

Court No. 2

Reserved

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

Original Application (Appeal) No. 672 of 2020

Thursday, this the 18th day of May, 2023

“Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”

“Hon’ble Maj Gen Sanjay Singh, Member (A)”

No. 4277128N Ex Sep Randhir Kumar, Son of Sri Mangal Singh,
Care of Sri Nagrendra Kumar 132/A/4, Harwara, Dhumanganj,
Prayagraaj

..... Petitioner

Ld. Counsel for the Petitioner : **Shri Rohit Kumar, Advocate**

Versus

1. Chief of the Army Staff DHQ PO, New Delhi - 110011.
2. Commandant cum Chief Record Officer, Records the Bihar Regiment, PIN-908765, C/o 56 APO.
3. Union of India, Through Secretary Ministry of Defence, New Delhi.

..... Respondents

Ld. Counsel for the Respondents : **Shri Yogesh Kesarwani,
Central Govt. Counsel.**

ORDER**“Per Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”**

1. The instant Original Application has been filed on behalf of the petitioner under Section 15 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

- “(a) Quash the rejection order of the Chief of Army Staff bearing No. C/08617/DV-3(B) dated 12 Apr 2010 with all the consequential benefits to the applicant.*
- (b) Quash the Additional Directorate General Discipline and Vigilance DV-3 letter No. 04812/Gen/DV-3(B) dated 09 Oct 2006 with all the consequential benefits to the applicant.*
- (c) Quash the orders of the Officiating General officer Commanding in Chief Northern Command bearing No. 22013/P/500/DV-4 dated 15 Jul 2006, with all the consequential benefits to the applicant.*
- (d) Quash the summary court martial proceedings including its verdict dated 19 Nov 2004 (especially keeping in view violation of Rule 34 (1) of the Army Rules 1954, with all the consequential benefits to the applicant.*
- (e) Issue any other order or direction considered expedient and in the interest of justice and equity.*
- (f) Award cost of the petition.”*

2. In brief, the facts of the case are that the petitioner was enrolled in the Army on 10.10.1998. petitioner was posted in 47 Rashtriya Rifles and while on duty his weapon AK 47 Rifle was found missing. First Information Report was lodged on 18.02.2003. Court of Inquiry was ordered and Summary of Evidence was recorded. The petitioner was tried by Summary Court Martial (SCM) on 19.11.2004 and he was inflicted punishment of 6 months Rigorous Imprisonment coupled with dismissal from service. The petitioner mercy petition against the punishment which was rejected by General Officer Commanding in Chief Norther Command vide order dated 15 July 2006. He again submitted petition addressed to Choef of Army Staff which was also rejected vide order dated 09.10.2006. The petitioner submitted statutory petition which was also rejected vide order dated 12.04.2010. Being aggrieved, petitioner has filed instant Appeal with the prayer to quash the punishment of dismissal awarded by the SCM.

3. Learned counsel for the petitioner submitted that petitioner was posted in 47 Rashtriya Rifles. While on duty he slipped down the hill in a gorge where the weapon of petitioner including one magazine and 30 rounds of the Rifle misplaced. Court of Inquiry was ordered by General Officer Commanding CIF (K) vide Convening Order dated 22.02.2003. FIR for loss of weapon was lodged on 18.02.2003 in Police Station Kupwara. In Court of Inquiry, it is clearly seen that the statement of the witnesses is entered in different handwriting whereas compliance of statutory provisions of Rule 180 of Army Rules 1954 has been entered in someone else handwriting as such compliance of Rule 180 of Army Rules 1954 has not been done faithfully. Further while recording the Court of Inquiry, the person whose character or military reputation is at stake has to be present throughout the court of inquiry, and he shall be asked whether he wishes to cross examine the witness or not and a endorsement regarding the same should be made by the officer recording and also the signature of the

accused obtained which has not been done in the instant case. Three personnel involved in the same offence were blamed by the Court of Inquiry and punished . Hav IC Mishra was awarded punishment of Severe Reprimand and Sep GD Bhai and Sep Raju Singh were awarded punishment of 28 days RI. This action on behalf of the respondents was also violative of Doctrine of Proportionality and such action was discriminatory and attracting Articles 14, 15 and 21 of the Constitution of India. As per Rule 182 of Army Rules 1954 ***“Proceedings of a Court of inquiry, or any confession, statement or answer to a question, made or given at a court of inquiry, shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial of such person for wilfully giving false evidence before that court”***. The perusal of records of Column 4 in Appendix ‘A’ to Army Order 24/94 shown reproduced in Para 4 reveals that no Prosecution Witnesses have been produced which made the alleged investigation violative of statutory provisions of Army Rules 1954. It is duty of the Officer carrying out investigation to ensure that at least one or two Prosecution Witnesses must be produced, and the accused must have the opportunity to cross examine the said witnesses, and accused has right of defence witness in his support, at the investigation stage itself, if he so desires and non compliance vitiates entire follow up action. There is endorsement regarding compliance of Rule 23 (3) of Army Rules 1954 which claims that accused has declined to cross examine the witnesses appeared before the summary of evidence, thereafter there is a certificate regarding compliance of Rule 23 (1), (2) and (3) of Army Rules 1954 which has been shown done on 09 Sept 2004, thereafter there is a certificate which has been signed by accused and by the independent witness Sub PR Zerai but this certificate is dated 09 Sept 2004 is not possible. Perusal of records reflects that one Charge Sheet is dated 19.11.2004 and the trial by Summary Court Martial

has also been shown to have been completed in matter of 60 minutes on 19.11.2004, it establishes committal of serious infractions. Violation of Rule 33 (7) of Army Rules 1954 thereby making the entire trial by summary Court Martial illegal, irrational and perverse Para 5 of AIR 1992 SC 417 relied upon as well noncompliance of Rule 34 (i) of the Army Rules 1954, which lays down that Charge Sheet must be served/ handed over to the accused 96 hours before commencement of trial by a Court Martial, and noncompliance vitiates entire follow up action. Summary Court Martial format shows that provisions of Rule 115 (2) of the Army Rules 1954 read in conjunction with Rule 52 (2-A) of the Army Rules 1954 have not been followed. Statutory provisions of Rule 182 of Army Rules 1954 were not followed. He has also argued that Army Rule 22(1) had not been complied with. Learned counsel for the petitioner pleaded that action of the respondents vividly demonstrates and conclusively establishes that Rule of Law had ceased to exist and lawlessness had become the order of the day. He pleaded that punishment of dismissal awarded to the petitioner by SCM be quashed and petitioner be reinstated in service with all consequential benefits.

4. On the other hand, learned counsel for the respondents submitted that petitioner was enrolled on 10.10.1998. He was posted in 47 Rashtriya Rifles on 21.02.2002 located at Khargund Company Operating Base (COB). The Company was assigned corridor protection tasks on the National Highway 1A. The petitioner was issued Rifle AK-47 Registered Number TS 2176 Butt Number 117. There was a satellite post called 'Archana' manned by the personnel of Khargund COB. All administrative requirements of the 'Archana' Post were met from the main Khargund COB. Sep Randhir Kumar was part of the strength deployed at Archana Post.

5. On 17.02.2003, Ex Sep Randhir Kumar was detailed with his buddy, Sep Raju Singh to bring breakfast from the Khargund COB for rest of the personnel of Archana Post. As per routine a party for corridor protection was also detailed to go from Archana Post along with Ex Sep Randhir Kumar. The buddy pair left at approximate 0700 hrs along with the party detailed for corridor protection to reach Khargund COB. The buddy pair was last in the order of march. Half way down the route, the buddy pair decided to take a short cut and bifurcated to reach the Khargund COB on its own independently. On reaching the COB, while Sep Raju Singh headed straight to the langer, Ex Sep Randhir Kumar apparently went to STD booth, leaving his weapon outside and then went to the langer. Ex Sep Randhir Kumar after taking breakfast returned back and searched his weapon which he kept on the gate of STD Booth but he could not find and he realized that his weapon was missing and confided the same to his buddy Sep Raju Singh at about 0930 hrs. After an extensive search at all levels, viz Company Hav Maj, Platoon Cdr, Senior Junior Commissioned Officer and Company Commander, the matter was reported to the then Commanding Officer on 16 Feb 2003 at approximately 1300 hrs. Official report to all concerned was made thereafter.

6. A Court of Inquiry was ordered by Headquarter Counter Insurgency Force vide letter dated 22.02.2003. The petitioner was blamed for loss of Rifle AK 47, Registered Number TS-2176 along with one magazine and 30 rounds due to negligence. It also blamed others for administrative lapses. The case was also referred to 15 Corps Intelligence and Survival Unit. Disciplinary action was taken against the petitioner for negligently losing the weapon. After reassembly of witnesses and recording of Summary of Evidence, sanction to carryout SCM was received vide order 26.10.2004. The petitioner was handed over charge sheet and summary of evidence to try by SCM by Col KSR Mohan, Commanding Officer 47 Rashtriya Rifles through convening order dated

14/11/2004. Copy of the same was also endorsed to the friend of accused and petitioner was awarded punishment to 'Suffer Rigorous Imprisonment for six months and to be dismissed from service'. During Court of Inquiry Army Rule 180 was invoked for the recording of Summary of Evidence. During the SCM, Sep Randhir Kumar never cross examined any witness. He pleaded 'Guilty'. SCM proceedings were sent to Deputy Judge Advocate General 15 Corps who returned it after review vide order dated 30.11.2004. Ex Sep Randhir Kumar had submitted a petition dated 02.03.2006 under Army Act Section 164 (2) addressed to General Officer Commanding in Chief Northern Command for seeking clemency which was based more on technical grounds for disqualification of SCM proceedings rather than the committal of offence, which was considered and rejected by General Officer Commanding in Chief Northern Command vide order dated 15.07.2006. The petitioner also submitted petition dated 31.12.2008 to Chief of Army Staff for treating his earlier petition dated 31.12.2006 under Section 179 Of Army Act 1950. Since all due procedure to try the petitioner was followed to pass sentence of 'Dismissal from service' and RI for six months, there was no scope to interfere in the impugned order. Grounds taken by the petitioner in instant Appeal for setting aside punishment of dismissal were denied. The Learned counsel for the respondents pleaded that sentence passed by the SCM are in accordance with law. Instant Appeal has no force and is liable to be dismissed.

7. We have heard learned counsel for the parties and perused the documents available on record.

8. It has been pleaded by learned counsel for the respondents that the SCM, on the basis of evidence on record, has rightly convicted the petitioner and the sentence awarded to the petitioner cannot be said to be disproportionate to the offence committed by him. It has been argued that there was sufficient evidence against the petitioner. The offence committed by the

appellant is of very serious nature, therefore, the punishment of dismissal from service and RI for six months cannot be said to be disproportionate.

9. We have gone through the original record carefully and perused the entire evidence. During Court of Inquiry, 11 witness were examined whose details are as under:-

(a) Witness No 1 Sep Randhir Kumar of 47 RR, B Coy. In the Court of Inquiry, he has stated that I was detailed for Adm duty which includes bringing breakfast of the post persons from Coy HQ. On 17.0-2.2003 at about 0730 hrs Nk RS Folane checked the weapons and ammunitions of Adm party and Corridor Protection party Report was given to Sub LD Bodra who briefed him regarding the movement, minimum distance to be maintained between each member of the party and the COB. The order was passed to move. When the column left Archana Post for Coy HQ location, I was last in COB and just ahead of me was Sep Raju Singh my buddy, the second person of the Adm party. After covering about 250 mtrs to 300 mtrs, I along with Sep Raju Singh decided to take the short cut route leading to Coy post. The JCO led column i.e. balance of the party moved towards the Coy HQ location on a separate to going through 24 RR location. After reaching Coy HQ loc I placed my belongings viz BPJ personal weapon AK 47 Rifle, 1 four ltr plastic container and haversack on a box outside the STD booth barrack. I then proceeded towards the cook house for my breakfast. I also collected breakfast and tea ration of the personnel of Archana Post. When I reached the place where I had left my belongings, I found my weapon was missing. I checked by barrack. When I did not find the weapon, I along with Sep Raju Singh decided to search for the weapon along the route we had taken for coming to Coy HQ location. We searched the entire route and reached the Archana Post but could not find the weapon. I informed

about the loss of weapon to Nk RS Folane, NCO Incharge of Archana Post. He told me to go back to Coy location and inform Officiating CHM, Hav IK Mishra about the loss. I along with Sep Raju Singh again walked back to the Coy HQ loc and informed Hav IK Mishra, CHM about the loss of my weapon. He checked every person present in the Coy HQ location for their personal weapons. We then walked for Coy Cdr Maj Jaswant Singh who had gone with Corridor Protection Party. On his return, Coy Cdr was informed about the incident by Offg CHM. The Coy Cdr thereafter organised a search along the entire route as well as the build up areas close to the route. At about mid night the search was called off and we returned to Archana Post. Sep Randhir Kumar in question replied that Sep Manager Bhagat had handed over his personal weapon AK 47, Butt No 117 and Regt No TS-2176. Sub LD Badra briefed us before we move out from the post for the Coy HQ. I along with Sep Raju Singh took a different route because it was a short cut leading to the Coy post. I was last in COB and Sep Raju Singh was just ahead of me. As asking the question that Are you sure that weapon was with you when you reached Coy HQ. He replied that weapon was probably with me. On asking 'Do you remember having stopped anywhere in route before reaching Coy HQ location, he replied that while moving on the shortcut route, he fell down once. Otherwise he did not had any break or stopped in route. He replied that he came to Coy HQ location where he had kept his weapon and went for breakfast. On return he found that his weapon was missing. After search, he informed the matter to CHM.

(b) Witness No 2 is Nk RS Folane of 47 RR Bn. He is NCO Incharge of Archana Post of B Coy location. On 16.02.2003, when corridor protection party came back to the post, I checked each member of the party of their weapons and stores. At about 1930 hrs on the same day I

made the detailment for the next day duties. Sep Randhir Kumar and Sep Raju Singh were tasked to go along with Corridor Protection party to Coy HQ and get breakfast for the post persons. On 17.02.2003 at about 0730 hrs I organised the fallen of the corridor protection party including the Adm party. After checking the weapons and stores, I gave report to Sub LD Badra, the party commander. The JCO thereafter briefed the party regarding the route to be followed. He during this briefing told them to maintain adequate distance between each other and the route to be taken will be through 24 RR Bn location. At about 1030 hrs, Sep Randhir Kumar and Sep Raju Singh returned to the Post. Sep Randhir Kumar informed me that his AK 47 Rifle was missing. I asked him to go back to the Coy post and inform Hav IK Mishra Offg CHM, B Coy about the loss of his weapon. At the same time, I told Sep Randhir Kumar that his weapon may have been taken by some person of Corridor Protection party by mistake. Sep Randhir Kumar along with the search party came to post at about 2030 hrs and immediately went back. He finally returned back to Archana Post at about 2345 hrs. The JCO had briefed the party about minimum distance between each person and the route to be taken will be along 24 RR Bn location. In cross question Sep Randhir Kumar stated that Sub LD Badra had made the mention about the route along the 24 RR location during his briefing to the party.

(c) Witness No 3 Sep Manager Bhagat of 47 RR Bn. I was on sentry duty on 17.02.2003 from 0300 hrs to 0630 hrs. I was relieved by Sep Vijay Kumar Tirkey at 0630 hrs. I stayed inside the sentry bunker as it was very cold. At about 0700 hrs Sep Randhir Kumar asked me for his weapon which was kept inside the sentry post. I took the weapon and handed over the same to him at that time I did not see the markings on the weapon.

(d) Witness No 4 is Sep Raju Singh of 47 RR Bn. I along with Sep Randhir Kumar were detailed to move along with Corridor Protection Party at Coy HQ location and to return back along with the breakfast for persons of Archana Post. We were at the end in COB. After covering half route, we decided to take shortcut leading to Coy location, since we were lagging behind. I handed over my weapon to Sep Om Prakash and went to cookhouse for breakfast. At about 0830 hrs Sep Randhir Kumar told me that he has not been able to find his Rifle AK-47. He said that he had kept his weapon on the box out side the PCO Barrack. We reached the barrack and searched but could not find the weapon. We also went back on the route to find weapon as it might have been dropped enroute by Sep Randhir Kumar. After searching complete route, the weapon could not be found. We reached Archana Post and informed to Nk RS Folane about loss of weapon. He asked to go back to Coy HQ location and inform Officiating CHM Hav IK Mishra. We went back to Coy HQ location and informed about the loss of weapon to Officiating CHM Hav IK Mishra of B Coy. Once the Corridor Protection party reached, Hav IK Mishra Officiating CHM of B Coy informed Maj Jaswant Singh B Coy Commander. A search was immediately organised in the coy location and also along the route which we had taken in morning. The weapon could not be recovered by us.

(e) Witness No 5 is Sub LD Bodra of 47 RR Bn. Before moving the post, I briefed the party about route to be taken by us along 24 RR location. On 17.02.2003 at about 0730 hrs, I was informed about loss of weapon of Sep Randhir Kumar. A thorough search was made but weapon was not found. Before the party leaves the post detailed briefing about the task and order on opening the fire are given and when the party comes back

weapon and ammunition and stores are checked and the party is debriefed by the commander.

(f) Witness No 6 is Maj Jaswant Singh Coy Commander, B Coy of 47 RR Bn. On knowing about loss of weapon, I called Sep Randhir Kumar and enquired as to how he had lost the weapon. Sep Randhir Kumar said that he along with Sep Raju Singh had come to collect the breakfast. Sep Randhir Kumar possibly kept his bag, kerosene oil container and weapon outside the PCO barrack on a wooden box. After he had finished his breakfast, he went to collect his equipment and weapon. He found that the weapon was missing. He informed Sep Raju Singh and both of them went to search the weapon in Coy Headquarter barracks. When they did not find the weapon, they decided to search for the weapon on route they had taken for coming to Coy HQ location. At about 1330 hrs, Sep Randhir Kumar reported the matter to Hav IK Mishra Officiating CHM who checked the weapon of all persons of Coy HQ as per their But No and Regd No. Everybody was in possession of his own weapon. Hav IK Mishra felt that they should wait for the Corridor protection party to come back. There was a possibility that by mistake somebody from the corridor Protection party may have taken the weapon. When the corridor protection party had returned at Coy Location, the matter was reported to senior JCO and all weapons of the party were checked but the missing weapon could not be traced. I asked Sep Randhir Kumar to narrate the whole incident to me. He told me that after reaching Coy location he had kept his equipment, empty oil container and weapon on a wooden box outside STD booth barrack. He then had breakfast, collected tea rations and a Radio Set and finally at about 0845 hrs decided to move back to Archana Post. He came out of barrack and started collecting his belongings. Everything was there except the weapon. He also informed

Sep Raju Singh about the loss of weapon. He further added that a civilian (milkman) from village had also used the same track before 0845 hrs. After listening to him I decided to search at two places. First the Coy area and second route to Archana Post. I decided that the route could be searched by party of Sub LD Bodra. I ordered to check the barracks. All the beddings from one barrack were shifted and detailed search was carried out. Similarly all stores and all places where Sep Randhir Kumar had gone were searched. All the vehicles were also searched. At about 1030 hrs, I again sent a search party equipped with metal detector. I again called Sep Randhir Kumar and asked him if he was absolutely sure that he had actually kept his weapon outside the STD Booth. He said he was not sure. At around 2300 hrs I sent a party to milk man's house to search his house and bring him to Coy location. This party came back at 0030 hrs along with milkman. I enquire from him and come to conclusion that he was not aware of the said weapon. I wanted to report this matter to Commanding Officer but the communication was so bad that I could not inform the entire episode. At 1400 hrs, he informed the matter to, Commanding Officer 47 RR Bn.

(g) Witness No 7 Hav IK Mishra of B Coy of 47 RR. At about 1130 hrs Sep Randhir Kumar and Sep Raju Singh came to coy HQ location and told me about loss of weapon. After inquiring from Sep Randhir Kumar, I checked the barrack and the weapons of persons present in the post to check if the missing weapon was there. I also checked Coy out post for missing weapon. When Corridor Protection party returned to the post, I reported the matter to Coy Senior JCO and Coy Commander. Coy Commander also organised search at night and also on 18.02.2003. Then matter was reported to Commanding Officer.

10. Similarly, remaining witnesses were examined and their statements were recorded. Same statements were given by them.

11. Before proceeding further in this matter, we would like to give the brief description of the evidence recorded during the SCM:

(a) PW-1 is Sub LD Bodra of 47 RR Bn, the then Subedar In Charge of Archana Post, a Satellite post of B Coy 47 RR. He has stated that Sep Randhir Kumar of B Coy, 47 RR is present as accused. On 17.2.2003 Sep Randhir Kumar lost his personal weapon AK 47 Rifle Regd No TS-2176, Butt No 117 along with one Magazine and 30 rounds of AK 47 ammunition. I had briefed the corridor protection party, including Sep Raju Singh and Sep Randhir Kumar who were detailed as the Adm party to fetch the breakfast for Archana Post. I briefed the two parties, viz the corridor protection party and the Adm party, with respect to the timing of move, the route to be followed which was through 24 RR location due to inclement weather and also regarding tactical and security aspects. I was in the corridor protection party and we left Archana Post at around 0730 hrs on 17.02.2003 for B Coy Post. The corridor protection party leading and was to be followed by the adm party consisting of two Sep including the accused. On reaching the coy post, since we were getting late, we had a quick breakfast and moved out for corridor protection duties. I did not notice and did not check the adm party, which was to collect the breakfast, reporting at the coy post and since it was getting late we moved for the corridor protection duty. In the evening at about 1745 hrs, we returned from the corridor protection duty to coy post, collected the dinner for the persons of Archana post and returned to Archana Post. At Archana Post I was informed about the loss of personal weapon, one magazine and thirty rounds of Sep Randhir Kumar. The petitioner Sep

Randhir Kumar declined to cross examine the Prosecution witness No 1 Sub LD Bodra.

(b) PW-2 is Sep Raju Singh of B Coy 47 RR. I was posted with the unit since Oct 2001. I was located at Archana Post a Satellite Post of B Coy 47 RR at the time of the incidence. I identify Sep Randhir Kumar of B Coy 47 RR who is present as accused. On 17 Feb 2003, I was detailed alongwith Sep Randhir Kumar as Adm party to go to B Coy post and fetch breakfast for all the personnel of Archana Post. On 17.02.2003 at around 0730 hrs both of us left Archana post for B Coy post. We were walking behind the corridor protection party. Sep Randhir Kumar suggested to me that since we were lagging behind the corridor protection party we should take a short cut and reach the B Coy post at the earlier. The short cut was normally used by such adm parties quite often. In route Sep Randhir Kumar Slipped once. On reaching the B Coy post I kept my personal weapon with another soldier Sep Om Prakash and proceeded to Cook house to collect breakfast. At around 0930 hrs, Sep Randhir Kumar informed me that he could not locate his personal weapon AK R7 Rifle Regt No TS-2176, Butt No 117 along with a magazine and thirty rounds of AK 47 Ammunition which he claimed that he had kept outside the PCO barrack. Both of us went to PCO barrack and looked for the weapon. Having not found the weapon, we decided and searched the entire route to Archana Post looking for the weapon. We returned to B Coy post and reported the matter to Hav IK Mishra, Officiating CHM of B Coy 47 RR Bn at around 1130 hrs. Sep Randhir Kumar declined to cross examine Sep Raju Singh.

(c) PW-3 is Sep GD Bhai of B Coy 47 RR Bn. I am posted with this unit since Nov 2001. On the day of incident, I was detailed for Sentry duty at main gate of B coy post. I identify Sep Randhir Kumar of B Coy

47 RR Bn who is present here as accused. On 17.02.2003, while on sentry duty at the main gage of B coy post at around 0815 hrs, I noticed Sep Raju Singh and Sep Randhir Kumar entering the Coy post. They however did not report to the Sentry post and neither had I checked them as I was busy on the telephone. Further, I noticed the two persons leaving the coy post at 1030 hrs and again returned at 1130 hrs. I did not notice whether Sep Randhir Kumar was carrying a weapon while entering the coy post at 0815 hrs. I noticed that he was not carrying the weapon while leaving the coy post at 1030 hrs and while entering again at 11.30 hrs. Sep Randhir Kumar decline to cross examine the prosecution witness No 3 Sep GD Bhoi.

(d) PW-4 is Hav IK Mishra. At the time of incident, I was performing the duty of Offg CHM at the time of incidence. I identify Sep Randhir Kumar of B Coy 47 RR Bn who is present here as accused. On 17.02.2003, Sep Randhir Kumar and Sep Raju Singh were detailed as Adm party to take the breakfast for the persons of Archana post from B Coy post. They came from Archana post in the morning to collect the breakfast. They did not report their arrival to me which was contradictory to the orders. Sep Randhir Kumar subsequently realised that his weapon was missing so Sep Randhir Kumar and Sep Raju Singh left the Coy post again without informing me. Violating the norms being followed, I came to know about this later on from the two persons themselves. They traced their route back to Archana Post but could not find the missing weapon along with a magazine and 30 rounds of AK 47 ammunition. They then returned to the Coy post and reported the entire matter to me. This was around 1130 hrs. I organized a search within the Coy post, including the living lines, stores, kote posts and also the latrine area. The weapon could not be traced out. Due to inclement weather, the line

communication was not functional. The Coy Cdr Maj Jaswant Singh was out with the Corridor Protection party. The matter could be reported to him by Senior JCO only when he returned from the Corridor Protection duty. The accused Randhir Kumar declined to cross examine the prosecution witness Hav IK Mishra.

(e) PW-5 is Major Jaswant Singh of 416 (I) Engr Bde. I was posted with 47 RR at the time of incidence. I identify Sep Randhir Kumar of B Coy 47 RR who is present here as accused. On 17.02.2003 when I returned from Corridor Protection duty, I was given the report by Coy Senior JCO Sub Harbans Singh that the personal weapon of Sep Randhir Kumar, AK 47 Rifle Regt No TS-2176 Butt No 117 along with one magazine and 30 rounds of AK 47 Ammunition was missing. He was issued the weapon, three magazine and 90 rounds out of which two magazines and sixty rounds were still with him. The Senior JCO gave this report to me around 1800 hrs. I inquired the matter. It was revealed that Sep Randhir Kumar and Sep Raju Singh were detailed as Adm party to fetch breakfast for the persons of Archana Post from B Coy Post. They were instructed by Sub LD Bodra, Subedar Incharge Archana Post to follow the Corridor Protection Party and to follow the route through 24 RR location due to inclement weather. The two individuals decided to take the short cut instead to save on time. On further enquiry Sep Randhir Kumar informed that while on his way to B Coy Post, he had slipped once. He further claimed that on arrival at B Coy Post, he kept his weapon and other items in front of PCO Barrack. Subsequently after collecting the breakfast, when he went to PCO barrack, the weapon along with a magazine and thirty rounds of ammunition was missing. The very fact that the weapon was left unattended contradictory to orders. Thereafter Sep Randhir Kumar informed Sep Raju Singh searched the

entire route which they had followed to come to B Coy Post but they still could not find the weapon. They returned to B Coy Post and informed the officiating CHM Hav IK Mishra at around 1130 hrs. This was approximately two hours later than the time when Sep Randhir Kumar himself discovered the loss of the weapon. Valuable time had been lost and early search could have resulted in finding the weapon. On enquiry, Sep Randhir Kumar was not even sure when and where he had lost the weapon, whether enroute to B Coy Post or in front of PCO Barrack at B Coy Post. All this indicates negligence by the individual. Sep Randhir Kumar declined to cross examine the prosecution witness Maj Jaswant Singh.

12. The petitioner was afforded opportunity of hearing in terms of Army Rule 33 (7). The operative part of the said Rule states : ***“As soon as practicable an accused has been remanded for trial by a General or District Court Martial, and in any case not less than 96 hours or on active service 24 hours before his trial, an official shall give to him free of charge a copy of Summary of Evidence.”*** There was no violation of Army Rule 33 (7) and consequently violation of 34 (1) does not arise. Further, a counter signed certificate by the petitioner has been annexed as Annexure No CA-4 along with counter affidavit. The petitioner was fully at liberty to seek changes regarding friend of accused which petitioner never sought. The friend of accused was intimated 96 hrs in advance so that he could brace himself up about his role, various provisions and their adherence. Certificate to the effect explaining the consequence of “Pleading Guilty” has already been enclosed as Annexure No CA-4 to counter affidavit. A Tentative Charge sheet dated 07.09.2004 before the recording of Summary of Evidence was served upon the petitioner. The petitioner was cautioned in terms of Army Rule 23 (3). The petitioner was asked by Capt SS Lamba, Friend of Accused to produce any witness, the accused

declined to produce any witness in defence including any witness as to his character. The petitioner having declined to adduce any evidence, Summary of Evidence was concluded. Provisions of Army Rule 23 (1), (2), (3) and (4) were duly complied with. The summary of Evidence consisting of 05 witnesses on 09 pages was recorded by the Officer Recording Summary of Evidence in presence of accused. The petitioner gave a certificate stating that charges have been explained to him. He was explained his right as accused as mentioned in Army Rule 23 and Army Rule 33. He has given a certificate to the effect that "I have been shown the orders of Commanding Officer 47 RR Bn Col KSR Mohan regarding the recording of Summary of Evidence". He has also given certificate that tentative charge sheet has been read over in my front by Maj Jacob Freeman, the Officer Recording the Summary of Evidence.

13. On loss of rifle, FIR was lodged on 18.02.2003 at Police Station Kupwara. The Army Act and Army Rules lays down complete procedure for investigation and conducting the Court Martial. At this stage, we would like to quote Para 8 of the pronouncement of the Hon'ble The Apex Court in the case of **Ajmer Singh And Ors. Vs Union of India (UoI) And Ors. AIR 1987, SC, 1646:**

" 8. Sections 34 to 68 contained in Chapter VI of the Act specify the different categories of offences under the Act including abetment of offences under the Act. Chapter VII of the Act which comprises Sections 71 to 89 of the Act deals with the punishments awardable by Court-Martial in respect of the different offences. Sections 101 to 107 contained in Chapter IX of the Act deal with the arrest and custody of offenders and the proceedings prior to the trial. Chapter X of the Act describes in Sections 108 to 118, the different kinds of court martial, the authorities competent to convene them, their composition, and respective powers. In chapter XI consisting of Sections 128 to 152, we find detailed provisions laying down the procedure to be followed by Court-Martial in conducting the trial of offenders. Chapter XII deal with the execution of sentences and the establishment and regulation of military prisons etc.

The subject of granting pardons, remissions and suspensions of sentences is dealt with in Sections 179 to 190 comprised in Chapter XIV of the Act, Thus we find that the Act contains elaborate and comprehensive provisions dealing with all the stages commencing from the investigation of offences and the apprehension and detention of offenders and terminating with the execution of sentences and the grant of remissions, suspensions etc.”

14. Learned counsel for the petitioner has raised certain technical grounds for setting aside punishment of dismissal awarded by SCM. Such an interpretation would be against the spirit of the administration of criminal justice. At this stage we would like to mention that earlier the dictum was that the hundred guilty may escape but no innocent person should be punished: But with the change in time the dictum has also changed. The dictum now is that no innocent person should be punished but letting guilty escape is also not doing justice according to law. On this point reference may be made to the pronouncement of Hon'ble The Apex Court in the case of **Bhagwan Jagannath Markad v. State of Maharashtra**, (2016) 10 SCC 537, wherein Hon'ble The Apex Court has held in Para 20 as under:

“Exaggerated to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape”.

15. Before proceeding further on the point of hearing of a charge by the Commanding Officer, we would like to quote Army Order No. 70 of 1984 which reads as under:-

“Army Order No. 70/84 which deals with hearing of a charge by the commanding officer may be set out as under:

1. *Discipline process under the Military law commences with Army Rule 22 which lays down that every charge against a person subject the Army Act, other than an officer, shall be heard in the*

presence of accused. The accused shall have full liberty to cross-examine any witness against him. This is a mandatory requirement and its non-observance will vitiate any subsequent disciplinary proceedings. In the case of officers, the rule becomes equally mandatory if the accused officer requires its observance under Army Rule 25.

2. It is, therefore, incumbent on all Commanding Officers proceeding to deal with a disciplinary case to ensure that "Hearing of Charge" enjoined by Army Rule 22 is scrupulously held in each and every case where the accused is a person other than an officer and also in case of an officer, if he is so requires it. In case an accused officer does not require "Hearing of the Charge" to be held, the Commanding Officer may, at his discretion, proceed as described in Army Rule 22(2) or Army Rule 22(3).

3. It may be clarified that the charge at this stage is a "Tentative" charge which may be modified after the hearing or during the procedure as described in Army Rule 22(3)(c) or during examination after completion of the procedure under Army Rule 22(3)(c), depending on the evidence adduced. Further, as long as the Commanding Officer hears sufficient evidence in support of the charge(s) to enable him to take action under sub-rules (2) and (3) of Army Rule 22, it is not necessary at this stage to hear all possible prosecution witnesses. As a matter of abundant caution it would be desirable to have one or two independent witnesses during the hearing of the charge(s).

4. After the procedure laid down in Army Rule 22 has been duly followed, other steps as provided in Army Rule 22 has been duly followed, other steps as provided in Army rules 23 to 25, shall be followed both in letter and spirit. It may be clarified that the statutory requirements of Army Rules 22 to 25 cannot dispensed with simply because the case had earlier been investigated by a court of Inquiry where the accused person (s) might have been afforded full opportunity under Army Rule."

16. We would also like to quote the pronouncement of Hon'ble Delhi High Court in the case of **Lance Dafedar Laxman Singh vs. Union of India & ors.** (1992 SCC On Line Del 371) in paras 9 and 10 as under :

“(9). The scope of investigation which is preliminary in nature to be conducted under the Army Rules 22 has strictly to be adhered to. The word ‘Charge’ came up for interpretation before the Division Bench of this Court in the case of Ex Sappy Rajbir Singh Vs. Union of India & Ors. In Crl W. No. 43/1985 decided on 27th May, 1988. It was pointed out that the word ‘charge’ referred to means a simple complaint or allegation against the soldier concerned. The rules lay down a clear distinction between the ‘charge sheet’ and the ‘charge’. Charge has been defined in sub rule (2) of Rule 28 under this very chapter. It reads as under:

(10) The “charge-sheet” has to be framed after the preliminary investigation during which the statements of the witnesses and the plea of the accused are not to be recorded in writing. However, the nature of the offence has to be made known to the accused and the witnesses are to be examined in support of those allegations in his presence. The accused has also to be given full liberty to cross examine those witnesses deposing against him. The Commanding officer after holding the preliminary investigation has been given three options in sub-rule (3) of Rule 22. If the Commanding officer is satisfied then the case should proceeded. He will adjourn it for purposes of having the evidence reduced into writing. The procedure of recording evidence is laid down in Army Rule 23.”

17. It is settled position of law that tentative Charge-Sheet may be modified/amended subsequently. Thus hearing under Army Rule 22(1) is only for the purpose of satisfying the Commanding Officer whether there exist a prima facie case against the petitioner which requires trial. If he is so satisfied then he can take further steps and in case he is not satisfied, proceedings can be dropped by him at that very initial stage. We would also like to quote Army Rule 149 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, 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 these rules.

18. Hon’ble The Supreme Court in the case of **Major A. Hussain** (supra) has also observed as under:

“When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or no. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court martial unless it is shown that accused has been prejudiced or a mandatory provisions has been violated. One may usefully refer to Rule 149 quoted above.”

19. We would also like to quote Section 475 of The Code of Criminal Procedure, 1973 which reads as under:-

“475. DELIVERY TO COMMANDING OFFICERS OF PERSONS LIABLE TO BE TRIED BY COURT MARTIAL.-(1) *The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for time being in force, as to cases in which persons subject to*

military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air-force station, as the case may be, for purpose of being tried by a Court-martial.

Explanation.- In this section-

(a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company.

(b) "Court-martial", includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purposes by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial."

20. The perusal of above quoted provisions makes it abundantly clear that intention of law is to give primacy to the army authorities for taking a decision whether the petitioner has to be tried either by the army authorities or under the civil law.

21. In the instant case it is undisputed fact that that petitioner was posted in B Coy, 47 Rashtriya Rifles. On 17.02.2003, he was detailed with Sep Raju Singh to bring breakfast for the persons of Archana Post from B Coy Post. He was issued AK 47 Rifle Regt No TS-2176, Butt No 117 along with three magazines

and 90 rounds out of which AK-47 Rifle, one magazine and 30 rounds were misplaced. Perusal of court of inquiry reveals that he was not sure whether his rifle and rounds were misplaced in route from Archana Post to B Coy Post or at PCO Barrack. After thorough search Rifle and ammunition was not traced out. He was instructed by Subedar LD Bodra, JCO Incharge Archana Post to follow the Corridor Protection Party and to follow the route through 24 Rashtriya Rifle location due to inclement weather but contrary to this he followed short cut route. In Summary of Evidence, he pleaded guilty. SCM observed that his AK-47 Rifle was lost due to his negligence and he was awarded punishment of six months RI and dismissal from service. Loss of weapon in the Army has very serious consequences and no leniency can be shown in the matters of loss of weapon as it can go in the hands of unsocial elements. After taking into consideration the submissions made on behalf of the petitioner we do not find any procedural illegality or irregularity in conducting the SCM and finds recorded on the basis of the evidence are also in accordance with the rules. The case law referred by the petitioner is based on different facts and is of no help to the petitioner.

22. All the circumstances which we have discussed earlier have been proved beyond reasonable doubt against the petitioner and when all these circumstances are weighed together, it leads to the only conclusion that Rifle AK 47, Registered Number TS-2176 and Butt Number 117 issued to Sep Randhir Kumar was lost due to his negligence as established by the Court of Inquiry. No other conclusion on the basis of these circumstances can be arrived at. Therefore, in view of discussions made above, we are of the considered view that there is no illegality, irregularity leading to miscarriage of justice in conduct of SCM. The SCM has followed all the procedural safe guards prescribed for and no illegality that can vitiate the proceeding could be brought to our notice.

23. Accordingly, we are of the view that the findings recorded by the SCM are in accordance with law and based on correct appreciation of evidence.

24. Keeping in view the seriousness of offence committed the punishment awarded, cannot be considered to be disproportionate.

25. Accordingly, O.A. (A) No 672 of 2020 is **dismissed**.

26. No order as to costs.

(Maj Gen Sanjay Singh)
Member (A)

(Justice Ravindra Nath Kakkar)
Member (J)

Dated : 18 May, 2023

Ukt/-