

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

T.A.NO.116 OF 2010
W.P.(C) No.24510 of 2006 of the Hon'ble High Court of Kerala at Ernakulam

TUESDAY, THE 24TH DAY OF JANUARY, 2012/4TH MAGHA, 1933

CORAM:

HON'BLE MR. JUSTICE JANARDAN SAHAI, MEMBER (J)

HON'BLE LT.GEN.THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

K,P. RAJU, AGED 47 YEARS,
S/O. LATE PEETHAMBARAN,
KANNANKARA MELETHIL, KARAKKAD P.O.,
CHENGANNUR, ALAPPUZHA DISTRICT.

APPLICANT/PETITIONER:

BY ADV. SRI. M.P. KRISHNAN NAIR.

versus

1. UNION OF INDIA, REPRESENTED BY THE SECRETARY
MINISTRY OF DEFENCE, MEW DELHI.
2. THE GENERAL OFFICER COMMANDING IN CHIEF,
HEADQUARTERS, NORTHERN COMMAND, **RESPONDENTS/RESPONDENTS:**
UTTAMPUR, C/O.56 ARMY POST OFFICE.
3. THE GENERAL OFFICER COMMANDING,
3 INFANTRY DIVISION, C/O.56 APO.
4. THE COMMANDING OFFICER,
11 ENGINEERING REGIMENT, C/O.56 APO.

R1 TO R4 BY SR. PANEL COUNSEL SRI. K.M. JAMALUDEEN.

ORDER

Janardan Sahai, Member (J):

The applicant, a Sapper in the Indian Army, was charged for an offence under Section 52(a) of the Army Act. A charge sheet dated

4.12.1989 was served upon him by the Commanding Officer stating that he committed theft of the property belonging to the Government. The charge sheet reads as follows:

"Charge Sheet

*The accused, No.1361565E rank Spr Name KP Raju,
315 Fd Pk Coy(11 Engr Regt) is charged with:-*

COMMITTING THEFT OF PROPERTY
BELONGING TO THE GOVERNMENT
in that he,

at Field on 15 Oct 89, at 2130 h committed theft of clothing items mentioned below, the property of 409 Fd Coy, 11 Engr Regt.

(a) Sleeping Bag	No.1
(b) Blanket BK	" 3
(c) Net Mosquito	" 4
(d) Boot Ankle	Prs. 2
(e) Coat Parks Outer	Nos.2
(f) Towel Hand	" 4
(g) Hood winter	" 1
(h) Overall Combination	" 2
(j) Socks Wool Heavy	Prs. 3
(k) Balclova	Nos.3
(m) Trouser D	" 2
(l) Coat Parks inner	" 1
(n) Line Bedding	" 1

Sd/-

*(Pramod Kumar Vyas
Colonel
Commanding Officer
11 Engineer Regiment*

*Place: Field
Date: 04 Dec 89*

Sd/-

*Capt.
Adj. 11 Engineer Regt."*

The applicant was brought to trial by Summary Court Martial on 9.12.1989.

He pleaded guilty to the charge and was awarded punishment of six months

rigorous imprisonment in civil jail and dismissal from service. His mother preferred a representation, Ext.P6, dated 31st January 1990 to the GOC-in-C Northern Command and the Chief of Army Staff (COAS), and the applicant himself also filed a separate petition under Section 164 of the Army Act, dated 23rd March 1990 (Ext.P7). The petition was dismissed by COAS on 13th December 1991. The applicant preferred Writ Petition No.5120 of 1992 in the Kerala High Court challenging the order of the COAS dated 13th December, 1991. The Writ Petition was disposed of by an order dated 9th November, 1998 with a direction to respondent No.2, GOC-in-C, Northern Command to dispose of afresh the representations, Exts.P6 and P7. The applicant preferred Writ Appeal No.281/99 against the decision of the learned Single Judge. It appears that during the pendency of the writ appeal, the directions given by the learned Single Judge were carried out and a fresh order, Ext.P8, dated 8th March 1999 rejecting the petitions was passed by the GOC-in-C, Northern Command. The Writ Appeal No.281/99 was decided on 8th August, 2006 with liberty given to the applicant to challenge the order dated 8th March, 1999 which was Ext.A1 in that appeal. The applicant then filed a second Writ Petition, No.24510 of 2006 in the Kerala High Court, in which he has prayed for quashing the Summary of Evidence and also the Court Martial proceedings as well as Ext.P8 order dated 8th March,1999. According to the applicant, two sets of Summary of

Evidence were recorded, one on 27.11.1989 and the other on 28.11.1989 and the prayer is to quash both sets of summary of evidence. The papers of the said Writ Petition have been transferred to this Tribunal in view of the provisions of Section 34 of the Armed Forces Tribunal Act, 2007. That is how, the present TA has come up before us.

2. We have heard the learned counsel Mr.M.P.Krishnan Nair, on behalf of the applicant and Mr.K.M.Jamaludeen, the learned Senior Panel Counsel, on behalf of the respondents.

3. A copy of the Summary Court Martial proceedings has been annexed to the T.A. as Ext.P2 series and the copy of the Summary of Evidence recorded on 27.11.1989 has been annexed to the petition as Ext.P1(b). The copy of the Summary of Evidence recorded on 28.11.1989 is annexed as Ext.P3 and Annexure R4(c) to the counter/reply filed in the T.A.. The main submission advanced by the learned counsel for the applicant is that although the plea of guilty has been recorded in the Summary Court Martial proceedings, but the applicant did not understand the nature and effect of the plea and that in fact there was no legal evidence against the applicant in the Summary of Evidence and looking into the nature of the evidence of the prosecution witnesses brought out in the Summary of Evidence, it was the duty of the Commanding Officer who presided over the Court to advice the applicant to withdraw the plea of guilty, in view of the

provisions of Rule 115 Sub-Rule(2) of the Army Rules. To appreciate the contention, it is but apt for us, to narrate briefly the evidence recorded against the applicant in the Summary of Evidence.

4. We shall first refer to the Summary of Evidence, Annexure R4(c) annexed to the counter/reply filed by the respondents. This evidence was recorded on 28.11.1989. PW1 is Naib Subedar R Padmanabhan of 409 Field Company, 11 Engr Regiment. He has stated that on 16th October 1989 at about 0930 hours he came to know from Subedar Ikambaram that there was theft in 409 Field Company, QM Store on 15th October 1989 night. The Officiating Commanding Officer, Lt. Col. K.S.Saini detailed Captain Gurdev Singh and the witness (PW1) to search various places. Captain Gurdev Singh and the witness went in search of the lost clothing items behind the barracks of Field Park Company and DTL Loc, but could not find anything. While returning, Subedar LTM Pillai and Subedar Ikambaram and Sapper Satheesan met them at 409 Field Company Office and then Sapper Satheesan told them that some unauthorised items were lying on his bed. A list of the 13 clothing items has been given by the witness which are said to have been found on Sapper Satheesan's bed, and found lying with him. He also stated of having gone to where Sapper KP Raju, applicant, was staying, but could not find any clothing items. PW2 Havildar S.Murugan stated that at about 0800 hrs on 16th October 1989 he had given the key of

the company salvage store to Sapper Shiv Prasad asking him to collect Kerosene Oil for the cookhouse. After collection, Sapper Shiv Prasad reported that one plank of Company QM Store was broken on one side. The witness went immediately to the Company QM Store area and found that someone had broke open the store from the side. When the store was opened, some clothing items were missing. He has also given the list of the same 13 items described by PW1. At about 1030 hours, Sapper Satheesan informed them that some items were lying on his bed and on checking they were the same items which had been stolen. On 28.10.1989, Subedar Pillai, Company Subedar 315 Field Park Company handed over few items, those were found near Sapper KP Raju's bed. These items have been disclosed as two blankets and one sleeping bag inner. PW3 is Sapper C.K.Satheesan on whose bed the stolen items were found. He stated that on 15.10.1989 he went to the Officer's Mess and came back to the office around 2230 hours. At about 2245 hours, Sapper KP Raju, the applicant, came to him with some clothing items which he stole from 409 Field Company. Sapper KP Raju asked the witness to keep those items with him and threatened the witness not to tell anyone. Then Sapper Raju along with the witness went to collect the balance of items lying at 409 Field Company QM store. He asked the witness to keep the items with him. On 16th October 1989, the whole regiment came to know about the theft. At about 10 30 hours,

Sapper Satheesan reported to Subedar Sukumaran that some unauthorised clothing items were lying under his bed. He did not tell that he was afraid of Sapper KP Raju. He has further stated that Court of Inquiry was ordered in which he stated that he was innocent as he was afraid of Sapper KP Raju. The Summary of Evidence was also recorded in which he did not come out with the truth. On 6th November 1989, Havildar Narayan of 315 Field Park Company came to the witness and asked him to tell the truth about the stolen clothing items from 409 Field Company QM Store. Then he told him that the applicant, KP Raju, had broken and opened the 409 Field Company QM Store on 15th October 1989 night and handed over some clothing items to the witness to keep them with him and threatened not to tell anyone.

5. From the prosecution evidence in the Summary of Evidence [Annexure R4(c)], it appears that the star witness against the applicant is PW3, Sapper C.K.Satheesan. The clothing items stolen from the store were found lying on his bed. Pws.1 and 2 have stated that Satheesan had informed them about these items lying on his bed. In such circumstances, an inference could be drawn that the stolen items were in the possession of Sapper C.K.Satheesan and a presumption could be drawn that he had committed the theft unless he could explain their presence in any other manner. It would be but natural on his part to put the blame on some

other person. In view of the fact that the stolen items were found on his bed, his statement would have to be read with great caution.

6. When we examine the statement of PW3, we find that there are certain circumstances, which make his statement quite untrustworthy. He has stated that the applicant had asked the witness to keep the stolen items with him on 15.10.1989 itself, the date on which the theft is said to have been committed. He, however, did not disclose the name of the applicant till 6th November, 1989 when Havildar Narayan is said to have come to him and asked him to tell the truth about the stolen clothing items and it was then after a passage of 21 days that he told him about the theft committed by the applicant. It is to be noted that in between the commission of the theft and 6th November 1989, a Court of Inquiry had been convened and Summary of Evidence was also recorded and in paragraph 3 of his statement, the witness has admitted that in the Summary of Evidence earlier recorded he had not come out with the truth. In the Summary of Evidence recorded on 27.11.1989 Sapper C.K.Satheesan was examined as PW2 and he has stated that he was performing the duty of runner, on 16th October 1989 when Sapper KP Raju came to him with some clothing items and asked him not to tell this to anyone. In view of these infirmities, the statement of C.K.Satheesan is wholly untrustworthy. Learned Senior Panel Counsel submitted that the statement of PW3, C.K.Satheesan, is supported

by PW2, Hav. S.Murugan, who has stated that on 28.10.1989 Subedar Pillai handed over a few items which were found near Sapper KP Raju's bed, viz., two blankets and one sleeping bag inner. The witness himself has not deposed that the blankets and the sleeping bag inner had been seen by him to be lying near KP Raju's bed. This part of the statement is clearly a hearsay one. Moreover, the theft is said to have been committed on 15.10.1989 and the stolen items blankets and sleeping bag inner are said to have been handed over by Subedar Pillai long after on 28.10.1989. That apart, all the stolen items for which the applicant has been charged had already been found on Satheesan's bed on 16.10.1989. These additional items therefore it appears are not included in the charge. To lend credence to the statement of Subedar Pillai, learned Senior Panel Counsel referred to the statement of Subedar Pillai, PW1, recorded on 27.11.1989, in Ext.P1 filed by the applicant with the petition. A perusal of the statement of Subedar Pillai recorded on 27.11.1989 however indicates that he has not at all deposed about the recovery of any stolen items from near the bed of the applicant. He has however stated that Sapper Satheesan had told Havildar Narayan that applicant KP Raju has stolen the clothing items from 419 Field Company Store and kept them under his bed and threatened Sapper Satheesan not to tell anyone. It also appears from the set of the Summary of Evidence filed by the applicant that the statement of the

applicant was also recorded in which he has admitted having committed theft on 16.10.1989. The statement has been marked as confidential, but his signatures have been obtained. It is well settled that accused cannot be made a witness against himself and the officer recording the Summary of Evidence has committed a gross illegality in recording confidentially the statement of the applicant. No doubt, after the evidence of the prosecution witnesses in the Summary of Evidence is recorded and is over, the accused has to be cautioned and asked whether he wishes to make any statement voluntarily but that is a separate matter. The proceedings of the Summary of Evidence filed by the applicant indicates that after he had been so cautioned, the applicant declined to make a statement. It thus appears from the evidence brought out in the Summary of Evidence that in substance, the statement of Sapper C.K.Satheesan alone is against the applicant and his statement was unworthy of credit, for the reasons we have already given.

7. The learned counsel for the applicant also submitted that the whole manner in which discovery of the stolen items has been narrated by the prosecution witnesses is highly doubtful and suspicious and it is pointed out that stolen items were found on the bed of Sapper Satheesan, PW2. It is also pointed out that on this aspect there is discrepancy in the version of prosecution witnesses and that while at some places it stated

that stolen items were found on the bed of Sapper Satheesan, in other places it is stated that it was found underneath the bed. He also submits that keeping the stolen items on the bed of Satheesan for the whole night would have exposed the theft and it is a most unnatural conduct and cannot be believed. The incident is said to have taken place in field area and it would have been difficult to sell the stolen items.

8. In the above circumstances, we find merit in the contention of the learned counsel for the applicant that it was the duty of the presiding officer to have invoked the provisions of Army Rule 115 Sub-rule (2) and to have advised the applicant to withdraw the plea of guilty. The scheme of the Army Act and the Rules does not entitle an accused person to obtain the services of a professional lawyer in Summary Court Martial proceedings. It is only in GCM and DCM that the services of a professional lawyer can be availed of by the accused. In such circumstances, it is all the more necessary that the Presiding Officer of the Court should be wary and guard the interest of the accused that he be not prejudiced. It has to be borne in mind that the accused is a layman and is not conversant with the Evidence Act and other provisions of law. In our opinion, on the evidence brought out in the Summary of Evidence in the present case, the Presiding Officer should have well advised the applicant to withdraw the plea of guilty. No

doubt, the proceedings of Summary Court Martial contain a certificate that the provisions of Rule 115 sub-rule (2) have been complied with, but that certificate does not indicate that the Presiding Officer had advised the applicant to withdraw the plea of guilty and if so what response the applicant had given. Rule 116 (4) also empowers the Presiding Officer to convert the plea of guilty to non-guilty. The photocopy of the proceedings of trial indicate that signatures of the applicant have not been taken against the plea of guilty. Although there is no statutory requirement therefor, but the requirement to obtain the same has been stressed in judicial decisions vide **Devilal Sahu vs. Union of India** [2009(2) Service Cases Today 152 (Rajasthan)] and **Union of India vs. Ex.L/Nk. Bega Ram**, Mil.L.J. 2007 Rajasthan 231 (See para 5 relying upon the Division Bench decision of the Rajasthan High Court in **Union of India vs. Ex.Sepoy Chander Singh**, 1997(6) SLR 643).

9. There is another aspect of the matter which requires to be considered. It appears that one set of Summary of Evidence was recorded on 27.11.1989 whereas another set of Summary of Evidence was recorded on 28.11.1989. Reference to the two sets of Summary of Evidence has been made by the applicant in paragraph 9 of the petition. This discrepancy has been sought to be explained in paragraphs 7 and 9 of the counter affidavit filed by the respondents in W.A.No.281/99 and it is stated

therein that the Commanding Officer in terms of Army Rule 22(1) ordered a Summary of Evidence to be recorded and the same was recorded by Major K.S.Raju and the Summary of Evidence prepared by him dated 27.11.1989 was submitted before the Commanding Officer. Thereupon, the Commanding Officer after perusal of the Summary of Evidence directed the Officer who recorded the Summary of Evidence to record the statements of some more witnesses as he had not recorded complete statement of the witnesses. Accordingly, the officer recording the Summary of Evidence took the statement of two additional witnesses and Ext.P3 Summary of Evidence dated 28.11.1989 was submitted. However, this explanation does not explain why the statement of Sapper C.K.Satheesan was recorded twice. The counsel for the applicant submitted that the Commanding Officer apparently had done so as the evidence recorded on 27.11.1989 was inconvenient and also in view of the illegality in getting the statement of the accused/applicant, therefore, he got another set of Summary of Evidence recorded on 28.11.1989.

10. We are of the view that the explanation given in the counter affidavit does not explain why the statement of Sapper C.K.Satheesan was recorded twice. We have also found that the confidential statement of the accused was recorded illegally. The Presiding Officer also failed to advise the accused/applicant to withdraw his plea of guilty. For the reasons given

by us, we are of the view that trial is vitiated on account of the flaw in the procedure which has prejudiced the applicant and consequently the conviction and sentence of the applicant is liable to be set aside. The incident is an old one pertaining to the year 1989 and trial was also held long time back and after a lapse of so many years it is not a fit case where the applicant should be re-tried. In the above circumstances, we set aside the conviction and sentence of the applicant. The applicant had put in more than fourteen years service. It appears that the normal term of engagement of the applicant would have come to an end on 3rd February 1990, had he not been dismissed. In such circumstances, actual re-instatement cannot be directed. The ends of justice would be met if the applicant is granted consequential benefits viz., salary from the period of dismissal up to the date his normal term of engagement would have come to an end and also the pensionary benefits thereafter. Ordered accordingly. The respondents are directed to work out the arrears due to the applicant expeditiously within a period of six months and pay the same without delay. T.A. allowed.

Sd/-
LT. GEN. THOMAS MATHEW,
MEMBER (A)

Sd/-
JUSTICE JANARDAN SAHAI,
MEMBER (J)

DK.

(True copy)

Prl. Private Secretary