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RESERVED
COURT NO.1 (List 'B')

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

Transferred Application No. 75 OF 2011

Wednesday, this the 04th day of October 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Ex No 15472680F, SWR Ashok Kumar of 'Cavalry, son of Sri Deshraj Singh, resident of village and post Khera Shattu, Police Station-Khair, District-Aligarh. ...Petitioner

Vs.

1. The union of India through Secretary, Ministry of Defence, South Block, New Delhi.
2. The Chief of the Army Staff, South Block, New Delhi.
3. The General Officer Commanding, Uttar Bharat Area, Bareilly (H.Q. U.B. Area Bareilly).
4. The Presiding Officer, General Court Martial, held at COD, Kanpur.Respondents

Shri Bachchan Singh : Ld. Counsel for the petitioner.

Shri S.N. Pandey :Ld. Counsel for the respondents.

Maj Salen Xaxa : OIC Legal Cell.

“(Per Hon'ble Air Marshal Anil Chopra, Member (A))”

1. Being aggrieved with sentence to suffer rigorous imprisonment for one year and dismissal from service imposed upon the petitioner by the General Court Martial, the petitioner approached the High Court of Judicature at Allahabad by means

of Civil Misc. Writ Petition No. 16382 of 2008. After constitution of the Armed Forces Tribunal, the said Writ Petition has been transferred to this Tribunal under the provisions of Section 34 of the Armed Forces Tribunal Act, 2007 and has been renumbered as T.A. No. 75 of 2012.

2. We have heard Shri Bachchan Singh, learned counsel for the petitioner and Dr. S.N. Pandey, learned counsel for the respondents assisted by Maj Salen Xaxa, OIC Legal Cell and have perused the record.

3. Facts necessary for adjudication of the controversy involved in the present petition, in brief, are that the petitioner was enrolled in the Indian Army on 21.02.1998 in the Armed Regiment and was posted in 8 Cavalry in the year 1999. The petitioner was granted 30 days balance of annual leave from 22.09.2000 to 21.10.2000. It is alleged that on 19.10.2000, while travelling by train in Military compartment enroute Aligarh to Ghaziabad to report to his unit, he met one Ikramuddin alias Naik Raju, working as an agent of Pakistani Intelligence Agency. The petitioner and said Ikramuddin had conversations during course of which they exchanged their telephone numbers. Further allegations are that the petitioner divulged military information viz. location of his unit, weapons held and unit telephone numbers.

4. The petitioner and Ikramuddin also discussed with regard to meager pay and allowances being granted to the troops in the Army. Ikramuddin advised the petitioner to continue in the

Army for full length of his service tenure i.e. 17 years and earn pension with a view to fetch a decent job as an ex-serviceman. Ikramuddin promised the petitioner to get him a good job with the aid of his uncle's son who he stated was posted in a good position in a factory in Ghaziabad. Ikramuddin confided with the petitioner that there was financial advantage only by indulging in illegal trade. He assured the petitioner that if the petitioner decides to indulge in illegal trade he may contact him (Ikramuddin) who would provide him necessary aid since he was in acquaintance with a person doing such trade. The petitioner is alleged to have contacted said Ikramuddin on telephone on two occasions, firstly in October 2000 and subsequently in March 2002 but could not contact him.

5. It is alleged that Ikramuddin was arrested by the civil police sometimes during the year 2002 and when interrogated he disclosed names of several Army personnel including that of the petitioner and as a consequence the petitioner was placed under arrest on 10.06.2002. A court of inquiry was conducted from 19.08.2002 to 12.12.2002. The petitioner was examined as a witness and also afforded opportunity in terms of Army Rule 180 of the Rules, 1954. In the court of inquiry the petitioner is alleged to have admitted his guilt. The Officiating General Officer Commanding, Madhya Bharat Area, Jabalpur issued directions for taking disciplinary action against the petitioner and others.

6. Summary of evidence was recorded under Rule 23 of the Rules. Since certain aspects were to be brought on record

additional summary of evidence were recorded. During the course of recording of Summary of Evidence

, a confessional statement dated 29.06.2002 purportedly made by the petitioner was produced in which the petitioner has alleged to have confessed all acts of culpability.

7. Charge was framed against the petitioner, to quote:-

“CHARGE SHEET

The accused, No 15472680F Sowar Ashok Kumar of 8 Cavalry, attached to Central Ordnance Depot, Kanpur, is charged with:-

COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, FOR A PURPOSE PREJUDICIAL TO THE SAFETY OR INTERESTS OF THE STATE, COMMUNICATING TO A PERSON, INFORMATION IN RELATION TO MILITARY AFFAIRS OF THE GOVERNMENT WHICH MIGHT BE DIRECTLY OR INDIRECTLY USEFUL TO AN ENEMY, CONTRARY TO SECTION 3(1) (C) OF THE OFFICIAL SECRETS ACT, 1923.

in that he,

on route, Aligarh-Ghaziabad on 19 October 2000, which came to the knowledge of the authority competent to initiate action on 12 December 2002, for a purpose prejudicial to the safety or interests of the State, communicated to Shri Ikramuddin alias Naik Raju, working as an agent of the Pakistani intelligence Agency, the following information relating to Formation/Unit of the Indian Army which might be directly or indirectly useful to an enemy:-

- (a) *Location of his unit;*
- (b) *the Brigade under which his unit was serving;*
- (c) *Weapon systems of Tanks held by his unit and address of his unit including telephone numbers.”*

8. Hearing of charge envisaged under Rule 22 of the Army Rules, 1954 was concluded. The petitioner was tried by a General Court Martial on the charge under Section 69 of the

Army Act, 1950 read with Section 3 (I) (C) of the Official Secret Act, 1923 for passing secret information to Ikramuddin. The petitioner was found guilty by the General Court Martial and was awarded one year's rigorous imprisonment and dismissal from service. The sentence awarded by the General Court Martial was confirmed by the Confirming Authority on 06.04.2006. The petitioner preferred representation dated 17.07.2007 under Section 164 (2) of the Act which was rejected by Chief of the Army Staff vide order dated 27.10.2007. Since the petitioner had already undergone more than one year in military detention, he was not subjected to civil prison.

9. Learned counsel for the petitioner submitted that the alleged confessional statement is in conflict with the provision of Section 24 of the Indian Evidence Act inasmuch as while extracting confessional statement from the petitioner was during protracted custody and he was subjected to torture and coercion in order to obtain confessional statement. He submitted that the petitioner ought to have been given time for reflection during which period he should have been completely out of influence. He submitted that since the petitioner was apprehensive that evidence would be created to falsely implicate him, he refused to sign the papers of additional summary of evidence. It is next submitted that Rule 23 contemplates only recording of summary of evidence, thus, the additional summary of evidence recorded by Lt. Col R.C. Sharma was without jurisdiction and the same cannot be used as a substantial piece of evidence against the petitioner. Ld.

Counsel for the petitioner also commented that the General Court Martial proceedings are barred by limitation as provided under provisions of Section 122 of the Army Act. He further submitted that there is violation of Sections 101 to 103 of the Act, and Rule 27 of the Rules, framed thereunder.

10. Repelling contention of Ld. Counsel for the petitioner, it is submitted by Ld. Counsel for the respondents that the petitioner had divulged valuable information about location of the unit, the weapons of protection against infantry as well as air attack to said Ikramuddin with a view to gain undue advantage which is not expected from a disciplined Army person. It is submitted that General Officer Commanding Madhya Bharat Area, the competent authority directed disciplinary action against six Army persons including the petitioner for their involvement in espionage activities. It is submitted that Major R.P. Singh, prosecution witness No 5 examined at the General Court Martial had stated on oath that he had ascertained from the petitioner whether his statement was made voluntarily or not to which the petitioner had accepted that he had made confessional statement voluntarily and had denied use of any threat, promise or inducement in order to extract the voluntarily statement. He submitted that the petitioner was kept in military custody as per provisions contained in Section 102 to 103 read with Rule 27 of the Army Rules. Necessary sanction of the competent authority and Central Government had been taken from time to time for keeping the petitioner in custody. He submitted that offence under Section 3 (I) (C) of Official Secret Act read with Section

69 of the Army Act made out against the petitioner as he had communicated classified information to Ikramuddin, a Pakistani ISI agent. Learned counsel for the respondents submitted that due to exigencies of service and in the interest of administration, the Court Martial was dissolved on 27.10.2005 and separate trials were ordered in respect of remaining five accused including the petitioner and no prejudice has been caused to the petitioner on this count. It is submitted that the statutory complaint preferred by the petitioner under Section 164 (2) of the Army Act was considered and rejected by the Chief of The Army Staff vide order dated 27.10.2007 taking into account all factual and legal aspects.

11. Section 24 of the Indian Evidence Act for convenience sake is reproduced as under:-

“Confession caused by inducement, threat or promise, when irrelevant in criminal proceedings. – A confession made by an accused person is irrelevant in a criminal proceedings, if the making of the confession appears to the Court to have caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

12. Section 24 of the Evidence Act lays down the rule for the exclusion of the confession which are made non-voluntarily. Such a confession would be irrelevant if making of the confession appears to the Court to have been caused by any

inducement, threat or promise having reference to the charge against the accused. If the confession comes within the four corners of Section 24 of the Evidence Act, it would be irrelevant and cannot be used against the maker. While arriving to a conclusion whether the alleged confession was voluntary or not, the court must scrutinize all the relevant factors such as the person to whom the confession is made, the time and making of it, the circumstances in which it is made. The court has to satisfy that it is voluntary, it does not appear to be the result of inducement, threat or promise and the surrounding circumstances do not indicate that it is inspired by some improper or collateral consideration suggesting that it may not be true. If the making of confession appears to the Court, (the Tribunal in the instant case) to have been caused by any inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the Court to give the accused grounds, which would appear to him that by making it he would gain advantage or avoid any evil of a temporal nature in reference to the proceeding against him, it will not be relevant and it cannot be proved against the person making the statement.

13. In the case of ***Chaya Kand Nayak vs. State of Bihar***, (1997) 2 Crimes 297 (Pat), their Lordships of the Apex Court have observed:-

“The extra-judicial confession cannot be sole basis for recording the confession of the

accused, if the other surrounding circumstances and the materials available on the record do not suggest his complicity.”

14. In ***Balwinder Singh vs. State of Punjab***, (1995)

Supp 4 SCC 259 their Lordships observed:

“An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances its credibility becomes doubtful and it loses its importance. The Court generally look for independent reliable corroboration before placing any reliance upon an extra-judicial confession.”

15. The petitioner was arrested on 10.06.2002 and was placed in military custody in A.M.C. Centre, Lucknow from 10.06.2002 to 31.07.2002. It may be noticed that PW-9, Lt Col R. P. Verma of Command Liaison Unit, who interrogated the petitioner while under military custody in A.M.C. Centre, Lucknow has stated that initially for two days of questioning the accused (petitioner) he did not show any desire to give the confessional statement. It appears that after prolonged question might have been carried out till he desired to give his confessional statement. Thus, it would be seen that initially the petitioner was interrogated by PW-7 for two days and thereafter he was interrogated by other officer of the CCLU for three or four days. He was subjected to frequent interrogation by Central Command Liaison Unit (CCLU) for prolonged questioning. Thereafter he was attached to 39, Gorkha Training Centre, Varanasi Cantt and later on he was placed in

Military custody at 66 Armored Regiment at Kanpur. That the petitioner remained in military custody for more than three and a half years, is evident from para-27 of the counter affidavit the respondents have admitted that since the petitioner had already undergone pre-trial custody therefore pre-trial custody undergone by the petitioner is set off against the regular term of rigorous imprisonment awarded by the Court Martial under Section 169 A of the Army Act, 1950. Thus the petitioner was in military detention with effect from 10.06.2002 till 15.04.2006, i.e. for more than three and half years and his alleged confession was recorded during his military detention by the officers of Central Command Liaison Unit (CCLU) on 29.06.2002. There is thus no room of doubt that the petitioner was under military custody when his alleged confessional statement is said to have been recorded. It may also be relevant to mention that the respondents have accepted in para 27 of the counter affidavit that the petitioner was kept in detention for almost three and a half years and, thus, his sentence of one year rigorous imprisonment was set off.

16. The first limb of contention of learned counsel for the petitioner is that the confessional statement allegedly made by the petitioner was not voluntary and was extracted by the respondents by causing inducement, threat, coercion and promise after placing the petitioner under prolonged military custody since 10.06.2002 till 29.06.2002 when it is alleged that the petitioner had made the alleged confessional statement. At the cost of repetition, it may be observed that PW-9, Lt Col R. P.

Verma of Central Command Liaison Unit, who interrogated the petitioner has stated, "Initially for two days when I was questioning the accused (petitioner) he did not show any desire to give the confessional statement. Thereafter the prolonged question might have been carried out till he desired to give his confessional statement." This witness further stated that the petitioner never expressed his desire to give the confessional statement to him. This witness further stated that he did not know the name of the interrogator who asked him to inform the Commanding Officer, CCLU that the subject (petitioner) is desirous of giving confessional statement. This witness did not remember the exactly but he stated that it may be after three or four days later after he finished initial questioning with the accused. Thus, it would be seen that initially the petitioner was interrogated by PW-7 for two days and thereafter, he was interrogated by other officer of the CCLU for further three or four days. Submission of learned counsel for the petitioner that the confessional statement was obtained under pressure and threat in the circumstances cannot be ruled out.

17. The respondents have failed to satisfy the voluntariness of the confession. We find nothing on record to show that the petitioner who was laboring under great mental disorder while in detention was in a fit frame of mind to make the confessional statement. Besides the confessional statement made by the petitioner was not free from the vice of arbitrariness of being extracted under pressure and threat.

18. Section 25 of the Indian Evidence Act, 1872 provides that no confession made to a police officer (Officer of the CCLU in the present case) shall be proceeded against a person accused of any offence. For convenience sake, Section 25 (supra) is reproduced as under:

“25. Confession to police officer not to be proved.—No confession made to a police officer, shall be proved as against a person accused of any offence.”

19. From the discussions made hereinabove it is evident that the petitioner was in continuous military detention at the time of making alleged confessional statement. We are of the view that the statement made by the petitioner was an extracted confessional statement obtained by threat and coercion while in military custody. The alleged confessional statement in the garb of Section 25 of the Indian Evidence Act cannot be proved against the petitioner to return the guilt and punishment awarded.

20. So far as the second limb of arguments of learned counsel for the petitioner that the entire proceedings are vitiated on the ground that the respondents have resorted to additional summary of evidence is concerned, the respondents submitted that there is no violation of Army Rule. Rule 23 of the Army Rules 1954 provides for the procedure for taking down the summary of evidence. The additional summary of evidence was recorded on the orders of the Commanding Officer. Since summary of evidence (SOE) had already commenced and once the SOE was permitted under rule, the additional SOE was its

necessary con-commitment. We may, however, point out that the entire proceedings contemplated under Rules 22 to 25 are only preliminary and it is meant for the purpose of Commanding Officer satisfying himself whether court-martial should be ordered or not. We must also observe that the main thrust of the argument in this case is only about the violation of Rule 23 of the Rules. We are unable to find any flagrant violation of any of these rules. Even otherwise if there are some minor irregularities they do not, in any way, affect the proceedings in the general court-martial during which a regular trial was conducted.

21. In Major **G.S. Sodhi vs. Union of India and ors**, AIR 1991 SC 1616, it was observed that:

“14. The next submission is that the additional summary of evidence is not contemplated under law and therefore the proceedings in relation to such additional summary of evidence is vitiated. It must be remembered that it is only an additional recording of summary of evidence for which no special provision is necessary because it is only in addition to the summary of evidence (SOE) already commenced and once the SOE is permitted under rule the additional SOE is its necessary con-comitent. We may, however, point out that the entire proceedings contemplated under Rules 22 to 25 are only preliminary and it is meant for the purpose of Commanding Officer satisfying himself whether court- martial should be ordered or not. We must also observe that the main thrust of the argument in this case is only about the violation of Rules 22 to 25. But we are unable to find any flagrant violation of any of these rules. Even otherwise if there are some minor irregularities they do not, in any way, affect the proceedings in the general court-martial during which a regular trial was conducted.”

22. Ld. Counsel for the petitioner then vehemently contended that the provisions of Rule 135 have blatantly been violated.

Rule 135 for convenience sake is reproduced as under:-

“135. Calling of witness whose evidence is not contained in summary.— If the prosecutor, or, in the case of a summary court-martial, the court intends to call a witness whose evidence is not contained in any summary of evidence given to the accused, notice of the intention shall be given to the accused, a reasonable time before the witness is called together with an abstract of his proposed evidence; and if such witness is called without such notice having been given the court shall, if the accused so desires it, either adjourn after taking the evidence of the witness, or allow the cross-examination of such witness to be postponed and the court shall inform the accused of his right to demand such adjournment or postponement.”

23. Ld. Counsel for the petitioner submitted that out of nine witnesses, six witnesses were not examined during pre-trial stage i.e. summary of evidence and they were introduced and produced for the first time during the General Court Martial. He submitted that it was incumbent upon the General Court Martial to have given to the petitioner notice of the intention and the list of such witnesses together with an abstract of the proposed evidence and in the absence thereof the principles of natural justice stand violated and the entire General Court Martial proceedings vitiate. Learned counsel for the petitioner placed reliance in the case of **Ex Hav/Clk Rajendra Kumar Mishra vs. Union of India & Ors**, Mil LJ AFT (Kol 90). In the case of **Ex Hav/Clk Rajendra Kumar Mishra vs. Union of India & Ors** (supra) the Armed Forces Bench Kolkata after referring to a

catena of cases has noticed that five witnesses were examined at the stage of recording of summary of evidence whereas during summary court martial trial as many nine witnesses were examined. It was further observed that however nothing is on record to indicate that witnesses whose evidence was not recorded during recording of summary of evidence contained in summary trial were called for examination and cross examination during summary trial after serving notice upon the accused as required under Rule 135 of the Army Rules. It was held:-

“If the prosecutor, or, in the case of a summary court-martial, the court intends to call a witness whose evidence is not contained in any summary of evidence given to the accused, notice of the intention shall be given to the accused a reasonable time before the witness is called together with an abstract of his proposed evidence; and if such witness is called without such notice having been given the court shall, if the accused so desires it, either adjourn after taking the evidence of the witness, or allow the cross-examination of such witness to be postponed and the court shall inform the accused of his right to demand such adjournment or postponement.”

It is, therefore, quite evident from the afore-quoted rule that in SCM, if the court intends to call a witness whose evidence is not contained in any summary of evidence, notice of the intention shall be given to the accused together with an extract of his proposed evidence. The main purpose of introduction of such rule is that the accused should be given reasonable time and opportunity before the witness is called. It is stipulated further that if such witness is called without such notice having been given to him, the court shall, if the accused so desires, postpone cross-examination of such witnesses to ensure such reasonable time for cross-examination of the witnesses as may be required by the accused. After a careful scrutiny of SCM proceeding, we,

however, do not find anything on record to indicate that the accused was given prior notice before examining those witnesses who were not examined at the time of recording of summary of evidence or their cross-examination was ever deferred to enable the accused to cross-examine them after a reasonable period of time. In such situation, we are to opine that the principles of natural justice have again been blatantly violated in the SCM trial by examining those witnesses who were not examined during summary of evidence since prior notice was not served upon the accused before such examination as per requirement of Rule 135 of Army Rules.

(Emphasis Supplied)

24. In the case in hand admittedly out of nine witnesses, six witnesses were not examined during the pre-trial stage (SOE) and were examined during the General Court Martial. Learned Counsel for the respondents could not place on record anything to indicate that prior notice before examining these witnesses who were not examined at the time of recording of summary of evidence or their cross examination was ever deferred to enable the petitioner to cross examine them after a reasonable period of time. Thus the entire General Court Martial proceeding were conducted in contravention to principles of natural justice and suffer from the vice of irregularity.

25. Learned counsel for the petitioner also argued that the respondents had kept the petitioner in unauthorized detention for prolonged period in contravention to Rule 101 of the Army Rules, 1950. For convenience sake Rule 101 (supra) is quoted below:

“101. Custody of offenders.-(1) Any person subject to this Act who is charged with an offence may be taken into military custody.

(2) Any such person may be ordered into military custody by any superior officer,

(3) An officer may order into military custody any officer, though he may be of a higher rank, engaged in a quarrel, affray or disorder.

102. Duty of commanding officer in regard to detention—(1) It shall be the duty of every Commanding Officer to take care that a person under his command when charged with an offence is not detained in custody for more than forty-eight hours after the committal of such person into custody is reported to him, without the charge being investigated, unless investigation within that period seems to him to be impracticable having regard to the public service.

(2) The case of every person, being detained in custody beyond a period of forty-eight hours, and the reason thereof, shall be reported by the commanding officer to the general or other officer to whom application would be made to convene a general or district court-martial for the trial of the person charged.

(3) In reckoning the period of forty-eight hours specified in sub-section (1), Sundays and other public holidays shall be excluded.

(4) Subject to the provisions of this Act, the Central Government may make rules providing for the manner in which and the period for which any person subject to this Act may be taken into and detained in military custody, pending the trial by any competent authority for any offence committed by him.

103. Interval between committal and court-martial- In every case where any such person as is mentioned in section 101 and as is not on active service remains in such custody for a longer period than eight days, without a court-martial for his trial being ordered to assemble, a special report giving reasons for the delay shall be made by his commanding officer in the manner prescribed, and a similar report shall be forwarded at intervals of every eight days until a court-martial is assembled or such person is released from custody.”

26. From the record, it is evident that the petitioner was detained in military custody and kept in close arrest from 10.06.2002 till 26.02.2006, the date the General Court Martial proceedings were concluded and the petitioner was punished. Rule 102 (2) provides that in case a person is detained in custody beyond a period of 48 hours, the reason thereof shall be reported by the Commanding Officer to the General or other officer to whom application would be made to convene a General or District Court Martial for the trial a person is charged. Sub para 4 of Rule 102 provides that the Central Government may make rules providing for the manner in which a person subject to this Act may be taken into detention in military custody, pending trial by competent authority for the offence committed by him. The respondents along with the counter affidavit have placed on record as **Annexure CA-6 to CA-18** to emphasize that necessary sanction of the competent authority i.e. Central Government has been taken from time to time to keep the petitioner under military custody. As mentioned earlier the petitioner was taken into custody on 10.06.2002. From the Annexures annexed to the counter affidavit it is not borne out that the permission from the competent authority or the Government at least from June 2002 to September 2003 was obtained to authorize the respondents to keep the petitioner in detention for more than forty eight hours from the date of his arrest, i.e. 10.06.2002. Thus, at least from June 2002 to September 2002, the custody of the petitioner in military detention was unauthorized.

27. A conceptus of our observations made hereinbefore is that the petitioner was kept in unauthorized detention at least from June 2002 to Sept 2002 without obtaining authorization from the authority concerned and the Government. The alleged confession made by the petitioner during military custody, which was the sole basis of his conviction by the General Court Martial, was not a voluntary confession, rather it was extracted by coercion and threat, and cannot be safely relied upon to convict and sentence the petitioner. Further, production of witnesses who were not produced and examined during pre-trial stage of court of inquiry and summary of evidence has rendered the entire General Court Martial proceedings violative of principles of natural justice and the conviction and sentence awarded by the General Court Martial deserves to be set aside.

28. T.A. is accordingly **allowed**. The impugned order of dismissal from service and sentence of one year rigorous sentence dated 06.02.2006 are set aside. Consequences to follow. The entire exercise shall be completed within a period of four months from the date of presentation of a certified copy of this order.

The punishment of one year rigorous imprisonment was set off by the respondents, as such, no further orders are being passed on this count.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

Dated : 4th October 2017
anb

(Justice D.P.Singh)
Member (J)