COURT NO.3, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

1.
TA 388/2010
WP(C) 307/2008

Jagvir Singh Gulia ..... Petitioner
Versus
UOI & Ors ..... Respondents

For Petitioner : Mr. SM Dalal Advocate
For Respondents : Mr.Ajai Bhalla, Advocate

CORAM
HON'BLE MR. JUSTICE R.C. MISHRA, MEMBER
HON'BLE LT GEN S.K. SINGH, MEMBER

O R D E R
31.03.2015

Judgment allowing the TA pronounced, signed and dated.

(R.C. MISHRA)
MEMBER (J)

(S.K. SINGH)
MEMBER (A)

Chanana/31.03.15

COURT NO.3, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

TA 388/2010
WP (C) 307/2008

Jagvir Singh Gulia (since deceased) through LRs **….. Petitioner**

(i) Smt. Sarita Devi, wife of late Jagvir Singh Gulia
(ii) Jatin, minor Son of late Jagvir Singh Gulia
(iii) Priya, minor Daughter of late Jagvir Singh Gulia
(iv) Kartar Singh Gulia, son of late Chhotu Ram
(v) Smt. Savitri Devi, wife of Kartar Singh

Versus

UOI & Ors **….. Respondents**

For Petitioner **:** Mr. SM Dalal, Advocate

For Respondents **:** Mr. Ajai Bhalla, Advocate

CORAM

HON'BLE MR. JUSTICE R.C. MISHRA, MEMBER.

HON'BLE LT GEN S.K. SINGH, MEMBER

JUDGMENT
31.03.2015

By virtue of section 34 of the Armed Forces Tribunal Act, 2007 brought into force w.e.f. 10.08.2009, this petition, under Article 226 of the Constitution of India, pending before the High Court of Delhi, stood transferred to this Tribunal.

2. During pendency of the TA before this Tribunal, the petitioner expired on 27.04.2010 and thereafter, vide order dated 16.07.2010, permission was

granted to bring his legal representatives on record. However, for the sake of convenience, Jagvir Singh (since deceased) shall be referred to as the petitioner.

3. The petition was filed on 11th January, 2008 for issuance of

> (i) a writ/order in the nature of Certiorari to quash the impugned proceedings of SCM (Summary Court Martial) including the findings and sentences recorded by it as well as the order dated 29.10.2007,passed by the respondent no.2, rejecting the petitioner's Statutory complaint, under Section 164(2) of the Army Act,1950(hereinafter called "the Act")
>
> (ii) a writ/order in the nature of Mandamus commanding respondents to reinstate the petitioner in service with all consequential benefits.

4. The petitioner was enrolled as Nursing Assistant in Army Medical Corps (AMC) on 21.10.1994. At the relevant period, he had remained posted as Lance Naik at Command Hospital, Central Command Lucknow (for short 'CHCC'). He was detailed as a sentry to perform guard duty in Single Officers' Accommodation of CHCC. The guard comprised of one Guard Commander and three sentries including him.

5. The prosecution story, in short, may be narrated thus:-

A. On 24.05.2005 at around 0715 hours, as Hav/NA Sunil Kumar Chauhan entered the Cardiology Department of CHCC by opening the main door, he noticed that some of the items kept there had been stolen in the preceding night. On the same day at about 1330 hrs, an FIR regarding the theft was lodged at Police Station Cantt Lucknow. Accordingly, a case under Section 379 of the IPC was registered as crime No. 90/05.

B. The consequent investigation by police revealed that the theft was committed jointly by the petitioner, Sepoy Balsuni Nand Kishore, Recruit Vinayak Patil and Recruit Pawan Kumar Dubey. They were apprehended and at their instance some of stolen items were recovered from bushes near Nursing Officers' Mess of the Base Hospital.

C. After completion of the investigation, Charge sheet was submitted in the Court of ACJM Lucknow. However, upon application under Section 125 of the Act, moved by Col B.M.Mishra, Sr. Registrar and OC Troops, the case was handed over to the Commanding Officer and the accused was handed over to Army authority for being tried by a Court Martial. Thereafter, Sepoy/Nursing Assistant Balsuni Nand Kishore had become deserter with effect from 20 July 2006. In such a situation, the petitioner and the co-accused viz., Recruit/Nursing Assistant Vinayak Patil, and Recruit/Nursing Assistant Pawan Kumar Dubey, all of Command Hospital, Central Command Lucknow attached to Base Hospital, Lucknow, were tried by the SCM on the following charge:-

"Army Act Section 52(a) Read with Section 34 of the Indian Penal Code	*COMMITTING THEFT OF PROPERTY BELONGING TO THE GOVERNMENT* *In that they together,*

At Lucknow, on night of 23/24 May 2005, committed theft of the following items from the Cardiology department of Command Hospital, Central Command, Lucknow, the property belonging to the Government:-

Ser No.	*Items*	*Quantity*	*Amount*

(a)	*Pulse Oximeter*	*01*	*Rs.54,600.00*
(b)	*Holter Recorder for Old Tread Mill Test*	*01*	*Not Available*
(c)	*Tread Mill Test Lead with cordless console*	*01*	*Note Available*
(d)	*Ambulatory Blood Pressure Programmer with paper roll*	*01*	*Note available*
(e)	*Epson Colour Printer Inkjet*	*01*	*Rs.2,500.00*
(f)	*Arterial Sheath for Pacemaker*	*05*	*Rs.2,450.00*
(g)	*Capsule Lipcard*	*342*	*Rs.3,177.00*
(h)	*Tablet Coversyl*	*552*	*Rs.3,588.00*
(j)	*Tablet Carnitor*	*130*	*Rs.2,183.48*
(k)	*Nitrolingual Glyceryl Trinirate Spray*	*22*	*Rs.7,898.00*
(l)	*Eveready 1.5 Volt Cells*	*23*	*Rs. 161.00*
(m)	*Dura Cell 9 Volts*	*04*	*Rs. 516.00*
	Total		*Rs.77,073.48*

(Rupees seventy seven thousand seventy three and paise forty eight only)"

6. The petitioner abjured the guilt and pleaded false implication. As per his version,**(a)** having reported for duty as the third sentry at 1800 hrs on 23 May at Single Officers' Accommodation he had remained at his place of duty till 0600 hrs on 24 May 2005; **(b)** on 12 Jun 2005,i.e. almost 20 days after the incident of theft, Civil Police searched his personal belongings and having failed to find anything incriminating took him to police station where he was tortured and compelled to give a confessional statement under threat that in case of refusal he would be killed in a fake encounter. All this struck terror in his mind and on 13 June on being brought by police to the office of Registrar

CHCC, he agreed to sign in the presence of Col BM Mishra, the Registrar and the Civil Police personnel the statement, recorded by Col SS Naware, contents of which were not read over to him.

7. To bring home the charge the prosecution examined as many as nine witnesses whereas no evidence was led in defence.

8. Upon consideration of the entire evidence on record, the SCM, for the reasons recorded in Memorandum as per Army Order 309/73 (Annexure R-3), proceeded to hold the petitioner and the co-accused guilty of the offence charged with and sentenced them as indicated hereinabove.

9. Legality and propriety of the impugned conviction have been challenged on various grounds. Learned counsel for the respondents, however, while making references to the relevant legal provisions and pieces of incriminating evidence on record, has submitted that the conviction and sentences are well merited. We have gone through the record of the SCM proceedings and the corresponding pleadings. For the sake of convenience and in order to avoid repetition and cross references, the rival contentions may be discussed under the following headings:-

I. SCM's jurisdiction to try the petitioner for the offence.

10. These background facts are not in dispute:-

(i) The petitioner was attached to the 11 BIHAR and proceedings under Rule 22 of the Army Rules1954 (hereinafter referred as AR) were carried out by the CO (Commanding Officer) of 11 BIHAR. The Summary of Evidence (for brevity "S of E") was recorded by Lt. Col. SN Tiwari of AMC Centre and School. After investigation, charge-sheet was served upon the petitioner and the co-accused for the offence of theft of property belonging to the Government which is punishable under Section 52(a) of the Act.

(ii) The petitioner and the other accused were tried upon the charge by SCM presided by Col Chandra Shekhar, Sr. Registrar & OC Tps, Base Hospital Lucknow.

11. The plea of jurisdiction is based on two grounds :(1) that discretion under Section 125 of the Act was exercised improperly and arbitrarily;(2) that in view of mandate contained in Para 381of Regulation for the Army read with Note 5 appended to Section 116 of the Act in the Manual of Military Law the SCM in respect of the petitioner ought to have been conducted by his own CO viz. OC Tps CHCC, Lucknow and not by CO Base Hospital Lucknow.

12. While canvassing the first ground, learned counsel for the petitioner has strenuously contended that taking into consideration the nature of allegation against the petitioner and complicated questions of law requiring interpretation of various legal terms and phrases as contained in IPC and Indian Evidence Act the case based on circumstantial evidence ought to have been sent to the Criminal Court for trial. To buttress the contention implicit reliance has been placed on the decision of Delhi High Court in **R.S. Bhagat Vs UOI AIR 1982 Del 191**.

13. **R.S.Bhagat**, a Lt. Colonel in the Army, was tried for theft of saree belonging to a civilian and upon conviction was sentenced to be dismissed from the Army.Learned single Judge, even at the outset of the judgment, expressed the view that the final order of dismissal deserved to be quashed solely on the ground of being contrary to the decision of the Defence Minister and the advice of the Ministry of Law. Thereafter, while making reference to the guidelines laid down by the Constitution Bench in **Ram Sarup Vs UOI, AIR 1965 SC 247** for exercising the discretion under S.125 of the Act and the relevant instructions in the Manual of Indian Military Law 1937 published by the Government of India, Ministry of Defence, he proceeded to hold that the

discretion was exercised arbitrarily as the case was based entirely on circumstantial evidence and involving several complicated questions of law.

14. Indisputably, the ordinary Criminal Court and the Court Martial had concurrent jurisdiction to try the petitioner. The phrase "for which he is liable to be tried either by the court to which this Code applies or by a court-martial" occurring in Section 475(1) of the Code of Criminal Procedure, (that corresponds to Section 549(1) of the Old Code), imports that the offence for which the accused is to be tried should be an offence of which cognizance can be taken by an ordinary criminal court as well as a court-martial. The phrase is intended to refer to the initial jurisdiction of the two courts to take cognizance of the case and not to their jurisdiction to decide it on merits (**Delhi Special Police Establishment, New Delhi v. Lt. Col. S.K.Loraiya (1972)2 SCC 692**). Moreover, while upholding the constitutionality of Section 125 of the Act in the case of **Ram Sarup**, the Constitution Bench, had already propounded that the discretion to be exercised by the military officer specified in S. 125 of the Act as to the trial of the accused by court martial or by an ordinary court, cannot be said to be unguided by any policy laid down by the Act or uncontrolled by any other authority. There could be a variety of circumstances such as the exigencies of the service, maintenance of discipline in the Army, speedier trial, the nature of the offence and the person against whom the offence is committed, which may influence the decision as to whether the offender be tried by a Court-Martial or by an ordinary Criminal Court, and therefore it becomes inevitable that the discretion to make the choice as to which Court should try the accused be left to responsible military officers under whom the accused be serving. Still, the question regarding exercise of the discretion would arise only after the investigation was completed and the police report was available (**Superintendent and Remembrancer of Legal Affairs, West Bengal v. Usha Ranjan Roy Choudhury AIR 1986 SC 1655** referred to). In that case, like the facts of the present case, three army officers were charged with offences under Section 52 of the Army Act. The Army Authorities in that case had only requested for investigation to be made by the

civil police. After the investigation was complete, the criminal court proceeded to try the case without giving option to the Army Authorities as is envisaged by Rules 3 and 4 of the Criminal Courts and Courts Martial (Adjustment of Jurisdiction) Rules, 1952 to exercise their option. The Apex Court held that the action of the Army Authorities in calling for a detailed police report at the investigation stage could not amount to the Authorities under the Act exercising the option *not* to try the accused by the court-martial and the Army Authorities could not be said to have voluntarily abandoned their option to try the accused in court-martial. Further, as observed by the Supreme Court,in ***Balbir Singh v. State of Punjab, (1995) 1 SCC 90,*** the right to exercise the option is with the Authorities and an accused has no right to demand or choose trial by a particular forum.

15. A decision is an authority for what it decides and not for what could be inferred from the conclusion. There is always peril in treating the words of a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. (See **Padmasundara Rao** (dead) **v. State of T.N. AIR 2002 SC 1334)**

16. In this view of the matter, the decision in **R.S.Bhagat**'s case (above) cannot be treated as an authority for the proposition that in each and every case, based on circumstantial evidence and raising complicated questions of law the Commanding Officer or the other prescribed officer would be left to no other choice except to have the offender tried by an ordinary criminal court. It must be held to be confined to the peculiar facts of that case not laying down any principle of universal application. Apparently, the discretion under Section 125 was properly exercised in the wake of well-settled guidelines.

17. There is a yet another aspect of the matter. The petitioner instead of challenging the exercise of discretion under Section 125(supra) by the officer concerned for making a choice between criminal court and court-martial,

voluntarily submitting to jurisdiction of the Court Martial took a chance of a judgment in his favour. He now cannot take exception to jurisdiction of the SCM. (**Tikaram and Sons Ltd., M/s. v. Commissioner of Sales Tax, U. P. AIR 1968 S C 1286** relied on)

18. Adverting to the second ground, it may be observed that, by way of order dated 12.07.2006 (Annexure-R5) the petitioner and the co-accused were validly attached to the Base Hospital by the Competent Authority viz. the GOC-in-C with the said Disciplinary Authority till finalisation of the disciplinary proceedings. Moreover, a bare perusal of the order would reveal that it was passed in pursuance of the advice given by Dy JAG vide letter dated 01.07.2006 (Annexure-R4) to attach the accused persons including the petitioner to any other unit under the provisions of Army Order 7/2000 for the reason that Col B.M.Mishra, the OC Troops of Command Hospital, having been examined as a witness during investigation, was ineligible and disqualified to hold the SCM. In this backdrop, the order of attachment, copy of which was supplied to the petitioner alongwith the SCM proceedings, was perfectly valid as being in consonance with the said Army Order. The contention to the contrary also deserves rejection as being apparently misconceived.

19. This apart, by virtue of Section 116 of the Act, a SCM may be held by the Commanding Officer of the Corps, Department or Detachment of the Regular Army to which the delinquent belongs. The expression Commanding Officer is defined in Section 3(v) of the Act in the following terms:-

> *"Commanding Officer", when used in any provision of this Act, with reference to any separate portion of the regular Army or to any department thereof, means the officer whose duty it is under the regulations of the regular Army, or in the absence of any such regulations, by the custom of the service, to discharge with respect to that portion of the regular army or that department, as the case may be, the functions of a Commanding Officer in regard to matters of the description referred to in that provision".*

20. Reference may also be made to Para 9 of the Regulations for the Army (for short " the Regulations"), that says:

> *9. Commanding Officer. – Except where otherwise expressly provided in these Regulations, the Commanding Officer of a person subject to the Army Act is either: -*
>
> *(a) The officer who has been appointed by higher authority to be a commanding officer while able effectively to exercise his power as such, or*
>
> *(b) Where no appointment has been made, the officer who is, for the time being, in immediate command of –*
>
> *(i) The unit to which the person belong or is attached to, or*
>
> *(ii) Any detachment or a distinct sizeable separate portion of a unit with which the person is for the time being serving.*
>
> *And in respect of which it is the duty of such officer, under these Regulations or by the custom of the service, to discharge the functions of a Commanding Officer.*

21. Accordingly, the petitioner was rightly deemed to be belonging to the Unit to which he was attached.

22. Section 120 of the Act enumerates powers of the SCM. It reads:

> ***120. Powers of summary courts-martial**.—(1) Subject to the provision of sub-section (2), a summary court-martial may try any offence punishable under this Act.*
>
> *(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the Sections 34, 37 and 69, or any offence against the officer holding the court.*

(3) A summary court-martial may try any person subject to this Act and under the command of the officer holding the court, except an officer, junior commissioned officer or warrant officer.

(4) A summary court-martial may pass any sentence which may be passed under this Act, except a sentence of death or transportation, or of imprisonment for a term exceeding the limit specified in sub-section (5).

(5) The limit referred to in sub-section (4) shall be one year if the officer holding the summary court-martial is of the rank of lieutenant-colonel and upwards, and three months if such officer is below that rank.

23. Note 5 appended to the Section in the Manual of Military Law stood couched in these terms:-

" A NCO or a sepoy cannot be attached to another unit for the purpose of his trial by SCM except as provided in Regs Army para 381".

24. However, admittedly the Note has already been deleted by order of Govt. Of India, Ministry of Defence letter No.B/80328/JAG/1585/2001-D (AG) dated 28.08.2001. In **Vishav Priya Singh (Ex. LN) Vs. Union of India and Ors. 2008 VI AD (DELHI) 231** a Division Bench of Delhi High Court had set aside impugned verdict of SCM on a short ground, based *inter alia* on the Note referred to above, that it was not convened, constituted and completed by the CO of the Unit to which the petitioner belonged. Still, in the operative paragraph the Bench also suggested solution to a situation where allegations have been levelled against the CO of the Unit to which the accused belongs or where he is not readily and easily available to convene the SCM, by saying that in such a case, the accused may be subjected to trial by constituting any other Court Martial. In this view of the matter, the constitution of the SCM by the CO of the Unit to which the petitioner had been attached can also not be

questioned as illegal or incompetent. In other words,the decision in **Vishav Priya Singh**'s case is of no avail to the petitioner.

25. We, therefore, reject the plea of jurisdiction as not sustainable on any of the aforesaid grounds.

II. Violation of the provisions of AR 22(1) and 23

26. The next ground of attack against the validity of the pre-trial proceedings is based on AR 22(1) and 23. The averments made in the writ petition are to the effect that the petitioner had not pleaded guilty to the charge at any stage of the disciplinary proceedings. According to him,--

(1) Ignoring the fact that he was not examined as a witness by the Court of Inquiry, that had submitted its report on 27.05.2005 and AR 180 could not be invoked in his respect in, the CO did not examine any witness to ascertain whether he was prima facie blame worthy for the alleged offence and thus denied opportunity to cross examination any witness or to call witness in his defence.

(2) He wanted to call other members of the guard who were on duty in the fateful night to establish that he was present throughout the night at the place of duty and hence could not have taken part in the alleged theft.

(3) Prior to the hearing of charge proceedings, he had been illegally detained in police custody/ jail for 15 days.

(4) Provisions of AR23 (a) requiring that at the adjourned hearing evidence of witnesses shall be taken down in writing in the presence and hearing of the accused before the CO or such officer as he directs were contravened by permitting recording of Summary of Evidence by Lt Col NS Tiwari of AMC Centre and School, who being from a different unit was not under the Command of CO 11 Bihar and, therefore, the later had no authority in law to direct him.

27. However, the relevant records reflect that:

(a) the hearing of charge proceedings were carried out on 26.11.2005, in the presence of Capt. NK Mishra and Sub. Maj. KK Singh by Col. Devinder Singh, the CO of 11 Bihar.

(b) both the witnesses viz. Satyandra Kumar Singh, the investigating officer and Hav./Nursing Assistant SK Chauhan, who were heard, were subjected to cross-examination.

(c) The petitioner, on being informed that he was at liberty to make statement, came forward to admit that he had been involved in the theft in question.

(d) Col. Devinder Singh handed over tentative charge sheet to the petitioner on 26.11.2005 only.

(e) the Summary of Evidence was recorded by Lt. Col. SN Tiwari of AMC Centre and School, Lucknow.

28. Further, it is crystal clear from a bare reading of AR 23 that the officer recording S of E need not be the officer serving under the Command of the Officer, who had adjourned the case under AR22(3)(c) for the purpose of having the evidence reduced to writing. Moreover, in the instant case, no prejudice was caused to the petitioner due to assignment of the recording of S of E to Col NS Tiwari as he had been afforded a full opportunity not only to cross-examine the witnesses but also to call Sepoy/Nursing Asstt. Bamane Bhagawan Sheshe Rao as a witness to substantiate his plea of alibi.

29. In the light of these facts and circumstances of the case, the contention regarding violation of ARs 22(1) and 23 also deserves to be rejected.

III Virtual Denial of the right to defend

30. Learned counsel for the petitioner has further urged that since there was no urgency in the matter due to lapse of nearly 16 months after the incident of theft in question , trial by a DCM ought to have been ordered so as to enable him to engage a qualified lawyer and defend his case properly. In this regard, he has highlighted the under-mentioned facts:-

(a) The investigation was initially conducted by the civil police.

(b) SCM was presided by Col Chandra Shekhar,an officer of Army Medical Corps and a doctor by profession, who did not have the assistance of a professionally qualified Judge Advocate.

(c) As none of the Army Officers namely Maj Dewan Singh and Capt JP Pandey, detailed as friend of co-accused Pawan Kumar Dubey and the petitioner respectively, was a law knowing person, the cross-examination of the prosecution witnesses could be done in the most unprofessional manner.

31. The purposes of cross-examination are: 1) to discredit the witness; 2) to elicit testimony from the witness, which discredits unfavorable testimony given by other witnesses on the same side, creating a conflict with testimony of other witnesses on the same side; 3) to elicit testimony to corroborate favorable testimony; and, 4) to elicit testimony to support the case independently.

32. Having gone through the record of the proceedings, we are of the opinion that the goals of cross-examination were substantially attained. The tenor of the cross-examination of prosecution witnesses clearly reflects that it was not a sheer formality. The petitioner and the co-accused were well aware of the evidence collected during investigation and the missing links in the process. For example, while cross-examining Naik VD Hatkare (PW4), the petitioner posed a question whether the stolen properties were kept in his residence? The discrepancies in the timings of the seizure of the properties and production before the Magistrate were also highlighted. This apart, even veracity of the FIR was subjected to challenge. It is, therefore, not possible to hold that the defence was in any way prejudiced due to non-availability of a qualified lawyer.

IV Appreciation of evidence

33. A close scrutiny of the details of reasons for awarding punishment to the petitioner as given in the memorandum (Annexure R-3), would reveal that the

SCM proceeded to convict the appellant of the offence primarily on the basis of the following incriminating pieces of evidence -

(i) Extra-judicial confession.
(ii) Recovery of the stolen articles at the instance of the petitioner.

34. Lt Col SS Naware (PW-6) clearly deposed that, on 13.6.2005, he had recorded the petitioner's voluntary confessional statement(Exhibit 5) in the presence of Col B. N. Mishra, Senior Registrar of Command Hospital Central Command. Col B. N. Mishra (PW-8) also came forward to corroborate the corresponding part of the prosecution story by stating that the petitioner was duly cautioned before recording of his confessional statement and no inducement or threat given. As per the statement, the petitioner was also involved in the theft as well as in taking the stolen items to the civil accommodation occupied by Nk/NA VD Hatkare.

35. To buttress the argument that the extra judicial confession was sufficient to form basis of conviction learned counsel for the respondents has cited the decision in **Chandra Bonia v. State of Assam, (2011) 14 SCC 760.** In that case, while reaffirming the well settled principle that an extra-judicial confession is a very weak piece of evidence and ordinarily a conviction solely on the basis of such evidence cannot be maintained, the Apex Court observed that the confession made by the appellant to PW 7 was made in a different background inasmuch that as the appellant suspected that he had been identified by the witness he had returned to warn her not to divulge any information to anyone and very proximity of the murder and the extra-judicial confession spoke volumes as to its authenticity. In this context, the following facts were highlighted:-

(i)PW7's house was about 100 yd away from the murder site .(ii) when she had come out from her house to throw the starch out of the cooked rice, she had seen three persons running away from the house of the

deceased.(iii) a little later, the appellant-accused had come to her house carrying a dao and addressing her as didi had told her that he had murdered two persons and cautioned her not to disclose this fact to anybody otherwise .she too would be killed and (iv) on account of fear, she and her husband had left their residence and shifted to some other place.

36. Coming to the case in hand, it may be observed that the confessional statement was allegedly made nearly 20 days after the occurrence of theft. Moreover, it was not legally admissible as hit by Section 26 of the Evidence Act in view of the admissions made by Satyendra Kumar Singh (PW-7), a Sub Inspector of Civil Police that at the relevant point of time the petitioner placed under arrest on 12th June was still under custody and that he was present in the office complex when the statement was recorded. The pronouncement in **Chandra Bonia** 's case, therefore, is distinguishable on facts. Further, since the defence was able to probabilise that the petitioner was in custody of police while he had made extra-judicial confession before Col SS Naware PW6, the decision in **Aftab Ahmad Anasari v. State of Uttaranchal AIR 2010 SC 773** is also not applicable to the facts and circumstances of the present case. In that case, the law relating to the extra judicial confession was explained in these terms:

> *"The evidence relating to extra-judicial confession inspires confidence of this Court. Though extra-judicial confession is considered to be a weak piece of evidence by the courts, this Court finds that there is neither any rule of law nor of prudence that the evidence furnishing extra-judicial confession cannot be relied upon unless corroborated by some other credible evidence. The evidence relating to extra-judicial confession can be acted upon if the evidence about extra-judicial confession comes from the mouth of a witness who appears to be unbiased and in respect of whom even remotely nothing is brought out which may tend to*

indicate that he may have a motive for attributing an untruthful statement to the accused. In State of U.P. vs. M.K. Anthony, AIR 1985 SC48, this Court, while explaining the law relating to extra-judicial confession, ruled that if the word spoken by the witness are clear, unambiguous and unmistakable one showing 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, the extra-judicial confession can be accepted and can be the basis of a conviction. According to this Court, in such a situation, to go in search of corroboration itself tends to cause a shadow of doubt over the evidence and if the evidence of extra-judicial confession is reliable, trustworthy and beyond reproaching, the same can be relied upon and a conviction can be founded thereon."

37. Relying upon these observations made by the Supreme Court, learned counsel for the respondents has submitted that the fact that none of the stolen items was recovered from Nk/NA VD Hatkare's house wherein the same were stated to be kept did not assume any significance.

38. However, there is yet another aspect of the matter. As per the prosecution version, on 26.11.2005, at the stage of hearing of the charge, the petitioner even after cross-examining SI Satyendera Kumar Singh(PW-7) and the first informant Hav/NA Sunil Kumar Chauhan (PW-1) had admitted his complicity in the theft but this confessional statement was retracted in the S of E. In his statement recorded by Lt Col SN Tiwari on 08.04.2006, the petitioner had been emphatic in stating that he had remained in the guard room from 1800 hrs on 23.05.2005 to 0600 hrs on 24.05.2005. Moreover, in order to substantiate the plea, he had examined Sepoy/Nursing Asstt. Bamane Bhagawan Sheshe Rao. Further, the fact that extra judicial confession recorded

by Col. SS Narware (PW6) also stood retracted was suggestive of the inference that it was not voluntary. In such a situation as laid down in the case of **Shrishail Nageshi Pare vs State of Maharashtra AIR 1985 SC 866**, a general corroboration in material particulars from the other evidence on record was necessary. But as pointed earlier, the part of statement suggesting that the stolen articles were kept in the house of Nk/NA VD Hatkare (PW-4) remained unsupported.

39. Under these circumstances, no reliance could have been placed on the confessional statement said to have been made to Col. SS Narware.

40. As pointed out already, the other incriminating piece of evidence relied by the SCM concerns recovery of the stolen articles on 15.06.2005 at 2230 hrs from bushes located behind the Nursing Officers' Mess, Base Hospital, at the instance of the petitioner and the co-accused. Curiously enough, no one was summoned by the investigating officer SI Satyendra Kumar Singh (PW-7) to witness the proceedings relating to seizure of the stolen articles. We are not oblivious of the legal position that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written simply because recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. In this regard the following observations made by the Supreme Court in the case of **State, Govt. of NCT of Delhi v. Sunil, (2001) 1 SCC 652** may usefully be quoted :-

> *"Hence it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the investigating officer contemporaneous with such recovery must necessarily be attested by the independent witnesses. Of course, if any such statement leads to recovery of any article it is open to the investigating officer to take the signature of any person present at that*

time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth."

41. It is also well settled that if the evidence of Investigating Officer is convincing, the recovery of material object cannot be doubted on the ground that seizure witnesses did not support the contents of the corresponding memo **(See. Modan Singh v. State of Rajasthan AIR 1978 SC 1511)**. However, fact remains that no voluntary disclosure statement as contemplated by Section.27 of the Evidence Act and allegedly made by the petitioner was tendered in evidence. Besides this, the testimony of SI Satyendra Kumar Singh (PW-7), the investigating officer to the effect that the stolen items were recovered at 2230 hrs on 15 June 2005 (Answer No. 92) from the bushes behind the Nursing Officers' Mess suffered from the following material discrepancies and inconsistencies with the other evidence on record:-

(i) In his earlier statement recorded in the S of E, he had asserted that the recovery of the articles was effected from bushes behind Base Hospital Officers' Mess which is admittedly located at a distance of 2 km from the Nursing Officers' Mess.

(ii) Sub Maj SK Sharma, (PW-3) deposed before S of E and also before the Court that he and Col BM Mishra had seen the stolen items in the police station at 1700 hrs on 15 June (Answer No. 54) whereas Col BM Mishra, (PW-8) having admitted that he had gone to the police station on 15 June at about 1700 hrs expressed his inability to recollect whether he had seen the recovered items there. According to him, he had only seen a sealed bag said to contain the stolen articles in the Magistrate's Court on 16 June . However, Lt Col J.S. Sabharwal, PW-9

in his answers to question Nos. 192 and 193 deposed that he had seen the stolen items in the office of the Registrar viz. Col B.M Mishra and the same were brought there by the police for the purpose of identification. In one of the answers during cross examination, SI Satyendra Kumar Singh stated that the stolen items were recovered on 22 June (Answer No. 108).

42. Above all this, even an oral statement of the petitioner leading to discovery of the stolen articles more than 20 days after the incident from a place accessible to people of the locality was not admissible (**Abdul Sattar Vs UT Chandigarh AIR 1986 SC 1438** relied on). In the wake of these surrounding circumstances, the factum of discovery was not otherwise reliable,

43. For these reasons, we are of the considered view that on one hand, none of the incriminating pieces of evidence could be proved beyond a shadow of reasonable doubt and on the other hand, the probability of defence was also established. For this, reference may be made to the admission made by Sub Rajendran L (PW2) to the effect that being detailed as the Duty JCO for 23/24 May 2005, he had checked the guard of single Officers' accommodation at 2230 hrs on 23 May and at 0330 hrs on 24 May 2005, and found all the sentries including the petitioner present at their respective points of duty. In such a situation, the petitioner was certainly entitled to benefit of doubt.

44. Accordingly, the petition is allowed. The impugned conviction and consequent sentences awarded to the petitioner (since deceased) are set aside. The order dated 29 October, 2007 (Annexure P5) rejecting his statutory petition also stands quashed with the direction that he shall be deemed to be in service till he became entitled to earn his service pension as admissible under the relevant regulations, on completion of minimum qualifying service. The respondents are further directed to disburse pensionery and other retiral

benefits payable to the petitioner to such legal representatives as are eligible under the relevant regulations to receive the same.

(R.C. MISHRA)
MEMBER (J)

(S.K. SINGH)
MEMBER (A)

New Delhi
Raj/31.3.15