

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

**T.A NO. 592 OF 2009  
(WRIT PETITION (C) NO. 622 of 1999)**

BALBIR SINGH, NO.10826321 EX SWR  
VILL. & P.O: KHATELA  
DISTT. FARIDABAD (HARYANA).

THROUGH: MR. J.S MANHAS, ADVOCATE

**.. PETITIONER**

VS.

1. THE UNION OF INDIA THROUGH SECRETARY,  
MINISTRY OF DEFENCE, SOUTH BLOCK,  
CENTRAL SECRETARIAT, NEW DELHI.
2. THE CHIEF OF ARMY STAFF,  
ARMY HQ, SOUTH BLOCK, DHQ P.O,  
NEW DELHI-110 011.

THROUGH: MR. ANKUR CHIBBER, ADVOCATE WITH LT. COL.  
NAVEEN SHARMA

**.. RESPONDENTS**

**CORAM**

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

**JUDGMENT**

09.03.2010

1. Balbir Singh, the appellant herein, challenges the Court Martial proceedings dated 2.2.1991, whereby he was found guilty under Section 52(a) of the Army Act for having committed theft of a .38 Revolver (Reg. No.V-303675) belonging to the Government, and the order of the Chief of Army Staff dated 17.3.1997, whereby the statutory appeal filed by the appellant was rejected. He has also sought to be reinstated in service with all consequential benefits.

2. It is contended by counsel for the appellant that the appellant was not afforded the opportunity of being heard at the time of framing of charge under Army Rule 22, violating the provisions of

Army Rules 180 and 185. The appellant never pleaded guilty. His signature was not obtained on the so-called plea of guilt which created doubt about the authenticity of the plea of guilt. Moreover, the appellant was not apprised of the consequences of pleading guilty as is warranted under Army Rule 115(2). The certificate annexed to the proceedings does not show that the same was given at the time when the plea of guilt was recorded, which also creates doubt about its genuineness. Further, there is no evidence on record from which the guilt of the accused could be proved.

3. The appeal was resisted by the respondents contending, inter alia, that the stolen revolver was recovered from behind the wooden boxes within a short span of time. Therefore, there was no need of further going for Court of Inquiry as contemplated under Regulation 602. Moreover, the plea of guilt made by the appellant could be read in evidence in view of the provisions contained in Army Rule 23(3). Further, from the very beginning, there was suspicion

about the involvement of the appellant with regard to the theft of the revolver and it was subsequently proved when his confession statement was recorded.

4. As regards non-compliance of Army Rule 180 is concerned, it is an undisputed fact that no Court of Inquiry had taken place. In view of Army Rule 185, it is mandatory that Court of Inquiry is assembled under the orders of the Commanding Officer. Army Rule 185 reads as under:

**“185. Court of inquiry when rifles, etc., are lost or stolen.---** (1) Whenever any weapon or part of a weapon, which forms part of the equipment of a squadron, battery, company or other similar unit, and in respect of the loss or theft of which a fine may be imposed under rule 186 is lost or stolen, a court of inquiry shall be assembled, under the orders of the officer commanding the army, army corps, division or independent brigade, to investigate the circumstances under which the loss or theft occurred.

(2) The officer who assembled the court shall direct it to record an opinion as to the circumstances of the loss or theft.”

Further, as per Regulation 602(b), a Court of Inquiry shall be held in all cases of losses. Learned counsel for the petitioner has submitted that in view of Section 15(4) of the Armed Forces Tribunal Act, 2007, this Tribunal shall allow an appeal against conviction by a Court Martial where ‘the finding of the Court Martial is legally not sustainable due to any reason whatsoever. Here, in this case, the procedure as contemplated under Army Rules 180 and 185, appears to have been violated. The reason given for not conducting Court of Inquiry is apparent as recovery of the stolen revolver within a short span of time is not a ground to dispense with the Court of Inquiry as contemplated under Army Rule 185. There is procedural irregularity in the conduct of Court Martial which has resulted in miscarriage of justice.

5. It has next been contended by counsel for the petitioner that there is not an iota of evidence against the petitioner and merely on conjectures and surmises, by attaching undue significance to the so-called confession, complicity of the petitioner has been attached.

6. As stated above, the petitioner was charge-sheeted for the offence under Section 52(a) of the Army Act. In support of its case, the prosecution examined PW 1 (LD Kunna Ram), who, on 5.1.1991 in the presence of Nb Ris Nihal Singh, counted all the arms physically and found them correct as per the ledger. According to him, thereafter, he issued one pistol, one sten and two SLRs to the guard and to the persons on duty. After the arms issued, the kotes were locked by him in the presence of the JCO. At the time of second parade on the same day, the officiating senior JCO asked for arms cleaning, which was done. When others went to get cleaning materials, the petitioner was asked to get the broom for sweeping the kote. As he brought a hard broom, the petitioner was asked to get a soft broom from 4 troop.

Then the appellant went to bring the soft broom. This witness did not whisper anything casting even suspicion with regard to the involvement of the petitioner in the alleged theft.

7. PW 2 (Nb Ris Nihal Singh) also gave an identical statement. He stated that nine persons, including the petitioner, were detailed for cleaning weapons on 5.1.1991. The petitioner was asked to bring broom for cleaning the weapons. The cleaning process finished by 1215 hours. When PW 2 reached the Kote, he was informed by the Kote NCO about the missing of one pistol. On enquiry, he was told that the petitioner was the only person who had entered the Kote. The petitioner having been suspected of taking the revolver, he was asked to return the revolver. But he refused having taken the revolver. Thereupon, PW 2 ordered for a detailed checking of the weapons at 1645 hours, the revolver was found Swr Ram Kishore Bana and Swr Mool Chand behind a box in the presence of the petitioner.

PW 2 picked up the pistol which was wrapped in polythene paper and showed it to the Commandant Col. R.K Loomba.

8. PW 4 (Ris Badan Singh), who was the officiating Senior JCO 'B' Squadron also reiterated about the detailment of nine officials for cleaning the weapons. At about 1340 hours, he was informed by Dfr. Jai Singh about the missing of .38 revolver from the Kote. Thereafter he made an extensive checking for the lost revolver and asked the Kote NCO as to how the pistol could be missed. The Kote NCO informed him about the suspicion of petitioner's involvement in the alleged theft as he was the only person who was in the Kote. Then the petitioner was brought before the Squadron Commander for interrogation. He further stated that when the Squadron Commander enquired about the revolver, the petitioner denied having taken it. Further, the petitioner appeared tense and nervous at that time.



9. Pw 5 (Dfr. Jai Singh) stated about the request made by the petitioner for granting of leave. On 4.1.1991 the petitioner met him outside the Technical Store and requested not to send him as Gunman next day as he wanted to meet the Squadron Commander and the Senior JCO to talk about the leave.

10. PW 7 (Swr Ram Kishore Bana) also gave an identical statement that the accused wanted leave. This witness was there in the search party and found the revolver hidden behind the wooden box wrapped in a polythene cover. He also stated that the same was handed over to Nb. Ris Nihal Singh.

11. Other witnesses, viz. ALD Surinder Singh (PW 8), Swr. Ramesh Chand (PW 9) and Swr. Malkhan Singh (PW 10), were also examined by the prosecution. But they did not whisper about the revolver theft of which has been attributed against the petitioner.

12. Prosecution also examined PW 3 Capt. S. Tripathi, who was at the relevant time officiating Adjutant. He stated that on 5.1.1991 around 1500 hours he was informed by the Squadron Commander Maj. U. Malik about the missing of one .38 revolver and asked to proceed immediately to Nabha Railway Station and the Bus Stand to check the luggage of those personnel proceeded on leave. He could not find anything incriminating from their luggage. He thereafter questioned the petitioner who initially pleaded his ignorance, but later when he was asked about his mental disturbance, he gave the following answers:

Q9. Are you mentally disturbed or is something worrying you and because of this you may have taken out the weapon-Try and remember?

A. Yes. I am mentally disturbed.

Q10. What is the problem which is worrying you?

A. I have a problem at home. I have been adopted by my uncle (father's elder brother). My uncle has gifted the land

to me which is envied by others in the village. They keep trouble me and my family.

Q11. Who are they? Are they your own brothers or cousins?

A. No, they are villagers- a rival group.

Q12. So what do they do?

A. They till the fields forcibly and trouble my women folk.

Q13. What sort of trouble? Please confide in me?

A. They trouble my wife and sister when they go to the fields for the call of nature. They have even raped my wife (breaks down and cries).

Q14. So you had decided to take some sort of revenge?

A. Yes. I had decided to shoot them.

Q15. So is this the reason that you had taken out the pistol?

A. (Cries) Yes.

Q16. OK-First sit down (He sits down on the mat). Don't worry. Now tell me when did you take out the pistol? Since you have told me so much, you might as well tell me the whole thing so that things become clear. Be a man and own up so

that others are not blamed (I get up and stand next to the table).

A. Day before yesterday, I was detailed as gunman on the School Bus to go to Patiala. I had gone to the Kote to draw the rifle. That is the time I had taken it out.

Q17. But you had gone to draw the rifle-how come you drew the pistol out?

A. No, I had drawn the rifle and when I went to take the security chain from the locker, on seeing it open, I took out a revolver.

Q18. Where was the Kote NCO?

A. He was filling in the register and my back was towards him.

Q19. Where did you hide it?

A. I had put it under my jersey.

Q20. Were you wearing a short coat on top of it?

A. No.

Q21. Then didn't it show?

A. No. (IC-36740K Maj U Malik walked in and I told him about the details of the confession).

Q22. Are you sure you had taken it out day before yesterday and not today. Try and remember.

A. Yes, I am sure- I had taken out the pistol day before yesterday.

Q23. Didn't anybody notice it while taking it out?

A. No, I had hidden it under the jersey next to the breast pocket.

Q24. Then what did you do?

A. I went to Patiala and wanted to run away with the rifle and amn.

Q25. Why didn't you run away? Did anybody stop you?

A. No body stopped me but I couldn't gather enough courage to run away.

Q26. Did you take out the pistol today or the day before yesterday?

A. Day before yesterday. (IC-36740K Maj U Malik left the office at this time)

PW 3 also made it clear that the petitioner thereafter retracted from his confession when he was asked further questions and denied having taken the revolver either on 5.1.1991 or subsequently.

13. The first part of the statement of PW 3 determines its species. But subsequently the witness in all fairness clarified that the petitioner thereafter retracted from his statement and denied having taken any weapon on that day or any other date. His statement, if read as a whole, cannot be used as an incriminating piece of evidence against the petitioner.

14. It was further contended by counsel for the petitioner that the prosecution cannot bank upon the so called plea of guilty recorded by the Court Martial unless there is evidence to substantiate the alleged theft. However, from the side of the prosecution, much emphasis has been made on the point that the petitioner had pleaded

guilty and in view of Army Rule 23(3), the evidence against the petitioner, including his own statement, is sufficient to fix his culpability.

15. As has been stated, there is no evidence against the petitioner and the prosecution witnesses had not satisfactorily explained the involvement of the petitioner in the alleged theft. As regards the plea of guilt or the admission by the petitioner is concerned, the legal provisions cannot be set at naught while shifting the burden solely on the petitioner. The burden, which rests on the prosecution to establish its case beyond reasonable doubt, is neither utilised nor shifted because the petitioner pleaded guilty. The prosecution must discharge its initial burden to establish complicity of the accused and until it does so, the question arises whether the accused has committed the offence or not. This position, though often overlooked, would be easy to understand if it is appreciated with the civil rule of pleadings if it is not governed by the right of the accused in

a criminal trial. Unlike in a civil case, it is open to the criminal court to find in favour of an accused on a plea not taken up by him and by so doing, the Court does not invite the charge that it has made out a new case for the accused. The accused may not plead guilty and yet the Court may find evidence and the evidence in the circumstances of the case could otherwise be an offence to which the accused is not connected. Here, in this case, the petitioner, in the statement made at the time of recording of the summary of evidence, has stated with regard to the theft of the weapon. But that would not itself be sufficient to establish the guilt of the petitioner and the burden is always on the prosecution and it never shifts. Even in respect of cases covered by Section 105 of the Evidence Act, the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and the circumstances obtaining in the case. He may adduce evidence in support of the plea directly or rely on the prosecution case itself or he can indirectly introduce such



circumstances by way of cross examination and also rely on the probabilities and the other circumstances (see **Vijayee Singh and others v. State of U.P** – 1990 (3) SCC 190).

16. It shall be useful to mention that there is no confession. The so-called confession of the petitioner, if read as a whole, would lead to three different conclusions, viz. (i) where the accused confessed his guilt of stealing the revolver with a view to take revenge; (ii) the accused is belying the prosecution evidence that the theft took place on 5.1.1991, whereas he is stating that the alleged theft took place two days prior thereto; (iii) where the accused is retracting his confession. Under such circumstances, it is not possible to treat the statement of the accused independently given at the time of Court Martial to be an admission. In that premises, the so-called admission of the accused could, at the best, be considered to be a supplementary evidence to substantiate the prosecution version. But it cannot be considered as sole evidence where the prosecution failed to show the

involvement of the accused in the case of commission of that crime.

On this point, it would be beneficial to refer to the principle of law

enunciated by the apex Court in **Nandini Satpathy v. P.L Dani** ((1978)

2 SCC 424) which reads as under:

“The first obligation of the criminal justice system is to secure justice by seeking and substantiating truth through proof. Of course, the means must be as good as the ends and the dignity of the individual and the freedom of the human person cannot be sacrificed by resort to improper means, however worthy the ends. Therefore, ‘third degree’ has to be outlawed and indeed has been. We have to draw up clear lines between the whirlpool and the rock where the safety of society and the worthy of the human person may co-exist in peace”.

In view of the above, we do not find evidence to prove the charge

against the petitioner for the offence under Section 52(a) of the Army

Act. It is grossly inadequate and solely on the basis of the retracted

confession or admission of his guilt, conviction will not stand. The prosecution has failed to discharge the burden.

17. The appeal is, therefore, allowed. The impugned orders are set aside. The petitioner shall be deemed to be in service from the date of his dismissal till the date he attained the age of superannuation. He will not be entitled for any backwages, but this interregnum period will be considered for the purpose of pensionary benefits.

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

**(S.S KULSHRESHTHA)**  
**MEMBER**