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

TA/671/09
WRIT PETITION (CIVIL) NO.3476/2000

1. NO.14903710P L/NK VIJENDRA KUMAR SHARMA
RESIDENT OF VILLAGE AND POST MUKUNDPUR
DISTRICT MUZAFFAR NAGAR, U.P.
2. NO.4179406A SEP BHIM CHAND
R/O. VILLAGE JALTURI, P.O.MARCH
DISTRICT PITHORAGARH, U.P.
3. NO.4179693-SEP PRATAP SINGH
R/O.VILLAGE TANDA, TEHSIL NAINITAL
DISTRICT NAINITAL, U.P.
4. NO.4184154H-SEP MANOHAR SINGH
R/O. RANIKHET, P.O. RANIKHET
DISTRICT ALMORA, U.P.

THROUGH : COL. K. DIGAMBER SINGH, ADVOCATE

...APPELLANTS

VERSUS

1. UNION OF INDIA
THROUGH ITS SECRETARY
MINISTRY OF DEFENCE
SOUTH BLOCK
NEW DELHI.
2. THE CHIEF OF THE ARMY STAFF
ARMY HEAD QUARTERS
SOUTH BLOCK
NEW DELHI.
3. GOC-IN-C
HEAD QUARTERS SOUTHERN COMMAND

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PUNE, MAHARASHTRA.

- 4. GOC-IN-C
HEAD QUARTERS
MAHARASHTRA AND GUJARAT AREA
BOMBAY.**
- 5. GENERAL COURT MARTIAL
THROUGH ITS PRESIDING OFFICER
STATION AHMEDNAGAR
MAHARASHTRA.**

**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

Dated : 11th MAY, 2010

1. This Writ Petition under Article 226 of the Constitution of India has been brought by the petitioners for quashing the General Court Martial (GCM) proceedings held on 06.09.1995 whereby the petitioners were held guilty for offences under Section 386 read with Section 34 IPC and also under section 354 IPC and sentenced to two years rigorous imprisonment and dismissal from service. Simultaneously prayer has been made by them to be reinstated in service and be also provided all pecuniary benefits including continuity in service. Having receipt this

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petition from Delhi High Court, in view of the provisions contained in Section 15 of the Armed Forces Tribunal Act, 2007 [The Act] it has been treated as an Appeal.

2. It is contended by the appellants that they have falsely been roped into this case because of high handedness on the part of the civil Police. They being subject of Army Act ought to have been proceeded by following procedures under Army Rules 177, 179 and 180. Not only this, the mandatory provisions as contained under Army Rule 22, 23 to 25, 33 and 95 in the conduct of the trial of the appellants were not adhered to, resultantly the entire trial stood vitiated. As was also held in the case of Maj Genl D.S.C. Rai Vs. G.C.M., Fort St. George, Madras, Madras High Court, WP Nos.3067 and 3068 of 1984. It is manifestly clear from Army Rules that failure to comply with rules 22, 23 and 24 would vitiate the General Court Martial proceedings. The Hon'ble Supreme Court of India in Lt Col P.P.S.Bedi and others Vs. UOI, reported in AIR 1982, SC 1413 and SLJ 1982 (2) Pg. 582 SC supra. Also Maj G.S.Sodhi Vs. UOI, WP (Crl) 478 of 1989 S.C.Order dated 30 Nov.1990 elucidated the same principle. It was also said that the guilt of the appellants was established by the General Court Martial (GCM) on the basis of conjectures and surmises. There was nothing on record which could fix the identity of

appellants. If identification has been made in the court, the same has no significance. Further, whatever recoveries have been assigned from the possession of the appellant are also doubtful. Even the FIR is said to be delayed and that would itself create doubt about the testimony of the witnesses, including that of the police witnesses.

3. This appeal is resisted from the side of Union of India. It is said that there is ample evidence to fix the culpability of the appellants. The moment matter was reported to the Police Station, the police came into action and accused persons were chased at two different places and were caught with looted articles. They were brought to the Police Station where they were also identified by the complainant and other witnesses of the incident. Recovery Memo was also prepared. Further those accused persons were also identified there in the court. It is also said that there could be no reason for police implicating the appellants/accused in this case.

4. In order to appreciate the points agitated by learned counsel for the parties it shall be necessary to make a brief narration of the facts. As would appear from the materials on record, on 17.09.1994 Smt. Vimal Bai Eknath Ghowate along with Gulab Babu Bhai Pathan and

Eknath Narayan Ghatole were coming back to Khamaswadi in their jeep around 2300 hours. At that time the jeep was driven by Gulab Babu Bhai Pathan and PW2 Smt. Vimal Bai Eknath Ghowate was sitting at the driver side seat. They took a brief halt at Maharashtra Industrial Development Corporation (MIDC), Ahmednagar for some refreshment around midnight intervening on 17/18-09-1994. They again started towards Khamaswadi. At that time, PW2 Smt. Vimal Bai Eknath Ghowate preferred to sit at the rear seat of the jeep and Sh. Eknath Narayan Ghatole was occupying the seat by the side of the Driver. When they reached Jamkhed road near Hathi Bavri, one person gave signal to stop the jeep. However, the driver did not stop it. About 15-20 yards ahead, when the jeep was negotiating an up hill slope, four persons came in front of the jeep as a result of which it stopped. The person who had first waved the jeep to stop, came and started abusing the driver of the jeep and pulled him outside the jeep. They had also pulled out Eknath Narayan Ghatole from the jeep. All the five persons started giving severe beatings to the driver and also to Sh. Eknath Narayan Ghatole. PW2 Smt. Vimal Bai Eknath Ghowate pleaded for mercy. Those persons also started misbehaving with her and threatened to kill them by giving threat of knife. They got into the jeep and told the driver to take them to Ahmednagar. During this journey one of the five persons sat with the

driver and remaining four sat in the rear seat. They started not only misbehaving with the lady but also looted cash, jewellery and other items. They molested PW2 Smt. Vimal Bai Eknath Ghowate. After extorting Mangal Sutra, golden Ganthan, suitcase and cash they stopped the Jeep and ran away. Report was lodged at the Police Station Bhingar on the intervening night of 17/18-09-1994 at about 0100 hours. The police heard the incident and asked Eknath Narayan Ghatole to accompany them to the scene of incident. After sometime the police party returned with two accused persons namely Sep Bhim Chandra and Sep Pratap Singh and got them identified. The police in the presence of PW2 Smt. Vimal Bai Eknath Ghowate made a search of these persons. Ganthan was recovered from Sep Bhim Chandra and cash from Sep Pratap Singh. They both were taken into custody. After about 10-15 minutes, another police party brought Sep (L/Nk) Vijender Kumar Sharma and Sep Manohar Singh who was carrying the suitcase (ME-1). They were also identified. Sh.Gulab Babu Bhai Pathan, Eknath Narayan Ghatole and Smt. Vimal Bai Eknath Ghowate also received injuries and were examined by the doctor and given first aid. The investigation was initially conducted by the police and all the Seizure Memos were prepared by them. Subsequently, the case was transferred to Military for trial under the Military Law. After framing of charges under section 386 read with 34

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and also 354 of IPC, the General Court Martial proceedings (GCM) were drawn against all the accused. The prosecution in support of their contention examined PW1 Maj Narendra Singh who brought all the records before the General Court Martial, PW2 Smt. Vimal Bai Eknath Ghowate who is the victim of molestation and owner of the articles which were looted from her, PW2 Smt. Vimal Bai Eknath Ghowate, PW3 Sh.Gulab Babu Bhai Pathan driver of the jeep. PW4 Sh.Eknath Narayan Ghatole made narration of the incident. PW5 Dr. Ravindra Gopala Rao Sonar, Medical Officer, Civil Hospital, Ahmednagar who made the medical examination of the injuries of the victims, was examined. He had given the description of the injuries sustained by each of them. It also connects to the time of the incident. PW6 Sh.Yeshu Ambu Bhingardive was examined in whose presence the site plan of the place of incident was prepared. PW7 Sh.Jai Bharath Hanumanth Chinchne and PW8 Sh.Vilas Manohar Katore are the witnesses of Seizure. They were declared hostile and have not supported the prosecution version. Prosecution further examined P.S.I. Shabbir Abbas Ali Kazie of Camp Police Station Bhingar as PW9 and PW10 Dy. S.P.Sh. Asha Ram D.Shinde of Ahmed Nagar City Division.

5. In defence, the accused have examined DW1 Maj Prakash Govind Deval of Adm. and Depot Battalion MIRC Ahmednagar who translated the version records, Lt Col Bhupendra Singh, Adm. Officer, Center, HQ MIRC, Ahmednagar as DW2. These witnesses stated about the good character and antecedents of the accused persons.

6. It is strenuously argued by the learned counsel for the appellants that evidence adduced by the prosecution was grossly deficient and would not fix the identity of the accused persons. They were simply roped into this offence by the Civil Police so as to settle scores as in the past there was some dispute between the Civil Police and Military personnel as is also evident from the statement of the defence witness. It is also said that the factum of incident may not be under challenge but they have nothing to do with the incident. Whatever had taken place, there was no recovery from them and the police had planted that recovery so as to malign the military personnel.

7. The material question refers to the identification of the appellants. In that regard we have been taken to the original FIR which is full of interpolations with regard to the timings of its lodging and further to show that the criminals were appearing to be army personnel. From the

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perusal of the original FIR, it appears that it was lodged at about 0920 hours on 18.09.1994 but by some interpolation it was shown to have been lodged at 0120 hours. No plausible explanation for this interpolation has come on record. There other important aspect of this case was that the wireless message was flashed that the loot had taken place and the criminals were appearing to be Army personnel. On the basis of such message, rigorous search was made. But from the original FIR these lines that 'all the criminals appearing to be Army personnel' were subsequently interpolated in the FIR, which would belie the contents of wireless message and the prosecution witnesses. The interpolation part is evident from the spacing between the lines which are not in agreement with the other part of the FIR. PW2 Smt. Vimal Bai Eknath Ghowate who has narrated the entire incident as referred above but stated that the FIR was lodged by her at the concerned Police Station at about 0100 hours on 18.09.1994. Obviously for the reasons of interpolation in FIR about the timings, the testimony of this witness is not free from suspicion. This part of the FIR with regard to the participation of 4-5 army personnel in the incident of loot would itself create doubt about the flashing of such message because of obvious interpolation in FIR. After hearing such message P.S.I. reached at the Police Station. There is nothing on record to show the timings of departure and arrival of this witness at the Police

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Station. He, soon thereafter, from the Police Station along with 3-4 constables and Eknath Narayan Ghatole went at the place where the loot had been assigned. They saw 5-6 persons going towards Darawadi side. They were chased and out of them two were caught. The testimony of these witnesses have also been challenged on the ground that after the loot, sufficient time has elapsed and it is unbelievable that the accused along with such stolen articles would wait there for the police to come so as to be identified and caught. There appears to be no probability for the accused to wait and out of them two were arrested and rest managed to run away. They were brought at the Police Station along with the articles which were said to have been looted. Similar is the statement of PW10 Dy S.P.Asaram D Shinde who received the message at about 0050 hours on the night intervening 17/18-09-1994. He along with 3-4 constables left the city Police Station. When they crossed Darewadi and reached Gokhlhari, they saw 3-4 persons in the headlight of the jeep near the Nallah and at a distance of 200 meters. The police supposedly chased these persons and two were caught and brought to the Police Station with the articles. It does not inspire confidence and it is also not possible that the accused waited and kept the articles with them including the suitcase. There was no necessity for them to carry an identifiable suitcase with a few used clothes! Further there is nothing on record at the Police Station

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to show the timings of the arrival and departure of these witnesses in the police diary.

8. It was next argued that there is no evidence with regard to the involvement of accused appellants. There is even no evidence that in the jeep light they were identified by the occupants of the jeep. No efforts were made by the police for having their identification done according to law. It shall not be off the point to mention that failure to hold test identification parade does not make the evidence of identification in court inadmissible, but at the same time where the identification of the accused by the witnesses is made for the first time in court, it cannot form the basis for conviction. Even assuming the accused persons to be army personnel as was referred in the FIR (though by way of subsequent addition) there was a necessity of holding an identification parade. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited

as eyewitnesses of the crime. In this case, evidence of the occupants of the jeep before the GCM had taken place after about one year. In such a situation, the identification before the GCM loses its significance. It is also a strange phenomenon of this case that in the absence of light when the first time these culprits participated in this incident, one is snatching Ganthan, one is snatching cash and other suit case and fourth one was misbehaving with PW2 Smt. Vimal Bai Eknath Ghowate. Attributing such specific individual roles would itself make out the statement of witnesses to be unnatural. No reliance can be placed on the testimony of these witnesses.

9. It has further been argued by the learned counsel for the appellants that whatever the recovery at the time of search has been assigned from the accused is not proved. These material articles were planted against them at the Police Station. In that regard statement of the witnesses of the seizures PW7 Sh.Jai Bharath Hanumanth Chinchne and PW8 Sh.Vilas Manohar Katore was referred. They denied the recovery of those articles in their presence. Further emphasis has also been made that the seizure ought to have taken place where these accused persons were caught by the Police by giving necessary chase. No search was made at the spot. Under such circumstances emphasis has been made that the

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Seizure which has been assigned there at the Police Station has no meaning and would not substantiate the prosecution version. From the prosecution version, it is clear that the accused persons in different lots were caught with the looted articles at different places. No care was taken to make this seizure memo at that place. There is no explanation as to what prevented the police party to prepare the search memo in the presence of independent and respectable witnesses. The search which was affected at the Police Station is not substantiated by the witnesses (PW7 & PW8). It is well known that in all matters where the police want that the story should be believed they always get an independent witness of the locality so that evidence may lend support to what is alleged by the police officer. Admittedly, the witnesses of that locality were not taken. Independent witnesses in this case would be all the more necessary especially in view of the fact that the persons involved were supposedly army personnel. In such a controversial situation, when the local police was having some differences with Army, the presence of independent witness was essential. Reliance may be placed in the case of ***Kehan Singh Vs. Delhi Administration AIR 1988 S.C. 1883***. Apart from police witnesses, other persons are interested witnesses. Under such circumstances, the evidence of search and seizure of the articles (material exhibits) from accused are not such as to inspire confidence and cannot

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be accepted. As regards the chase of the accused persons it is said that the place where they were caught is not very far from the place of the incident. This also is unnatural and unlikely as the accused would not have waited with the looted items till the police arrived.

10. In this regard it shall also not be off the point to mention that the defence witnesses have characterised the accused persons to be of good antecedents and it has also come on record that the Police had some differences with the Army, hence the possibility of false involvement of the accused appellants cannot be ruled out. We do not find any reason to disbelieve the Senior Officers of the Defence forces relating to the good conduct of the accused appellants. Evidence of general reputation and general disposition is relevant in criminal proceedings (*See Bhagwan Swaroop Vs. State of Maharashtra, AIR 1965 SC 683*). In view of the aforesaid discussion we are of the opinion that whatever evidence has been advanced by the prosecution is full of discrepancies. It does not inspire confidence. Moreover the FIR which is the basis of incident was interpolated to fix the identity of the military personnel. Even the search/seizure so relied upon had not been proved **For the reasons assigned above, appeal deserves to be allowed.**

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11. Appeal is allowed. The General Court Martial (GCM) proceedings including that of conviction and the sentence awarded to the accused persons are set aside. They shall be deemed to have been reinstated from the date of their dismissal and serve till attaining the age of superannuation in their present rank and shall be entitled to all pecuniary benefits including back wages and pension.

S.S.DHILLON
(Member)

S.S.KULSHRESTHA
(Member)

PRONOUNCED IN THE OPEN COURT
TODAY ON DATED 11th MAY, 2010