the persons moving on the road. Ld. Counsel for the respondents has argued that keeping in view the facts that the petitioner was driving the vehicle after consuming the liquor was

serious offence and therefore, this is the minimum punishment that could have been awarded to the petitioner. The petitioner has not been dismissed from service. He is getting pension.

6. Before proceeding further we would like to describe the summary of evidence.

7. **Prosecution Witness – 1** - Lance Havildar Jagtar Singh of 171 Filed Regiment has been examined, who was coming on Jonga vehicle along with Major S. Uttam. He has given a details of the incident as under :-

“At around 1445 hours near a bridge which is approximately 200 meters short of Regimental Post gate of 9 SIKHLI at Mendhar a 2 ton vehicle came from opposite direction with high speed. To save my vehicle I took it to the extreme left. As soon as the 2 ton vehicle crossed, narrowly missing the Jonga, Major S. Uttam got down from the jonga and shouted for the 2 ton to stop. However, it did not stop. After this Major S. Uttam told me to turn the jonga and we chased the 2 ton. We tried to stop the 2 ton vehicle by blowing the horn but still it did not stop. However, after chasing the vehicle for approximately 1.5 km to 2 km I overtook the 2 ton vehicle and forced him to stop. The driver and the co-driver of the vehicle were called by Major S. Uttam. The driver of the vehicle was Lance Havildar Khima Nand and co-driver was some DSC person whose name I don't know. Both were heavily drunk. Major S. Uttam noted down the particulars of the driver and told him that he will report the matter to his unit. After this we returned to our unit.”

8. It transpires from the record that the petitioner has cross examined the Prosecution Witness – 1. The only one question put to him and the question put and answer thereof are as under :-

(a) No. 4177355Y Lance Havildar Khima Nand - "At the place where your vehicle crossed my vehicle I was turning my vehicle. Why didn't you stop after seeing my vehicle.?"

(b) No.14464113N Lance Havildar Jagtar Singh. Your vehicle was coming from the opposite direction with speed. How do I know that you were going to turn your vehicle at that spot. Also if that was the case your speed should have been very less, given some signal or blown horn for me to stop."

9. **Prosecution Witness – 2** – Captan S.K. Anand of 17 Kumaon. He has stated in his evidence that he has received a telephone call from Major S. Uttam, Adjutant, 171 Field Regiment. He has given evidence by stating that he was told by Major S. Uttam. This witness has also stated that in the unit we have laid down detailed instructions for the Unit MT. Every day fall in of all drivers is taken in the morning and the contents of the unit MT standing order procedures are read out. Drivers are briefed about the safety aspect and in spite of the said precautions Lance Havildar Khima Nand consumed liquor while on duty and drove the vehicle. This witness was also cross examined as under :-

"(a) No. 417355Y Lance Havildar Khima Nand – When Adjutant, 171 Field Regiment reported the matter to you. Did you enquire from him as to what the 2 ton vehicle was trying to do and what was his speed at the time of crossing his vehicle?"

(b) IC-56647A Captain S. Anand. No.

10. **Prosecution Witness No. 3** – No. 4169407P Havildar Kailash Singh Waldia of 17 Kumaon. He has stated in his evidence that he was the person who was accompanying the petitioner in 2 ton vehicle. This witness has not given any statement about the incident. The petitioner had declined to cross examine the witness.

11. **Prosecution Witness No.4** – No. JC538702L Naib Subedar Prakash Ram of 17 Kumaon. He has stated in his evidence as under :-

“On 12 Feb 99 all drivers of the MT were made to fall in at 0645 hours. In the fall in the unit MT standing over procedures was read by Naik Govind Singh. After this Lance Havildar Khima Nand got his vehicle fitness certificate signed. He left for Mendhar around 0945 hours. He came back around 1700 hours. At 1730 hours same day I was called by Adjutant alongwith MT havildar and Lance Havildar Khima Nand. I was told by the Adjutant that today Lance Havildar Khima Nand was driving his vehicle after consuming liquor. He also said that it has been reported by the Adjutant, 171 Filed Regiment. After this while enquiring from Lance Havildar Khima Nand I found that found smell of liquor was still coming from his mouth.

4. Lance Havildar is an old and experience driver. He is even MT course qualified. He is fully aware of the consequences of driving after consuming liquor. Still he consumed liquor while on duty and was driving his vehicle. All the drivers in the unit are briefed regularly about the MT discipline.”

12. No cross examination was done by the applicant to this witness.

13. After the statement of the witnesses the statement of petitioner was also recorded. The relevant part of his statement reads as under :-

“Around 1230 hours when I was going to the cookhouse for the food I met Sepoy Govind Singh of DSC. He told me to have food with him. Together we consumed one to two pegs of liquor each before having food. At around 1330 hours I came back to the place where my vehicle was parked. I relaxed for about half an hour inside the vehicle. After that I took the vehicle and came to Regimental Post Gate of 9 SIKHLI to pick up the unit transients. When I reached there I turned my vehicle to left to come up to the main road. After coming on the main road I stopped by vehicle. At that time there was no co driver or dandaman in my vehicle. Sepoy Govind Singh of DSC who was standing nearby boarded the 2 ton and sat in co driver seat. After this I took my vehicle ahead to turn vehicle in the opposite directions as there was space available on the right side. As soon as I was about to turn the vehicle in opposite direction, I saw one jonga coming in speed from the opposite direction. To avoid accident I took my vehicle straight forward looking for another place to turn. As Jonga passed by he signaled me to stop. I stopped my vehicle after going some distance. However in the meantime the jonga had turned and came to the place where my vehicle was parked. The Artillery Officer who was travelling in the jonga called me. He said that you are drunk. He also said that he will report the matter to the unit since you are driving after consuming liquor. I told him that, yes, I have consumed liquor and you can report to my unit if you feel so. After he left I brought my vehicle to 9 SIKHLI MT park and wants off to sleep. At around 1600 hours Havildar Kailash Singh came after completing task and woke me up. After this we came back to the unit.

Enroute we picked up eight transients. After reaching unit I reported to the Adjutant on telephone. Soon I was called by the Adjutant alongwith MT JCO and MT Havildar. Adjutant enquired from me whether I have consumed liquor. I told him that I did consume liquor. After that I was arrested. My hands and legs were tied and was kept on the road till twelve 'O' clock in the night." (Underlined by us)

14. The charges which were leveled against the petitioner reads as under:-

FIRST

CHARGE

Army Act

Section 42(3)

NEGLECTS TO OBEY SPECIAL ARMY ORDER

in that he

while in OPERATION RAKSHAK on 12 Feb 99 intermittently drove vehicle BA No.87 C 48831K Truck 2.5 Ton TATA between 1400 h to 1700 h under influence of alcohol contrary to paragraph 38(h) of Special Army Order 14/S/73 which prohibits consumption of alcohol while on driving duty.

SECOND

CHARGE

Army Act

Section 48

INTOXICATION

In that he,

on 12 Feb 99 when on operational duty on 'OP RAKSHAK' tasked to get fresh supplies and transients was found intoxicated at 1700 h while parking Vehicle BA N.87 C 48831K

Truck 2.5 ton Tata in the Battalion Headquarters premises.

15. In the Counter Affidavit respondents have denied the case of the petitioner that the petitioner was given a Class IV Vehicle. It has been pleaded on behalf of the respondents that the petitioner was posted in a Field Location that too in an operation area, hence, there was no question of Class IV vehicle to be driven in operation area. So the pleadings in this regard are false. It was pleaded by the respondents that the charges were framed on 15.02.1999 and Summary Court Martial was assembled on 17.02.1999. It has also been pleaded that the petitioner was granted pension of the rank to which he was reduced. It transpires from the perusal of record that in the Summary Court Martial the petitioner pleaded 'Guilty' and accordingly he was punished. Copies of Summary Court Martial proceedings are enclosed with the Rejoinder Affidavit.

16. The Ld. Counsel for the petitioner has also argued that in the instant case in the Convening Order dated 15.02.1999 the names of four other witnesses are mentioned while they were not examined in the summary of evidence. This arguments of Ld. Counsel for the petitioner has no substance as the names of the witnesses mentioned in the Convening Order are the name of the persons who had to remain present during Summary Court Martial as witnesses of Summary Court Martial proceedings. The Ld. Counsel for the petitioner has pleaded that there was violation of

Rule 22 of the Army Rules, 1954. So far as the non-observance of the Rule 22 of the Army Rules, 1954 is concerned the arguments of Ld. Counsel for the petitioner is misconceived as the procedure laid down is that the tentative charge-sheet is prepared and thereafter Summary of Evidence is recorded and only thereafter convening Order is passed. In the instant case the Summary of Evidence was recorded on 14.02.1999. Convening Order was issued on 15.02.1999 and thereafter Charges were framed on 15.02.1999 and Summary Court Martial took place on 17.02.1999. Thus the submission of the Ld. Counsel for the petitioner that the charges should have been framed before recording Summary of Evidence is absolutely wrong and misconceived arguments and has absolutely no substance.

17. The arguments of the Ld. Counsel for the petitioner is that friend of petitioner has not been provided to the petitioner as per his choice. In this regard he has placed reliance on the pronouncement of Hon'ble Allahabad High Court in the case of ***The Chief of Army Staff and Others Versus No. 133883630-K Ex. Sep. Dvr. (MT) M.Z.H. Khan (Special Appeal No.43 of 2002)***, decided on 11.09.2006. In that case there was request from the petitioner to engage a civil defence lawyer, but, he was not permitted to do so. On this strength it was held that there was violation of Rule 129 of the Army Rules, 1954. In a very recent Judgment Hon'ble Apex Court in the case of ***Jaswant Singh Versus Union of India and Another (Civil Appeal No.6886 of 2014)***, decided on 10.12.2018, has held that there was violation of

Rule 129 of the Army Rules. In that case a request was made by the petitioner for engaging a defence lawyer, the same was declined and on the basis of the same it was held that there was violation of Rule 129 of the Army Rules, 1954. But in the instant case there is no pleading of the petitioner that the friend of accused was not provided as per his choice. There is no pleading that he had proposed the name of any friend which was not provided by the respondents. Therefore, we do not find any substance in the submission of the Ld. Counsel for the petitioner. In the facts of this case petitioner has pleaded 'guilty'. Law is settled on the point that only such procedural irregularities vitiates the trial where such an irregularity causes prejudice to the accused in his defence or any mandatory provision of procedural law has been violated or it cause failure of justice. While there is no such pleading on behalf of the petitioner in this case. On this point reference may be made in the case of ***Bhagwan Swaroop Versus Mool Chand***, reported in (1983) 2 SCC 132, ***Mahadev Govind Gharge Versus LAO***, reported in (2011) 6 SCC 321 and also ***Shantibai K. Vardhan Versus Meera G. Patel***, reported in 92008) 6 Mah LJ 833.

18. The last argument of the Ld. Counsel for the petitioner is that punishment awarded to the petitioner is excessive. Ld. Counsel for the petitioner in support of his submission has placed reliance upon law laid down by the Hon'ble Apex Court in the case of ***Ex. Naik Sardar Singh Versus Union of India and Others***, reported in 1992 AIR 417 and ***Rnjit Thakur Versus Union of***

India and Others, reported in 1987 AIR 2386. On the strength of these pronouncements it is submitted that the punishment awarded to the applicant is shocking to the conscience of the Court. On behalf of respondents it is submitted that under the Army Regulations an Army Driver, as per Rules, is not authorized to drive the Vehicle after consuming the liquor. It is submitted that the respondents have taken the lenient view in awarding the punishment since the petitioner has already served so many years for the army and at present he is getting pension of the rank to which he has been reduced, therefore, the quantum of punishment is befitting to the offence committed by the petitioner and cannot be said to be excessive and bias. In the case of **Ex. Naik Sardar Singh Vs. Union of India and Others** (Supra) relied upon by the Ld. Counsel for the petitioner, the petitioner was carrying seven bottle of liquor without permit, while proceeding on leave in excess of permission to carry five bottle of liquor, hence, Hon'ble Apex Court held that award of punishment of three months' R.I. and dismissal from service are excessive. That was not a case where the petitioner was found driving a vehicle in a drunken state. Law is settled on the point that power to inflict appropriate punishment lies within the domain of the competent authority and the Courts have no role to play with the quantum of sentence. But the sentence has to suit the offence and the offender. It should not be a vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience of the Court. It has been so held by the Hon'ble Apex

Court in the several cases and also in the case of **Ex. Naik Sardar Singh Versus Union of India and Others** (Supra). The relevant paragraphs of the said Judgment are quoted below :-

“The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial, but the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review.” In Bhagat Ram v. State of Himanchal Pradesh, [1983] 2 SCC 442 this Court held as under :

“It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the constitution.”

19. Similar view has been expressed by the Hon'ble Apex Court in the case of Ranjit Thakur Versus Union of India, reported in 1987 AIR 2386. In that case the allegation against the petitioner was under Section 41(2) of the Army Act, 1950 for disobeying a lawful command given by his superior officer. The minimum rigorous imprisonment provided while not on active service. Keeping in view of that the proceedings of the Summary Court Martial and consequent order and sentence are quashed and the

petitioner was reinstated with all monetary and service benefits. But the facts of instant case is that the petitioner drove the vehicle very rashly and after consuming the liquor and therefore this act was serious offence because an Army Driver is not permitted to drive a vehicle in a drunken state, because, such an act may endanger the lives of persons moving on the road and also to cause damage to the government property. Keeping in view the facts and circumstances of the case and the fact that the petitioner is getting pension of the rank to which he was reduced, we found substance in the submission made by the Ld. Counsel for the respondents that this is the minimum punishment that could have been awarded to the petitioner, because, it must be give a message to the other drivers of the Armed Forces not to consume liquor when they are supposed to drive the vehicle.

20. In view of above discussions, we do not found any illegality in the order dated 17.02.1999, annexed as Annexure No. IV of the Transferred Application. The Transferred Application is devoid of merit and deserves to be dismissed.

21. Accordingly, **Transferred Application No. 565 of 2010 is dismissed.**

No order as to costs.

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

Dated: December, 2018

(Justice S.V.S. Rathore)
Member (J)

AKD