Court No. 2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 49 of 2010

Friday this the 13th day of October, 2017

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

Smt Asha Devi and others being legal heirs of No. 14344892L Havildar (Operator) Bishram Giri(Deceased) son of Late Sri Hariwansh Giri,Village & Post- Kanso, District - Mau.

…….. **Appellant**

By Legal Practitioner: Shri PN Chaturvedi, Advocate
Learned Counsel for the Appellant.

Versus

1. Union of India, Through Secretary, Ministry of Defence South Block, New Delhi.
2. The General Chief of the Army Staff, New Delhi.
3. General Officer Commanding, 11 Infantry Division, c/o 56 A.P.O.
4. Officiating Commanding Officer, 191 Field Regiment (Presiding Officer, c/o 56 A.P.O.)

…… **Respondents**

By Legal Practitioner: Shri DK Pandey,
Learned Standing Counsel for the Central Government alongwith Major Rajshri Nigam, Departmental Representative.

ORDER

Per Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

1. This Original Application(appeal) has been filed under Section 15 of the Armed Forces Tribunal Act, 2007 with the following prayers:

> *"(i) To accept and allow this application by quashing and setting aside the impugned judgment and order dated 30.05.2002 and 24.12.2003 passed by District Court Martial proceeding and Chief of the Army Staff in compliance to pursuant to judgment and order dated 29.07.2009 passed by Hon'ble High Court of Judicature at Allahabad.*
>
> *(ii) To direct the Respondents to reinstate the Appellant in service by exonerating him from all the charge levelled against him by making payment of salary or paying emolument with all consequential.*
>
> *(iii) To direct the respondent award the cost of application in favour of the Appellant.*
>
> *(iv) Any other order which appears to be just and proper in the interest of justice may also be passed in favour of the Appellant"*

2. During the pendency of the instant Original Application (A) Havildar Bishram Giri died, therefore, his wife Smt. Asha Devi and other legal heirs were substituted in place of deceased appellant and they have contested this case.

3. In brief, the facts of the case are that the appellant was initially enrolled in the Army on 23.01.1980 and was posted as Havildar (Operator) in 316 Medium Regiment. He served with 17 Rashtriya Rifles (RR) from July 1996 to April 1998 on Extra Regimental Employment (ERE) and in the month of August 1998 he was reverted back to his parent Unit i.e. 316 Medium Regiment and was appointed as Battery Havildar Major(BHM). In the year 1996 a Pistol bearing Registration No. 1506619 was stolen from the Kote of 17 RR and a Court of Inquiry was held for the loss of the said Pistol. At that time the Appellant was not found guilty in the said Court of Inquiry. Persons who are found responsible for the loss of the Pistol and for the negligence in the performance of

their duty were punished in the departmental proceedings. The allegation against the appellant was that on 08 October 2001 a promotion conference was held in 316 Medium Regiment wherein the promotion matters of Battery Havildar Major(BHM) and other Non Commissioned Officers(NCOs) were discussed. The promotion conference was attended by the Commanding Officer, Second-in-Command, all the Battery Commanders, Adjutant, Officiating Subedar Major, Senior JCO and the Head Clerk of the Unit. After this conference the appellant in the intervening night of 8/9 October 2001 went to the house of Subedar Dev Duttt (who had attended the promotion conference). Subedar Dev Dutt at that time was sitting in his room along with Naib Subedar Jai Ram and Naib Subedar Krishnaram, The appellant came to his room and was standing near entrance gate. He was having one tape recorder in his hand. After some conversation, he told Subedar Dev Dutt that he is going to the residence of the Commanding Officer, but he was advised by the person sitting inside the room not to go to the residence of the Commanding Officer as it was late in the night. The appellant pulled out the Pistol from his shorts and threatened the persons. These persons tried to take away the Pistol from him. After extending threats, the appellant went away along with his Pistol and Tape Recorder. Information of this incidents was immediately given to the Adjutant Capt PS Swaroop who came to the Unit and with the help of the guards arrested the appellant and put him into the Quarter Guard. However, subsequently he was released from the Quarter Guard under the orders of the Commanding Officer with the instruction to keep watch on him. Instructions were also issued to search for the pistol which was used by the appellant. Subsequently, on 15 October 2001, the Pistol was found by Havildar(DMT) G Subramanyam who found the Pistol half buried in the ground while he was preparing the bus for school duty and he informed the higher officers of the Unit by raising alarm “Mil Gaya.” The Pistol was recovered by the Officers of the Unit and it was examined by Naik(Armourer) Padma Konwar who confirmed its make and registration number. At the time of recovery the magazine was having ‘10’ live rounds. Thereafter a message was sent to 17 R.R. informing the recovery of this Pistol. In reply it was informed that this

Pistol was stolen on 02.11.1996 from their Kote**.** On the basis of the facts narrated above, the appellant was charge-sheeted as under :

"***<u>First Charge</u>*** ***COMMITTING THEFT OF PROPERTY***
Army Act ***BELONGING TO THE GOVERNMENT***
Section 52 (a)

in that he,

At field, between 02 Nov and 16 Nov 1996 whose identity became known to the authority competent to initiate action on 17 Nov 2001, committed theft of Pistol 9 mm Auto 1A (RF1) 1992 registered No 15066049, property of the Government.

<u>Second Charge</u> ***ASSAULTING HIS SUPERIOR OFFICERS***
Army Act
Section 40 (a) *in that*

*at Suratgarh, on 08 Oct 2001, when JC-257219X Subedar (Technical Assistant) Dev Dutt of his unit tried to take away the loaded Pistol from him, pointed the said Pistol at the said Subedar (Technical Assistant) Dev Dutt and threatened him alongwith JC-263202A Naib Subedar (General Duty) Krishna Ram and JC-263899Y Naib Subedar (Driver Special) Jai Ram, also of the same Regiment, by stating, "**Yeh bachon ka khilona nahin hai. Agar aap log aise harkat karoge to main pahle aap tino longon ko uda dunga, uske bad Commanding Officer ke pas jaunga" ("This is not children's toy. If you people behave in this manner, I will first kill the three of you and then go to the Commanding Officer",or words to that effect).***

<u>Third Charge</u> ***AN ACT PREJUDICIAL TO GOOD ORDER AND***
Army Act ***MILITARY DISCIPLINE***
Section 63

in that he,

at the place and date stated in the second charge, was in improper possession of ten rounds of Small Arms Ammunition 9 mm Ball as per following details :-

(a) 08 Rounds of LOT No KF 93, and

(b) 02 Rounds of LOT No KF 81."

4. District Court Martial(DCM) was held and the appellant was found guilty of the charges and accordingly was awarded the punishment of dismissal from service, reduced to ranks and RI for one year and six months in civil prison.

5. In the Counter Affidavit, it has been pleaded on behalf of the respondents that the appellant had challenged the DCM Proceeding before Hon'ble High Court at Allahabad by filing Writ Petition No. 6128 of 2004 which was dismissed for want of territorial jurisdiction with liberty to the petitioner to challenge the order of sentence awarded to him before the appropriate forum in the State of Rajasthan itself. Thereafter, the appellant approached the Hon'ble Armed Forces Tribunal, Regional Bench, Jaipur and preferred Original Application No. 11 of 2010 challenging his conviction and sentence by DCM under Section 14 of The Armed Forces Tribunal Act where as it ought to have been filed under Section 15 of the Armed Forces Tribunal Act, 2007. Because of this reason the learned counsel for the appellant withdrew his application with liberty to file an appeal before the Armed Forces Tribunal having territorial jurisdiction. Accordingly, the said application was dismissed as withdrawn with liberty to file an appeal under Section 15 of the said Act. But instead of filing Appeal under Section 15 of the Armed Forces Tribunal Act, 2007 before the Hon'ble Jaipur Bench, the appellant has preferred this Original Application under Section 15 before this Tribunal. This Appeal was admitted for hearing on 07 April 2010. It is pertinent to mention here that the appellant was resident of the State of U.P.

6. The grounds taken on behalf of the appellant in the original application have been denied by the respondents. It has been stated that the accused had put in more than 22 years and 4 months of service and prior to this incident he was punished twice for the offences under the Army Act. It has been pleaded that the DCM, on the basis of evidence on record, has rightly convicted the appellant and the sentence awarded to the appellant cannot be said to be disproportionate to the offence committed by him.

7. Learned counsel for the appellant has argued that in this case no F.I.R. was lodged and in absence of any F.I.R. the Army Authorities had no right to proceed with the investigation. He has also argued that Army Rule 22(1) had not been complied with. At

the time of recovery of the Pistol no recovery memo was prepared. The recovery is not alleged to have been made from the possession or from the room of the appellant, therefore it cannot be treated as an incriminating circumstance against him. He has also argued that after his arrest by the Adjutant under the orders of the Commanding Officer(CO), the appellant was released, it shows that in the opinion of the C.O. there was no evidence against him justifying his detention in Quarter Guard. It has also been argued that in connection with the theft of the Pistol, alleged to have been recovered, a Court of Inquiry was held in 17 RR in Doda where the persons who were responsible for the theft of the said Pistol were punished. Therefore, now the appellant cannot be convicted for the said offence as there is no evidence that the appellant has committed the theft of the said Pistol.

8. On behalf of the respondents, it has been argued that there was sufficient evidence against the appellant. There is direct evidence of the persons who were threatened with the Pistol. It has also been argued that that F.I.R. was lodged in Rajasthan where this incident had taken place. Learned counsel for the respondents has argued that the Criminal Courts and the DCM both have jurisdiction to try offences under section 69 of the Army Act and there is no bar where the case is triable by the Criminal Court also, Army authorities cannot proceed with the case. It has also been argued that the appellant was earlier punished on two occasions for offences under the Army Act. The offence committed by the appellant is of very serious nature, therefore, the punishment of dismissal from service, reduction in rank and RI for one and half year cannot be said to be disproportionate.

9. We have gone through the original record carefully and perused the entire evidence. Before proceeding further in this matter. We would like to give the brief description of the evidence recorded during the DCM:

(a) PW-1 is Capt PS Swaroop, the then Adjutant. He has stated about promotion conference held on 08.10.2010 and has also stated that in the intervening night of 8/9.10.2001, he got information from Officiating Subedar Major regarding the incident. After getting the information he went to the place

of occurrence and arrested the appellant with the help of the guards and thereafter he was kept in Quarter Guard at about 2250 hrs. He was subsequently released in the same intervening night at 0030hrs under the orders of the Commanding Officer.

(b) PW-2 is Lance Havildar (DMT) G Subramanyam who was performing the School Bus duties at relevant time. He saw the pistol half buried near his bus then he raised alarm and in the presence of several persons and the same was recovered.

(c) PW-3 is Naik (Armourer) Padma Konwar who has examined the Pistol and has given details of its identification.

(d) PW-4 is Subedar (GD) Gurbachan Singh. On the date of incident, this witness was performing the duties of Subedar Adjutant and has stated that the Adjutant had conducted a fall-in and told about the story of last night which had taken place with Subedar Dev Dutt and has also directed that the Pistol was missing so we all have to search for the same. The entire Unit was divided into the various squad for search parties and the parties were asked to carry out the selective search of the Unit areas. At about 0630hrs on 15.10.2001, a central fall-in was conducted in MT Park Area by Major Jatinderbir Singh Sidhu for carrying out usual search. He had heard voice from the other direction '**Mil Gaya Pistol Mil Gaya**' and thereafter he rushed toward the place from where the alarm was raised. Major Jatinderbir Singh Sidhu also reached on the spot and said Pistol was recovered.

(e) PW-5 is Major Jatinderbir Singh Sidhu. He has also given evidence regarding recovery of pistol.

(f) PW-6 is Major Paramjit Singh, He was an officer from the 17 RR where from the Pistol was actually stolen. He has stated that he was posted at 17 RR Battalion performing the duty of Company Commander of Foxtrot Company. He has given the details of the places where the Unit was located. He has stated that in the month of October/November 1996, Naik Wagmode Hanumant Maruti,

Lance Naik Rajbir Singh and the appellant Bishram Giri were holding the appointments of Kote NCO, Rear NCO and CQMH respectively in the Company. The appellant was dealing with rations, clothing and small arms ammunitions. Due to nature of his appointment the appellant used to visit Battalion Headquarters frequently. On 02.11.1996, he was sitting in Battalion Headquarters alongwith Capt Rahul Pipariya and Major Banwari Lal outside the Foxtrot Company Kote. On the request of Capt Rahul Pipariya to explain the functioning of 9mm Pistol, he ordered his Kote NCO Naik Wagmode to open the Kote and bring a Pistol and thereafter he explained the functioning of the Pistol to Capt Rahul Pipariya and thereafter the Pistol was given to Sep Hari Kumar, who was also serving in the 17 RR and was performing the duty of Sahayak of Capt Rahul Pipariya, to keep the same in the Kote. He has also stated that at that time appellant was also present alongwith squad of 8 to 10 persons. He left for his post on the same day. On 12.12.1996 when he came down for handing over the charge to his reliever then he was informed by Naik Wagmode that one 9mm Pistol bearing Regd No. 15066049 which was taken out from the Kote on 02.11.1996 for explaining the functioning to Capt Rahul Pipariya is missing with effect from 02.11.1996 itself. This witness has also admitted the loss of this Pistol, an inquiry was conducted and he was also punished for negligence in performance of his duty.

(g) PW-7 is Naik Wagmode. He has corroborated the evidence of PW-6 Major Paramjit Singh. He has also stated that from 02.11.1996, the appellant has slept in the Kote for three nights before proceeding on leave.

(h) PW-8 is Naik Rajbir Singh of the 17 RR He has also corroborated the evidence of PW-6 and PW-7.

(j) PW-9 is Subedar Dev Dutt, Senior JCO. He has given evidence regarding the incident of threatening by appellant on pistol point and has also identified the Pistol with which he was threatened by the accused in the presence of other two witnesses at his room.

(k) PW-10 is Naib Subedar Krishna Ram who was also present with PW-9 in his room at the time when incidence of threatening with Pistol took place. He has fully supported the case of prosecution.

(l) PW-11 is Subedar Shamsher Singh(Retired) who is the witness of recovery of Pistol by Maj Jatinderbir Singh Sidhu.

(m) PW-12 is Naib Subedar Jai Ram. He was also present in the room of PW-9 Dev Dutt when the incidence of threatening took place. He has also supported the case.

(n) PW-13 is Havildar Hari Ram who has stated that after the incident of 08.10.2001, he saw the Appellant near the place, where from the Pistol was recovered. He has also given the details of the conversation that took place between Dev Dutt and appellant when Dev Dutt also reached there. He has stated that at that time appellant said that he was anticipating that he will chase him and therefore he has concealed the weapon and now nothing is with him. So no action can be taken against him.

(o) PW-14 is ex Sep Hari Kumar, he was posted to 17 RR. He has stated that he had put the Pistol in Kote over the Box and informed the Kote NCO who was present inside the Kote and was busy doing some documentation. Since he was in a hurry to lay the breakfast so he did not bother about the Pistol after keeping the same on the Box. At that time the appellant came there and started talking to Major Paramjit Singh. In the mean while somebody from the MI Room informed the Kote NCO that there was a telephone call for him. Accordingly, the Kote NCO left for the MI Room to attend the said telephone call and came back. He(PW-14) has also stated that after clearing the plates of breakfast he went inside the Kote. The Kote NCO was present but the Pistol which he had placed on the box was not there. Since the Kote NCO was present inside the Kote so he thought that he must have kept the Pistol inside the box and therefore he did not bother to check. This witness has also been punished with imprisoned for 28 days.

(p) PW-15 is Captain Rajnish Kumar Maahi who has recorded the Summary of Evidence and has also recorded the statement of accused. His evidence is of formal nature.

10. No evidence in defence was produced on behalf of the appellant.

11. The first contention of the learned counsel for the appellant is that in this case, FIR was not lodged but there is specific averment of the respondents that the FIR was lodged.

12. Learned counsel for the respondents has stated that there is evidence of recovery but at that time it was not clear as to where from this Pistol had been stolen, hence there was no question of lodging FIR of a theft case. It was only when report received from 17 RR, it was revealed that the Pistol was stolen from Kote of 17 RR.

13. 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. Apart from it, the arguments of the learned counsel for the appellant if given any weight would lead to a situation which is unwarranted under law. In case FIR is not lodged, the accused cannot be put to prosecution for the offence committed by him. Simultaneously, he shall also be released by the DCM only on the ground that FIR has not been lodged. 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. It is true that in this case there is no direct evidence that the Pistol was stolen by the appellant. The Pistol was also not recovered from his possession and there was no report regarding the theft or loss of the 10 rounds which were also recovered alongwith the Pistol. Virtually, these are the three main grounds of the learned counsel for the appellant to challenge the DCM proceedings. His argument is that there is no evidence against the appellant to connect him with the offence alleged.

16. So far as the arguments that there was no report about the loss or theft of the rounds is concerned, the evidence of PW-5 is a complete answer to this arguments. This witness has stated in his cross-examination by the appellant that " *No loss of any ammunition of any kind was ever reported during my tenure at 17 RR. The witness qualifies his statements and states that though, no loss was reported but if somebody dishonestly intended to steal the ammunition, he could have easily done the same, as the war system of accounting was being followed and no fired cartridge cases were required to be deposited back for the accounting purpose. The words of mouth was more than*

sufficient to account the expenditure of the ammunition in various encounters with Militants. It was difficult to check a dishonest man who could have been issued with certain numbers of rounds of ammunition for an operation and he intentionally might have made a false report on termination of the operation e.g. " if a Jawan issued with a 100 rounds of ammunition for a particular operation fired lesser number of rounds but claim to have fired all the ammunition issued to him, could not have been detected, as the system of the posting fired cartridge cases was not in vogue due to operational commitments."

17. The witness has further stated that it was easily possible for a person holding the charge of ammunition to manipulate dishonestly, because during Counter Insurgency Operation (CI Ops) in 1996 Sten Machine Carbine 9mm and its ammunition were used extensively. Ammunition including 9 mm Ball was held by Kote NCO of the Foxtrot Company and the accused was the NCO in-charge of the same.

18. This fact emerged in the cross-examination of this witness by the appellant himself. The above quoted statement of this witness is very convincing and inspires confidence. In CI Ops there cannot be any method to check a person who dishonestly says that he has fired more number of rounds then he has actually fired. There is no mechanism to ascertain this fact. Therefore in view of the above statement of the witness, we don't find any substance in the submission that there was no report of loss/theft of 10 rounds which have been recovered along with the Pistol.

19. The submission of the learned counsel for the appellant is that no seizure memo of this Pistol was prepared therefore the recovery itself was doubtful. Keeping in view peculiar facts and circumstances of the case as discussed above we are not the least impressed with this argument. The first reason is that every procedure is meant to do the complete justice and not to frustrate it. When by means of reliable evidence it is proved that the Pistol was seen in the hands of the appellant at the time of threatening and subsequently, it was recovered from the place from where he was seen coming after the incident of 08.10.2001. Therefore in these circumstances simply because a seizure memo

was not prepared in accordance with provisions of Cr.P.C. cannot be considered to be fatal to the prosecution.

20. Apart from it, in this case no effort was made by the officers of the Unit where the appellant was posted at the time of incident to create any false evidence. It was an accidental recovery of the Pistol. It has come in evidence that prior to the date of recovery on 15.10.2001, the said place was not used for the parking of the vehicles earlier and was being used for parking the vehicles only wef 14.10.2001. It appears that the appellant buried the Pistol in the ground but because of the movement of heavy vehicles, the sand would have moved and the Pistol was visible. It was seen by witness and on his raising alarm, other persons reached there and the recovery was made. The witnesses who went to the place have proved the factum of recovery of Pistol from that place. Apart from it, the appellant could not produce even a single witness in support of his defence. He has not alleged any enmity or ill-will against any officer or witness. We are aware of the legal position that the burden to prove its case always lies on the prosecution and simply because the appellant could not lead any defence evidence would not, by itself, be a ground to lend support to the prosecution case**.**

21. It has been argued that in the departmental inquiry held at 17 RR regarding the missing of this Pistol the appellant was not held responsible. Other persons were held responsible for it. So now, at such belated stage he cannot be held responsible for the theft of the same Pistol.

22. It is evident that in the departmental inquiry in17 RR three persons were held responsible. First was in-charge of Kote i.e. Naik Wagmode, second Sep Hari Kumar who was given the Pistol to keep it back in the Kote and the third Major Jatinderbir Singh Sidhu under whose order the Pistol was taken out of Kote to explain the functioning of Pistol. It has also come in evidence of witnesses of 17 RR that they had full faith in the appellant. Since on that very day, he was not performing the duty in Kote, therefore in absence of recovery of the Pistol the persons who were found negligent in performing

their duty were held responsible and were accordingly punished. But in the facts of the instant case the Pistol has been recovered and just because in earlier departmental inquiry, the appellant was not found guilty would not be of any help to the appellant, more so in the instant case new evidence of recovery of pistol has come into light.

23. Before proceeding further with the appreciation of evidence we consider it appropriate to deal with the legal arguments raised by the learned counsel for the appellant. He has argued that Army Rule 22(1) has not been properly complied with by the Commanding Officer, Col PS Rajeshwar who has signed the Charge-Sheet because he was a witness of fact as per the evidence given by Capt PS Swaroop, PW-1. Since he was directly involved in the investigation of the case and under his orders the appellant was released from the custody from the Quarter Guard with the instruction to keep him under observation and to carry out the search of the Pistol, therefore, he could not have heard the witnesses under Army Rule 22(1) because he was a witness himself. The Pistol was recovered on 15.10.2001 and therefore the Commanding Officer could not have done any hearing of the charge under Army Rule 22 about the fact of recovery of the Pistol. In reply to this argument, it has been argued on behalf of the respondents that under the legal provisions, Col PS Rajeshwar was the Commanding Officer of the appellant under Section 3(v) of the Army Act. He has also argued that Charge-Sheet was given to the appellant on 02 April 2002 and he was given full opportunity to defend himself. He has also argued that under the Law it is the Commanding Officer only who can gave order for recording of evidence and trial by Court Martial. It is pertinent to mention here that only after recording the conviction of the appellant. Commanding Officer Col PS Swaroop was examined as CW-1 only on the point of sentence to prove previous punishments of the appellant, if any. Only after his evidence the sentence was passed. This exercise was done under Army Rule 64. Appellant was also given an opportunity to cross-examine this witness but he declined. So Commanding Officer has not been examined as a witness of any fact on the basis of which conviction of the accused was recorded. He has only proved previous punishment awarded for appropriate

sentence. Before proceeding further on this point, 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."*

24. 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."*

25. It is nowhere the case of appellant that the Commanding Officer did not hear witnesses or he was not given opportunity of cross-examination. The perusal of the Army Order quoted above clearly indicates that at the stage of hearing of witnesses under Army Rule 22(1) it is not necessary for the Commanding Officer to hear all the witnesses. At this stage, we would like to mention the difference between the Charge-Sheet and the Charge. Charge is only the alleged facts constituting the civil offence alleged against the appellant. Charge-Sheet is the formal description of the alleged charges which the accused is required to face in the DCM/GCM. 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 appellant 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. Therefore, at the stage when the witnesses are heard under the Army Rule 22(1), even if for argument sake, it may be presumed that, by that time recovery of Pistol had not taken place, even then it cannot be a ground to hold that the Army Rule 22(1) was not properly complied with. Threatening other army personnel at Pistol's point by the appellant was itself sufficient to order his trial. It is the primary stage and at this stage there was sufficient grounds to order for further proceedings against the appellant. So far as the submission the learned counsel for the appellant that the Commanding Officer himself was a witness to incident is concerned, it has virtually no substance. The Commanding Officer has not witnessed any incident of this case. He was called subsequently after the particular incident, as he was the Commanding Officer of the Unit. It was the duty of other officers to inform him and accordingly he was informed. It is nowhere alleged by the prosecution that at the time when the appellant threatened the other army personnel with Pistol or at the time when the Pistol was recovered, he was also present. Simply because he had passed certain orders in view the circumstances which emerged following the incident it cannot be presumed that the Commanding Officer himself was a witnesses of any fact against the appellant. At this 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 chare-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.

26. 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."

27. It is pertinent to mention here that the Commanding Officer Col PS Swaroop was not examined as a prosecution witness in the DCM or at any other stage. He was only examined as CW-1 on the point of sentence after recording conviction.

28. In view of the legal position quoted above and the views expressed by us, we don't find any substance in the submissions made by the learned counsel for the appellant. Now we come to the point of appreciation of evidence.

29. It is true that there is no direct evidence that the appellant had stolen the above mentioned Pistol, nor the same was recovered from his possession. After careful perusal of the entire evidence, we are of the considered view that this case is not based on direct evidence so far as theft of pistol is concerned. However there exist several circumstances against the appellant on the basis of which conclusion has been drawn by the DCM. On the point as to how the evidence of prosecution in cases of circumstantial evidence has to be evaluated and what are the standards prescribed for recording a finding of conviction on the basis of circumstantial evidence, reference may be made to the pronouncement of Hon'ble The Appex Court in the leading case of **Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116.** It is pertinent to mention that this case has been followed repeatedly in almost all the subsequent

pronouncement by the Hon'ble The Apex Court. In this case Hon'ble The Apex Court has held :

> *"53. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra,(1973) 2 SCC 793 where the observations were made: [SCC para 19, p. 807): "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions." (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

In this background we have scrutinised the evidence.

30. On the basis of evidence of the prosecution, the following circumstances stands proved against the appellant:-

(a) The appellant was posted in 17 RR during the period between 2.11.1996 to 16.11.1996.

(b) The appellant was in-charge of Kote and had free access to the Kote where the Pistol, in question, was kept. For want of space the weapons in Kote were not displayed in Kote in conventional manner and were kept in boxes stocked over each other.

(c) On 2nd November 1996, this Pistol was taken out on the orders of Major Paramjit Singh to explain the functioning of the Pistol to Capt Rahul Pipariya at the time of breakfast.

(d) This Pistol was kept on the box in Kote by Sep Vijay Kumar who was serving the breakfast.

(e) At that time appellant was present there and he slept in Kote for three nights.

(f) The appellant is the only person from the 17 RR who was present at Suratgarh on 08.10.2001.

(g) The appellant was witnessed by Havildar Dev Dutt and two other witnesses who were sitting in the room of Dev Dutt when the appellant entered into the room and indulged in some conversation with them and during the said conversation he took out the said Pistol and all the three persons present there were threatened by the appellant with the pistol which he was carrying.

(h) The three witnesses have stated that the there was red colour paint on the butt of the Pistol. There was sufficient light for them to see the Pistol.

(i) On the same day the appellant was seen by Havildar Hari Ram coming from the place where from subsequently the same Pistol was recovered.

(j) There is the evidence of PW-3 Naik Padam Kumar who has confirmed the registration number and make of the Pistol.

(k) The report of the concerned officer from the 17 RR confirming that it was the same Pistol which was stolen from the Kote between 02.11.1996 to 16.11.1996.

(l) Identification of the recovered Pistol by three witnesses who were sitting in the room of Dev Dutt, that it was the same Pistol which they have seen in the hands of the appellant during incident on 08.01.2001.

31. When all the above mentioned incidents and circumstances are weighed together, then it leads to the conclusion that the appellant is the only person who had stolen the

Pistol from the Kote of 17 RR and it remained in his possession and with the same Pistol he had threatened the three witnesses who have deposed against him and have also identified the Pistol after its recovery.

32. The appellant has failed to explain as to how this Pistol came into his possession. His defence in this case is of total denial, but when the fact that he was in possession of the pistol is established by reliable evidence, then the provisions of Section 106 of the Indian Evidence Act, 1872 shall come into play. Section 106 of the Indian Evidence Act, 1872 reads as under :-

> *"106.* ***Burden of proving fact especially within knowledge.-*** *When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*
>
> *Illustrations*
>
> *(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.*
>
> *(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."*

33. When it is established that the appellant was in possession of a Pistol which was stolen from the Kote of 17 RR then the burden was on the appellant to explain as to how he came into the possession of that pistol. In the peculiar facts of this case his simple denial will not help him and failure of furnishing any explanation in pursuance of Section 106 of Indian Evidence Act, 1872 would lead to an adverse inference against the appellant.

34. Great emphasis has been laid by the learned counsel for the appellant on the ground that in this case, after the alleged recovery of the Pistol, no seizure memo was prepared in compliance of the provisions of the Cr.P.C. He has drawn our attention towards Chapter 7(c) of Cr.P.C. with which deals with general provisions relating to

searches. On the strength of this submission the plea of the learned counsel for the appellant is that in absence of such search memo the recovery itself cannot be believed therefore the recovery cannot be treated as an incriminating evidence against the appellant.

35. ***Per Contra,*** learned counsel for the respondents has argued that there is no provision for preparation of the seizure memo under the Army Act/Rules. Therefore, if any seizure memo in compliance the provisions of the Cr.P.C. has not been made, then it would not render any help to the appellant.

36. We have examined the provisions of Cr.P.C. on which learned counsel for the appellant has placed reliance. Section 99 of Cr.P.C. deals with the direction etc. it is immaterial in the facts of this case. In this case the recovery has not been made in pursuance of any search warrant, therefore this section has no application. Section 100 deals with the search of a closed place which is in charge of a person. In the facts of the instant case, this section has also no application because the recovery has not been made from the room of the appellant but it has been accidently recovered from an open place. Therefore, provisions of section 100 Cr.P.C. also have no application in the facts of this case. Apart from this, learned counsel for the appellant could not bring to our notice any Army Rule/Regulation/Circular that the army authorities are required to prepare a seizure memo of every recovery. It has also not been argued as to how the defence of the appellant has been prejudiced by non preparation of such recovery memo. Apart from it, Section 5 of the Cr.P.C. makes the provisions of the Cr.P.C. inapplicable in respect of all matters covered by such special law. It was also not taken as one of the grounds in the O.A.

37. It has also been argued that in case no FIR was lodged. On this point, we would like to quote Army rule Section 125 which reads as under :

> *"**125. Choice between criminal court and court-martial.-** When a criminal court and a court-martial ha each jurisdiction in respect of an offence, it shall be in discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be*

instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody."

38. 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 PRSONS 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."

39. The perusal of two 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 appellant has to be tried either by the army authorities or under the civil law. We would also like to quote the observations of the Hon'ble The Apex Court in the case of

Som Datt Datta vs Union of India and ors 1968 AIR page 414. In that case, though the FIR was lodged with regard to a civil offence but before the commencement of the actual investigation, the case was taken over by the army authorities. In that perspective, after considering all the case laws Hon'ble The Apex Court has observed as under :

> ***"****Section 125 presupposes that in respect of an offence both a criminal court as well as a court-martial have each concurrent jurisdiction. Such a situation can arise in a case of an act or omission punishable both under the Army Act as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections, in the first instance, it is left to the discretion of the officer mentioned in s. 125 to decide before which court the proceedings shall be instituted, and, if the officer decides that they should be instituted before a court-martial, the accused person is to be detained in military custody; but if a criminal court is of opinion that the said offence shall be tried before itself, it may issue the requisite notice under s. 126 either to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt of the said requisition, the officer may either deliver over the offender to the said court or refer the question of proper court for the determination of the Central Government whose order shall be final. These two sections of the Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction, having regard to the exigencies of the situation in any particular case. In the present case, we are unable to accept the contention of the petitioner that merely because Maj. Agarwal had directed that the First Information Report should be lodged with the Civil Police through Second Lt. Jesudian, it means that the competent authority under s. 125 of the Army Act had exercised its discretion and decided that the proceedings should be instituted before the criminal court. The reason is that Maj. Agarwal was not the competent authority under s. 125 of the Army Act to exercise the choice under that section. The competent authority was the General Officer Commanding, Madras, Mysore and Kerala Area and that authority had decided on September 2, 1965 that the matter should be tried by a Court-Martial and not by the Criminal Court. On the same date, the General Officer Commanding, Madras, Mysore & Kerala Area had ordered the constitution of the Court-Martial under Ch. VI of the Army Rules to investigate into the case of the petitioner and the other accused persons. There was admittedly no direction by the Commander of that area to hand over the proceedings to the Criminal Court. It is true that Maj. Agarwal had directed a*

report to be lodged with the Civil Police at 4.00 a.m. on September 2, 1965. It is also true that Sri Bashyam, Inspector of Police had inspected the place of occurrence, seized certain exhibits and held inquest of the deadbody of Spr. Bishwanath Singh. Sri Bashyam has admitted that he stopped investigations on the same date as directed by the military authorities. Merely because Sri Bashyam conducted the inquest of the dead-body of Spr. Bishwanath Singh or because he seized certain exhibits and sent them to the State Forensic Science Laboratory, Madras for chemical examination, it cannot be reasonably argued that there was a decision of the competent military authority under s. 125of the Army Act for handing over the inquiry to the Criminal Court. On the other hand, the action of the General Officer Commanding in constituting the Court of Inquiry on September 2, 1965 indicates that there was a decision taken under s. 125 of the Army Act that the proceedings should be instituted before the Court-Martial. The second branch of the argument of the petitioner is based upon s. 549 of the Criminal Procedure Code which states:

"(1) The Central Government may make rules consistent with this Code and the Army Act, the Naval Discipline Act and the Indian Navy (Discipline) Act, 1934, and the Air Force Act and any similar law for the time being in force as to the cases in which persons subject to military, naval or air force law, shall be tried by a Court to which this Code applies, or by 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 regiment, corps, ship or detachment, to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by Court-martial.

The Central Government has made rules in exercise of powers conferred on it under this section. The Rules were published at p. 690 in s. 3 of Part H of the Gazette of India, dated April 26, 1962, under Ministry of Home Affairs, S.R.O. 709, dated April 17, 1962. Rules 3, 4, 5 and 8 are to the following effect:

"3. Where a person subject to military, naval or Air Force law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a court- martial, such Magistrate shall not proceed to try such person or to issue orders for his case to be referred to a Bench, or to inquire with a view to his

commitment for trial by the Court of Sessions or the High Court for 'any offence friable by such Court, unless

(a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or Air Force authority, or

(b) he is moved thereto by such authority." "4. Before proceeding under clause (a) of rule 3 the Magistrate shall give written notice to the Sup C1/69--13 Commanding Officer of the accused and until the expiry of a period of seven days from the date of the service of such notice he shall not-

(a) convict or acquit the accused under sections 243, 245, 247 or 248 of the Code of Criminal Procedure, 1898 (V of 1898), or hear him in his defence under section 244 of the said Code; or

(b) frame in writing a charge against the accused under section 254 of the said Code; or

(c) make an order committing the accused for trial by the High Court or the Court of Sessions under section 213 of the said Code." "5. Where within the period of seven days mentioned in rule 4, or at any time thereafter before the Magistrate has done any act or issued any order referred to in that rule, the Commanding Officer of the accused or competent military, naval or Air Force authority, as the case may be, gives notice to the Magistrate that in the opinion of such authority, the accused should be tried by a court-martial, the Magistrate shall stay proceedings and if the accused is in his power or under his control, shall deliver him, with the statement prescribed in sub-section (1) of section 549 of the said Code to the authority specified in the said sub-section." "8. Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to military, naval or Air Force law has committed an offence, proceedings in respect of which ought to be instituted before him and that the presence of such person cannot be procured unless through military, naval or Air Force authorities, the Magistrate may by a written notice require the Commanding Officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against such person before the court-martial, if since instituted, and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted."

40. Though in the facts of this case it has come in the evidence of PW-2 that he had gone to lodge the FIR but learned counsel for the respondents has argued that as per his instructions in this case FIR was not lodged. It is true that copy of the FIR has not been

filed neither during the Court Martial nor before this Tribunal by any of the parties. On this point, PW-2 has stated as under:-

> *"Later, on the same day I went to the police station Suratgarh along with Capt Raxpal Singh, Sub Lalan Pandey and Nb Sub VK Tripathi to report the matter regarding recovery of the aforementioned pistol."*

41. This witness was not cross-examined at all by the defence on the point of FIR. Apart from it in this O.A. which was originally filed by the appellant Havildar Bishram Giri, it has no where been pleaded as a ground that FIR was not lodged. It is only when the substituted heirs of Ex. Havildar Bishram Giri were brought on record then during course of argument this point has been raised for the first time. In this perspective we don't find any force in this submission.

42. After taking into consideration the submissions made on behalf of the appellant we do not find any ground on the basis of which the prosecution evidence can be rejected. No worthwhile evidence could be elicited in the cross-examination of witnesses to disbelieve their testimony.

43. All the circumstances which we have discussed earlier have been proved beyond reasonable doubt against the appellant and when all these circumstances are weighed together, it leads to the only conclusion that appellant is the person who had stolen the Pistol from the Kote of 17 RR and it remained in his possession. In absence of any explanation from the appellant the only conclusion that can be drawn is that after the theft of the pistol it remained with him and it was used by him for the purpose of threatening the three witnesses who have been examined by the prosecution. No other conclusion on the basis of these circumstances can be arrived at. Therefore in view of discussion made above, we are of the considered view that there is no illegality, irregularity leading to miscarriage of justice in conduct of DCM. The DCM has followed all the procedural safe guards prescribed for and no illegality that can vitiate the proceeding could be brought to our notice.

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

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

46. Accordingly this O.A. lacks merit and deserves to be dismissed.

47. This O.A. No. 49 of 2010 is hereby dismissed.

48. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

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

Dated: **October , 2017**.
RPM/-