

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

**TA/522/2009
(Writ Petition (C) no. 4878/08)**

**WG. CDR. B.D.JENA
(16887-N) ADMN
FLAT NO.B-203, PLOT NO.5
NPSC APARTMENT
SECTOR-2, DWARKA
NEW DELHI.**

THROUGH : SH. V.S.TOMAR, ADVOCATE

...APPELLANT

VERSUS

- 1. UNION OF INDIA
THROUGH ITS SECRETARY
MINISTRY OF DEFENCE
SOUTH BLOCK
NEW DELHI-110 011.**
- 2. THE CHIEF OF THE AIR STAFF
AIR HQS (VAYU BHAWAN)
RAFI MARG, NEW DELHI.**
- 3. AIR OFFICER COMMANDING-IN-CHIEF
SOUTH WESTERN AIR COMMAND, IAF
GANDHI NAGAR, GUJARAT**
- 4. WING COMMANDER R.GUPTA
C/O. AIR OFFICER IN CHARGE PERSONNEL
AIR HQS (VAYU BHAWAN)**

NEW DELHI.

**5. GROUP CAPTAIN S.NEELKANTHAN
C/O. AIR OFFICER IN CHARGE PERSONNEL
AIR HQS (VAYU BHAWAN)
NEW DELHI.**

**6. SH. JAYESH L. BABLA
S/O. LATE SH. LAXMIKANT M.BABLA
411-B, MUNDRA ROAD
BHUJ (GUJARAT)**

**THROUGH : MS. JYOTI SINGH, ADVOCATE
WING COMMANDER ASHISH TRIPATHI**

...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 : 10.02.2010**

1. This petition has been received on receipt from Delhi High Court has been treated as an Appeal under section 15 of Air Force Tribunal Act. It is for quashing the findings and the sentence of the General Court Martial (GCM) assembled at Air Force Station, Bhuj on 07.08.2003. It is contended that the Convening Order dated 01.08.2003 was not passed by the competent authority so was also the

position of the charge sheet not having been issued in compliance of Rule 37 of the Air Force Rules. Simultaneously prayer has also been made for setting aside the dismissal of the appellant from the service and he be reinstated with all consequential benefits.

2. It is submitted by the appellant that he was commissioned as a pilot officer on 19.06.1982 in the Administrative Branch of IAF. His services were recognised and on 05.03.2001 he was posted at Air Force Station, Bhuj for taking up reconstruction work at Air Force Station, Bhuj that was completely destroyed due to earthquake on 15.01.2001. He was also selected as Wing Commander w.e.f. 19.05.2002 and was designated as Chief Admn. Officer at that very station. Not only this in recognition of dedication, his name was forwarded for Vashisht Seva Medal by his Station Commander Gp Capt Mohit Kumar. In the month of December 2002, Gp Capt Mohit Kumar was posted out and Gp Capt S.Neelkanthan (respondent no.5) took over as new Station Commander w.e.f. 09.12.2002. Gp Capt S.Neelkanthan felt annoyed with the appellant as he refused to recommend Squander K.S.Palia for posting as Security Officer. The petitioner did not agree on the name of Sqn Leader K.S.Palia who was facing IB & SIB surveillance, though respondent no.5 was interested in his name. Further respondent no.5 expressed his desire that Wg Cdr

R.Gupta would officiate in place of appellant on his leave period but the appellant however clarified the position that Sqn Leader Kedarinath was already conversant with the work so he be permitted to look after the work. In as much the respondent no.5 started feeling annoyance with the petitioner as he did not succumb to his wishes for telling the weak points of the previous Stn Cdr, Group Captain Mohit Kumar. He was having some ill will against Gp Capt Mohit Kumar and recalled all his previous instructions/orders by him. Since appellant was not cooperating with the whimsical approach of the respondent no.5 and so he was bent upon to harass him. The appellant went on temporary duty-cum-leave to Delhi (Air Hqs. VB) from 24.12.2002 to 23.01.2003. The respondent no.5 called Sh. Jayesh Babla (PW1) along with Sqn Ldr Kedarinath on 29.12.2002 and discussed the matter with regard to privatisation of Cable T.V. and directed PW1 Sh. Jayesh Babla to go ahead with the work from 01.01.2003 without having the approval of the Hqs SWAC, IAF. On appellant's return from leave, to his utter surprise he noticed that his living-in room was also shifted under the instructions of respondent no.5 and he was required to proceed on temporary duty w.e.f. 28.01.2003 to AF Stn. Pune.

3. It is next contended that on 27.01.2003 at about 2330 hrs. when the appellant was watching T.V. after having dinner in his room the door bell rang and when the appellant opened the door he found Wg Cdr. Kulkarni, Sqn. Ldr Palia, Sqn Ldr Mahindrakar, Sh. T.B.Panda there at the door and they barged in his room and started making search of his room. Purpose of the search and also authority for the same were not disclosed to the appellant. This unruly illegal behaviour was also brought to the notice of respondent no.5 who too rebuked him. They have not ensured the compliance of AFO 15/90 mandating "the IAF police personnel supervising the search to offer themselves to be searched by the suspects before commencement of search at any premises". The appellant was put under the close arrest about 2330 hrs on 28.01.2003 and they took various photographs in the outer room of the appellant by placing his money on the table. It is further said that PW1 Sh.Jayesh Babla did not enter his room on 27.01.2003 at about 2330 hrs. nor he handed over any currency/ money to him. Further there was no occasion for him to have approached the appellant with some bribe as he was also not the competent authority to award the contract for the purpose. That contract was to be awarded by Hqs South Western Air Command IAF.

4. The respondents with view to harm the appellant had initiated the proceedings illegally without ensuring the compliance of Rule 24 for recording summary of evidence pursuant to the orders of Gp Capt B.S.Dhanova. No opportunity to cross examine the witnesses was afforded to the appellant. He was threatened to confess his guilt by Flt Lt Bindra, Comm. Dy. Judge Advocate, Gp Capt B.S.Dhanova, Wg. Sinha and Gp Capt S. Neelkantan. The appellant could not understand the implications and under immense pressure and on the promise that he would be let off lightly gave a confessional statement during recording of Summary of Evidence. On the same day the appellant was flown back from AF Stn. Naliya to AF Bhuj to collect his civil clothes and salary.

5. It is further submitted that GCM was ordered by AOC-in-C SWAC vide convening order dated 01.08.2003. The appellant was detached from AF Stn.Baroda (36 Wing, AF) with en-route leave to report to AF Station, Bhuj (27 Wing) w.e.f. 22.07.2003 to 0700 hrs. on 02.08.2003. There was no fair trial of the appellant. Even the Judge Advocate appointed in the GCM Sqn. Ldr PNS Nair was junior to him and no adherence was made to the arrangement under rule 46 (2) of the Rules which would also vitiate the trial as no sincere efforts were made to associate Judge Advocate senior to the appellant. Further the case is

based on no evidence. PW1 Sh. Jayesh Babla who is material witness and from whom demand of the bribe was made, did not support the prosecution version. He ultimately turned hostile. Even after lengthy cross by prosecution during the GCM, nothing could be arrived from the statement of PW1 Sh. Jayesh Babla which would lend support to the prosecution. The appellant pleaded not guilty and there is no evidence worth credence to fasten the culpability of the appellant. The amount of Rs.35,000/- is said to have been paid through crossed cheque. This is not acceptable proposition as no body would take bribe through cheque.

6. This appeal is resisted on behalf of the respondents. It is contended that the present appeal has been brought by fabricating false grounds. While initiating the GCM proceedings, the procedure as prescribed under rules was adhered to. Even at the time of Summary of Evidence, opportunity was given to the appellant for cross examining the witnesses. When the appellant was on leave, PW1 Sh. Jayesh Babla was communicated by respondent no.5 to go ahead with the contract work subject to final approval from the Command HQ. Further demand of bribe by the appellant was received from Sh. Jayesh Babla. The money bearing signatures and the numbers of which were separately drawn on the sheet was handed over to the appellant. The search was made in the

room of the appellant on 27.01.2003 and from his dressing gown amount of Rs.15,000/- and a cheque of Rs.35,000/- were recovered. The appellant also cooperated with the respondent and handed over the amount to the raiding party. There was a demand from the side of the appellant of Rs.1,50,000/- from PW1 Sh. Jayesh Babla in consideration for the award of the contract. The raid was arranged and at that time the independent witnesses Sh.TB Panda, the principal of Kendriya Vidyalaya, Bhuj was present and witnessed the entire raid. The seizure memo was also prepared on which the signatures of the appellant was also taken and the currency recovered from the appellant quite agreed with the numbers already retained by the raiding authority. The appellant at that time confessed his guilt.

7. It has further been specified that the appellant was brought before the GCM for his trial on two charges. He was found guilty for the first charge and the second charge was dropped as it would entail much delay. The charge sheet dated 30.07.2003 was signed by Group Capt BS Dhanova, Station Commander 12 FBSU, AF to which the appellant was attached. The contention of the appellant that he was attached to different Unit is all misleading. The involvement of the Sqn. Ldr PNS Nair being the junior officer to the appellant was unavoidable as no senior officer

was available despite lot of efforts made by the respondent no.5. The convening authority i.e. AOC-in-C, SWAC, IAF approached Air HQ vide Signal Message No.PS/480 dated 29.07.2003 for the appointment of officer of requisite rank but of no avail. PW1 Sh. Jayesh Babla was won over by the appellant but when confronted with his earlier statement recorded in Summary of Evidence that landed support to the prosecution case.

8. It has next been contended that there is ample evidence to prove the guilt of the accused/appellant. As regards to the procedural aspects it has further been averred that the Station Commander 27 Wing, AF was a prosecution witness in the case and therefore, the appellant was attached to 12 FBSU, AF for compliance of Rule 24 of AF Rules 1969. The Convening Officer had decided to conduct the trial at 27 Wing, AF and there appears no illegality or jurisdictional error in view of Section 123 of Air Force Act, 1950.

9. The appellant was tried by GCM on 07.08.2003 on two charges. The first charge under section 53 (b) of the Air Force Act, 1950 with the averment that he at 27 Wing Air Force at about 2245 hours on

27.01.2003 in his capacity as Chief Administrative Officer, without proper authority extracted Rs.50,000/- from Sh. Jayesh Laxmikant Babla as consideration for award of Cable TV Network contract at 27 Wing, AF. The second charge under Section 65 of the Air Force Act, 1950 (alternative to the first charge) averred that the petitioner improperly obtained Rs.50,000/- from Sh. Jayesh Laxmikant Babla as consideration for award of Cable TV Network contract at 27 Wing, AF. The second charge was dropped against the petitioner and the finding of the guilt was also affirmed by the AOC-in-C, SWAC. For the first charge the appellant was found guilty and was sentenced to undergo six months RI and to be cashiered. The finding of guilt was approved by AOC-in-C, SWAC on 13.09.2003 but the sentence of imprisonment was commuted and the other part of the charge was also commuted into dismissal from service.

10. It is submitted by the learned counsel for the appellant that the finding of the guilt recorded against the appellant is totally based on conjectures and surmises. There is no evidence from which inference of guilt can be drawn. It is also submitted that here in this case PW1 Sh.Jayesh Babla who made complaint against the appellant with the allegation that he demanded bribe money from him for getting the contract of Cable T.V. The PW1 Sh.Jayesh Babla when examined in the

GCM disowned the prosecution version for the demand of the money by the appellant. Under such circumstances, the entire story of the demand of the money and handing over the same for the purpose falls to the ground and further when the complainant PW1 Sh.Jayesh Babla did not support to the prosecution the entire case would crumble down. It has also been submitted that if there could be any substance in the prosecution version or when such raid was proposed it could be possible to have the currency notes treated with phenolphthalein powder. The currency was not treated with powder moreover there is no scientific test having complied to prove that the appellant handled the currency notes. Suffice is to mention that non treatment of the currency notes with phenolphthalein powder would not be the sufficient ground to reject the testimony of the witnesses. Prosecution witnesses gave credible acceptable deposition. They have also stated that the currency notes were signed and its numbers were also noted on a sheet before arranging of the raid. The currency notes bearing the signatures were recovered from the possession of the appellant. As mentioned above number of marks on the currency notes mentioned in the pre-trap panchnama and the post trap panchnama (seizure memo) were the same. The accused made endorsement on the Seizure Memo. This could be sufficient to establish the guilt against the accused/appellant. In the case of *Sayyed Shabiralli Hafizali Vs. State of*

Maharashtra (2009) 6 SCC Pg.724 it was observed by the Hon'ble Supreme Court as under:

It is of significance that in the complaint dated 02.12.1986 the complainant had specifically stated that the accused shall be coming for handing over the gate pass and for taking the money i.e. bribe amount on 03.12.1986 in the afternoon. Therefore, as rightly noted by the High Court if really the complainant had issued any receipt or chit in respect of the cloth and had told the accused to bring that chit or receipt, it is only after obtaining the said chit he would pay the amount of Rs.100. Then he would not have lodged the complaint because at that time he had no idea as to what to do in the situation on 03.12.1986.

Admittedly, when the post-trap panchnama was drawn the accused was present there. So also the panch witness, Sayajirao was present. After drawing the panchnama a copy of the same was immediately given to the accused. Not only that, he made endorsement on the original panchnama for having received a copy. If really the accused had handed over the receipt of the cloth the complainant and accepted Rs.100 as a price of the lost cloth, he would have told the panchas as well as to the police that the receipt has been handed over to him and the said fact be mentioned in the panchnama but this has not happened. There was no mention about

the accused having stated to have brought the chit of the cloth.

The evidence on record has clearly established the accusations and the trial court and the High Court have rightly relied on the same. In the instant case the occurrence took place on 02.12.1986. At the point of time it cannot be said that the gratification was a trivial thing as referred to under Section 4. Above being the position, there is no merit in this appeal which is accordingly dismissed.

11. Recovery of the currency notes though not denied but he refers about his non complicity. It was contended by him that had there been any truth in the acceptance of money, he might have destroyed it when he was given opportunity for going to toilet. Such reply itself is erroneous and would not account for the recovery so established from the side of the prosecution. See State of U.P. V/s. Bhaiya Lal Verma (2008) 15 SCC Pg.161.

12. We have gone through the Seizure Memo which bears the signatures of the appellant. There is no reason to reject the deposition of these witnesses. Merely on the ground that they are the Officers of the same department and were under the influence of the Gp Capt

S.Neelkanthan or of the senior officers. Independent person namely, Sh.TB Panda, the principal of Kendriya Vidyalaya, Bhuj also stood as a witness who have testified the procedure adopted for making the search of the room of the appellant. Reliance may be place on the cases of *State of U.P. Vs. Ganga Ram, AIR 2006 SC Page 20 wherein it was held that:*

It is now well settled principle of law that whom to cite as witness and whom not is within the domain of the prosecution. It is also well settled principle that the prosecution evidence has to be weighted and not be counted. It is just because any other pedestrian or resident of the vicinity has not been cited as witnesses will be no ground to throw away the otherwise reliable testimony of the eye-witnesses which is natural and inspires confidence. There is no evidence on record to show that there were other pedestrian or resident of the vicinity present at the relevant time, besides the prosecution witnesses. In our view, the aforesaid reason by the High Court is based on conjectures and surmises and is perverse.

13. Further from the materials on record it is clear that PW1 Sh.Jayesh Babla from whom bribe was demanded made complaint and the entire proceedings for raid were initiated against the appellant. But when examined he did not support the prosecution witness and turned

hostile. The testimony of the hostile witness cannot be brushed aside as was held in the case of *Sat Pal Vs. Delhi Administration*, AIR 1976 SC

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“From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of the fact to consider in each case whether as a result of such cross examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept in the light of the other evidence on record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard the evidence in toto.”

14. It is true that declaration of a witness to be hostile does not ipso facto reject the evidence and it is now well-settled that the portion of evidence being advantageous to the parties may be taken advantage of but the Court before whom such a reliance is placed shall have to be extremely cautious and circumspect in such acceptance. In *State of U.P. vs. Ramesh Prasad Mishra* the Supreme Court held as under:

It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.”

15. From fact that PW1 Sh.Jayesh Babla though turned hostile but the statement would show that there was sign of truth in the prosecution case. In this context it may be useful to hold that PW1 Sh.Jayesh Babla was examined as a witness in the Summary of Evidence where he supported prosecution version but before the GCM he changed the version and gave altogether a different statement. But from this it can well be inferred that money was handed over or left by him in the room of the appellant. His testimony remained unimpeachable on this front from the side of the defence. Though he mentioned that under pressure he had

to comply the directions of the Senior Officer and therefore, he left Rs.15,000/- and a cheque of Rs.35,000/- at the room of the appellant. But while confronted with his earlier statement by the GCM itself, it has come out from his statement that when his statement was recorded he could not understand that he was going to involve the appellant in some trouble. It was further clarified by him that during Summary of Evidence he stated that he handed over the letter voluntarily to the Station Commander but when he realised that he had done something wrong against Wg Cdr BD Jena and was now speaking the truth. It was also stated by the witness in cross examination that “he did not exactly remember for making any such statement that he assured to hand over the first instalment of money to Wg Cdr BD Jena when he gets the agreement finalised the balance would be paid”. Again he projected his inability to remember whether he made any statement before Summary of Evidence that “Wg Cdr BD Jena asked me to give a self cheque in place of a cheque in his name.” As per such part of the statement of the witness, this much is decipherable that he left the money in the room of the appellant. There is no denial from the side of the appellant that PW1 Sh.Jayesh Babla entered into his room. There is also no explanation of the inculpatory circumstances as how this money reached to his room when he himself was present. The burden to prove such inculpatory circumstances also rests on the appellant.

16. The appellant failed to give any reasonable explanation for such inculpatory circumstances appearing against him. There is also the testimony of Principal of College Sh.TB Panda whose presence at the time of recovery of money is also not disputed and there appears to be no reason to disbelieve his testimony which finds corroboration also from the Seizure Memo bearing the signatures of the appellant.

17. Much thrust has been laid that the Prosecution witness Sh.Neelkanthan was having ill will against the appellant as he did not agree to his suggestions being uncalled for and were not in the interest of the work. Because of that annoyance he has falsely been roped in this case. It shall be useful to mention that in the criminal prosecution if otherwise the justified and based upon adequate evidence does not become vitiated on account of malafide however, justified and reasonable apprehension is established. Here there is no bias of some of the Junior officer who made the raid against the appellant. There could be no reason to have fabricated the entire case against him. Reliance may be placed on the case *Captain Arminster Singh vs. Parkash Singh Badal & Others*, (2009) 6 S.C.C. Pg.260 wherein it was held that:

It is a well-established proposition of law that a criminal prosecution, if otherwise, justifiable and based upon adequate evidence does not become vitiated on account of mala fides or political mandate of the informant or the complainant. However, if justifiable and reasonable apprehension of miscarriage of justice and likelihood of bias is established, undoubtedly, the proceeding has to be transferred elsewhere by exercise of power under Section 406 CrPC.

18. It is contended by the appellant that the charge sheet was signed by an Officer who was not CO of the appellant. Convening Order was signed by CPSU HQ, SWAC, IAF being the Staff officer on behalf of the Convening authority in terms of 43 (a) of the Air Force Rules 1969 and is not legally sustainable. In that regard it has been made clear from the materials on record that the appellant was attached to 12 FBSU, AF on 30.07.2003 i.e. date on which the Station Commander 12 FBSU, AF had signed the charge sheet being the CO of the appellant. Even from the findings recorded by GCM is based on the materials produced before them. It was noticed by the Court that after scrutinising the original signals leave application was found which satisfies that the appellant was on attachment to 12 FBSU, AF from 21.07.2003 to 01.08.2003 and further at that time Grp Capt B.S.Dhanova who signed the charge sheet

on 30.07.2003 was infact the CO of the appellant on that date. In that regard the detailed events of the date where the appellant remained attached have been given on affidavit by Grp Capt DV Mohbe for clarifying the position as sort by this Bench as under:

<u>Sl No.</u>	<u>Event</u>	<u>Date</u>
1.	Attached to 12 FBSU, AF	28 Jan 03
2.	Attachment ceased from 12 FBSU, AF	19 May 03
3.	Attached to 12 FBSU, AF	06 Jan 03
4.	Sent to 36 Wg, AF from 12 FBSU, AF followed by leave (from 21 Jul 03- 02 Aug 03 i .e. after conclusion of recording of Summary of Evidence in the case of Gp Capt Mohit Kumar	13 Jul 03

Signing of the charge sheet is obviously in pursuance of the Rule 4 (15) of the Air Force Act, 1950. There appears no substance in the contention of the appellant.

19. Further placing reliance on the case of *Union of India Vs. Charanjeet 2000 SC Pg 3425* it is submitted that the Junior officer was associated with the GCM which is in violation of Rule 46 of the Air Force Rules, 1969. Sufficient evidence has come on record that despite all possible efforts the senior officer was not available because of other emergent duties. Under such circumstances the junior officer conducted

the GCM. It would not be violative of Rule 46 Air Force, 1969 moreover no prejudice is caused to the appellant.

20. Considered as a whole, we find the prosecution witness to be clear and cogent, they are consistent and credit worthy. Witnesses are independent and disinterested. We do not find any reason to disbelieve their testimony. Even from the statement of PW1 Sh. Jayesh Babla inference with regard to leaving money and cheque at the room of the petitioner is quite evident and uncontroverted by the defence counsel. The finding of guilt so recorded by GCM does not require any interference.

Appeal is dismissed.

S.S.DHILLON
(Member)

S.S.KULSHRESHTA
(Member)

PRONOUNCED IN OPEN COURT
ON 10th FEBRUARY, 2010