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IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

T.A NO. 239 OF 2009
(Writ Petition (C) No. 2134 of 1999)

1. Smt.Bidami Devi, deceased petitioner's mother.
2. Smt.Sharda Devi, deceased petitioner's widow.
3. Rajveer Singh, deceased petitioner's son.
4. Kanchanbara (minor), deceased petitioner's daughter through Smt.Sharda Devi, deceased petitioner's widow.
All residents of Village andn Post Office Kumawas (Khichran), Kumawas Via Dumra, Distt. Jhunjhunu, Rajasthan.

18.2.2010

Through: Mr. M.G Kapoor, Advocate

.. Petitioner

Vs.

1. Union of India
Through the Secretary
Ministry of Defence, South Block
New Delhi – 110 011.

2. Chief of the Army Staff
Army HQ South Block, New Delhi – 110 011.

3. General Officer Commanding
HQs 15 Infantry Division
C/o 56 APO.

Through: Lt. Col. Naveen Sharma

.. Respondents

CORAM

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

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JUDGMENT
15.01.2010

1. Challenge is against the order passed by the General Court Martial (GCM, for brevity) dated 12.2.1988, whereby the accused-petitioner was found guilty of the charge punishable under Section 120-B of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for one year and six months and dismissed from service. The punishment was affirmed by the Chief of Army Staff. Relief has also been sought to reinstate the petitioner in service with all backwages and consequential benefits.

2. It is contended on behalf of the petitioner that the entire case was fabricated to implicate the petitioner falsely in a conspiracy to allow a smuggler to cross the international border of the country. The GCM found him guilty based on no evidence. The testimony of a co-accused was accepted as evidence which is not acceptable under the law. The accused cannot appear as a witness in the same case, where he was jointly tried

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with the co-accused. His position in such a situation would not be that of an approver. The accused should not be tried jointly when the co-accused was also termed in the same proceedings as an accomplice or approver. Further, procedural requirements as envisaged under Army Rules 22 and 97(2) were not adhered to by the Commanding Officer. The appellant was not given legal assistance by providing the service of a civil lawyer. On the other hand, the prosecution was represented by a competent civil lawyer. There was no fair trial.

3. The facts of the case, in brief, are as follows: While the petitioner was performing his duties at the post known as 'Tower Post', one Sepoy by name Jag Mehar Singh had approached the petitioner and sought his help to allow some smugglers to cross the international border. The petitioner was alleged to have been told that he would be paid handsomely in case he helped the smugglers for the purpose. The petitioner agreed to help them to cross the border. Sepoy Jag Mehar Singh was nabbed and subjected to interrogation. Thereupon, the petitioner's name was disclosed by Sepoy Jag Mehar Singh. Statements of the

witnesses were recorded. The provisions of Army Rules 22 and 23 were resorted to and there was a joint trial of both the accused and Sepoy Jag Mehar Singh.

4. The appeal was resisted on behalf of the Union of India contending, inter alia, that Sepoy Jag Mehar Singh along with one civilian was apprehended on 8.9.1987 by the Border Security Force, Nekapaty near Village Veera, Punjab. On interrogation, Sepoy Jag Mehar Singh revealed about the involvement of the petitioner in the case. It was further revealed that the petitioner had agreed to help the smugglers to cross the border. The petitioner is also stated to have confessed before the Liaison Unit with regard to his agreement to help the civilian, Ajit Singh, to cross the border. After affording hearing on the charge under Army Rule 22, the Commanding Officer ordered for summary of evidence, wherein the evidence of Sepoy Kulveer Singh was also recorded and there is no inhibition in appearing the accused as a witness against the co-accused. The Army Rules were strictly adhered to and adequate

opportunity was given to the accused-petitioner to contest the case by engaging a civil lawyer of his choice.

5. It has been vehemently argued by counsel for the petitioner that as would appear from the charge sheet, there was joint trial of all the three accused persons. All the three accused stood as witness against each other. Such a joint trial, on the basis of the confessional statement made by Sepoy Jag Mehar Singh, would not be read as evidence against the co-accused. Moreover, such a joint trial was not allowable in view of the provisions contained in Army Rule 35 and for that purpose, notice, as contemplated under Army Rule 35(4) is to be given. Army Rule 35 reads as under:

> "35. Joint trial of several accused persons
> (1) Any number of accused persons may be charged jointly and tried together for an offence averred to have been committed by them collectively.
>
> (2) Any number of accused persons, although not charged jointly, may be tried together for an offence averred to have been committed by

one or more of them and to have been abetted by the other or others.

(3) Where the accused are so charged under sub-rules (1) and (2), any one or more of them may at the same time be charged with and tried for any other offence averred to have been committed individually or collectively, provided that all the said offences are based on the same facts, or form or are part of a series of offences of the same or similar character.

(4) In the cases mentioned above, notice of the intention to try the accused persons together shall be given to each of the accused at the time of his being informed of the charges, and any accused person may claim, either by notice to the authority convening the court or, when arraigned before the court, by notice to the court, that he or some other accused be tried separately on one or more of the charges included in the charge-sheet, on the ground that the evidence of one or more of the other accused persons to be tried together with him, will be material to his defence, or that otherwise he would be prejudiced or embarrassed in his defence. The convening authority or court, if satisfied that the evidence will be material or that the accused may be prejudiced or embarrassed in his defence as aforesaid, and if the nature of the charge admits of this, shall allow the claim, and such accused person, or, as the case may be, the other accused person or

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persons whose separate trial has been claimed, shall be tried separately. Where any such claim has been made and disallowed by the authority convening the court, or by the court, the disallowance of such claim will not be a ground for refusing confirmation of the finding or sentence unless, in the opinion of the confirming authority, substantial miscarriage of justice has occurred by reason of the disallowance of such claim."

It is clear from Army Rule 35 that it is the discretion of the Court to amalgamate the cases against the accused persons if they relate to the same incident, provided their interest is not inconsistent with each other. The only requirement that the Court has to satisfy is that the accused is not prejudicially affected and that it is expedient to amalgamate the cases. Instruction had also been issued by the Army for the guidance of the officers convening Court Martial proceedings, wherein joint trial of the co-accused, who has conflicting interest both as a witness and as an accused in the same trial, has been disapproved. The guidelines read as follows:

"4. If in any case two or more persons are suspected of complicity in an offence, and it is found necessary to call one of these as a witness for the prosecution against the other or others charged in connection with the offence, one of two courses must be taken, either –

(a) Proceedings against him must be abandoned and any charge therein already preferred against him dismissed; or

(b) Steps must be taken to ensure that the case against him is disposed of summarily or tried by court martial, before the trial of persons concerned against whom he is to give evidence, and that he is, only tendered as a witness when he has already been acquitted or convicted.

In all such cases the circumstances and the course proposed should be fully set out in a covering letter to the convening officer."

It has further been pointed out that one of the co-accused, Sepoy Jag Meher Singh, made a confessional statement and disclosed the name of the petitioner. If that is read as evidence, it would materially affect the interest of the petitioner. Moreover, a co-accused cannot appear as a witness against his own cause. From the

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materials on record produced by the respondents with the summary of evidence recorded on 12.10.1987, it is clear that Mahinder Singh (the petitioner) was shown as a prosecution witness. In another summary of evidence recorded against another co-accused, Sepoy Kalvir Singh on 12.10.1987, the accused-petitioner was examined as a prosecution witness. When the summary of evidence was recorded against the accused-petitioner on 11.11.1987, co-accused Sepoy Jag Meher Singh deposed against the accused-petitioner in the summary of evidence. The summary of evidence is alleged to have been recorded mechanically. It would appear that there was a joint trial of all the three accused involved in the act of conspiracy to allow the smugglers to cross the border. In this case, the position of each of the accused was as that of accomplice.

6. Under Section 33 of the Indian Evidence Act, an accomplice can appear as a witness in a case where he is not an accused. In this case, as has already been referred, there was a joint

trial of all the three accused and one appeared as a witness against another. The testimony of the accomplice was taken into account by the GCM. At the very threshold, it suffers from the infirmity as they are also facing trial in the case. It causes certain doubts as to the truthfulness and such statement of the accomplice would not lend support so far as guilt against the co-accused is concerned. The testimony of the accomplice cannot be admissible unless there are other circumstances or evidence from an independent source lending assurance to the mind of the GCM that the evidence adduced by the accomplice is true as against another accused and it would be safe to act on the testimony of the accomplice. No independent witness was examined by the prosecution. Therefore, such a statement made by the accomplice cannot be read in evidence.

7. It has next been contended that there are statements of all the three accused recorded at the stage of summary of evidence. Such statements made before the Court would not be

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construed as a confession. It is well settled that the confession of a co-accused is not substantive evidence against another accused in the same trial. As the apex Court held in **Kashmiri Singh** v. **State of Madhya Pradesh** (AIR 1952 SC 159), confession of a co-accused is not substantive evidence against other accused persons at the trial, but could be used for lending assurance if there is other substantive evidence to be utilised or acted upon. Here, there is no substantive evidence or circumstantial evidence to fasten guilt against the accused-petitioner. In **Haricharan** v. **State of Bihar** (AIR 1964 SC 1184), the apex Court observed at page 1188 thus:

> "The confession may be regarded as evidence in that generic sense because of the provisions of Section 30 of the Evidence Act. The fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of the co-accused person and it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality of the evidence and effect of unsaid evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt with

the judicial mind which is about to reach on the other evidence".

8. As has already been stated, the confession implicating the co-accused recorded in the summary of evidence cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept the other evidence and feels the necessity of seeking assurance in support of its conclusion deducible from the evidence. There is no evidence on record to lend corroboration to the so called statement/confession.

9. As regards the charge of conspiracy against the accused-petitioner, it may be mentioned that there is no evidence against him except the extra-judicial confessional statement of the co-accused which does not get corroboration from independent evidence. To establish the charge of conspiracy, there must be cogent evidence of meeting of two minds in the matter of commission of the offence, in the absence of which, the charge

cannot be said to have been established. There is no substantive evidence against the accused to prove the offence of conspiracy. Reliance may also be placed in the case of **State of Madhya Pradesh** v. **Paltan Mallah and others** (AIR 2005 SC 733).

10. Further, it has been contended that the prosecution was assisted by a competent lawyer. On the other hand, the petitioner was not given a fair trial by providing a civil lawyer to defend him. In that regard, the observation made by the apex Court in **Ranchod Mathur Wasawa** v. **State of Gujarat** (AIR 1974 SC 1146) was also referred to contend that 'indigent should never be a ground for denial of equal justice. Attention should be paid to appoint competent advocates equal to holding the complex cases – not patronizing gestures to raw entrants to the war'. From the circumstances of the case, it is clear that the petitioner was not given the assistance of a civil lawyer to defend him. Moreover, the statement made by the accused in the capacity of witness does not get corroboration from other independent evidence. Further, there

is no evidence, either direct or circumstantial, to corroborate the meeting of minds of the accused-petitioner with other accused for committing the offence. There is no corroboration to prove the culpability of the accused-petitioner under Section 120-B of the Code.

11. The petition is allowed. The impugned order is set aside. The petitioner shall be deemed to have been reinstated in service from the date of his dismissal and will be entitled to all backwages till he attained the age of superannuation and the period of interregnum shall be counted for pensionary benefits.

Amended vide the order dated 18.2.2010 and substituted as below

(LT. GEN. S.S DHILLON)
MEMBER

(JUSTICE S.S KULSHRESHTHA)
MEMBER

The petitioner shall be deemed to have been reinstated in service from the date of his dismissal and entitled to all back wages till he attained the age of superannuation. The interregnum period shall be counted for pensionary benefits also. The legal representatives of the deceased petitioner shall be entitled to draw all such dues which were payable to the petitioner before his death. Subsequently, the family pension matters etc. shall be decided as per rules.

It is hoped and expected that the respondents shall finalise the dues within a period of six months.

S.S.DHILLON 18.2.2010
(Member)

S.S.KULSHRESHTA
(Member)