

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

O.A NO. 445/2010

IN THE MATTER OF:

Col S.K. Jain**APPLICANT**
Through : Mr. K. Ramesh, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS ...**RESPONDENTS**
Through: Mr. Ajai Bhalla, counsel for the respondents

CORAM:

HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER

JUDGMENT

Date: 01.06.2012

1. The OA No.445/2010 was filed in the Armed Forces Tribunal on 27.07.2010.
2. Vide this OA the applicant has sought quashing and setting aside of the findings and sentence of the General Court Martial (GCM) as also the orders of rejection in the Pre-Confirmation petition by GOC-in-C, Northern Command vide order dated 04.06.2009. The applicant has also prayed for reinstatement in service with all consequential benefits.
3. Brief facts of the case are that the applicant was posted as the Commandant of Northern Command Vehicle Depot in 2006. On

18.12.2008, he was tried by a GCM which concluded on 26.03.2009.

The applicant was tried for the following three charges:-

(a) **First Charge:** Under Army Act Section 69, "Committing a civil offence, that is to say criminal misconduct contrary to Section 5(2) of Prevention of Corruption Act, 2006 (J&K) (Act No.XIII of 2006 Samvat). In that he, while performing the duties of Commandant, Northern Command Vehicle Depot, on 27.09.2008 the applicant abused his position as a Public Servant and obtained for himself a sum of Rs.10,000/- from Shri Sumesh Magotra.

(b) **Second Charge:** Under Army Act Section 69, "Committing a civil offence, that is to say being in possession of ammunition in contravention of Section 3 of the Arms Act 1959, contrary to Section 25(1-B) of the Arms Act, 1959. In that he, on 27.09.2008, the applicant was found in possession of the following ammunition without any authority:-

Description of Ammunition	Lot No.	Qty
7.62 mm SLR	8096 OFV	04 rounds
	8092 OFV	01 rounds
9 mm	ZZ 16 KF	03 rounds

(c) **Third charge:** Under Section 63 of the Army Act "An act prejudicial to good order and military discipline for being in

possession of cash amounting to Rs.28,000/- without any satisfactory explanation". In that he, while performing his duties as Commandant, Northern Command Vehicle Depot, a sum of Rs.28,000/- was found in the possession of the applicant on 27.09.2008 without any satisfactory explanation.

4. The applicant was found guilty of first and second charge. He was found not guilty of third charge.

5. Accordingly, the applicant was convicted and sentenced on 26.03.2009 to be dismissed from service. He made an application under Army Act Section 164 for pre-confirmation petition, which was rejected on 04.06.2009. The applicant also filed post confirmation petition on 03.11.2009. It is stated that despite directions, outcome of the petition has not been received.

6. **Demand for money:** Learned counsel for the applicant argued that in the first charge it was alleged that a sum of Rs.10,000/- was paid to the applicant by one Shri Sumesh Magotra, PW-14 on the applicant's demand for passing of inspection test in respect of 100 Royal Enfield Motor Cycles into the Depot. It was also alleged that demand was made by the applicant in the presence of PW-4, Lt. Col D.K. Sood and Mr. Vikas Rathore. Out of those, Lt Col Sood did not support the factum of demand and Mr. Vikas Rathore was not produced as witness in trial.

7. Learned counsel for the applicant further argued that PW-14 has stated in his deposition that the demand was made by the applicant in his office on 17.09.2008, at that point of time, Mr. Vikas Rathore was also present. Despite being a material witness qua the demand, Mr. Vikas Rathore was not produced by the prosecution despite time was sought to produce him. He further alleged that after four days, PW-14 met Col Manish D. Kachhy (PW-15), CO of Northern Command Counter Intelligence Unit and explained to him his difficulties. It is alleged that thereafter, on 26.09.2008 PW-14 got photocopies of 20 currency notes of 100 denomination done and kept the copies with him which included 100 numbers of 100 denomination currency notes which were to be paid by him to the accused/applicant next day. It was also alleged that on 27.09.2008, PW-14 went to the office of accused between 10.00 hours and 10.15 hours and gave him an envelop containing same currency notes of Rs.10,000/-.

8. It is alleged that this envelop containing Rs.10,000/- was recovered from the office of the accused the same day by the Board of Officers/search team. It is alleged that after having handed over the money to the accused, PW-14 informed PW-1 on telephone at about 10.30 hours on 27.09.2008.

9. Learned counsel for the applicant argued that as per the deposition of PW-14 when he visited the accused on 17.09.2008, Lt Col D.K. Sood was already seated in his office, while PW-14 was

accompanied by Mr. Vikas Rathore. PW-14 has, in his statement asserted that when they were discussing the issue of passing of inspection of 100 Motor Cycles, the issue of money transaction "Lenden" was discussed. However, the same has not been corroborated by PW-4 who has made no reference to this conversation that took place in his presence in the office of accused on 17.09.2008. Further, the defence counsel argued that Mr. Vikas Rathore who could have been best witness to say material thing about the alleged demand of money made by the applicant was not summoned as a witness at all. Rather, in his cross examination by the defence, PW-4 Lt Col DK Sood has deposed at page 73 that *"The accused did not ask for a payment of Rs.100/- per Motorcycle for the delivery of the said Motorcycle in my presence."* He further stated that *"It is correct that Mr. Sumesh Magotra had never complained to me that he was being harassed by the inspection team during the In-inspection of the said Motorcycles."* PW-4 has further deposed that *"No negotiations, demand of discussion for payment of money with regard to delivery of the motorcycles took place during the meeting on 17 Sep 2008 during my presence."*

10. Learned counsel for the applicant argued that in the absence of any corroborative evidence that the applicant had demanded the said amount. It is very unsafe to conclude the same as it was essential that Mr. Vikas Rathore should have been examined. He asserted that in

view of this, the applicant's demand for the said amount emanates from PW-14 i.e. Mr. Sumesh Magotra while Col D.K. Sood completely denied this conversation. As such, it is contended that the benefit of doubt goes to the applicant.

11. Learned counsel for the respondents stated that PW-14 on 17.09.2008 alongwith Shri Vikas Rathore had visited the applicant in his office. He had stated that *"Initially the matter relating to rusting of the vehicles was discussed. The vehicles had got rusted because these were unloaded at Zirakpur, in the open during rainy season. Thereafter the discussion switched to the matter of money transaction (Len Den). The accused asked us as to how much we were going to pay for delivery per vehicle. We told him that we would pay Rs.100/- per motorcycle as was done in the year 2007. The accused, however, said that he would like more payment this year and wanted Rs.300/- per motorcycle. We then told him that the cost of Engine Oil and other materials had already gone up and therefore, we were not in a position to pay more than Rs.100/- per motorcycle. Finally the payment of Rs.100/- per motorcycle was settled."* As PW-14 himself talks with accused, therefore, non-production of Mr. Vikas Rathore will not be fatal to the prosecution.

12. Learned counsel for the respondents also argued that PW-14 has stated that a meeting was arranged by some personnel of Northern Command Liaison Unit after 3 or 4 days with PW-15. Pw-14

has stated that *"Next day, I had gone to meet Colonel Manish D Kachhy, Commanding officer, Northern Command Counter Intelligence Unit and explained him the difficulties being faced by me. I had told him in detail about it. I had explained to him that we had to wait for 2 to 3 hours at the gate, the inspection team used to keep finding faults with the vehicles, the money was being demanded for clearing the vehicles and that the vehicles were not cleared until the orders were received from the Commandant."*

13. Learned counsel for the respondents suggested that PW-14 on 26.09.2008 obtained photocopies of 20 currency notes of Rs.100/- denomination done and kept with him which were included in the 100 numbers of Rs.100/- denomination currency notes which were to be paid by him to the accused next day. He drew our attention to the statement of PW-14 that on 27.09.2008, between 1000-1015 hours, he had gone to the office of accused and gave him the envelop containing Rs.10000/-. On being asked, he replied that the amount is Rs.10000/- as part of the first instalment.

14. Having heard both the parties and having examined the proceedings, we note that it is only PW-14's statement which states that the accused had made a demand of Rs.10,000/- as illegal gratification. PW-4 who was also present in the office of accused when the discussion was going on and in his statement, PW-14 has categorically stated that *"Lt Col D.K. Sood was already sitting in his*

office". This is the description that PW-14 gave regarding his meeting with the applicant on 17.09.2008. It is obvious that no statement or discussion or conversation regarding "Len Den" could have taken place which was not heard by PW-4. Besides, the other witness who was also there at the time of the demand allegedly have been made on 17.09.2008 was Mr. Vikas Rathore. Mr. Vikas Rathore was sought to be produced by the prosecution. But he was finally not produced as a witness. But subsequently, the prosecution at page 332 stated that *"they have taken a conscious decision not to call them and it may please be recorded in the proceedings"*. His evidence was important especially so because at page 298, PW-14 has stated that *"When I mentioned 'we' or 'us' while referring to our discussions in the office of the accused on 17 Sep 2008, I was referring to myself and Mr. Vikas Rathore. I had also stated that 'Len den' matters used to be discussed by Mr. Vikas Rathore as I was not connected there with"*. PW-14 further stated at page 267 that *"The purpose of visit of Mr. Vikas Rathore was to meet the accused. He had come on his own for the said visit. He had, however, called me in the morning and asked me to check whether the accused was available"*. We have noted that at page 267, PW-14 had stated that *"Len den ke bare mein Colonel SK Jain sahib se, main baat nahi karta tha, jab bhi bat karni hoti, wohi (Mr. Vikas Rathore) karte the"*.

15. From the above, it is evident that the prosecution consciously decided not to produce Mr. Vikas Rathore as evidence because his deposition perhaps was not supporting the contention of the prosecution. In view of the above, we are of the opinion that the demand of money by the applicant for illegal gratification is not proved beyond reasonable doubt.

16. **Recovery of the envelop containing illegal gratification:** In this respect, learned counsel for the applicant contended that it has been alleged that PW-14 went to the Office of the Commanding Officer, NCCIU after his meeting with the applicant on the next day. Here he explained to Col, Manish Kachhy (PW-15) that he was having difficulties in getting his items cleared in the Northern Command Depot, Udhampur. Col Kachhy (PW-15) has stated that *"This report was given to me by my Subedar Major and persons of a team of my troops, which had gone to the Enfield's Motorcycles workshop for a routine task. At this I called for Mr. Sumesh Magotra to my office before taking any further action. It was between 20 to 23 Sep 2008 that Mr. Sumesh Magotra came to my office and narrated about the harassment and that he was under pressure to make a payment of Rs.10,000/- in cash so that his motorcycles consignment would get accepted at Northern Command Vehicle Depot."* (reference page 305-306).

17. PW-15 has also stated that on 26 Sep 2008, Mr. Sumesh Magotra again contacted him and informed him that he was due to make the cash payment under pressure on 27.09.2008. PW-15 has stated that he assured PW-14 that authorities will take suitable action and thereafter he proceeded to Northern Command Provost Unit and met Col S.A. Kulkarni (PW-1) and narrated to him the possibilities of exchange of illegal money. It appears that Col S.A. Kulkarni received a call from Mr. Sumesh Magotra and he asked him that if he wanted to make a formal complaint and if he had any proof to report. They met in the office of Col S.A. Kulkarni later in the evening where *"Mr. Sumesh Magotra gave a verbal complaint which was simultaneously written and typed by the Northern Command Provost Unit and Mr. Sumesh Magotra thereafter signed it as his written statement of complaint. He also handed over the photocopies of 20 x Rs.100/- currency notes duly signed and authenticated by him as the proof."* After this at about 1930 hours the same day, PW-15 returned to his office.

18. Learned counsel for the applicant argued that from the alleged facts, the sequence of events is not clear, because as per the statement of PW-14, he had informed Col Kachhy after having received the demand for illegal gratification on 17.09.2008. On the other hand, Col Kachhy, PW-15 has himself stated that he was informed by his Subedar Major that a civilian vendor supplying motorcycles to the Northern Command Vehicle Depot was facing

difficulties. As such, he *"permitted Mr. Sumesh Magotra to see him between 20-23 September 2008"*. Therefore, there is a material contradiction between the statements of PW-14 and PW-15. In this case, PW-14 being the principal player, his credibility is questionable.

19. Learned counsel for the applicant also stated that at page 316, PW-15 has stated that he, *"however, is aware that Mr. Sumesh Magotra had come to his unit on 12 Sep 2008 looking for Colonel SS Khara, the previous Commanding Officer of his unit as he had done some work during his tenure. He had not given him any audience on that date."* Learned counsel for the applicant asserted that from the above statement it is proved beyond doubt that Mr. Magotra's narration of events to PW-15 Col Kachhy was not as per the sequence of events that he has reconstructed in his statement.

20. Learned counsel for the respondents argued that based on the statement of PW-14 and the information that he had provided to Lt Col SA Kulkarni, PW-1 at the behest of PW-15, it was very clear that the applicant had abused his position as Commanding Officer, Northern Command Vehicle Depot by demanding Rs.100/- per motorcycle from PW-14.

21. Having considered the rival contentions advanced by learned counsel for both the parties, we are of this opinion that there seems to be a conflict between the exact sequence of events which has taken

place after the demand of illegal gratification was made in the office of applicant on 17.09.2008 especially so, since PW-14 had tried to meet PW-15 on or around 12.09.2008. Therefore, this further supports our earlier conclusion that there was no discussion in the office of applicant on 17.09.2008 regarding the demand for illegal gratification.

22. On 27.09.2008 at about 1000-1015 hrs, PW-14 gave a call from outside the gate of the Northern Command Vehicle Depot to Col Kachhy (PW-15) when PW-15 gave a telephone number of Col S.A. Kulkarni, CO, Northern Command Provost Unit (PW-1) and directed him to inform PW-1 after giving the illegal gratification. When he contacted PW-1 on telephone, the latter asked for proof of having paid the illegal gratification and to give him a written complaint. He (PW-1) asked PW-14 to come to PW-1's office "in the evening". PW-14 went to the office of Col Kulkarni alongwith Col Kachhy (PW-15), where his complaint was transcribed and typed, which he signed.

23. PW-15 in his deposition has stated that he gave the telephone number of Col S.A. Kulkarni (PW-1) on "26 Sep 2008 evening" (page 306). Thereafter on 27.09.2008 he proceeded to meet PW-1 in his office, where he received the call from Mr. Magotra (PW-14) that he had given the cash to the applicant in his office. During the telephonic conversation with PW-14, Col Kulkarni asked PW-14 to come and make a formal complaint and also submit the proof of payment.

24. In view of the foregoing, it leads us to conclude that the photocopies of 20 x Rs.100.00 currency notes were made on 26.09.2008 by PW-14 and handed over to PW-1 as proof in the evening of 27.09.2008, after the recovery was affected in the forenoon.

25. Learned counsel for the applicant further argued that the white envelop containing Rs.10,000/- was ferreted out by Hav D.K. Singh, PW-8 of Northern Command Provost Unit. He argued that when Col S.A. Kulkarni alongwith DPM HQ Northern Command arrived with Nb Subedar S.K. Fogat, PW-7 and four NCOs and he informed the applicant that he had a very unpleasant task of putting the applicant under arrest for accepting illegal gratification. Meanwhile, he also summoned Second-in-Command PW-4 D.K. Sood and asked him to carry out physical frisking of the JCO and NCOs accompanying PW-1 i.e. Col S.A. Kulkarni. Col Sood frisked all of them that is to include PW-7 Nb Sub S.K. Fogat and PW-8 Hav D.K. Singh and found that they did not have any cash or envelop with them. Subsequently, the applicant was taken away to go and see the place of his internment to one of the Officers' Mess where Hav D.K. Singh also accompanied him in the vehicle. Before they left the office, PW-1 ordered locking and sealing of Office and asked PW-7 S.K. Fogat to ensure that no one enters the office. Thereafter, on the way out, they met the search team led by Col. V.K. Bahugana, PW-3 and two more officers. They were asked to wait in front of the office by PW-1. On their return, the

search team carried out the search of the office. The search team searched for almost an hour. When they could not find anything, PW-1 offered the help of his team of Nb Sub Fogat and Hav D.K. Singh which was agreed to by the Search Team Leader Col Bahuguna. PW-1 Col Kulkarni offered the accused the option to frisk the two i.e. PW-7 Nb Sub Fogat and PW-8 Hav D.K. Singh, before they could assist in the search, which the applicant declined. As soon as they entered the office or soon thereafter, Hav D.K. Singh took out a white envelop from under the computer table. Subsequent checking revealed that this envelop contained Rs.10,000/- which also included those 20 x Rs.100/- notes, photocopies of which was alleged to have been kept by the respondents. He further argued that since the two personnel from the CMP were not frisked before they conducted the search, it is quite possible that Hav D.K. Singh planted the envelop at the place from where it is alleged to have been recovered because despite searching for more than one hour, the search team was unable to find this envelop which was alleged to be lying under the computer table.

26. Learned counsel for the applicant further argued that before taking away of the applicant with him, Col Kachhy ordered for sealing of the office but when they left, Nb Sub Fogat was still looking for the runner who had the keys to the office. So it cannot be said conclusively that the office was sealed and before that there was no possibility that there was no access to anyone. While statement of Sep

S Nayak, PW-9 at page 133 states that *"on being questioned as to whether it was possible for anybody else to go and place some item in the office of the accused while the witness (Runner) was not around, the witness responds that he could do so if he wanted (Chahega to rakh sakta tha)"*. He also drew our attention to the fact that no one seems to have seen how Hav DK Singh recovered the said envelop. PW-1 at page 22 has stated in response to the queries by the Court, *"the witness submits that from the position where he was, he could not see the exact spot from where Havildar D.K. Singh had recovered the white envelop containing money."* Again at page 211, PW-1 has stated that he is aware that in alleged cases of illegal gratification, it is more appropriate to treat the currency notes with Phenolphthalein powder so that the delinquent is caught red handed. PW-1 has stated that he did not have the said facility. On the other hand, he had facilities for lifting and storing finger prints but PW-12 Shibben Lal Bhat, the forensic expert, at page 154 states that *"I had carried out the finger prints examination of the envelope and 20 currency notes and the finger prints of the aforesaid persons could not be detected thereon."* The report has been marked as Exb.85.

27. Learned counsel for the applicant argued that PW-11 Lt Col Avinash Thakur who was part of the search team stated at page 147 that *"I did not see the spot from where Havildar D.K. Singh recovered the white envelope containing the cash"*.

28. Learned counsel for the applicant asserted that in the statements of PW-1, PW-3, PW-5, PW-7, PW-10 and PW-11, all of them who were present at the time of so called recovery have stated that they have not seen from where and how PW-8 Hav D.K. Singh had recovered any white envelop containing the money from under the table. On the contrary, PW-1 had stated in response to the queries by the Court that *"from the position where he was, he could not see the exact spot from where Havildar D.K. Singh had recovered the white envelop containing money"*.

29. Learned counsel for the applicant stated that from the foregoing it is clear that it was more of a pre-meditated trap to implicate the applicant who was under posting. The applicant had never demanded the illegal gratification and on that date i.e. 27.09.2008, no money was paid but it was planted by the respondents through PW-8 Hav D.K. Singh who seems to have ferreted out the envelop containing the amount despite the fact that there were many officers who had conducted the search earlier in the same room and were present in the room but could not see as to how PW-8 managed to take out the envelop.

30. Learned counsel for the respondents stated that the fact that 20 notes of Rs.100/- denomination were photocopied and serial numbers noted by Col Kulkarni (PW-1) after PW-14 Mr. Sumesh Magotra handed over the envelop to the applicant. PW-14 has stated that he

left the envelop on the table of the applicant. Therefore, the authenticity of the actions taken by Mr. Sumesh Magotra, PW-14, Col S.A. Kulkarni, PW-1 and Col Manish Kachhy, PW-15 are established. Thereafter, the applicant was given an offer to frisk the search team as also PW-7 and 8 when they were invited into the room by the search team. The applicant declined the offer. Therefore, there is no justification for the applicant to say that the envelop containing the money was planted.

31. He further argued that the conspiracy theory created by the defence was not maintainable since the GCM was of the opinion that there was nothing on record which was brought out as evidence to suggest any conspiracy since there is no indication of any crime of prior concert to do an illegal act or legal act by illegal means.

32. Learned counsel for the respondents further argued that PW-14 handed over the money to the applicant and he called up PW-1 and informed him about the same. On 27.09.2008 at about 1030 hours, PW-1 received a call from PW-14 informing him that he had just paid Rs.10,000/- to the applicant and had come out from his office.

33. Learned counsel for the respondents argued that PW-14 had stated that he had briefed Col Kachhy and explained to him the difficulties being faced by him in getting the motorcycles cleared by the

Commandant, Northern Command Vehicle Depot. He had given him the details of the demand made by the applicant.

34. Learned counsel for the respondents argued that it has come out in the evidence of PW-1, 3, 7, 8, 10 and 11 that a white envelop containing 100 currency notes of Rs.100/- denomination was recovered by PW-8 from under the computer table. Learned counsel further contended that the Court has considered the circumstances and facts of the case from the time PW-1 had reached the office of applicant alongwith four CMP personnel and till the time the search by Board of Officer was concluded. He drew our attention to the fact that the conspiracy theory propagated by the defence was not maintainable because there was nothing on record to suggest that the evidence was part of a conspiracy and there was no indication of any crime of prior concert of an illegal act or a legal act by illegal means. He further states that it has come out clearly in the evidence that PW-14 had handed over the money to the accused and thereafter he informed PW-1 on telephone on 27.09.2008 at 10.30 hours.

35. Having heard both the parties at length and having examined the documents on record qua the recovery of envelop containing the amount of Rs.10,000/-, we are of the opinion that the applicant was given an opportunity to frisk the search team, which he declined to do so. Subsequently, when the two CMP personnel were invited to assist the search team, he was again offered that he could search these two

personnel. At page 45, PW-3 has stated that "*Colonel SA Kulkarni asked the accused that he was free to check the members of the Board of Officers before the search was carried out, to which the accused declined*". PW-3 has again stated at page 46 that after having conducted the search for an hour, he was asked by PW-1 "*if the board had finished the search, then he could call CMP personnel to search the office as they are professionals and trained to carry out this kind of search. This suggestion was agreed by me as it was to assist to carry out the task of the board.*" On the other hand, PW-8 in his statement at page 199 in reply to question No.9 has stated that "*The search was not carried out but Colonel VK Bahuguna had told the accused that he could search us, if he so wanted*" which indicates that the CMP personnel who entered the second time were not searched by the applicant, though an offer was given. We also find that these two personnel were frisked by PW-4 Col V.K. Sood earlier but much before the actual search was conducted.

36. We have also noted that none of the individuals who were present at the time of recovery of the envelop containing the said money were PW-1, PW-3, PW-5, PW-6, PW-7, PW-10 and PW-11, saw exactly as to how and from where the said envelop was recovered by PW-8. Since no frisking of PW-7 and 8 was carried out by the applicant or anyone else from the search team before they were

invited to help the search team, the suspicion of the envelop having been planted by PW-8 in a surreptitious manner cannot be ruled out.

37. We have also observed that this room from where the alleged white envelop containing Rs.10,000/- was recovered, was in exclusive possession and control of the applicant. The fact that the envelop contained currency notes which was recovered from the office of the applicant by PW-8 was the same that was given by PW-14 Mr. Sumesh Magotra as part of the illegal gratification to the applicant, has not been proved beyond reasonable doubt. In view of the foregoing, we are of the opinion that in pursuance of demand for the amount in terms of illegal gratification as alleged to have been recovered from the office of the applicant on 27.09.2008 has not been conclusively proved. Mere recovery of money in the manner stated by the prosecution will not help them in proving the charge levelled against accused.

38. **Second charge:** The second charge pertains to Army Act Section 69, "*Committing a civil offence, that is to say being in possession of ammunition in contravention of Section 3 of the Arms Act 1959, contrary to Section 25(1-B) of the Arms Act, 1959.*"

39. It has been stated by the learned counsel for applicant that 5 rounds of 7.62 mm SLR and 03 rounds of 9 mm Ball were recovered

from the office drawer of the applicant by the board of officers constituted for searching the office of the applicant.

40. Col V.K. Bahuguna who was the Presiding Officer of Board of Officer himself at page 46 stated that *"When I opened one of the drawer on the left side I found a carton of ammunition. When I opened the ammunition carton, I found live ammunition, that is, quantity three of 9 mm ball and quantity five of 7.62 SLR rounds. I asked the accused about the ammunition lying in his office. He told me that it had been lying for long. I told him it was not the place to keep it. The ammunition should have been fired and cartridges deposited. He did request me and the Board not to reflect the ammunition in the board proceedings which I did not accept"*.

41. PW-13 Major S.B. Mishra who was an expert witness in terms of Ammunition opined that as per the markings on the ammunition 9 mm ball that was find in the room of the accused are "KF, 9mm, 2Z, 91" which signifies that this ammunition was of 1991 vintage. Similarly, the 7.62 ammunition possess the markings of "OFV, 7.62, M 80, 96" which signifies that this ammunition was of 1996 vintage. One round of 7.62 mm was of 1992 vintage. He further opined that shelf life of 9 mm ball ammunition is 7 years and that of 7.62 mm ammunition is 18 years from the year of manufacture. He stated that *"As per Ammunition Maintenance Instructions for Small Arms Ammunition, after completion of shelf life, the ammunition is rendered unserviceable and thereafter*

unservicable ammunition is destroyed by burning through closed incinerator method. Open ammunition is recommended for accelerated exploitation within six months". Therefore, he stated that "the ammunition which has out lived its life is fit for being fired, but the certainty that it will fire cannot be assured and moreover, it's performance and accuracy would also not be optimum and it may also not achieve the desired results. The firing of such ammunition is also hazardous and may also lead to an accident, that is, damaging the weapon and possibility of injury to the firer".

42. Learned counsel for the applicant argued that the ammunition was lying in his drawer since he had taken over. It is due to sheer neglect that he had not bothered about the same as they were of no use and undertaken its correct disposal as per instructions. He also argued that the Arms Act 1959 is strictly not applicable to the Armed Forces especially so as the recovery of the said ammunition was from within the notified area of the Army.

43. Learned counsel for the respondents argued that this was a clear case of violation of standing orders as also the violation of the Arms Act in which he was required to be in proper authorisation for being in possession of the said ammunition in his custody. Being a senior officer and holding the appointment of Commandant NCVD, he was aware of the importance and procedure for correct disposal of

such ammunition. Thus, the charge of Section 69 under the Arms Act is conclusively proved.

44. Having heard both the sides and looking at the circumstances of the case, it is evident that the said ammunition was recovered from the left hand side drawer of the table of the applicant. This box contain some old ammunition i.e. 03 rounds of 9 mm ball and 05 rounds of 7.62 SLR. All the ammunition was of old vintage. Despite being old vintage, it could have been used by any person having ulterior motives. It was, therefore, incumbent upon the applicant to report to the concerned authorities or to dispose off the said ammunition or to send it to the correct holding agency. It should have been kept in unit magazine where ammunition normally is kept. As per the applicant, this ammunition was found by him on having assumed the charge. Having noticed this ammunition, he should have taken steps to ensure that the said ammunition was properly accounted for.

45. The gravamen of the second charge is for holding ammunition in contravention to Section 3 of the Arms Act 1959 read in conjunction with Section 25(1-B) of the Arms Act, 1959.

46. Section 3 of the Arms Act makes possession of ammunition or fire arms without licence a crime in the eyes of law. Section 25(1-B) lays down that any individual found in possession of arms/ammunition without license under Section 3 shall be liable to be punished with

imprisonment for a period which shall not be less than one year but it may extend to three years and shall also be liable to be fined.

47. In this case, the possession of ammunition in the custody of the applicant has been proven beyond doubt. But the prosecution has not been able to ascribe any motive or reason for the applicant to have done so. Besides, the applicant has contended that this was lying in his office since the time had taken over and he does not have any knowledge from where it came from. We have also noted that there is no deficiency in the holding of ammunition in the unit. In view of the foregoing, it implies that the applicant did not undertake action as per the instructions on the subject for its disposal in an appropriate manner.

48. In view of the foregoing, we are of this opinion that though the ammunition was in the drawer of his office table, but for that he was found responsible to report and to take responsible step for disposing the same. Therefore, it cannot be construed as an act in violation of the Arms Act 1959. At best, he can be charged of not having followed the orders on the subject of disposal of any surplus/old ammunition. Therefore, we are of this opinion that instead of charging the delinquent under Sections 3 and 25B of the Arms Act and under Section 69 of the Army Act, the charge should be under Section 63 of the Army Act, in that he failed to take action as per standing instructions for disposal of old and surplus ammunition. Charge under

Section 63 of the Army Act is a lesser charge and for which no fresh evidence is required.

CONCLUSION:

49. We have come to the conclusion that the prosecution has been unable to establish that the demand of amount paid as illegal gratification amounting to Rs.10,000/- and kept in a white envelop was done by PW-14 Mr. Sumesh Magotra, dealer of the motorcycles. There is a dichotomy in the statements leading to the date and timings of Mr. Magotra is alleged to have left the envelop on the table of the applicant on 27.09.2008. It is further substantiated by the fact that the so called demand made by the applicant on 17.09.2008 for Rs.100/- per motorcycle being cleared in the inspection does not corroborate with the fact that no motorcycles were offered for inspection on the date of alleged inspection on 28.09.2010 (page 291). Inconsistencies and non-corroboration in the statements of PW-15 Col Manish Kachhy, NCCIU and PW-1 Col S.A. Kulkarni, CO Northern Command Provost Unit seems to discredit the credentials of PW-14 further. The innocuous assertion by PW-15 of NCCIU suggest that between 14.08.2008 till date, Mr. Magotra has visited his office on five occasions. He further adds that his first visit to the office was between 20-23 September 2008. This in itself is a question mark to the assertions made by Mr. Sumesh Magotra and therefore, the charge of having demanded the alleged amount is not found proved beyond

reasonable doubt. The burden of proving charge even in such type of cases of corruption always lies on the prosecution.

50. Further, we note that Mr. Sumesh Magotra never told PW-15 that Mr. Vikas Rathore had told him to pay Rs.10,000/- to the accused. Further, Col Kachhy PW-15 has asserted that *"he, however, is aware that Mr. Sumesh Magotra had come to his unit on 12 Sep 2008 looking for Colonel SS Khara, the previous Commanding Officer of his unit as he had done some work during his tenure. He had not given him any audience on that date"*. All this goes to show that connection between Mr. Sumesh Magotra and Col Kachhy was more than just this incident. Therefore, the evidence of Mr. Sumesh Magotra needs to be viewed with suspicion. In the absence of any other corroborating evidence, there is a question mark in the statement made by PW-14 Mr. Sumesh Magotra.

51. We have heard both the parties at length in detail and having examined the documents on record. We have further gone into the statement made by PW-14. Pw-14 in his examination in chief stated that he was expecting a consignment of over 350 motorcycles which he wanted to park in the inspection area of the Vehicle Depot. This was declined by the applicant. The first consignment of this 350 motorcycles reached Udampur around 15.08.2008. He has also stated that he was actually dealing with Lt Col D.K. Sood, PW-4 for pre-delivery inspection of all vehicles especially motorcycles. During

the pre-delivery inspection, 71 vehicles were handed over to the Vehicle Depot by 16.09.2008. On 17.09.2008, Mr. Vikas Rathore who was carrying and forwarding agent for the Royal Enfield Motorcycles had visited Udhampur and both of them visited Lt Col D.K. Sood as also the applicant. On the other hand, at page 219 in response to the questions by the Court, he has confirmed that not a single motorcycle was offered for inspection on 27.09.2008. Further, at page 267, PW-14 has stated that he was not the person who discussed issues of "Len Den". This was the job of Mr. Vikas Rathore and therefore, he has had a meeting on 17.09.2008.

52. Besides, the failure of the prosecution to bring Mr. Vikas Rathore who was the material witness creates a doubt regarding the probity of PW-14 Mr. Magotra's evidence.

53. PW-14 has also stated subsequently, that in the year 2008, he had approached Station Officer Ramby who advised him to contact Vigilance Officer at Jammu. He had then contacted the Vigilance Officer who advised him to approach the CBI and gave a contact number. When he contacted the CBI on the said number, he was given a contact number of another CBI official who belong to Batote. The said person advised the PW-14 to approach whenever he wanted to do something in this regard. However, in the meantime, a person from NCCIU had come in his contact. Therefore, Mr. Magotra did not pursue the matter with the CBI. Read with the assertion of PW-15 that

the PW-14 had earlier worked for his predecessor and had also visited him around 12.09.2008 or before, it is quite possible that Mr. Magotra was finding a method to frame the applicant. In view of the foregoing, we are of this opinion that PW-14 Mr. Magotra has not come with clean hands and may have come with ulterior motive. Apparently, he was finding ways and means to involve the applicant in a case. Since Mr. Magotra was also dealing in motorcycles and the requirement of Northern Command Vehicle Depot of 350 motorcycles Royal Enfield Motorcycles had started arriving only after 15.08.2008, there was no good reason for him for trying to contact the Vigilance Officer/SHO/CBI in the matter of illegal gratification to the applicant. Besides, he having worked for the predecessor of Col Kachhy, PW-15 earlier, indicates that Mr. Magotra was involved in unclean activities, although he has denied emphatically that he has ever given bribes to public servants. Besides, PW-14 at page 268 has stated "*it is correct that during the year 2007 while delivery of the motorcycles were given, the accused had proceeded on leave, Lt Col D.K. Sood has officiated as Commandant, Northern Command Vehicle Depot*" and he has emphatically denied that he had paid any money to the applicant in 2007.

54. We also note that no motorcycle were produced for inspection on 27.09.2008. Also that the alleged demand (deal) for payment of

Rs.100/- per motorcycle was concluded on 17.09.2008. So, the question of payment, therefore, on 27.09.2008 defies logic.

55. As such, the evidence that Mr. Sumesh Magotra has actually delivered the envelop containing Rs.10,000/- on 27.09.2008 has not been proved beyond doubt.

56. As regards the recovery of envelop with the alleged illegal gratification of which photocopies of 20 currency notes of Rs.100/- denomination were available with Col S.A. Kulkarni, PW-1, the envelop was recovered by Hav. D.K. Singh, PW-8. Interestingly, all six witnesses other than Hav D.K. Singh who were present in the room have not seen Hav D.K. Singh actually going down on his knees and using the handle of the fly beater to sweep the area under the computer table as claimed by him. No witness who was present in the room at that point of time says that he saw Hav DK Singh actually recovering the envelop from the place from where he claims to be. Besides, no evidence has come out to show that in case the envelop was lying under the computer table, the condition of the envelop in itself would have indicate as to whether the envelop was actually recovered from the place where it is alleged to have been recovered. As such, the recovery of the envelop containing the illegal gratification from the possession of the applicant, from his office of which he was the custodian is not proved beyond doubt. In the absence of the demand, to say that the illegal gratification was actually given to the

applicant and the recovery of the said envelop containing the illegal gratification from the office of applicant has not been proved conclusively. To this extent, the GCM authority has not properly appreciated the facts and conclusion thereon is unsustainable.

57. Our opinion draws strength from the judgment of **(2002) 5 SCC 86 Subhash P. Sonvare Vs State of Gujarat** wherein their Lordships have held that the demand for illegal gratification should be established as mere possession of recovery of the illegal gratification cannot be grounds for conviction. In this case, neither the demand has been proved nor the recovery of the said envelop containing the money has been proved beyond reasonable doubt.

58. Our view is further strengthened by **(1979) 4 SCC 725 Suraj Mal Vs State (Delhi Administration)** wherein their Lordships have held that mere recovery of bribe money, divorced from the circumstances under which it was paid, is not sufficient to convict when the substantive evidence in the case was not reliable.

59. We have also relied upon **(1980) 3 SCC 110 Abdulla Mohammed Pagarkar Vs State (Union territory of Goa, Daman and Diu)** and **Moreshwar Hari Mahatme Vs State (Union Territory of Goa, Daman and Diu)** wherein their Lordships have held that under the Evidence Act of 1972, Section 3 clearly indicates that for any charge to be proved "suspicion, however, strong cannot be a

substitute for proof". They have further observed that under Section 102 of the Evidence Act, onus of proof of existence of every ingredient of a charge always rests on the prosecution and never shifts on the accused. Especially, in criminal trials they observed that appreciation of evidence are to be based on facts and mere impression of prosecution witnesses, testified long after the event, cannot be held to be reliable.

60. Further, in **AIR 1995 SCC 2178 M.K. Harshan Vs State of Kerala**, their Lordships have observed that "acceptance of illegal gratification should be proved" and in a trap case, recovery of tainted money from the accused does not constitute corroborated evidence and could suffer from infirmities. Plea of the accused on the other hand that tainted money was planted without his knowledge appears to be probable and thus the accused was given the benefit of doubt. In this case, the facts of the case are almost similar and therefore, we can rely on the recovery of the envelop with the said money cannot be taken as conclusive proof especially so, when the demand for illegal gratification has not been proved beyond doubt.

61. So far as recovery of ammunition is concerned, in the absence of any motive on the part of applicant, we are of the opinion that the charge needs to be framed under Section 63 of the Army Act in that the applicant having not followed the standing instructions as regards the disposal of surplus/old arms and ammunition. We quash the

charge under Section 69 of the Army Act and substituted it with charge under Section 63 of the Army Act i.e. failing to obey standing orders in maintaining good order and discipline.

62. Our opinion has further strengthened by **(2003) 8 SCC 9 Dev Singh Vs Punjab Transport Development Corporation Ltd., and others** wherein their Lordships have held that punishment has to be in proportionate of the offence. A judicial review when called for merits court's intervention in case the punishment imposed by the disciplinary authority is not commensurate with the charge so established. In this case, since the charge under Section 63 of the Army Act has been substituted by us is a lesser charge vis-a-vis Section 69 of the Arms Act read in conjunction with Section 3 and 25-B of the Arms Act. It is thus a fit case for revising the sentence.

63. The third charge was not proved and the applicant was held not guilty by the GCM.

64. In view of the foregoing, we find that there is no evidence to prove the first charge. As regards the second charge, we opine that the charge be substituted by Section 63 of the Army Act "*an act prejudicial to good order and discipline*" and which stands proved.

65. Since the applicant is held guilty of only charge No.2, under Section 63 of the Army Act "*an act prejudicial to good order and military discipline*", which is a lesser charge, we consider it fit to review

the sentence in the changed circumstances. We find that considering charge No.2 proved, ends of justice will be met by sending the applicant on compulsory retirement from the date he has been dismissed with all pensionary and retirement benefits.

66. The currency notes so recovered be forfeited subject to directions otherwise in case of appeal after the period of limitation of appeal. Disposal of the said ammunition be carried out as per orders of the respondents.

67. This order be complied with within 120 days from the date of this order failing which an amount of 12% will be levied on the sum due, till the date of payment.

68. In the light of above discussion, the OA is partly allowed. No orders as to costs.

(M.L. NAIDU)
(Administrative Member)
Announced in the open Court
on this 01st day of June, 2012.

(MANAK MOHTA)
(Judicial Member)