

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

**TA NO. 633 OF 2009
(WRIT PETITION (C) NO. 2626 OF 2000)**

COL. HARJINDER SINGH LAMBA

.APPELLANT

VERSUS

UNION OF INDIA & ORS.

.RESPONDENTS

ADVOCATES

**MR. G.K SHARMA FOR APPELLANT
M/S. ANIL SRIVASTAVA & AMIT KUMAR
WITH
LT. COL. NAVEEN SHARMA FOR RESPONDENTS**

CORAM

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

J U D G M E N T

24.2.2011

1. Col. (Retd) Harjinder Singh Lamba filed W.P (C) No. 2626 of 2000 before the Delhi High Court for quashing the General Court

Martial (GCM) proceedings, whereby he was held guilty of having committed the offence under Army Act Section 52(f) read with Section 34 of the Indian Penal Code and sentenced (i) to forfeit five years service for the purpose of pension and (ii) to be severely reprimanded. Simultaneously, he also sought to grant him pensionary and other benefits. The writ petition was transferred to this Tribunal and the same is being disposed of by this judgment, treating it as an appeal under Section 15 of the Armed Forces Tribunal Act 2007.

2. The facts giving rise to this appeal, in brief, are: The appellant joined the Army Service Corps (ASC) on 12.1.1969. On 8.1.1992, he was posted to 524 ASC Battalion as its command. The Battalion composed of Bn. HQ, HQ Coy, 2 Mechanical Transport Companies (MT Coys) viz. 'A' and 'B' Coys (MT) and one Supply Coy viz. 'C' Coy Supply. The 'C' Coy (Sup) had four Composite Platoons viz. 9, 10, 11 and 123 Composite Platoons. The whole battalions, except the 10 Composite Platoons, were located at Bikaner. The 10 Composite Platoons was located at Mahadevbali at a distance of 70 km from Bn. HQ. it used to draw meat on hoof and fresh rations from Supply Depot

Suratgarh and deliver the same to HQ 24 Artillery Brigade and its units at Mahadevballi. One jeep and a few one ton/three ton vehicles were kept with the platoon for its use on orders of OC 10 Composite Platoon, which was functioning under the command of Officer Commanding 'C' Coy (Sup). After joining duty, he held a conference of officers wherein the need to maintaining good discipline and taking proper care in using Government transport and stores was emphasised. While so, Lt. Col. Rameshwar Bhatt, who was a senior officer to the appellant, was posted as Second in Command (2IC) in the place of Lt. Col. S.R Dubey. To avoid embarrassment of having command over a senior officer, the appellant made a request with the Army HQ through GOC 24 Infantry Division to cancel the posting of Lt. Col. Bhatt and to allow Lt. Col. Dubey to complete his tenure. However, the Army HQ rejected it. Further, Lt. Col. C.L Khandelwal was also senior to the appellant. The appellant replaced him with Maj. Gurmeet Singh to the dislike of Lt. Col. Khandelwal. During August 1992, Sub. Udaivir Singh was complained of inefficiency, drunkenness and misconduct and was asked to proceed on leave. After leave, he was posted to HQ Coy 524 ASC Bn. As part of discipline, he was sent

on route march, which resulted in developing personal grudge against the appellant. On 4.11.1992, Lt. Col. P.S Arya gave a complaint against Lt. Col. Bhatt of misconduct, including misbehaviour with another officer's wife. On 16.11.1992, Lt. Col. Bhatt was asked by the appellant to submit his written comments on the issue. Feeling unhappy with the discipline oriented approach of the appellant, Lt. Col. Bhatt, Lt. Col. Khandelwal and Sub Udaivir Singh conspired together against the appellant and Maj. Gurmeet Singh to implicate in a false case so as to remove the appellant from the command of 524 ASC Bn. In furtherance of this common intention, Lt. Col. Bhatt approached GOC 24 Inf Div with a false and frivolous complaint against the appellant and Maj. Manjit Singh alleging misuse of Government transport at 10 Composite Platoons located at Mahadevbali. The GOC, instead of investigating into the allegations levelled against Lt. Col. Bhatt, based on the false complaint, ordered a Court of Inquiry (COI) into the allegations levelled against the appellant. In the COI, the trio viz. Lt. Col. Bhatt, Lt. Col. Khandelwal and Sub. Udaiveer Singh made statements against the appellant and Maj. Gurmeet Singh, which culminated in the trial by the GCM. As part of the disciplinary

proceedings, the appellant and Maj. Gurmeet Singh were attached to HQ 24 Artillery Brigade. Lt. Col. Bhatt thereafter assumed command of the Battalion being the 2IC, which enabled the trio to implement their pre-arranged plan against the appellant and Maj. Gurmeet Singh. The appellant and Maj. Gurmeet Singh were attached to HQ 24 Military Brigade for disciplinary action and its charge was given to Lt. Col. Bhatt, who pressurised his men to give evidence against the appellant and Maj Gurmeet Singh. The GCM, finding no evidence and the witnesses to be untrustworthy, held the appellant not guilty. However, merely on conjectures and surmises, the revisional authority remanded the case for fresh consideration of Charges 1 to 3. Adopting a pick and choose method, the revisional authority failed to take into consideration the statements of the witnesses who supported the defence version. Thereafter, the GCM, presumably under the influence of the revisional authority, held the appellant guilty of Charge No. 3.

3. The appeal was resisted by the respondents contending, inter alia, that the service transports were illegally used to carry fresh

rations and meat on hoof for troops deployed at Mahadevballi Camp from Bikaner in contravention to the conditions provided in the short term agreement and in the agreement of supply order, which caused loss to the Government. In the COI, the appellant was found responsible for permitting use of his unit transports to carry fresh rations in contravention of the agreement. Further, the appellant ordered adjustment of fresh rations issued to the units and made payment to the contractor at higher rates with mala fide intention. On finalisation of the COI, the appellant was attached to HQ 24 Arty Bde for the purpose of disciplinary action. Thereafter, preliminary hearing under Army Rule 22 was held and statement of evidence was recorded. Subsequently, the appellant was tried by the GCM on seven charges, four under Army Act Section 52(f) read with Section 34 IPC, one under Army Act Section 63 read with Section 34 IPC and two under Army Act Section 42(e). After trial, based on the evidence, the GCM found the appellant not guilty. However, on revision, the appellant was found guilty of Charge No. 3. The appellant chose not to file a pre-confirmation petition. However, his post confirmation petition was rejected by the Central Government on 8.3.1996. Counsel

for the respondents pointed out that the provisions of ARs 22 to 24 were complied with and, there was no irregularity in the findings of the GCM and the revisional authority. The punishments awarded were commensurate with the gravity of the offence.

4. In order to appreciate the rival contentions raised by learned counsel for the parties, it would be appropriate to refer to Charge No. 3. It reads:

THIRD CHARGE

Army Act Sec. 52(f) read with Sec. 34 of Indian Penal Code against both the accused

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD

in that they together

at field, between 15 Jul 92 and 28 Sep 92, while holding the appointments as aforementioned in the first charge, and well knowing that the responsibility to deliver fresh rations and meat on hoof at Supply Point Mahadevbali Location was of M/s Amar Nath Arora, with intent to defraud, caused the said rations to be brought in service transport from Bikaner to Mahadevbali and thereby causing financial loss to the Government.

After further evaluating the evidence on remand, the GCM confirmed its finding of “not guilty” with regard to Charge Nos. 1 and 2. However, the GCM held the appellant “guilty” of Charge No.3 placing reliance on the statements of Capt. Hari Kishan Naidu (PW 12) that the appellant ordered him to change certain entries in the car diaries, but he refused; Sub. Udaivir Singh (PW 23) that when he informed the second accused that service transport was used for taking fresh rations and meat on hoof from Bikaner, he was told that it was done on the orders of the appellant; and Nb. Sub. RBS Tomar (PW 7), Hav. SS Das (PW 10) and Hav Ram Milan Singh (PW 20) that the appellant was aware of the transports and thus he actively connived in misuse of transports.

5. Before examining the evidence, the legal position with regard to “common intention” is to be considered. To find out whether the appellant is vicariously liable for the offence charged against him, there should be a common intention. “Common intention” implies a pre-arranged plan. In **Ramaswamy Ayyangar and others v. State of Tamil Nadu** (1976(3) SCC 779), it was observed by the apex Court that the essence of Section 34 IPC is simultaneous

consensus of the minds of persons participating in the criminal action to bring about a particular result. It is true that to attract Section 34, no overt act is needed on the part of the accused if he shares the common intention with others anticipating in respect of the ultimate criminal act, which may be done by any one of the accused sharing such intention. Further, in **Dani Singh and others v. State of Bihar** (2004(13) SCC 203), the apex Court observed as under:

“20. ‘Common intention’ implies pre-arranged plan and acting in concert pursuant to the prearranged plan. Under this section a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a prearranged plan and prior concert.”

In essence, for fixing the culpability of the accused, consensus of minds of the persons participating in the act (in this case, the act of permitting illegal transport service) is essential.

6. The prosecution, in support its case, placed reliance on the statement of PW 12 Capt. Hari Kishan Naidu, who stated before the GCM that he was directed by the CO, Col. HS Lamba (the appellant) for sending service transport vehicle to the supply point Mahadevbali for carrying fresh rations and meat on hoof from Bikaner. It was also stated by him that Lt. Col. Rameshwar Bhatt told him to apprise the appellant that he would report if service vehicle were used and when Lt. Col. Bhatt reported the matter to the GOC 24 Inf Div, the appellant told him to change certain entries made in the record diary of the vehicle, which he refused. In his cross examination, he contradicted his earlier statement made to COI as well as in the summary of evidence, denying to have given any such statements both to the COI and in the Summary of Evidence. His statement reads:

“Q. 4. (COI) – Have I ever given you orders to detail service transport to carry fresh and MOH for troops deployed at Mahadevbali from Bikaner during the operation of STA and duration of local purchase period?

A. 4 (COI) - No. I confirm that the same was asked to me and I had replied accordingly.

It is correct to say that at Court of Inquiry a question was asked to me by accused No 1 as “Has any

officer, JCO or any other person of the Battalion ever reported to you that the JCO-in-charge supply point Mahadevbali, was providing service transport for carriage of fresh rations from Bikaner to Supply Point Mahadevbali by the contractor” **(to which I had replied negatively).**

It is correct to state that I had made the statement at Court of Inquiry on 23 Nov 92. I do not remember whether accused No 1 had asked any question to me, at Summary of Evidence to the effect that “Did I ever give you order to provide government transport for carriage of fresh & MOH and ice from Bikaner to Supply Point Mahadevbali during the period of STA i.e. 01 Jul to 28 Sep 92 on the dates of local purchase on 05 and 07 Oct 92 and during Nov 92.

It is correct to say that I had given the answer at Summary of Evidence that accused No.1 had not specifically given orders for use of government transport for the above, but vehicles were provided to ‘C’ Company, the purpose of which I am not aware of.

It is correct to say that I was asked question by the Court at Court of Inquiry, to the effect that ‘Did Lt Col Rameshwar Bhatt at any time mention to you about any malpractices including irregular use of service transport for carriage of fresh rations from Bikaner to Supply Point Mahadevbali by civilian contractor’, to which I replied in negative.”

In its earlier findings, the GCM had come to the conclusion that the statement of PW 12 Capt. Hari Kishan Naidu could not be relied upon

so far as allegation of making changes in the car diaries was concerned, since the appellant was not the custodian of those documents and they were in the custody of company offices. Then there arose the question, how could the appellant be held guilty, when he was not the custodian of the diary wherein allegedly changes were made? No inference of connivance on the part of the appellant in misusing service transports could, therefore, be ascertained. Moreover, this witness did a somersault and gave statement before the GCM different from what he had given in the COI and the summary of evidence. On the other hand, DW 1 Nb Sub V. Arulappan deposed before the GCM of having once seen rationed articles being unloaded from civil vehicle and twice civil vehicles were seen parked at the supply point Mahadevbali. Further, on 15.8.1992, he saw rationed articles were being unloaded from the civil vehicles. He also stated that the appellant had come to the supply point at Mahadevbali on that date.

7. PW 23 Sub Udaivir Singh stated that when he had brought to the notice of the second accused that service transports were being

used for taking fresh rations and meat on hoof from Bikaner, he was told that it was pursuant to the orders of the appellant. On 25.7.1992, when PW 23 went to collect fresh rations and meat on hoof, he stated to have told the contractor Sharafat Ali that he should deliver the articles in his vehicle at the supply point Mahadevbali. When this was communicated to Maj. Gurmeet (second accused), he told him that it was as per the instruction from higher ups. In his cross examination, when the witness was confronted with his earlier statement recorded in the court of inquiry, he stated that he had omitted to mention this statement. Such material omission before the COI is a contradiction. His statement reads:

“It is correct to say that the portion of my deposition before this Court ‘on 25 Jul 92, we came to collect fresh and MOH to Subji Mandi and Kasaiyon Ka Mohalla Bikaner, in military vehicle’ was not stated at court of inquiry. However, I had mentioned about misuse of government transport.

It is absolutely correct to suggest that the portion of my deposition before this court ‘I told Shri Sharafat Ali, that I had spoken to accused No.1 or not I deliver the rations in my vehicle’ was not stated at court of inquiry and summaries of evidence, recorded against both the accused persons.

It is correct to suggest that the portion of my deposition before this court 'I thereafter informed accused No.2, what Shri Sharafat Ali has said but was doing on the instructions from the higher ups' is not recorded at court of inquiry and both the summaries of evidence recorded against accused persons. I further add that I had repeatedly stated the said fact at Court of Inquiry and summaries of evidence, but the same has not been recorded."

It appears that the instructions were from the higher ups and who were the higher ups was not disclosed. The evidence is vague and from such a statement, connivance of the appellant cannot be construed.

8. It has come out from the evidence of PW 7 Nb. Sub RBS Tomar, PW 10 Hav. SS Das and PW 20 Hav Ram Milan Singh that the appellant was aware of using service transports illegally. But, during cross examination, PW 7 Nb Sub Tomar gave evidence that the entries in the car diaries were made by himself and two others viz. his NCO Hav Das (PW 10) and Hav Ram Milan Singh (PW 20). But from their statements it is not inferable whether it was under the instruction of the appellant or not. When PW 10 Hav Dass was confronted with his

earlier statement recorded in the COI and the summary of evidence, he was not able to give any explanation. The statements of these witnesses made during the cross examination are extracted hereunder:

“It is correct to say that I was asked a question at summary of evidence recorded against accused No.1 by accused No.1 as ‘Did I give you any order for using service transport for carriage of fresh/MOH during STA (Short Term Agreement) period?’

It is correct to say in response to the said question. I had stated there that **‘No, the order used to be given by the JCO/IC Sub Udaiveer Singh’**

It is correct to say that at summary of evidence recorded against accused No.1 the following question ‘who used to instruct you to fill up the vehicle car diaries’ was asked to me.

It is correct to say that in reply to the said question, **I had stated that I used to be instructed by Sub Udaiveer Singh.”**

During re-examination, at page 302, PW 10 Hav. S.S Dass has deposed thus:

“I had made statements in two summary of evidence recorded against accused No. 1 and 2

respectively. In my statement in the summary of evidence recorded against accused No.1, I had stated the fact that Nb Sub TP Bandgar had come to supply point Mahadevbali on 12 July 92.

I had stated at the summary of evidence recorded against accused No.2 that on 14 July 92, Sub Udaiveer Singh went to Bikaner. He returned in the evening and told me to make the relevant entries in our fresh ledger as the Commanding Officer has instructed him to do so. **It is correct to say that I had not stated the above said fact in the Summary of Evidence recorded against accused No.1.**

To the suggestion that accused No.1 had not given any such instructions as above said, **I state that Sub Udaiveer Singh had told me the same."**

When questioned by the Court (at page 303), the witness deposed that "whatever questions were asked to me about my statement at court of inquiry and summary of evidence, I had replied correctly."

9. There are discrepancies of material nature which would not only affect the core of the prosecution case, but would also affect the trustworthiness of these witnesses. Though improvements were made in the prosecution version regarding the use of service vehicle under the instructions of higher ups/appellant, no such statements

were made either in the Court of Inquiry or in the summary of evidence. Such improvement in the prosecution version would affect the credibility of the witnesses and such omissions would be labelled as contradictions.

10. With regard to the credibility of the witnesses, the apex Court, in **State of Uttar Pradesh v. M.K Anthony** (1985(1) SCC 505) has enunciated certain guiding principles, which read as under:

“10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about

the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer.”

As has already been mentioned, there were material discrepancies and inconsistencies in the statements of the witnesses and they were disbelieved by the GCM. From the statements of these witnesses, it is not discernible whether or not the appellant connived in making use of the service transport at any stage.

11. Further, the statements of Sep. P.K Sahoo (PW 14) and Pandey (PW 13) do not in any way show that service vehicle was used under the instruction of the appellant. It is clear that the car diaries were under the control of the respective Platoon Commanders and entries were made by the drivers before the commencement of

duties. Nothing has come out in evidence to prove the involvement of the appellant. Therefore, it is clear that the use of service vehicle was not with the tacit consent of the appellant. Viewed in this light, the findings by the GCM are unsustainable.

12. In the result, the appeal is allowed. The findings and sentence awarded by the GCM are set aside. We hold that the appellant is entitled to all pensionary benefits taking into account his total period of service under the relevant Rules.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER