IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

O.A No. 406 of 2010

SUB. AVTAR SINGH BAINS ...APPELLANT

Versus

UNION OF INDIA AND OTHERS ...RESPONDENTS

ADVOCATES

MR. SEWA RAM FOR THE APPELLANT
MR. AJAI BHALLA FOR THE RESPONDENTS

CORAM

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

JUDGMENT
07.01.2011

1. This appeal has been brought against the findings and the sentence awarded by the General Court Martial ('GCM') whereby holding the appellant guilty for the offence under Section 63 of the Army Act for selling 123 bottles of CSD Canteen liquor on 15th May 2008 to No. 15612898N Sep. Balbir Singh of IHQ, LU who posed himself as a civilian, and

sentencing the appellant to be dismissed from service. Simultaneously order dated 31st August 2008 rejecting the pre-confirmation application and also the order dated 22nd September 2008 whereby confirming the GCM proceedings are challenged. It is contended that the appellant has falsely been roped into the case and the entire case has been fabricated against him. The GCM proceeded to hold the accused/appellant guilty on conjectures and surmises when there was no evidence to fix the culpability of the accused/appellant. He was not provided copies of the daily proceedings in as much as the inspection was also denied to him. In the absence of the documents, it was not possible for the accused/appellant to defend his case properly. Non-providing of a fair opportunity is also evident from the materials on record where the defending officer had also endorsed non furnishing the copy of daily proceedings, non-grant of permission for inspection and even to examine the witnesses in his defence. It is also stated that there is a procedure for putting the accused/appellant for trial which was not followed. It is further contended that there was no valid convening order and at the same time Army Rules 22, 23, 24 and 37 were not complied with. The material exhibits such as the liquor bottles which are stated to have been sold by the

accused/appellant have not been produced before the GCM. Resultantly, the appellant was deprived of the opportunity to challenge the said recovery and the material exhibits. So was the position of the recovered amount of Rs. 15,000. Further the arrangements made under Army Rules 49, 51, 53, 137 and 147 were also flouted by the respondents with a result the valuable right of the appellant was adversely affected. This appeal was resisted on behalf of the respondents contending that Army Rules were strictly adhered to before passing the convening order against the accused/appellant. Moreover during the course of his trial, full opportunity was given to the accused/appellant. As regards the merits of the case, it is also contended that all the witnesses examined from the side of the prosecution have stated about the recovery of 123 bottles of liquor. Some of them were also the witnesses of the raid. There was no animosity between the accused and those witnesses and so there appears to be no reason to disbelieve those witnesses. Even otherwise, the defence witness has also supported the prosecution case with regard to recovery of those bottles including that of the signing of the recovery memo by the accused himself. On other aspects, the averments made in the appeal were also controverted from the side of the respondents.

2. Before appreciating the points involved in this appeal, a brief resume of the facts may be made. Anonymous complaints were received that Army liquor was being sold to the civilians by someone who was also drawing profit out of this. Looking on such complaint, one Sepoy was deputed by the authority concerned to verify the same by making an attempt to purchase one bottle of liquor from that person. Government money was also given to him for the purpose. One bottle of liquor was purchased by that decoy on 6th September 2007 from the appellant. Again as per the understanding between the appellant/accused and the decoy on 7th September 2007, 14 bottles of liquor were purchased by him. On getting satisfaction of such sale of liquor, on 12th September 2007 the decoy purchased 123 bottles of liquor from the accused/appellant for Rs. 15,000/- and the raid was arranged and the accused was caught and 123 bottles of liquor were seized as the case property and Rs.15,000/- which was given to the accused/appellant as a consideration of those 123 bottles purchased from him was also recovered. Appellant has challenged the said recovery. To the contrary, those 123 bottles were planted by the prosecution at his house. The so called confession statement of the appellant was obtained under duress.

3. In support of its case, prosecution examined Sub. Manohar Singh (PW-1) who was at the relevant time In-charge in the CSD of Kashmir House, E&C Branch. He stated that accused used to come to that CSD for purchase of 2-4 bottles on the liquor card which was permissible to him. He was a formal witness. PW-2 Sepoy Balbir Singh who went to the house of the accused/appellant as a decoy, was examined by the prosecution. He made it clear that Officer Commanding ('OC') Lt. Col. R.P. Pandey told him with regard to the sale of the Army liquor to the civilians in the area of Sector-2, R.K.Puram, New Delhi. As per the directions of his CO, this witness and one Hav. A.K. Singh were deputed to visit the area and to ascertain the truth of such allegation. He enquired from one Mr. Pawan who was running a tea stall in the area as to where Army liquor would be available. Mr. Pawan told him that from Quarter No. 40 Army liquor could be purchased. It was also appraised by him that only in the night hours the liquor could be available. He retuned to his unit and appraised the situation to the higher authorities. In the evening, he along with Hav. A.K. Singh went to the residence of the accused/appellant. In response to the door bell, the accused/appellant opened the door and asked for their identity. On having satisfied himself, the accused/appellant gave one bottle of liquor

to them for Rs. 200. When the accused was asked about the availability of more liquor, he assured the decoy that whatever quantity was desired could be managed. A few days later, he along with Captain Neeraj Kumar, Hav. A.K. Singh and driver Vinay Kumar went to Sector 2, R.K.Puram, New Delhi. This witness alone went to the accused while the others waited outside. As per the assurance, two cases of whiskey/rum were purchased and for that Rs.4,000/- was given to the accused/appellant. The witness further stated that the accused/appellant was asked to manage 9/10 cases for which he was assured that these could be collected on 12th September 2007.

4. This witness has also narrated the entire incident which had taken place on 12th September 2007. It was clarified by him that he along with Lt. Col. R.P. Pandey, Captain Neeraj Kumar, Hav. A.K. Singh and driver Vinay Kumar along with two persons went to the house of the accused/appellant. This witness had earlier gone to the quarter of the accused and asked for 10 cases of liquor which was also managed by the accused/appellant. While initially he had Rs. 8,000/- only but the balance amount was managed from Hav. A.K. Singh. In that way a sum of Rs.

15,000/- was given to the accused/appellant. The testimony of this witness could not be assailed.

5. PW-3 Hav. M.K. Kumawat who was also one of the members of the raiding party stated that on 12th September 2007 at about 1815 hours his CO directed him to go along with AHQ LU personnel for general duty. This witness was present when the raid took place at the house of the accused/appellant. It was categorically stated by him that total number of 123 bottles were purchased from his house and seizure memo vide Ext. 7 was also prepared which bears the signature of Sub. S.K. Thakur of AHQ and of accused/appellant vide Ext. 7S, 7S-1 and 7S-2.

6. The witness further stated that Sepoy Balbir Singh posed himself as a truck driver with a different name and in that way purchased 123 bottles of liquor from the accused/appellant. This witness has supported the prosecution version with regard to the selling of the CSD canteen liquor and recovery of 123 bottles of liquor at the spot. Even the seizure memo vide Ext.7 demonstrate the recovery of 123 bottles of liquor and the same was confiscated vide Ext. 7. In his defence the accused also appeared as DW-1 and stated that the entire incident dated 6th and 7th

September 2007 was fabricated against him. So is also the position of the incident of 12th September 2007. At that time he was sitting in his room and was watching television and talking to his kids. Around 2030 hours to 2100 hours while responding to the call of the door bell he saw a man standing outside the door with 3-4 cases of liquor and they were kept at the door. These cases of liquor were planted against him. His wife wanted to raise a hue and cry so as to attract the neighbours but she was not allowed to call them and the accused/appellant was falsely implicated in this case. The accused further examined in his defence DW-2 Hav. Ranjit Kumar Singh who stated that 123 bottles of liquor were recovered from the house of the accused/appellant and that a seizure memo was drawn at the spot. The defence witness also supported the prosecution case.

7. As regards the factual aspect, the testimony of the prosecution witnesses was not assailed. From their unequivocal statement it is clear that on two earlier occasions, the decoy went and collected bottles from the house of the accused. He reached that house after getting information from one Mr. Pawan, who was running the tea stall, that in the night hours liquor was sold by the accused/appellant. Accordingly, PW-2 Sepoy Balbir Singh as a decoy at the first visit made purchase of one bottle of liquor then

conveyed it to the superior officers and in the second round he made purchase of two cases of liquor. On 12 Sep, he was also accompanied by Hav. A.K. Singh and Hav. M.K. Kumawat (PW-3) who was also a member of the raiding party who supported the prosecution's version that a seizure memo was prepared at the spot which also bears the signature of the accused/appellant. The seizure memo was also drawn at the spot as is clear from the prosecution evidence and this fact was also stated in examination-in-chief by DW 2, Hav. Ranjit Kumar Singh.

8. It was contended on behalf of the accused/appellant that all those witnesses who appeared from the side of the prosecution had not stated the truth as they themselves were involved in fabricating evidence against the accused/appellant. The statement of these witnesses could not be assailed and they substantiated the prosecution version. Apart from it the prosecution version also got support from defence witness (DW-2) who stated about the aforesaid recovery which also bears the signature of the accused. It was submitted by the learned counsel for the appellant that DW-2 was won over by the prosecution and therefore that part of the statement of DW-2 cannot be read in evidence. DW-2 was not declared hostile, and though DW-2 has stated against the accused, the fact remains

that he was not declared hostile. This by itself cannot be a ground to discard the version of DW-2. Each case is judged on its merits. Reliance may be placed in the case of **Dharminder Singh @ Maan Singh v. State of Gujarat** (2002(4) SCC 679). There appears to be no reason to disbelieve the testimony of prosecution witnesses either.

9. It is next contended that the material witnesses were not examined by the prosecution and therefore such withholding of the witnesses may be read against the prosecution. We do no find that any of the material witnesses were withheld by the prosecution. PWs- 2 Sepoy Balbir Singh and PW-3 Hav. MR Kumawat are the key players in arranging the raid at the house of the accused/appellant. In **Vadevella Thervar v. State of Andhra Pradesh** (AIR 1957 SC 614), the Apex Court divided the nature of witnesses in three categories namely wholly reliable, wholly unreliable and neither wholly reliable nor wholly unreliable. In the present case the witnesses were wholly reliable and their testimony was also got corroborated from the seizure memo.

10. It is next argued by learned counsel for the appellant that as many as 123 bottles of liquor were alleged to have been seized from the

appellant by the military police and other officers. Its "panchnama" vide Ext. 7 was also drawn. But, during the course of trial, those bottles were not produced and so, it was difficult for the appellant to refer whether those bottles contained liquor or not. In the absence of material objects or exhibits having been brought on record, the appellant was deprived of a fair trial, which adversely affected his interest. However, from the side of the respondents, it is submitted that once the bottles were recovered at the spot and the "panchnama" bore the signature of the appellant, the prosecution version is substantiated. Therefore, non production of the material exhibits at the time of trial would be of no significance and the trial is not vitiated. The fact remains that those material exhibits (123 bottles of liquor) were not produced before the GCM. It should also be noted that the appellant did not insist upon production of the same, obviously for the reason that such seizure was not disputed by the appellant except by saying that it was planted. Here, in this case, the seizure memo bears the signature of the appellant, which clearly described the recovery of 123 bottles of liquor. When the seizure memo bore the signature of the appellant and its authenticity was proved by DW 2, non production of the material exhibits would not be of any significance.

11. The prosecution witnesses have stated about the recovery of 123 bottles of liquor and the preparation of the "panchnama". However, the testimony of these witnesses are assailed on the ground that the witnesses being Army personnel, their evidence cannot be said to be trustworthy. Having critically analysed the evidence of the prosecution witnesses, it created an impression on our minds that they are trustworthy witnesses and their evidence do not suffer from any infirmity at all. Nothing has been brought out in cross examination to create any doubt about their veracity. We find their evidence to be reliable. Keeping in view the circumstances of the situation, when appellant was apprehended with 123 bottles of liquor, the failure of the prosecution to examine any independent witnesses of the locality does not detract from the reliability of the prosecution evidence. In this regard, it may be mentioned that PW 3 is a "panch" witness to the seizure and he testified the seizure of the 123 bottles of liquor. Identical is the statement of DW 1 that recovery was made at the spot and recovery memo was drawn.

12. Further arguments were advanced from the side of the appellant that there was no convening order passed by the Commanding Officer and so, the trial of the appellant is violative of Army Rule 37. To the

contrary, it is submitted from the side of the respondents that the provisions of AR 37 were strictly adhered to by the Commanding Officer and after being satisfied from the materials on record, ordered assembly of court martial. Now the question that arises for consideration is, whether the assemblage of court martial was in accordance with AR 37 or not? In this regard, it would be appropriate to quote AR 37, which reads as under:

> "**37. Convening Of General and District Court-martial.**—
> (1) An officer before convening a general or district court-martial shall first satisfy himself that the charges to be tried by the court are for offences within the meaning of the Act, and that the evidence justifies a trial on those charges, and if not so satisfied, shall order the release of the accused, or refer the case to superior authority.
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> (2) He shall also satisfy himself that the case is a proper one to be tried by the kind of court-martial which he proposes to convene.
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> (3) The officer convening a court-martial shall appoint or detail the officers to form the court and, may also appoint, or detail such waiting officers as he thinks expedient. He may also, where he considers the services of an interpreter to be necessary, appoint or detail an interpreter to the court.
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> (4) The officer convening a court-martial shall furnish to the senior member of the court with the original charge-sheet on which the accused is to be tried and, where no judge-advocate has been appointed, also with a copy of the summary (omitted by SRO 17(E), dated 6th December, 1993) of evidence

and the order for the assembly of the court-martial. He shall also send, to all the other members, copies of the charge-*sheet* and to the judge-advocate when one has been appointed, a copy of the charge-sheet and a copy of the summary (omitted by SRO 17(E), dated 6th December, 1993) of evidence."

In this respect, it would also be relevant if we refer to the dictionary meaning of the words "convening order". Black's Law Dictionary (Eighth Edition) defines "convening order" as '***an instrument that creates a court-martial. The convening order specifies (1) the type of court-martial and its time and place, (2) the names of the members and the trial and defense counsel, (3) the name of the military judge, if one has been detailed, and (4) if necessary, the authority by which the court-martial has been created***'. If we go through AR 37(3), it would convey that only after being satisfied from the materials on record, the officer convening the court martial shall appoint or detail the officers to form the court. Accordingly the order was passed on 7th January 2008 which would imply that the Commanding Officer had satisfied himself before constituting the court-martial. The element of personal satisfaction of the convening authority can also be inferred the moment he detailed officers to form court martial.

13. It was contended that the appellant had not been afforded opportunities at the stage of AR 22 and 23. We do not find any irregularity in the conduct of such proceedings, adequate opportunity having been afforded to him at the stage of ARs 22 and 23. Furthermore, when full and fair opportunity was afforded to the appellant at the trial stage, the allegation of pre-trial investigation at the stage of ARs 22 and 23 would not violate the court martial. Reliance may be placed on the decision in **Union of India and others** v. **Maj. A. Hussain** (AIR 1998 SC 577), wherein it was held as under:

> "22. ..... A court-martial has also the same responsibility as any Court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of a conviction

and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment."

14. In view of the aforesaid discussions, the appeal fails and is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER