

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI**

**T.A NO. 178 OF 2009
(Writ Petition (C) No. 1211 of 1996)**

**D. Udayan, Spr/DMPT No. 1382308 M,
432 Fd Coy, Kanchrapara, Calcutta, West Bengal,
R/o Vilayil Veedu, Archa,
Verroor Village, Nediya Post,
Quilon District, Kerala-691 306.**

Through: Mr. C.N Srikumar, Advocate

.. Petitioner

Versus

- 1. Union of India, through Secretary,
Ministry of Defence,
New Delhi.**
- 2. Chief of Army Staff,
Army Headquarters, Karasena Bhavan,
New Delhi.**
- 3. GOC-IN-C, Eastern Command
Headquarters, Eastern Command,
Fort William, Calcutta-700 021.**

**4. Commanding Officer,
15 Engr Regt, 99 APO**

Through: Lt. Col. Naveen Sharma

.. Respondents

CORAM

**Hon'ble Mr. Justice S.S Kulshreshtha, Member
Hon'ble Lt. Gen. S.S Dhillon, Member**

JUDGMENT

DATED : 17.11.2009

1. This petition has been filed for quashing the finding and sentence awarded by the Summary Court Martial held at 15 Engineer Regiment from 17 – 25 October 1994, which passed the sentence of dismissal from service against the petitioner. The appellant has also pleaded that he be reinstated in service with full backwages and other benefits.

2. A brief narration of the facts of the incident are that: On 18/19th June 1994, the petitioner was serving in 15 Engineer Regiment under the command of Col. P.S Sanghera, who was his Commanding Officer. On the night of 18/19.6.1994, there was a theft in the house of

Maj. S.P Nawathe, an officer of the same regiment. The petitioner was held guilty of the theft and tried by a Summary Court Martial on two charges viz. under Section 52F of the Army Act for committing theft of property belonging to a person subject to military law and under Section 69 of the Army Act for committing a civil offence, that is to say, house breaking by night, contrary to Section 456 of the Indian Penal Code.

3. In his defence, the learned counsel for the petitioner stated that Sapper Udayan (the petitioner) was at that point of time doing the duties of helper (Assistant/Sahayak) to Lt. Col. Vijai Kapoor. On 18.6.1994, there was a party in the Officers' Mess of 15 Engineer Regiment, wherein all officers of the regiment attended. In their absence, the petitioner, Sapper Gopi, Sapper Muthalagu, Sapper Radhakrishnan and Naik Venkateshwaralu had a private party, where all of them, except Sapper Radhakrishnan (who was a teetotaler) consumed alcohol. The petitioner states that during the course of the evening, he was drunk. He also states that the injury sustained by him on his hand was on account of his fall from a cycle after such drinking.

4. Counsel for the petitioner repeatedly urged that the sole evidence, on which the petitioner had been convicted for robbery was the injury on his hand. According to the police who visited the site, as well as the Army personnel investigating the case, the wire mesh of Maj. Nawate's house had been broken into and the thief, who inserted his hand through the wire mesh to open the bolt, would have obtained some scratches on his hand. Accordingly, the entire exercise of enquiry centred around finding an individual with such injuries on his hand. Therefore, when they noticed that the petitioner had some injuries on his hand, albeit on account of a fall from a cycle, they pre-supposed that he is the thief. The petitioner has contended that this is mere suspicion and there is no evidence, whatsoever, to support the suspicion. Neither was any medical examination done nor blood samples matched with any that may have been obtained from the wire mesh or the evidence of any witness who has seen the petitioner in proximity of the house that was burgled. It was also argued on behalf of the petitioner that it is an undisputed fact that the petitioner did fall from his cycle. This fact is borne out by PW 5 Sapper Muthalagu, who was double-riding with the

petitioner on the cycle. The only dispute is the number of times that they fell. Some witnesses have said that he fell once (PW 5 Sapper Muthalagu and Sapper C. Shanmugam) while the petitioner has stated that he fell thrice. It is also evident from the statements of PW 3 Sapper Gopidasan, PW 4 Sapper Radhakrishnan and PW 6 N.K Venkateshwarlu that the petitioner and Sapper Muthalagu, who was double-riding with him, were both drunk at the time of falling off their cycles.

5. Counsel for the petitioner has time and again stressed on the fact that the injuries on the hand of the petitioner have been sustained on account of his falling off the cycle. The proposition that the injury was obtained when the petitioner put his hand through the wire mesh is totally unsubstantiated and without any supporting evidence.

6. Counsel for the petitioner also contended that the Sahayak of Maj. Nawate viz. Sapper Radhakrishnan (PW 4), in his testimony, when asked as to who all knew about the contents of the cupboard in Maj. Nawate's house, replied that only he, Sapper Muthalagu and Company Sweeper Sivola C. Kumar knew about the contents. The

petitioner's name is not mentioned amongst the names of such persons who knew about the contents of the cupboard.

7. Another material issue at hand is that although the petitioner was tried during the Court Martial on two charges, i.e. under Section 52F of the Army Act for theft and under Section 69 of the Army Act for house breaking, and found guilty by the Summary Court Martial on both the charges, when the Court Martial proceedings were sent to the competent confirming authority ie. Commander, Calcutta Sub area for confirmation, he changed the finding of "guilty" in respect of the charge under Section 52F of the Army Act to "not guilty". He, however, confirmed the charge of guilty under Section 69 of the Army Act and also the sentence of dismissal.

8. The petitioner's contention is that when the main charge of robbery has been dropped, the attendant charge of house breaking has no relevance because there was no motive or crime and neither has he indulged in such house breaking act.

9. He further urged that since the main charge of robbery had been dropped, the second charge of trespass was totally unsubstantiated as no witness or any other proof has emerged about the presence of the petitioner in the proximity of the house let alone seen him enter the house. Even this finding of guilty is based solely on the so called injuries on the hand of the petitioner. It is grossly irregular that even after converting the finding against the main charge from guilty to not guilty, the punishment remained the same! This is irregular and against the law. This callous attitude on the part of the Army was also borne out by the fact that even the Chief of Army Staff on 1.10.1996 when responding to the petition of the petitioner still continues to state that the individual was tried for two charges. There is no mention by the Chief of Army Staff that he knew that the individual was held not guilty on the first charge under Section 52(f) of the Army Act. It could, therefore, be presumed that he was unaware of the fact that the petitioner had been found not guilty on one of the charges. The "cryptic" directions of the Chief of Army Staff are appended below:

"1. I have examined the petition dated 20 Apr 95 submitted by No. 1382308M Ex Spr/DPMT D Udayan of 15

Engr Regt against the finding and sentence of Summary Court Martial (SCM) dated 17 Oct 94.

2. The above named individual was tried for two charged(s) under Army Act Section 52(f) and 69, that is committing theft of property belonging to a person subject to Military Law and committing a civil offence that is to say house breaking by night contrary to Section 456 of the Indian Penal Code (IPC) respectively. He was sentenced to be dismissed from service.

3. I reject the petition as it lacks substance".

10. We are of the view that a single isolated fact, uncorroborated by any other evidence or circumstances cannot by itself constitute adequate and wholesome evidence to convict the petitioner.

The learned counsel for the parties took us in detail into the relevant evidence and all materials on record to substantiate their respective stand. The learned counsel for the appellant contended that being a case depending merely upon circumstantial evidence, the prosecution miserably failed to prove the circumstances satisfactorily to complete the chain of circumstances so as to establish conclusively the guilt of the accused in this case in a manner that rules out every hypothesis inconsistent with the innocence. According to the learned counsel for the petitioner, the missing links were not explained by the

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prosecution. Total judgment is based on surmises resulting in grave injustice.

11. Under the present circumstance, we set aside the order of the Summary Court Martial dismissing the petitioner and direct that he be reinstated in service with full backwages. Parties shall bear their costs.

(Lt. Gen. S.S Dhillon)
Member

(Justice S.S Kulshreshtha)
Member

Pronounced in the Open Court
Today, 17th November 2009