

A.F.R.

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

RESERVED.
(Court No. 2)**Transferred Application No. 838 of 2010****Thursday the 17th day of September, 2015**“Hon’ble Mr. Justice Abdul Mateen, Member (J)
Hon’ble Lt. Gen. A.M. Verma, Member (A)”

No. 10405380Y Ex Sep Raji Hasan, S/o Sri Wasi Hasan, through Sagir Khan, S/o Sri Ghasite Khan, R/o Village/Mohalla Kamalpur, Post Bahabal Pur, Tehsil Chhibramau, District Kannauj.

.....Petitioner

By Shri Bachchan Singh, learned counsel for the applicant.

Versus

1. Chief of the Army Staff, New Delhi-110 011.
2. The Commandant, Central Ordnance Depot, Kanpur.
3. Commandant-cum-Chief Records Officer, Defence Security Corps Centre and Records, Cannanore.
4. Union of India through Secretary, Ministry of Defence, New Delhi-110 011.

.....Respondents

By Shri Mukund Tewari, learned counsel for the respondents, along with Capt. Ridhishri Sharma, Departmental Representative.

ORDER

1. Writ Petition No. 30806 of 2008 was received from the Hon’ble Allahabad High Court on transfer, on 21.6.2010 and registered before this

Tribunal as Transferred Application No. 838 of 2010. In this Writ Petition the petitioner has prayed for the following reliefs :

“(a) Issue a writ, order or direction to the Respondent No. 1 to treat the Petitioner as having continued in service till the date the Petitioner would have completed minimum pensionable service.

(b) Issue a writ of certiorari summoning and quashing the impugned verdict of GCM including the records of manipulated Inquiry/Investigation, as well cryptic Rejection Order of the Army Chief dated 25 Mar 2008, with all the consequential benefits to the Petitioner.

(c) Issue any other writ order or direction considered expedient, and in the interest of justice, and equity including refund of contributory dues of the Petitioner with penal rate of interests and release on Bail/Parole or by Suspending Sentence.

(d) The arrest of the applicant was illegal and his detention in custody beyond stipulated period of time was also illegal entitling him adequate compensation from Respondents.

(e) Declaring and adjudging the GCM proceedings without jurisdiction.

(f) Award Cost to the Petitioner.”

2. The facts of the case, in brief, are that the petitioner was enrolled in 114 (TA) Bn on 14.3.1990 and was discharged on 15.3.1997 at his own request. During this period he had an embodied service of 3 years, 6 months and 7 days. After discharge from TA he enrolled in DSC on 15.3.1997 and at the time of this incident he was posted with 293 Defence Security Corps (DSC) Platoon at Central Ordnance Depot (COD), Kanpur. He was transferred to H.Q. Eastern Air Command in November 2000. He was tried by General Court Martial (GCM) on the following charges :-

“First Charge
Army Act
Section 63

*AN ACT PREJUDICIAL TO GOOD ORDER AND
MILITARY DISCIPLINE*

in that he,

at Kanpur, between October 1997 and November 2000, which came to the knowledge of the authority competent to initiate action on 12 December 2002, while serving with 293 Defence Security Corps Platoon, Central Ordnance Depot, Kanpur, knowing that Shri Ikramuddin alias Bihari Sabjiwala was working as an agent of the Pakistani Intelligence Agency, improperly associated himself with the said Ikramuddin.

Second Charge
Army Act
Section 63

*AN ACT PREJUDICIAL TO GOOD ORDER AND
MILITARY DISCIPLINE*

in that he,

at Kanpur, during October-November 2000, which came to the knowledge of the authority competent to initiate action on 12 December 2002, while serving with 293 Defence Security Corps Platoon, Central Ordnance Depot, Kanpur, knowing that Shri Ikramuddin was working as an agent of the Pakistani Intelligence Agency, improperly introduced No 1553281F Sepoy Mohd Unus of the same unit to the said Shri Ikramuddin.”

and on 27.7.2005 punishment of 7 years’ R.I. and dismissal from service was awarded in GCM.

3. The petitioner was represented by Shri Bachchan Singh, learned counsel. The petitioner claims that there are several infirmities in the investigation and GCM proceedings. He claims that third degree methods

were adopted on him and he was made to sign on the dotted line when the charges were heard under the provisions of Rule 22 of the Army Rules on 17.5.2003. Further, was made to give extra-judicial confession which was recorded when he was in military custody. According to the petitioner, the prosecution has made out a story which is hypothetical, improbable, without evidence and was fabricated by the personnel of Central Command Liaison Unit(CCLU), who kept themselves behind the curtain of secrecy. The extra-judicial confession was extracted by the personnel of CCLU by extortion and applying inducement, threat and physical torture when he was in military custody from 27.5.2002 onwards. The confession was given by him under compulsion and on threat by the OC, Special Task Cell, Major (now Lt. Col.) Andrew Abraham. The confession was not given voluntarily and hence is barred by the provisions of Sections 24 and 26 of the Indian Evidence Act. The petitioner also claims that Lt. Col. R.P. Verma, who dictated the confessional statement was not brought before the GCM. During the trial by GCM the petitioner had denied all the charges and had stated that the confession had been obtained from him under duress. The so called Pakistani Agent, Mohd. Anwar @ Ikramuddin @ Bihari Sabjiwala also did not recognize him during the trial. The entire prosecution story, according to the petitioner, therefore, is false and the charges against the petitioner have not been proved at all, hence this petition deserves to be allowed.

4. The respondents were represented by Shri Mukund Tewari, Standing Counsel, along with Capt. Ridhishri Sharma, Departmental Representative.

5. The respondents confirmed that the petitioner was enrolled in 114 (TA) Bn on 14.3.1990 and was discharged on 15.3.1997 at his own request. He had embodied service of 3 years, 6 months and 7 days. During this period he was tried summarily under Section 39(a) of the Army Act on 10.11.1995 and was awarded punishment of 14 days' R.I. The respondents also confirmed that the petitioner had been enrolled in DSC on 15.3.1997.

6. The respondents stated that the petitioner had gone to Pakistan in the year 1980 on an Indian Passport to meet his relatives on a 'Tourist Visa', which was valid for 90 days. He, however, overstayed the period at Pakistan and was apprehended by the Pakistani Police and was awarded a sentence of 10 years' imprisonment. When the petitioner was in imprisonment at Pakistan, he was given an offer by the Pakistan authorities that if he agrees to work for Pakistan he would be released. Thereafter the petitioner was given training in Pakistan by one Col. Sayeed and was then a Pakistani Passport arranged and sent to India with INR 5,000/- in cash. The petitioner gave a telephone no. 355786 to Col. Sayeed. On return to India Col. Sayeed rang him up 2/3 times and asked the petitioner to obtain information about Indian Army. Col. Sayeed told the petitioner to not get caught but get enrolled in TA. The petitioner again went to Pakistan on the Pakistani Passport and returned to India after one year. Thereafter he enrolled in TA in 1990. While he was with TA, he again went to Pakistan

on an Indian Passport where he stayed for 3/4 days. In 1997 he was enrolled in DSC and there he came in contact with Mohd. Anwar @ Ikramuddin @ Bihari Sabjiwala. The petitioner gave some information to said Mohd. Anwar @ Ikramuddin @ Bihari Sabjiwala, who was a Pakistani agent. From Kanpur the petitioner was posted to Shillong. Before leaving for Shillong he introduced Mohd. Unus to the said Mohd. Anwar @ Ikramuddin @ Bihari Sabjiwala who also began to give information to the said Pakistani agent. Mohd. Anwar @ Ikramuddin @ Bihari Sabjiwala was apprehended by the Civil Police and name of the petitioner was revealed by him. The petitioner was thereafter brought from Shillong where he was with H.Q. Eastern Air Command. The case was investigated at Lucknow and thereafter he was arrested on 10.11.2002 and not in May, 2002, as claimed by the petitioner. After his arrest a Court of Inquiry was ordered. The charge was heard under Rule 22 of the Army Rules on 17.5.2003 and thereafter he was tried by GCM. During the trial, Mujib Hasan, the petitioner's brother, was declared a hostile witness. The extra-judicial confession was recorded in presence of two independent witnesses on 15.6.2002 and this confession was admissible as evidence. The charges were proved beyond reasonable doubt and there is no infirmity in the GCM proceedings.

7. Heard both the sides and scrutinized the documents.
8. The narrative by the respondents appears to be entirely based on the extra-judicial confession made by the petitioner.

9. First we turn to the findings by the GCM relevant extracts of which are as follows :

“1. The court has considered the entire evidence on record led through 18 prosecution witnesses and the court has also deliberated on the unsworn statement of the accused(Exhibits- 26 and 27). The court has very carefully perused the arguments advanced by the prosecution counsel and defence counsel in their closing address and reply there to by the defence counsel marked Exhibit-45 and Exhibit-46 respectively. The demeanour of the witnesses has been watched by the court. The reasons in support of the findings are given in succeeding paragraphs.

2. To arrive at finding in respect of First Charge the court has considered the following issues:-

(a) That the accused No 10405380Y Sep Raji Hasan of 239 Defence Security Corps Platoon attached to Central Ordnance Depot, Kanpur was at Kanpur and was serving with 293 Defence Security Corps Platoon attached to Central Ordnance Depot, Kanpur between October 1997 and November 2000 and act of culpability on the part of the accused came to the knowledge of the authority competent to initiate the action on 12 December 2002.

(b) That the accused during the aforesaid period knew that Shri Ikramuddin alias Bihari Sabjiwala was working as an agent of the Pakistani Intelligence Agency.

(c) That the accused improperly associated himself with the said Ikramuddin.

(d) That the said act of the accused was prejudicial to good order and military discipline.

3. x x x x x x

4. With regard to the aspect of the accused knowing that Shri Ikramuddin alias Bihari Sabjiwala was working as an agent of Pakistani Intelligence Agency, the court has placed full reliance on confessional statements made by the accused and Sep Moh Unus (PW-9) considering these meeting the requirements of Section 24 of the Indian Evidence Act, 1872.

5. Besides the above the testimony of Shri Rajesh Dwivedi (PW-13) and Shri Rajendra Prasad Singh (PW-16) the investigating officer clearly shows that Shri Ikramuddin alias Bihari Sabjiwala was acting as a Pakistani Intelligence Agent..... During the course of his friendship Ikramuddin had obtained information from the accused damaging to the security of the Army and the country. The duty was cast upon the accused on knowing that Shri Ikramuddin was working as an agent of Pakistani Intelligence Agent, to take immediate steps to report the matter to the superior military and civil authorities. However, as is apparent from his confessional statement and also from the investigation consequent to the arrest of Ikramuddin, that indulgence of the accused in the antinational activities subsequent to his release from Pakistani jail and his willingness to act for Pakistani Intelligence Agency prevented him to follow the right and proper path.....

6.The court has given careful consideration to Exhibits 26 and 27 which are the unsworn statements of the accused.....The consideration of evidence in entirety leads the court to only one conclusion that No 10405380Y Sepoy Raji Hasan of 239 Defence Security Corps Platoon, Headquarters Eastern Air Command attached to Central Ordnance Depot, Kanpur is guilty of the First Charge.

7. With regard to Second Charge the court has considered the following issues:

(a) *That the above mentioned accused was at Kanpur and was serving with 293 Defence Security Corps Platoon attached to Central Ordnance Depot Kanpur between October 1997 to November 2000 and the act of culpability came to the knowledge of the authority competent to initiate action on 12 December 2002.*

(b) *That the accused during the period mentioned above knew that Shri Ikramuddin alias Bihari Sabjiwala was working as an agent of the Pakistani Intelligence Agency.*

(c) *That the accused improperly introduced No 1553281F Sepoy Mohd Unus of the same unit (293 Defence Security Corps Platoon attached to Central Ordnance Depot Kanpur) to the said Shri Ikramuddin.*

(d) *That the said act of the accused was prejudicial to good order and military discipline.*

8. xxxxxxxxxx

9.The court has considered the confessional statement made by the accused marked Exhibits 8 and 9 and also confessional statement made by Sepoy Mohammad Unus (PW-9) and marked as Exhibit 13 and 14 as true and voluntary. There exists sufficient corroboration from the testimony of the Police Officers Shri Rajesh Dwivedi (PW13) and Shri Rajendra Prasad Singh (PW-16) and also from the VCD (ME-1) produced by PW-11 and PW-15. The transcripts of VCD in Hindi and English have been produced before court and marked Exhibits 21 and 22 respectively. It is evident from the above evidence that the accused improperly introduced Sepoy Mohd Unus to Ikramuddin whom he knew to be an agent of Pakistan Intelligence Agency.

10. x x x x x.

10. According to the findings, the court had placed full reliance on the confession of the accused and Mohd. Unus. There is only one other piece of

evidence which is testimony of the Police Officer who arrested the so called Pakistani agent who gave the name of the petitioner. Before going any further let us examine the admissibility of the extra-judicial confession. Sections 24 and 26 of the Indian Evidence Act are reproduced below :-

“24. 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 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 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.

COMMENTS

Extra judicial confession

- (i)
- (ii)
- (iii)
- (iv)
- (v) *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; Chaya Kant Nayak v. State of Bihar, (1997) 2 Crimes 297 (Pat).*
- (vi) *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 courts generally look for independent reliable corroboration before placing any reliance upon an extra-judicial confession; Balwinder Singh v. State of Punjab, (1995) Supp (4) SCC 259.

(vii) *It is well settled now that a retracted extra-judicial confession, though a piece of evidence on which reliance can be placed, but the same has to be corroborated by independent evidence. If the evidence of witness before whom confession made was unreliable and his conduct also doubtful and there is no other circumstances to connect accused with crime, conviction based solely on retracted extra-judicial confession is not proper and the accused is entitled to acquittal; Shakhram Shankar Bansode v. State of Maharashtra, AIR 1994 SC 1594.*

(viii)

(ix) *Tape-recording of confession denotes influence and involuntariness. Accused is entitled to be acquitted; State of Haryana v. Ved Prakash, 1994 Cr.LJ 140 (SC).*

(x)

(xi)

(xii) *The general trend of the confession is substantiated by some evidence, tallying with the particulars of confession for conviction of the accused; Madi Ganga v. State of Orissa, AIR 1981 SC 1165: 1981 Cr.LJ 628: (1981) 2 SCC 224: 1981 SCC (Cr.) 411.”*

“26. Confession by accused while in custody of police not to be proved against him. – No confession made by any person whilst he is in the custody of a police officer, unless it be made in the

immediate presence of a Magistrate, shall be proved as against such person.”

For a confession to be admissible in a court of law it must have been made voluntarily and not when the person making the confession is in custody. In the instant case we have examined the Exhibits attached with the GCM proceedings. Ext. 28 is the medical examination report at HQ Eastern Air Command, Shillong, dated 24.5.2002 whereby the petitioner was medically examined before he was to travel to Lucknow under an escort. Ext. 29 is Station HQ Cell, Lucknow, letter dated 27.5.2002 to 11 GRRC, AMCC&S and CCSR, Lucknow, in which the addressee had been asked to prepare prisoners' cells, Vide Ext. 30, the petitioner was attached by order dated 28.5.2002 initially with CCSR which later was changed to 11 GRRC with effect from 29.5.2002. Ext. 32 is a direction dated 29.5.2002 from HQ 11 GRRC to their administrative staff wherein it was stated that the petitioner would be kept under close arrest in the Quarter Guard. Ext. 35 is a letter dated 30.5.2002 from CCLU, Lucknow, addressed to 11 GRRC to send the petitioner to CCLU for investigation along with escorts. On 3.7.2002, 11 GRRC sent a delay report, which is at Ext. 40, in which date of close arrest has been indicated as 29.5.2002 (AN). Against the date of release, in this report, it has been mentioned "*Instruction not received since interrogation/investigation by CCLU is in progress*". Thus, it is very clear that the petitioner was under close arrest, i.e. under military custody, from 29.5.2002 to 3.7.2002. In fact, the petitioner remained in military custody well beyond this period and was sent to 39 Gorkha Training Centre on

1.8.2002, vide letter, Ext. 41. The extra-judicial confession was recorded on 15.6.2002. Also there is a CD for which videography was done on a day very close to 15.6.2002, either a day before 15.6.2002 or a day after. The exact date has not been indicated in the transcript of the video recording. Therefore, there is no doubt that the petitioner was under military custody on 15.6.2002 when his confession was recorded. Therefore, this confession is legally not admissible in the court of law.

11. Now, the question whether or not of the confession was voluntary. The petitioner in his examination, during the trial, stated, in response to several questions, that he was made to give this confessional statement after being beaten up. He gave the answers to Question Nos. 5, 9, 10, 14, and 26. In answers to these questions he categorically stated that he was beaten up. In answer to other questions, he denied that he was ever involved with the so called Pakistani agent. We are of the view that the confession was obtained from the petitioner forcibly under threat and inducement and it was not voluntary in nature, therefore, such confession is not admissible in a court of law under the provision of IEA24.

12. We have also examined the quality of evidence. It is a settled principle of law that extra-judicial confession is a weak piece of evidence unless it is corroborated by some other evidence. The Hon'ble Supreme Court in the case of **Aloke Nath Dutta and others v. State of West Bengal** reported in *MANU/SC/8774/2006* have stated as under :

“(4) Confession – When can be acted upon? – Satisfaction of Court necessary –Main features of confession to be verified. If not so

done, no conviction can be based on sole basis thereof. #Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the Court has to satisfy itself in regard to : (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration. #A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof.”

13. Further, the Hon’ble Supreme Court in the case of **Jaspal Singh v. State of Punjab** reported in (1997) 1 SCC 510 have held as under :

“The confession is not recorded in questions-and-answers form which is the manner indicated in the criminal court rules. The confession was retracted before the trial Judge by the acquitted accused Pooran Singh on 28.7.1985, where, he disclosed that he was produced for judicial confession by telling him that he would be a prosecution witness as an approver. It is also stated that the police had met him in the jail and his signature was obtained on a statement. It appears that the accused Pooran Singh was in police custody when he was produced handcuffed for recording judicial confession. When a judicial confession is found to be not voluntary and more so when it is retracted, in the absence of other reliable evidence, the conviction cannot be based on such retracted judicial confession.”

14. Further the Hon’ble Supreme Court in CrI. Appeal No. 393 of 1992 (*State of Punjab v. Gurdeep Singh*), decided on 8.9.1999, have dealt with in

detail in the matter of extra-judicial confession. The relevant portions of the aforesaid judgment are extracted below :

“1. The short question involved in the matter in issue before this Court is the justifiability of the order of acquittal passed by the High Court by reason of lack of probative value of an extra judicial confession found by the High Court in an appeal against conviction and sentence under Section 376 read with Sections 302 and 201 of the Indian Penal Code.

2. Admittedly, there is no direct evidence available on the record so as to attribute the commission of crime to the respondent herein but it is only on the basis of an extra judicial confession that the learned Sessions Judge thought it fit to pass the sentence for life imprisonment, which stands reversed by the High Court.

3. Confession in common acceptance means and implies acknowledgment of guilt – its evidentiary value and its acceptability however shall have to be assessed by the Court having due regard to the credibility of the witnesses. In the event however, the Court is otherwise in a position having due regard to the attending circumstances believes the witness before whom the confession is made and is otherwise satisfied that the confession is in fact voluntary and without there being any doubt in regard thereto, an order of conviction can be founded on such evidence.

.....

5. There is neither any rule of law nor of prudence that evidence furnished by extra-judicial confession cannot be relied upon unless corroborated by some other credible evidence. The Courts have considered the evidence of extra judicial confession a weak piece of evidence. If the evidence about extra judicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even

remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra judicial confession can be accepted and be the basis of a conviction. In such a situation, to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra judicial confession is reliable, trustworthy and beyond reproach the same can be relied upon and a conviction can be founded thereon.

.....

8. a later decision of this Court in *Kavita v. State of Tamilnadu MANU/SC/0436/1998 : 1998 CriLJ 3624* stated that in the very nature of things it is a weak piece of evidence. In paragraph 4 of the Report this Court in *Kavita's case (supra)* observed :

There is no doubt tht convictions can be based on extra judicial confession but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the witness of whom it is made. It may not be necessary that the actual words used by the accused must be given by the witness but it is for the Court to decide on the acceptability of the evidence having regard to the credibility of the witnesses.

.....

17. There is no denial of the fact that extra judicial confession is admissible in evidence and the Court in appropriate cases can rely thereon to the extent of even basing conviction of the accused. In a long catena of decisions of this Court, the settled position of the present day is that the extgra judicial confession by itself if, otherwise in conformity with the law, can be treated as substantive evidence, and in appropriate cases it can be used to punish an offender. We, however, hasten to add here that this statement of law stands qualified to the extent that the Court should insist on some assuring material or circumstance to treat the same as piece of substantive evidence.”

15. Further the Hon’ble Supreme Court in the case of **Rameswar Badi v. State of Orissa** reported in *MANU/OR/0325/2015* have held as under :

“Extrajudicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility – Extra-judicial confession should inspire confidence and the Court should find out whether there are other cogent circumstances on record to support it.”

16. Again in the case of **Nathu . State of Uttar Pradesh** reported in *AIR 1956 SC 56* have observed as under :

“(a) Evidence Act (1872), Ss. 3, 30 – Confessions of co-accused – Value.

Confessions of co-accused are not evidence as defined in S. 3 and no conviction can be founded thereon,

(b) Evidence Act (1872), S. 24 – Prolonged custody.

The prolonged custody immediately preceding the making of the confession is sufficient, unless it is properly explained, to stamp it as involuntary.

.....

“(6) It is contended for the appellant that this confession cannot be acted upon, firstly because it is not voluntary, and secondly because there is no evidence worth the name to corroborate it. On the question whether Exhibit P-15 was voluntary, the cardinal feature to be noted is that the appellant was kept separately in the custody of the C.I.D. Inspector (P.W. 33) from the 7th August to 20th August, and the confession was recorded on the 21st August.

It appears to us that the prolonged custody immediately preceding the making of the confession is sufficient, unless it is properly explained, to stamp Exhibit P-15, as involuntary. P. W. 33, made no attempt to explain this unusual circumstance. It is true that with reference to this matter the appellant made various suggestions in the cross examination of W. 33, such as that he was given .bhang and liquor, or shown pictures, or promised to be made an approver, and they have been rejected – and rightly – as unfounded.

But that does not relieve the prosecution from its duty of positively establishing that the confession was voluntary, and for that purpose, it was necessary to prove the circumstances under which this unusual step was taken. There being no such evidence, we are unable to act upon Exhibit P-15, as a voluntary confession. It was argued that better evidence was not forthcoming. As the investigation by P.W. 32 was, as already stated, half-hearted and perfunctory, and no adequate steps were taken to secure evidence before. P.W. 33 took up the matter on 18-7-1952.

All this is true, and the result is no doubt very unfortunate; but that does not cure the defect from which Exhibit P-15 suffers. It was also argued that both the courts below had found that Exhibit P-15 suffers. It was also argued that both the courts below had found that Exhibit P-15 was voluntary, and that that was a finding with which this Court would not interfere in special appeal. But then, the courts below have, in coming to that conclusion, failed to note that P.W. 33

has offered no explanation for keeping the appellant in separate custody from the 7th to 20th August, and that is a matter which the prosecution had to explain if the confession made on 21-8-1952 was to be accepted as voluntary.

In this view, the only substantive evidence against the appellant, Exhibit P-15, falls to the ground, and in strictness, the further questions whether that has been corroborated by the evidence of P.Ws. 13 and 15, and whether Exhibits P-5 and P-6 lend assurance to it do not arise.”

17. What it implies is that the extra-judicial confession is a weak piece of evidence and it must be corroborated. The Court must satisfy itself that firstly, it is voluntary in nature and secondly, it has been corroborated. In the instant case the confession is not voluntary as it was obtained under threat and inducement. Secondly, there is no corroboration except a piece of evidence given by the Police Officer which says that he arrested the Pakistani agent giving name of the petitioner. The petitioner in his confessional statement gave several pieces of information which could have been and should have been corroborated, such as firstly, he was given a Pakistani Passport on which he came to India, went back to Pakistan and again came back to India. The petitioner was not asked to produce this Passport. While he was in TA he went to Pakistan on an Indian Passport. During the trial in answer to a question whether he had obtained permission before going to Pakistan, the petitioner answered that such permission is not necessary. The petitioner, however, was not asked to produce his Indian Passport on which he had travelled to Pakistan. He was also not asked how did he get Visa for going to Pakistan. As per our understanding a person

needs to visit the concerned Embassy or High Commission to obtain Visa. If the petitioner visited Pakistan Embassy for the purpose of Visa, did he obtain permission for doing so?. The petitioner was not asked all these questions. He also should have been tried for going to a foreign country without obtaining prior approval. This also was not done. We find it somewhat unusual that a case of such a sensitive nature in which enormous volume of sensitive information about the Indian Armed Forces had been sent by E-mail and due to which this entire proceedings of the Court Martial was classified as 'secret' and was investigated by the personnel of the CCLU in such detail was not followed through properly by corroborating evidence. A confession which had been obtained when the petitioner was in military custody and a confession which turns out to be not voluntary tends to render the entire GCM legally not sustainable. We also have noted that during the examination-in-chief during the trial by GCM the petitioner stated that when he made the confessional statement, the personnel who had tortured him were present in the room both during extra-judicial confession and the Videography.

18. We also note that there are inconsistencies in the statements given by the two independent witnesses who were present when confession was recorded on 15.06.2002. Lt. Col. SPS Manhas was examined during the trial as P.W. 2 and Major Satyendra Singh, was examined as P.W. 5. Both these witnesses did not see any guard or escort when they reached the venue of the confessional statement. Both, when asked whether the

statement given by the petitioner was voluntary or not, said that they did not notice any injury mark on the petitioner. P.W. 2 said "*the accused gave his statement in Hindi*", whereas P.W. 5 said that "*the accused was writing on his own*". So there is lack of clarity whether the petitioner had dictated the confessional statement or it was written in his own hand. P.W. 2, on the issue of translation in english stated that "*I do not remember who translated it but he was a clerk whose particular was not known to me.*" P.W. 5 on the issue of translation of the petitioner's statement from Hindi to English stated that "*an officer had translated the statement from Hindi to English but particulars of that officer was not known to him*". P.W. 5 also said that throughout the period when confession was made, an officer sat opposite the petitioner whose particulars were not known to the witness. On the issue of recording of confession, P.W. 1, viz. Lt. Col. Andrew Abraham, who investigated the case, said "*the confession was recorded by two independent witnesses*". So here there are three separate statements with regard to confession. One independent witness says that the petitioner gave the statement in Hindi, the second one says that the confession of the petitioner was written by him, and the third one says that it was recorded by the independent witness. There is, thus, lack of clarity. Therefore, the credibility of the confession is also under suspect. Further, on the same issue P.W. 15, Major A.M. Singh, who was the Intelligence Officer, 215 CI Detachment at Kanpur, who was present during the Video recording said that "*he did not know if the petitioner in military custody*". We find it very

unusual and unbelievable that an Intelligence Officer who was intricately involved in the investigation would not be aware whether or not the person giving such a statement is in military custody.

19. The so called Pakistani agent, viz. Mohd. Anwar @ Ikramuddin @ Bihari Sabjiwala, denied knowing the petitioner. Mohd Unus, who was allegedly “improperly” introduced to the Pakistani agent by the petitioner also denied having been introduced so. In his Video recorded statement which is in a question-answer form, which is not the format of recording such statement, as held by the Hon’ble Supreme Court in the case of **Jaspal Singh** (*supra*), the petitioner stated that when the said Mohd. Anwar @ Ikramuddin @ Bihari Sabjiwala was away from Kanpur for 2/3 months, the petitioner’s brother Mujeeb Hasan ran the shop for him. During the trial Mujeeb Hasan denied this and said he never did any such thing.

20. We have also examined the charges. We find that the charges are less than the specific. The first charge could have been framed bringing out more specific nature of the offence and the information passed by the petitioner to the so called Pakistani agent could have been included and also the remuneration that he got passing such information. The charge of going to foreign country without permission could have been included.

21. With the aforesaid infirmities in the investigation purposes and the trial by GCM we have no choice but to quash the GCM proceedings. It is a pity that on such a sensitive issue involving National security the trial was conducted without collecting evidence which not only should have been

irrefutable but also corroborating. The extra-judicial confession is not admissible in a court of law on two counts that it was not voluntary and it was obtained when the petitioner was in military custody and this extra-judicial confession was the evidence on which the entire conviction was based.

22. Accordingly, the petition is partly allowed. The findings and sentence by the GCM, passed on 27.7.2005, are hereby quashed. Consequently, the rejection order of the COAS, vide order dated 25.3.2008, is also quashed. The punishment of R.I. suffered by the petitioner cannot be undone at this stage. No order as to costs.

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

(Justice Abdul Mateen)
Member (J)

PG.