

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

**TA/254/09
IN W.P.C. No. 7827/2009**

**COLONEL HARVINDER SINGH KOHLI
R/O. D-501 LAGOON APARTMENTS
AMBIENCE ISLAND
GURGAON-122 022.**

**THROUGH : MS. REKHA PALLI, ADVOCATE
MS. POONAM SINGH, ADVOCATE**

...PETITIONER

VERSUS

- 1. THE UNION OF INDIA
THROUGH THE SECRETARY
MINISTRY OF DEFENCE
SOUTH BLOCK
NEW DELHI-110 011.**
- 2. THE CHIEF OF ARMY STAFF
SOUTH BLOCK
NEW DELHI-110 011.**
- 3. THE GENERAL OFFICER COMMANDING-IN-CHIEF
EASTERN COMMAND
FORT
KOLKATTA-21**
- 4. THE GENERAL OFFICER COMMANDING
3 CORPS
C/O. 99 APO**
- 5. MAJOR GENERAL RAVINDERS SINGH (RETD.)
EX GENERAL OFFICER COMMANDING
57 MOUNTAIN DIVISION
(SERVICE THROUGH AG'S BRANCH,**

**MP DIRECTORATE, ARMY HQ, SENA BHAWAN
NEW DELHI)**

**6. BRIGADIER S.S.RAO
EX COMMANDER, 73 MOUNTAIN BRIGADE
DY GOC 36 INFANTRY DIVISION
C/O. 56 APO**

**THROUGH : SH. ANKUR CHHIBER, ADVOCATE
LT COL NAVEEN SHARMA**

...RESPONDENTS

CORAM :

**HON'BLE SH. S.S.KULSHRESTHA, MEMBER
HON'BLE SH. S.S.DHILLON, MEMBER**

**J U D G M E N T
DATE : 11.01.2010**

1. Challenge in this appeal is to the finding and order of the Court Martial dated 06.08.2004 whereby the petitioner was dismissed from service in gross violation of Army Rule 52 and 54 and also the subsequent orders dated 18.03.2008 and 20.02.2009 passed by Union of India on the post confirmation petition and also the order dated 20.02.2009 of Union of India declining to interfere with the sentence awarded to the petitioner.

2. It is contended by the petitioner that from the date of his entry in the Artillery Regiment he worked with all sincerity and

dedication in field areas and at high altitude. ACR's dossier also reflects his outstanding performance. The petitioner assumed command of 175 Field Regiment on 01.04.2000 and was also empanelled for promotion to the rank of Colonel by a duly constituted Selection Board and was promoted to the rank of Colonel on 01.09.2000. The petitioner remained in command of the said unit. In December 2003, he commanded successfully and apprehended number of Militants in North East. Brig. S.S.Rao (Respondent no.6) then Commander of 73 Mountain Brigade started pressuring petitioner to report kills by showing encounter so as to boost the image of the Brigade Commander and also to bring laurels to the Unit. The petitioner refused to succumb to such pressure and expressed his inability to kill innocent people. The respondent no.6 continued to mount pressure on the petitioner. On 17.08.2003 his Unit received a message that Respondent no.6 would visit the Unit in the afternoon the same day. He visited the unit the very same day at 12:30 hrs. and was received by Major J.S.Babbar, Captain Amitabh Kumar and Lt Sharma. The Unit again informed the respondent no.6 on his arrival that they had five militants in their custody. Respondent no.6 then directed to show them as "kills" to which the petitioner did not agree as the order itself was illegal. Respondent no.6 thereafter advised him to send a party which should fire in the air near Village Bara Nagadung so as to give impression to the villagers that an encounter with militants was

in progress and subsequently these five militants who were in custody could be deemed to have been killed in their encounter and report sent accordingly. Respondent no.6 also advised that after managing such killing the bodies should be shown to have been left behind mentioning because it was raining in the night and the terrain was bad but the recovered arms had been brought back. On the following day, a search party be sent which should report on return that the bodies were found missing. The petitioner and his other colleagues had to carry out the orders of respondent no.6 and for that he had been dragged to face GCM proceedings. There was no ill design motive on the part of the petitioner to have made false report about their killing except that he ensured the compliance of the directions of his superiors. The complicity of the respondent no.5 and 6 is well proved from the materials on record including from the taped version but while awarding punishment to them they were dealt differently and lenient punishment was awarded to them. He also made representation to the Chief of Army Staff who also recommended for lenient punishment keeping in view the orders passed against other officers who were associated in the said crime but the Union of India discriminated in the matter of petitioner and gave him severe punishment by way of dismissal from service.

3. It is further alleged that on the anonymous complaint about fake encounter on the night intervening 17th and 18th of August, 2003 the petitioner was made scapegoat whereas the entire scheme was hatched by respondent no.6. Further the compliance of statutory Rule 57 (a) and 63 was not ensured resultantly in the entire trial being vitiated.

4. This petition was resisted by the respondents contending that the petitioner along with Maj J.S.Babbar were tried by a GCM. Five charges were levied against the petitioner for having committed civil offence i.e. criminal conspiracy whereby false reporting of an encounter for the purposes of bringing laurels to his Unit and also made a false statement about that killing which could make out case u/s.57(a) R/w. Section 34 IPC. He also sent false report to senior officers knowing about the killing which was prejudicial to the good order and military discipline. He pleaded guilty against all the five charges made against him. His statutory petition u/s.164(2) of the Army Act was also rejected by UOI. Apart from it for setting up false case in obedience of alleged orders given by Respondent no.6 he planned fake encounter and forwarded citations including photographs etc. There is ample evidence on record to substantiate the charges levied against the petitioner coupled

with his plea of guilt. Further it is also contended that for such fraud played by the petitioner he deserves severe punishment.

5. To answer rival contentions of the parties it shall be useful to extract all the five charges which were made against the petitioner.

They are as under:

First Charge
Army Act Section 69
Read with IPC Sec
120 B
(Against both accused)

COMMITTING A CIVIL OFFENCE,
THAT IS TO SAY, CRIMINAL
CONSPIRACY, CONTRARY TO
SECTION 120 B OF THE INDIAN
PENAL CODE

in that they together,

at field, on or about 17 August 2003, while performing duties of Commanding Officer and Battery Commander of 175 Field Regiment respectively, agreed to cause to be done an illegal act to wit, using evidence known to be false, whereby a plan was made to fabricate an encounter with militants of ASSAM COMMANDO GROUP on night 17/18 August 2003, and the said act was done in pursuance of the agreement.

Second Charge
Army Act Section 57(a)
Read with IPC Sec 34
(against both accused)

IN A REPORT MADE BY THEM
KNOWINGLY MAKING A
FALSE STATEMENT

in that they together,

at field, on 18 August 2003, while in the capacity as aforesaid in the first charge in a special situation report made by them and forwarded to HQ 73 Mountain Brigade furnished details about an encounter of 175 Field Regiment personnel with the elements of

ASSAM C OMMANDO GROUP
on night 17/18 August 2003, well
knowing that no such encounter
had in actual fact taken place.

Third Charge
Army Act Section 57(a)
(Against accused no.1
only)

IN A DOCUMENT SIGNED BY
HIM KNOWINGLY MAKING A
FALSE STATEMENT

in that he,

at field, on 12 September 2003,
while in the capacity as aforesaid
in the first charge, in a citation
dated 12 September 2003, made in
respect of Accused no.2, stated as
follows:

“Displayed exceptional gallantry,
command ability and leadership in
the face of hostile fire and the
column eventually succeeded in
killing five ASSAM COMMANDO
GROUP terrorists and recovering
one 9 mm Browning pistol, two
double barrel breech loading rifles,
four single barrel breech loading
rifles, 250 grams of Gun powder,
lead pellets and incriminating
documents.”

Well knowing the said statement to
be false.

Fourth Charge
Army Act Section 57
(a) (Against accused
no.1 only)

IN A DOCUMENT SIGNED BY
HIM KNOWINGLY MAKING A
FALSE STATEMENT

in that he,

at field, on 12 September 2003,
while in the capacity as afore
stated in the first charge in a
citation dated 12 September 2003,
made in respect of JC-264960K
Naib Subedar (TA) Jaswant Singh
of 175 Field Regiment, stated as
follows:

“Displayed gallantry and

leadership of an exceptional order in the face of hostile fire. Used his ingenuity and self initiative with utter disregard to personal safety to come in close proximity to two militants who were holed up in dead ground and were firing indiscriminately and shot down both of them. In the process, he got bullet shots on his bullet proof jacket.”

Well knowing the said statement to be false.

SIXTH CHARGE
Army Act Section 63
(Against Accused no.1)

AN ACT PREJUDICIAL TO
GOOD ORDER AND MILITARY
DISCIPLINE

in that he,

at field, between 15 November and 15 December 2003, while in the capacity as afore stated in the first charge improperly advised following person of 175 Field Regiment to make false statements about killing of five militants and recovery of arms and ammunition on night 17/18 August 2003, before a Court of Inquiry, converted vide Headquarters 57 Mountain Division convening order no.57380/175 Fd Regt/A dt 11 November 2003.

- (a) JC-264960K Nb/Sub (TA) Jaswant Singh
- (b) 14370396F Hav (GD) Jarman Singh
- (c) 15135496A L/Nk (DMT) Harjit Singh
- (d) 14374350W Hav (GD) Gita Singh
- (e) 14398781F Hav (TA) Karnail Singh
- (f) 14354149K Hav (Opr) Manjit Singh
- (g) 15140118L Gnr (DMT) Gurmail Singh

- (h) 15137666X L/Nk (GD)
Gurminder Singh**
- (i) 13492512Y Hav (Opr) Jaspal
Singh**
- (j) 1442655H L/Nk (Opr) Sarabjit
Singh**
- (k) 15149740A Gnr (GD) Jasveer
Singh**

6. The petitioner admitted his guilt before the GCM and the certificate as required under Army Rule 115 (2) was also given by the GCM mentioning that all the charges were read and explained to the petitioner who pleaded guilty. Caution was also given to him that such plea of guilt would be read against him. This was the position of the five charges read and explained to the petitioner. On 04.08.2004 in the GCM the accused again pleaded guilty, but the GCM anyhow observed that it appears that on account of tremendous and environmental/organisational pressures the petitioner is accepting his guilt and so the GCM construed such plea of guilt to be not bonafide and treated his statement to be “Not Guilty”. The petitioner appears to have understood the benevolent approach of the GCM but he insisted upon recording his ‘plea of guilt’ and asserted that it should all be read in that manner and those statement of his should not be taken to negate his plea of guilt. Such note of his ‘plea of guilt’ was taken by the GCM. The petitioner also owned his responsibility for such design. All these factors were taken into consideration by the GCM and his plea of guilt was recorded. On the

basis of such plea of guilt the petitioner was convicted for all the five charges and was punished by way of dismissal from service.

7. The first and the foremost point agitated from the side of the petitioner is that the petitioner being Commanding Officer of the Artillery Unit declined to carry out the order of the respondent no.6 for killing of the five militants who were caught by his Unit but on his directions he had no option except to prepare the case of killing and he had to manufacture the evidence. Such obeying of the Command was undoubtedly his fault but his culpability was not more than the Senior Officer whose fault was viewed with leniency while awarding punishment to them. It was obvious from the charges and for which there was admission from the side of the petitioner that would undoubtedly be admissible in evidence. Such plea of guilt was deliberate and voluntarily. At the second occasion when the GCM intended to convert his statement construing it to be 'not guilty' instead of guilty, he insisted for mentioning his specific plea of guilt in the matter. Under Army Rule 115(2), there is a statutory provision which lays down the precautionary rules so as to ensure voluntariness and the accused being placed free from threat and influence of the superior. The accused through out pleaded guilty and even the GCM had also taken all precautions while explaining

him and the certification u/s.115(2) was also given by them. Such plea of guilt is admissible in evidence. It is a relevant fact that a judgment of conviction can be based on such admission, where it is found to be truthful, deliberate and voluntarily.

8. The declaration of the Commanding Officer of the Unit is generally taken as the gospel truth unless the correctness of such declaration is disputed or challenged with cogent proof showing facts to the contrary. Here in this case there is ample evidence of making false declaration. Even the petitioner nowhere desired that he managed false papers so as to show the killing of militants in an encounter and thereafter sent report to citation so that all concerned including Unit get commendations. Such act on the part of the petitioner was inconsistent with the interest of military service and not befitting the status, position and dignity of the Commanding Officer. Whether he ensured false encounter on the instructions of senior officers, would be immaterial. It was observed by the Apex Court in the case of *Union of India and Others Vs. Harjeet Singh Sandhu (2001) 5 SCC 593*, in the background of Rule 14 of the Army Rules, it was held that any wrongful act or any act of diligency which may or may not involve moral turpitude would be 'misconduct' under the Rule 14. Identical view was expressed by

Supreme Court in the case of *Baldev Singh Gandhi Vs. State of Punjab and Others (2002) 3 SCC 667*, that the expression ‘misconduct’ means unlawful behaviour, misfeasance, wrongful conduct, misdemeanour etc. The petitioner in the capacity of Commanding Officer, did not maintain absolute integrity, devotion to duty and did an act complained of bears forbidden quality or character.

9. The petitioner was commanding the Unit and it was expected on his part to have maintained high discipline and moral integrity. Morale and discipline are the very soul of an Army Officer and no other consideration, howsoever important, can out-weigh the need to strengthen the morale of the Armed Forces and to maintain discipline amongst them. He being the Commanding Officer was accountable for his acts or omissions and not to have been swayed by the wrongful command of his seniors. He cannot take the plea that he was faithfully discharging the orders of his superiors. The Doctrine of “full faith and credit” applies to the act done and performed. His duty is to faithfully discharge his duties to elongate the public purpose and to be in accordance with the procedure prescribed. It is undisputed as from the charter of duties, the responsibilities of the Commanding Officer that he is required to act in accordance with the rules. Commanding Officer is the

ultimately responsible and accountable for the action done and decision taken by him. He was also under obligation not to succumb to the illegal command of senior to prepare forge papers showing killing of five militants.

10. It is next contended that the petitioner had no ill design to prepare the forged papers so as to bring name and fame to his Unit or to superior officers. It was pursuant to the directions of his seniors he had to submit the papers showing encounter. The GCM and the Chief of Army Staff had taken strict view of the offence where fraud is proved against the petitioner but only because it is found to have been committed on account of the directions of the superior officers, the same may not lead to the conclusion that the petitioner was not involved in this conspiracy. The forged papers were prepared under his supervision and he would be liable for the acts of criminal misconduct.

11. There is ample evidence to fasten the culpability of the petitioner and charges have also been established. He has also admitted his guilt. It is at this juncture the conduct in the matter of preparing false report and stage managing the supposed killing of five militants on the

part of the petitioner without demur, which in turn make the principle of estoppels by conduct applicable in his case. The Supreme Court in *Tata Iron and Steel Co. Ltd. Vs. Union of India and others* (2001 (2) SCC 41) dealt with the issue of estoppel by conduct rather exhaustively vide paragraphs 20 and 21 stated the law pertaining thereto as below :

Estoppel by conduct in modern times stands elucidated with the decisions of the English Courts in Pickard v. Sears (1837: 6Ad. & El. 469) and its gradual elaboration until placement of its true principles by the Privy Council in the case of Sarat Chunder Dey v. Gopal Chunder Laha (1898 L.R. 19 I.A.203) whereas earlier Lord Esher in the case of Seton, Laing Co. v. Lafone (1887: 19, Q.B.D.68) evolved three basic elements of the doctrine of Estoppel to wit:

Firstly, where a man makes a fraudulent misrepresentation and another man acts upon it to its true detriment: Secondly, another may be where a man makes a false statement negligently though without fraud and another person acts upon it: And thirdly there may be circumstances under which, where a mis-representation is made without fraud and without negligence, there may be an Estoppel.

Lord Shand, however, was pleased to add one further element to the effect that there may be statements made, which have induced other party to do that from which otherwise he would have abstained and which

cannot properly be characterised as misrepresentation. In this context, reference may be made to the decisions of the High Court of Australia in the case of Craine v. Colonial Mutual Fire Insurance Co. Ltd. (1920: 28 C.L.R. 305). Dixon, J. in his judgment in Grundt v. The Great Boulder Pty. Gold Mines Ltd. (1938: 59 C.L.R. 641) stated that:

“In measuring the detriment, or demonstrating its existence, one does not compare the position of the representee, before and after acting upon the representation, upon the assumption that the representation is to be regarded as true, the question of estoppel does not arise. It is only when the representor wishes to disavow the assumption contained in his representation that an estoppel arises, and the question of detriment is considered, accordingly, in the light of the position which the representee would be in if the representor were allowed to disavow the truth of the representation.”
(In this context see Spencer Bower and Turner: Estoppel by Representation 3rd Ed.). Lord Denning also in the case of Central Newbury Car Auctions Ltd. v. Unity Finance Ltd. (1956 (3) All ER 905) appears to have subscribed to the view of Lord Dixon, J. pertaining to the test of detriment to the effect as to whether it appears unjust or unequitable that the representor should now be allowed to resile from his representation, having regard to what the representee has done or refrained from doing in reliance on the

representation, in short, the party asserting the Estoppel must have been induced to act to his detriment. So long as the assumption is adhered to, the party who altered the situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs, the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment.(vide Grundts: High Court of Australia (supra)).

Phipson on Evidence (Fourteenth Edn.) has the following to state as regards estoppels by conduct.

“Estoppels by conduct, or, as they are still sometimes called, estoppels by matter in pais, were anciently acts of notoriety not less solemn and formal than the execution of a deed, such as livery of seisin, entry, acceptance of an estate and the like; and whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. [Lyon v. Reed (1844) 13 M & W. 285, 309] The doctrine has, however, in modern times, been extended so as to embrace practically any act or statement by a party which it would be unconscionable to permit him to deny. The rule has been authoritatively stated as follows: Where one by his words or conduct willfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own

previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. [Pickard v. Sears (1837) 6 A.& E. 469,474] And whatever a mans real intention may be, he is deemed to act willfully if he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it. (Freeman v. Cooke: 1848 (2) Exch.654, 663).

Where the conduct is negligent or consists wholly of omission, there must be a duty to the person misled. {Mercantile Bank v. Central Bank (1938 AC 287, 304 and National Westminster Bank v. Barclays Bank International (1975 Q.B. 654] This principle sits oddly with the rest of the law of estoppel, but it appears to have been reaffirmed, at least by implication, by the House of Lords comparatively recently. [Moorgate Mercantile Co. Ltd. v. Twitchings (1977) AC 890 (H.L.)] The explanation is no doubt that this aspect of estoppel is properly to be considered a part of the law relating to negligent representations, rather than estoppel properly so-called. If two people with the same source of information assert the same truth or agree to assert the same falsehood at the same time, neither can be estopped as against the other from asserting differently at another time. [Square v. Square (1935) P.120]

12. The Learned Counsel for the petitioner submitted that as the other officer including senior officer were dealt with leniently while awarding sentence/punishment to them and so he should be kept at par with those superior officer in the award of punishment, more so in the circumstances that he obeyed their command. It is also said that Chief of Army Staff also recommended for lenient punishment in his matter. In our view seeing the conduct of the petitioner in making false declaration, citation and papers and also succumbing to the pressure of the seniors for carrying out wrongful orders cannot be viewed with leniency. It is not possible to exceed his prayer even on equitable grounds. In this regard it shall be useful to quote the principle of equality as enshrined in the case of *Prem Chand Somchand Shah Vs. Union of India*, (1991) 2 SCC pg.48. It is as under :

As regards the right of equality guaranteed under Act 14 the position is well settled that the said right ensures equality amongst equals and its aim is to protect persons similarly placed amongst discriminatory treatment. It means that all persons similarly circumstanced shall be treated alike both in privileges and liabilities imposed conversed, discriminatory may result if persons dissimilarly situate and treated equally. Even amongst persons similarly situate differential treatment would be permissible between one class and the other. In that

event it is necessary that the different treatment should be founded on an intelligible differtia which distinguishes persons or things that are grouped together from things left out of the group and that differential must have a rational relation to the object sought to be achieved by the statute in question.

13. The petitioner, in order to successfully invoke the right guaranteed under Act 14 of the constitution will have to establish that he and his other officers whether senior or junior are similarly situated. The petitioner being Commanding Officer had more responsibilities. He cannot equate his position with that of other officers. Again when lenient view was taken in the matter of other officers and in what enveloped circumstances that punishment was awarded but it shall not be of the point to mention that 'equality' it is trite, cannot be claimed in illegality. *(See Panche De vs State of Rajasthan (2009) 2 SCC pg.589).*

14. Lastly it is submitted by the Learned Counsel for the petitioner that the petitioner owned his responsibility for the entire mishap and innocently pleaded guilty though he was under pressure for forging the documents. Once the superior officers have been exonerated and the junior officer was not dismissed from service, his case shall also be considered sympathetically. Penalty from dismissal from service was

imposed by the authorities concerned on the recommendation of the GCM and no interference is warranted unless the punishment is shockingly disproportionate. The petitioner has also failed to show mitigating circumstances in his favour. The punishment awarded by the authorities cannot be characterised as disproportionate and shocking. In passing, reference may also be made that undue sympathy to impose inadequate sentence would do more harm to the military discipline and justice system and that was also taken into consideration by the authorities while rejecting the representation of the petitioner. Moreover the petitioner being the Commanding Officer he was required to be more honest towards his duties and the personnel attached with him. He cannot claim parity with his senior or the subordinate for the said offence in which they are said to be involved. They were not on equal pedestal and so he cannot be treated at par with them in the award of sentence.

15. We do not find any justified ground to interfere in the impugned order. **Petition dismissed.**

S.S.DHILLON
(Member)

S.S.KULSHRESHTA
(Member)

PRONOUNCED IN THE OPEN COURT
TODAY ON DATE 11.01.2010