

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

**T.A NO. 381 OF 2010  
(WRIT PETITION (CIVIL) NO.94 OF 2007)**

**HAV/PA BIJAY PAL SINGH**

**...APPELLANT**

**V.**

**UNION OF INDIA AND OTHERS**

**...RESPONDENTS**

**ADVOCATES**

**MR. D.S KAUNTAE FOR THE APPELLANT  
LT. COL. NAVEEN SHARMA FOR THE RESPONDENTS**

**CORAM**

**HON'BLE MR. JUSTICE S.S KULSHRESTHA, MEMBER  
HON'BLE LT. GEN. S.S DHILLON, MEMBER**

**JUDGMENT**

**16.08.2010**

1. Challenging the District Court Martial proceedings of 28.5.2004, whereby the appellant was held guilty under Army Act Section 64(e) of having accepted gratification for procuring the

empanelment of three civilians and under Army Act Section 63 of having improperly borrowed money in contravention of Para 337 of the Regulations for Army and sentenced him to undergo rigorous imprisonment for one year, to be reduced to ranks and to be dismissed from service, he approached the Delhi High Court by filing W.P (C) No. 94 of 2007. Subsequently, on formation of this Tribunal, the above writ petition has been transferred for disposal. Under Section 15 of the Armed Forces Tribunal Act 2007, appeal lies against any order, decision, finding or sentence passed by a Court Martial or any matter connected therewith or incidental thereto. Therefore, by virtue of Section 15, this Tribunal has full appellate power against the order of the Court Martial like a Court of Appeal. Since, in this case, the petitioner challenged the conviction by Court Martial by filing a writ petition, which has been remitted to this Tribunal, the same has been converted into an appeal under Section 15.

2. The facts as set out by the appellant in a nutshell are: the appellant was enrolled in the Army as a Clerk on 20.8.1991 and was converted and upgraded to the category of Hav/PA in April 1997 and posted as PA to Brigade Commander, 50(1) Para Brigade. On the night of

20/21.6.2003, while the appellant was sleeping in his house, a team of officers belonging to Agra Army Cantt raided his house and took the appellant into custody. While in custody, the appellant gave confessional statement under threat and coercion. Thereafter, the officiating Commanding Officer framed a tentative charge sheet against the appellant under Section 64(e) of the Army Act, which reads:

**TENTATIVE CHARGE SHEET**

**OBTAINING FOR HIMSELF A GRATIFICATION AS A MOTIVE  
FOR PROCURING THE ENROLMENT OF PERSON**

in that he,

at Agra in No.2002 obtained from Shri Fateh Singh, Shri Ashok, Shri Mukesh and Shri Devakinandan civilians, Rs.55000/-, Rs.30000/-, Rs.35000/- and Rs.70000/- respectively, a gratification as motive for procuring the enrolment of the said civilians.

A summary of evidence was ordered on 11.7.2003, which concluded on 1.9.2003. Subsequently, on 15.4.2004, based on the summary of evidence, the appellant was given a charge sheet, which reads:

**FIRST CHARGE**  
**Army Act Sec. 64(e)**

**ACCEPTING FOR HIMSELF A GRATIFICATION AS A MOTIVE  
FOR PROCURING THE ENROLMENT OF A PERSON**

in that he,

at Agra, in the month of Nov 2002, received for himself Rs.30,000/- (Rupees thirty thousand only) from Shri Ashok Kumar, son of Shri Balvir Singh, as a motive for procuring the enrolment of said Shri Ashok Kumar.

**SECOND CHARGE**

**Army Act Sec. 64(e)**

**ACCEPTING FOR HIMSELF A GRATIFICATION AS A MOTIVE  
FOR PROCURING THE ENROLMENT OF A PERSON,**

in that he,

AT Agra, in the month of Nov 2002, received for himself Rs.70,000/- (Rupees seventy thousand only) from Shri Devaki Nandan, son of Shri Gopal Singh, as a motive for procuring the enrolment of said Shri Devaki Nandan.

**THIRD CHARGE**

**Army Act Sec. 64(e)**

**ACCEPTING FOR HIMSELF A GRATIFICATION AS A MOTIVE  
FOR PROCURING THE ENROLMENT OF A PERSON,**

in that he,

at Agra, in the month of Nov 2002, received for himself Rs.35,000/- (Rupees thirty five thousand only) from Shri Mukesh, son of Shri Om Pal Singh, as a motive for procuring the enrolment of said Shri Mukesh.

#### **FOURTH CHARGE**

**Army Act Sec. 63**

#### **AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE**

in that he,

at Agra, in the month of Apr 2003, improperly borrowed Rs.60,000/- (Rupees sixty thousand only) from No. 14556679 Havildar (Vehicle Mechanic) Chander Pal Singh of HQs 50 (Independent) Parachute Brigade, in contravention to the provisions of Para 337 of Regulations for the Army 1987 (Revised Edition)

Based on the above charge, the appellant was tried by a District Court martial (DCM), which held him guilty of the charges and sentenced him to suffer rigorous imprisonment for one year, to be dismissed from service and to be reduced to ranks.

3. It is contended by learned counsel for the appellant that the DCM failed to appreciate the evidence adduced in the case. The case is totally based on the so called confessional statement, which was obtained by threat and coercion, while the appellant was under custody. The appellant never confessed to have accepted money either from any civilian or from any other person. The prosecution has also not been able to substantiate the charges levelled against the appellant. Furthermore,

one of the civilians, from whom allegedly the appellant borrowed money, refused to support the prosecution case and he was declared hostile. As regards the fourth charge, the money was taken by way of loan and the appellant repaid it with interest. No culpability could be fixed on the appellant and if so, the person who lent money would also be liable for prosecution. Therefore, the prosecution miserably failed to prove its case.

4. Resisting the appeal, it is contended by the respondents that the appellant made the confessional statement of having accepted money from three civilians for procuring enrolment in Army in the presence of other witnesses, apart from the senior officers who made search of his house. The documents recovered from his house established the appellant having amassed more money than the known source of income, the source of which could not be explained by him. That apart, he received money in contravention to Para 337 of Regulations for Army. The culpability of the appellant would stand proved even if the person, from whom he borrowed money, was not tried. Therefore, his plea of not establishing his guilt for not trying the person, from whom he borrowed money, would not stand.

5. In order to appreciate the rival contentions of the parties, it would be appropriate to refer to the statements of the prosecution witnesses, based on which the DCM found the appellant guilty of the charges levelled against him. **PW 1 Capt. MS Bains** has deposed of having received a complaint with regard to the undesirable activities of the appellant amassing wealth disproportionate to his source of income and accepting gratification for procuring enrolment for civilians in the Army. He has further stated that a search team was constituted to organise a surprise security check of office and residence of the appellant. After the search, he was handed over the following items which were recovered from the appellant:

1. One Computer floppy
2. One Executive diary of 1997 containing financial transaction.
3. One file containing quarterly statement of accounts for the period 11/91 to 2/03.
4. Two pass books of Post Office Recurring Deposit Account No. 4008125 and 498491 in the name of the appellant.
5. Summary of Accounts of the appellant in ICICI Bank, Nehru Nagar, Agra A/c No.628701012944 dated Jan 01, 2003.

- 6 Registration paper for purchase of plot for Rs.70,000/- near Sikandra, Agra dated 17 Jul 2001.
7. Registration paper for purchase of plot for Rs.1,84,038/- Shastripuram, Agra dt. 29 Mar 2003.
8. Registration paper dated 29 May 2003.

**PW 2 Nb. Sub. Lila Ram** has also stated with regard to the recovery of personal diary, one floppy, two files and stamps of various functionaries of HQ 50(I) Para Bde from the office of the appellant. He has also stated about the recovery of the motor cycle registration book, pass books and two plot registration papers from his residence. **PW 3 Maj. Jaychandran** has stated of having recorded the confessional statement of the appellant. **PW 4 Recruit (MT) Mukesh Kumar** has not supported the prosecution version by stating that he did not meet the appellant during his rally and did not take any training for his recruitment. He has also denied the fact of payment of any money to the appellant. He was declared hostile. **PW 5 L/Nk Yoginder Singh**, who took part in the investigation as to whether the individuals had paid money to the appellant, was deputed to take the statements of Ashok Kumar of Village



Tilakagarhi and Dekoi Nandan of Village Manthraja. When he questioned Ashok Kumar, he denied of either knowing the appellant or having given any money to him. Since Deoki Nandan was not present when PW 1 reached his house, he met the father of Deoki Nandan, who denied having given money to the appellant. **PW 6 Nb. Sub. Bhoop Chand**, who was detailed to enquire about the whereabouts of Narender Master, who allegedly took coaching classes for the new recruits, has stated that he could not find anybody by that name. **PW 7 Nb. Sub. Vinod Kumar Sharma**, being part of the investigation, went to the village of Subhash Yadav, who was suspected of touting activities, and was told by his wife and father that Subhash Yadav was not having any connection with any recruitment racket. **PW 9 Harender Master** was declared hostile as has not supported the prosecution version. **PW 10 Hav/Clk DK Yadav** is a formal witness who denied in cross examination of having knowledge about anybody giving bribe for enrolment in BRO Agra. **PW 11 Hav/Clk Satish Chandra** is also a formal witness who stated about the recording of the summary of evidence. **PW 12 Hav/Vehicle Mechanic CP Singh** also turned hostile as he did not support the prosecution. **PW 14 Capt TM Reddy**, who was one of the members of the raiding party, has stated

with regard to the recovery of some documents from the residence of the appellant. **PW 15 Recruit Deoki Nandan**, from whom allegedly money was received by the appellant for his empanelment, has also not supported the prosecution version and was declared hostile.

6. A perusal of the entire prosecution evidence would show that it has not substantiated the acceptance of gratification by the appellant, for which three charges were levelled against him. However, the total case is solely dependent upon the so called confessional statement made by the appellant. Suffice to mention that the appellant retracted his confession claiming it obtained under threat and coercion while in custody. It is to be noticed that a confessional statement must be voluntary. The materials on record show that the appellant was taken into custody from his house and the confessional statement was made while in custody. Such confession statement is to be evaluated with more care and caution. A judicial confession is admissible in evidence. A judgment of conviction can be based on confession if it is found to be truthful, deliberate and voluntary. As has already been mentioned, the appellant made the confession while in custody. Such confession would have no significance. The voluntary nature of a confession depends upon

whether there was threat, inducement or promise. Reliance may be placed on the decision in **Bharat v. State of U.P** (1971(3) SCC 950). The apex Court in **State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru** (2005(11) SCC 600) also observed as under:

"27. .... 'Confessions' which is a terminology used in criminal law, is a species of 'admissions' as defined in Section 17 of the Evidence Act. An admission is a statement, oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. While Sections 17 to 23 deal with admissions, the law as to confessions is embodied in Sections 24 to 30 of the Evidence Act. Section 25 bars proof of a confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate. Section 24 lays down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authority, the confession is liable to be excluded from evidence. The expression 'appears' connotes that the court need not go to the extent of holding that the threat, etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable

that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than a police officer. ....

29. .... 'Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law' (vide Taylor's Treatise on the Law of Evidence, Vol. I). However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of the confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession, be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognising the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Evidence Act has excluded the admissibility of a confession made to the police officer.

32. As to what should be the legal approach of the court called upon to convict a person primarily in the light of the confession or a retracted confession has been succinctly summarised in *Bharat v. State of U.P* (1971(3) SCC 950),

Hidayatullah, C.J., speaking for a three-Judge Bench, observed thus: (SCC p. 953, para 7):

"Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its use. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true. This was laid down by this Court in an earlier case

reported in *Subramania Goundan v. State of Madras* (1958 SCR 428)."

As has already been stated, the appellant was in custody and was taken to 17 Para Bde. Under such circumstances, the confession made by the appellant cannot be said to be voluntary under Section 24 of the Indian Evidence Act. In this regard, it is pointed out that Army Order 256/72 is a salutary provision which lays down certain precautions to be followed while recording statement so as to ensure voluntariness of the confession and the accused is placed in a situation free from threat or coercion. Army Order 256/72 reads:

"A military police officer (which expression includes a provost Marshal and any other person legally exercising authority under him or on his behalf) is as regard a person subject to the Army Act deemed to be a 'police officer', and consequently the admissibility, at a trial by court martial, of a confession made to him or whilst in his custody will be determined by the provisions of the aforesaid Sections 25, 26 and 27 of the Indian Evidence Act. Where, therefore, a person subject to the Army Act makes or it appears he is about to make a confession to a military police officer, or whilst in custody of such officer the procedure specified in Paras 3 and 4 (below) will be followed".



Reliance may be placed on the decision in **Babubhai Udesinh Parmar v. State of Gujarat** (AIR 2007 SC 420). The confessional statement is taken in its face value, even if it is not corroborated by any of the independent witness. Confession is mainly related to the acceptance of gratification, for which there is not even an iota of evidence to substantiate.

7. The entire prosecution case appears to be based on the wealth amassed by the appellant disproportionate to his known source of income. In this regard, some statements of the witnesses were also referred to. The appellant was not charged for any such offence which may fall within Section 13(e) of the Prevention of Corruption Act. Non framing of charge to that effect resulted in failure of justice putting the accused in a disadvantageous position. It is contended that the appellant is prejudiced by the fact that he was not afforded opportunity to rebut such evidence viz. possessing properties disproportionate to his known source of income. In **Shamnasaheb M. Multtani v. State of Karnataka** (2001(2) SCC 577), taking into consideration the provisions of Section 464 of the Code of Criminal Procedure, the apex Court held that a confession would be valid even if there is omission or irregularity in the framing of the charge, provided the same does not occasion in failure of

justice. Here, in this case, evidence was adduced by the prosecution with regard to purchase of properties, etc. But there was no charge and no opportunity was afforded to rebut those allegations or to adduce any evidence to that effect. In the absence of framing of charge, it resulted in failure of justice. This view also finds support from the decision of the apex Court in **State of A.P v. Thakkidiram Reddy** (AIR 1998 SCW 2750).

8. However, it is submitted from the side of the respondents as regards Charge No.4 that the appellant has borrowed Rs.20000/- through cheque from Hav CP Singh and this fact finds support from the statement of **PW 8 Hav/PA VK Chawla**. There is no denial as regards Charge No.4 is concerned viz. borrowing money from CP Singh. PW 12 did not support the prosecution version. But the fact of borrowing money from Hav/PA Chawla (PW 8) is well established. An amount of Rs.20,000/- was borrowed by the appellant and that amount was returned by him with interest. This, it is contended, is in violation of Para 337 of the Regulations for Army. It was a petty amount and that was borrowed for the purpose of the marriage of his younger brother. As has already been referred to in the case of **Shamnasaheb's case** (supra), the apex Court observed that where the accused is in any way prejudiced,



such non framing of the charge would not render the conviction invalid. Here, the charge was that he borrowed money in contravention of Para 337 of the Regulations for Army. Borrowing of money from PW 8 is established. But looking into the nature of offence, the punishment awarded to the appellant is shockingly disproportionate. Therefore, it would be appropriate if the punishment awarded to the appellant is converted into rigorous imprisonment for one year which he had already undergone.

9. In view of the aforesaid discussion, the appellant shall be deemed to have been discharged till he attained the minimum pensionable age and he will be eligible for all pensionary benefits. The appeal is allowed to that extent.

**(S.S DHILLON)**  
**MEMBER**

**(S.S KULSHRESTHA)**  
**MEMBER**