

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

O.A.18 OF 2010

TUESDAY, THE 22ND DAY OF JANUARY, 2013/2ND MAGHA, 1934

CORAM:

HON'BLE MR. JUSTICE SHRI KANT TRIPATHI, MEMBER (J)
HON'BLE LT.GEN.THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

APPLICANT:

THARESH T.,AGED 20 YEARS,
S/O SHRI THAMPAN, NUMBER 1485088 OP EX RECRUIT (CLERK)
HOUSE – KRISHNA NAGAR, SAGARA NAGAR 157,
PO ULIAKOVIL, DISTRICT KOLLAM – 691 019.

BY ADV. SRI. RAMA KUMAR.

versus

RESPONDENTS:

1. THE GENERAL CHIEF OF THE ARMY STAFF,
ARMY HEADQUARTERS (SENA BHAWAN),
DHQ POST, NEW DELHI – 110 011.
2. THE COMMANDING OFFICER,
NO.2 TRG BN,ASC CENTRE & COLLEGE,
BANGALORE-7.
3. UNION OF INDIA, REPRESENTED BY
SECRETARY TO DEPARTMENT OF DEFENCE,
NEW DELHI.

BY CENTRAL GOVERNMENT COUNSEL K.M.JAMALUDHEEN.

ORDER

THOMAS MATHEW, Member (A):

1. The applicant is an ex-Recruit of the clerical cadre of Army Service Corps (ASC), who was dismissed from service after a Summary Court Martial for the charge of theft of government property while he was undergoing training. Aggrieved by the action of the respondents, he has filed this application before this Tribunal.

2. The applicant, Thares.T was enrolled on 21.4.2008 and completed his basic training on 21.9.2008. He was undergoing trade training thereafter from 7.1.2009 to 15.8.2009. On 20.2.2009, he was detailed as a sentry along with other trainees at Iblur Camp Jungle area where they were undergoing training. This area has number of sandalwood trees hence is guarded round the clock. The applicant's duty was from 13.00 hours to 18.00 hours. At about 16.45 hours three sandalwood trees cut into seven pieces were discovered near his area of duty. The Junior Commissioned Officer in charge of Jungle area Naib/Subedar Mohammed Pervez and Company Havildar Major Vivek Ranjan questioned the applicant and Recruit.Satish Kumar of the

neighboring sentry post regarding cutting of the trees in their area of responsibility. It is the respondents' case that both the individuals confessed to the crime then and there. The applicant has maintained that he was innocent and was forced to shoulder the responsibility along with Recruit Satish Kumar. He was also forced to give a written statement implicating Sepoy/Clerk Sunny Wilson who is supposed to have asked them to cut the trees. It is submitted that he being a recruit and a fresher, was compelled to do what the seniors asked him to do.

3. It is averred by the applicant that evidence was taken without giving him an opportunity to cross examine witnesses. None of the accused were given an opportunity to give their statements. The summary of evidence was recorded by Nb/Sub.Suresh Kumar who was supposed to be the independent witness instead of Lt.Col.J.S.Multani who was the officer detailed to record it. A false certificate to the effect that the applicant had declined to make any statement or cross examine the witnesses was also recorded. The applicant was tried by a Summary Court Martial based on a charge under Section 52(a) of the Army Act for theft of property belonging to the government and was ultimately dismissed from service on 17.4.2009.

4. The applicant has contended that the entire proceedings against him was violative of the principles of natural justice. He was not permitted to make any statement or cross examine any witnesses and forced to sign false statements to that effect. After he was sentenced to be dismissed from service a petition under Section 164 of the Army Act was filed before the Chief of the Army Staff. However, without appreciating actual facts and circumstances of the case, the petition was rejected. It has been argued that the entire disciplinary proceeding against him was liable to be quashed. The applicant has therefore prayed for a direction to set aside the court martial proceedings and reinstate him in service with all attendant benefits.

5. The respondents have submitted in their reply that the applicant and Recruit Satish Kumar had admitted to cutting sandal wood trees at the behest of detailing Munshi Sepoy/Clerk Sunny Wilson. These statements were made in front of the court willingly and signed by them. The Summary of Evidence was recorded by Lt.Col.J.S.Multani and not Nb/Sub.Suresh Kumar. The petition of the individual was throughly examined by the Chief of the Army Staff before it was rejected due to lack of merit and substance.

6. It has been averred by the respondents that the applicant was undergoing Technical Training phase of his recruit training along with others of platoon 168. The training was conducted at Iblur Camp which is located 9 km away from the ASC training Centre. The Iblur camp has a perimeter of approximately 9.2 km and has more than 4000 sandalwood trees. The trainees at the camp in addition to their training are also responsible for the safety and security of the camp and the assets therein. The area is guarded round the clock and the sentries are posted to prevent encroachment or trespassing by unauthorized persons.

7. The respondents have submitted that on 20.02.2009 at about 15.30 hours, the Company Havildar Major(CHM) Vivek Ranjan got suspicious of the actions of Sepoy/Clerk Sunny Wilson, the 'Munshi' in charge of detailing Regimental Police (Sentry) at various posts at Iblur camp. When he went and checked the Sentries, he found three of them missing from their posts. The JCO-in-charge, Nb/Sub Mohammed Parvez was informed and when they went to the site Recruit Satish Kumar was seen emerging from the jungle. On questioning, he admitted to cutting

sandalwood trees along with Recruit/Clerk Thares T (the applicant) and also showed them where the cut pieces of sandalwood trees were kept near village post (another sentry post). A Court of Inquiry was ordered on 21.2.2009 and the two recruits and Sepoy/Clerk Sunny Wilson confessed to their crime. The Court of Inquiry found them guilty and recommended disciplinary action against all the individuals.

8. The Summary of Evidence was recorded by Lt.Col.J.S.Multani on 29.3.2009 and subsequent days. The applicant and others neither challenged the statements made against them by witnesses nor made any statement of their own. The officer recording the Summary of Evidence has recorded the signature of the applicant and the independent witness in the relevant areas of the proceedings. A certificate that he recorded the statements himself and that provisions of Army Rule 23(1), (2), (3) and (4) have been complied with was endorsed along with the proceedings.

9. The Commanding Officer, Col.A.K.Jha, after perusal of the Summary of Evidence issued the convening order to try by a Summary Court Martial Rect/Clk.Thares.T under Army Act Section 52(a) for the offence of 'committing theft of property

belonging to the Government'. It is contended by respondents that the applicant pleaded 'guilty' during the arraignment. Provisions of Army Rule 115 (2) was complied and the accused was explained the effect of his plea of guilt. The applicant made a statement to pardon him and to give him another chance to serve the Army. He also declined to call any witness. The applicant was found guilty of the charge and was accordingly dismissed from service. It has been submitted by the respondents that the entire proceedings were conducted as per the law.

10. The original copies of the Summary of Evidence and the Summary Court Martial proceedings have been produced for the perusal of the Tribunal.

11. We have heard Sri.Ramakumar, Senior counsel representing the applicant and Shri K.M.Jamaludheen on behalf of the respondents. We have also perused the documents that have been produced including the original copies of the Summary of Evidence and the Summary Court Martial Proceedings. The main contention of the applicant has been that he was innocent and was forced to admit his involvement in the theft. During the

recording of the Summary of Evidence he was neither permitted to make any statement nor cross examine the witnesses. Other Sentries present at the site of incident were not called to give statement before the court. He was pressurized to sign various documents by his seniors. When the Summary Court Martial started he was again told to plead guilty and he was assured that nothing would happen to him. He being a recruit with hardly one year's service, once again complied with the direction of senior officers and pleaded guilty without fully understanding its implications. The independent witness was from the ASC Centre and acted as part of the prosecution. The learned counsel contended also that the procedures as laid down in the Army Act and Rules were not followed during the entire proceedings. The Summary Court Martial proceedings therefore stood vitiated and needs to be set aside as the petitioner was denied a fair trial. The respondents have denied all these allegations and produced the Summary of Evidence and Summary Court Martial proceedings with the applicant's signatures at the appropriate places.

12. We had directed the respondents during the hearing to produce a sketch of Iblur Camp area with details of sentry posts,

location of trees that were cut and kept as also inter se distances between these areas. This sketch was produced and perused by the Tribunal.

13. A perusal of the various documents has shown that the respondents have followed the relevant Army Act and Rules in the conduct of the Summary Court Martial. We do not find any infirmity on that count as argued by the learned counsel for the applicant. Even though, the applicant has signed at relevant places of the Summary of Evidence and Court Martial proceedings, he has consistently reiterated his innocence in his petition to the Chief of the Army Staff, the application before the Tribunal and also during the hearing. He has maintained that his superiors forced him to admit to the misdeed and to sign in the documents of the disciplinary proceedings. We feel that these assertion should be considered along with the facts of the case that emerge from the documents that are available.

14. The sketch of the Jungle area of the Iblur camp makes it very clear that the location of the five Sentries, the place from where the trees were cut and where the cut pieces were kept were

all within a radius of 75 to 100 metres. Three sandalwood trees were cut into seven pieces of length varying from 41 to 78 cms and diameter of 26 cm to 37 cm. Applicant and five other recruits were placed on duty at this area from 13.00 hours to 18.00 hours. As per prosecution witness No.3 (PW-3), he along with PW-4 had found one of the sentry (the co-accused, Recruit Satish Kumar) missing from his sentry post at about 15.30 hours and on questioning him became aware of the crime committed by him and the applicant. Therefore, the cutting of the three trees, chopping them to seven logs and then carrying them to a place approximately 75 metres away took place in a period of two to two and a half hours. In between, PW-6 has stated that he had carried out a check of all the sentries between 13.00 hours and 16.30 hours and had found everyone in their respective places. Further, cutting of 'trees' would have been heard by all other sentries in that area. It is also pertinent that the seven cut pieces were located between two other sentry posts. These logs could not have been dumped there without the knowledge of the two sentries who were manning those posts. Later, the respondents had used a truck to transport the logs to the store. When viewed in its totality, it is difficult to believe that two recruits could have cut

three trees and removed the seven logs to a location between two other sentry posts with three other sentry posts in the near vicinity, all in a matter of two to two and half hours.

15. Another issue which cannot be ignored is the fact that the applicant was a 18 year old recruit with less than one year service at that time. He had spent about 9 months during his basic training at the ASC centre and came to the Iblur camp for Technical Training on 7.1.2009. The incident occurred 44 days later. Recruit Satish Kumar was also similarly placed like him. Once again it is difficult to believe that these two recruits who were fairly new to the place and the Army environment would have planned and carried out this theft with another young Sepoy. Sandal wood is a controlled item and its transportation and sale is carried out by government authorized dealers. Therefore, a larger question arises whether these recruits were acting alone or on behalf of someone else or were made scape goats to protect someone else.

16. In view of the aforesaid material infirmities and improbabilities, I find that (a) serious reasonable doubt arises as to the confession being voluntary in nature (b) only limited number

of witnesses were called for the disciplinary proceedings ignoring others present at the site of incident (c) a speedy trial was held and the case closed thereafter. I am of the opinion that the authorities at ASC centre and the Commanding Officer of the applicant failed to see the larger picture and implications or purposely ignored it and speedily concluded the case. The two young and raw recruits with another young soldier alone could not have carried out this crime to its conclusion by themselves. The question of how they were planning to dispose of the logs should have been the first one that the Army authorities examined. It has been admitted by the respondents that a Court of Inquiry was held on 21.2.2009, the day after the incident. The findings of the Inquiry was never revealed by the respondents. A detailed examination by the Court of Inquiry would have revealed the actual planners and perpetrators of this crime. It appears that the inquiry had a limited scope based on the confessional statements made at the site by the two accused. It is also pertinent that there is no evidence to link the two accused to the 'theft'. No one has seen the actual cutting of the tree or moving the logs to another place inside the camp. The actions of the Army authorities therefore raise more questions than the simple answer of admission of guilt by two

young recruits. I am of the considered opinion that consequent to the discovery of the crime, the respondents have not carried out a proper inquiry to identify the culprits.

17. It is difficult to ignore the assertions of the learned Senior Counsel for the applicant that he was denied a fair trial and falsely implicated when seen in the light of our discussions in earlier paragraphs. While dealing with a young recruit, the Commanding Officer should have ensured that all possibilities had been investigated and ruled out coercion and tutoring by his seniors. The independent witness should have been truly independent from the influence of the ASC Centre and the officer conducting the investigation or Court Martial. A plea of 'guilt' should have been handled with greater care and the Commanding Officer should have convinced the accused to change it to 'not guilty' and proceeded accordingly to give him the benefit of doubt. Instead we find that the respondents took an easy and speedy way to conclude an unpleasant incident. We are more than convinced that the applicant has not been given a fair trial and has been punished without going into all the aspects of the case.

18. In the result, the O.A. is liable to be allowed and the order of the Summary Court Martial is liable to be set aside.

Sd/-

LT. GEN. THOMAS MATHEW,
MEMBER (A)

Shri Kant Tripathi, Member (J):

19. I have gone through the well considered order prepared by my esteemed colleague, Hon'ble Lt.Gen.Thomas Mathew. I fully concur with the conclusion, but I would like to add a few words of mine.

20. The Summary Court Martial seems to have found the applicant guilty of the charge only on the ground that he pleaded guilty to the charge and summary of evidence which was read over and explained to him during the summary court martial was also against him as he neither made any statement of his own nor cross examined any of the witnesses who had given adequate evidence against him.

21. The plea of guilt allegedly made by the applicant could only be made as the basis for holding him guilty of the charge, if the same was a voluntary statement free from any inducement, threat or promise. Therefore, the first and foremost question that arises for consideration is whether the plea of guilt allegedly made by the applicant was free from inducement, threat or promise, and was voluntary. In order to answer the question, entire scenario of the incident, official status and length of service of the applicant, and the circumstances in which the alleged statement was made by the applicant, must also be kept in mind. Before the Tribunal, the applicant has very categorically denied to have made any such statement of confession (plea of guilt), therefore, the statement of the applicant before the summary court martial falls within the category of retracted confession.

22. It is also to be kept in mind that no statement amounts to confession unless it admits in terms of the offence or it substantially include all the relevant facts which constitute the offence. It must also be kept in mind that on the date of the incident the applicant was merely a recruit having only ten

months service and was deputed there for the trade training from 7.1.2009 only. The incident of theft ought to have been examined by keeping in view the question whether two recruits of ten months standing could successfully cut down three sandal trees without the knowledge of their superiors, in a place where five sentries at five guard posts were being deployed every time. Obviously, it could be done only either under orders or knowledge of some senior Army Officers or personnels. The new recruits, like the applicant and his associate, could not dare on their own, to cut down the trees and make them in several logs and to carry out the logs from the place of cutting to another place near guard post 55. It is also significant to mention that no statement of any eye witness or the guards who used to be deployed at various guard posts nearby the place of occurrence was recorded during the summary of evidence. Therefore, according to the record, none had seen the applicant either cutting the sandal trees alongwith his associate, or moving the logs from the place of occurrence to the place where they had been found kept. The applicant seems to have been implicated on the ground that he was not found at his guardpost on duty and he

made the statement before the prosecution witness, Naib Subedar Skt/MD Parwez (witness No.4) that he and recruit Skt.Sathish Kumar, had cut three sandalwood trees on the orders given by No.14850305 N, Sepoy Clerk Sunny Wilson, detailing Munshi of Iblur Camp. Therefore, the statement so made by the applicant before Naib Subedar Skt/Md Parwez does not seem to be either a confessional statement or plea of guilt. The applicant, who was merely a recruit of ten month's service, could not be blamed if he acted on such direction of the detailing Munshi because he might have thought that in case he would not carry out the direction of detailing Munshi, he could be put to task. The Summary Court Martial seems to have overlooked these material aspects of the case. It also appears that the applicant and the other recruit were used not only by the detailing Munshi but also by some other Senior Army personnels or officers as tools by misusing the position that they were new recruits and had no voice, therefore, the proper course for the Commanding Officer was to find out the "the real culprit or culprits" who were behind the episode instead of booking two new recruits on the basis of their aforesaid statements. Even according to the statement of the

witnesses recorded during the Summary of Evidence, it does not appear to be a case where the applicant acted with a dishonest intention in cutting the trees and doing other acts. To constitute the offence of theft, it is necessary to prove that the subject matter of theft was moved by the accused with a dishonest intention. The phrase "dishonest intention" means wrongful gain to the accused and wrongful loss to the person entitled to the property. When the applicant acted according to the direction of the detailing Munshi and carried out his command, how there could be a dishonest intention on his part. Therefore, whatever statement the applicant made during the interrogation prior to the proceeding of summary of evidence, as proved by the witnesses during the summary of evidence, does not fall within the category of confessional statement nor the same discloses any dishonest intention on the part of the applicant.

23. The other important aspect of the case is that the actual statement/words spoken to by the applicant, which, according to the summary court martial, was "plea of guilt" had not been recorded. The summary court martial merely

recorded the fact that the applicant pleaded guilty to the charge. When the applicant had already clarified the position during the interrogation as proved by the summary of evidence as to how the sandal trees were cut and had been brought after converting them into logs to the place where they had been kept and clarified that he did so under the orders of detailing Munshi, Sepoy Sunny Wilson, there was no reason for the applicant to go beyond that and to confess his guilt before the summary court martial. But the Commanding Officer seems to have treated the said statement as the plea of guilt and recorded accordingly. More so, there does not appear to be any evidence to show that there was any criminal conspiracy between the main culprit Sunny Wilson, on the one hand, and the applicant and other recruit, on the other, to commit the offence of theft. It appears that Sepoy Sunny Wilson, who was performing the duty of detailing Munshi, had his own design and without bringing that design to the notice of the applicant and other recruit Sathish Kumar, ordered them to cut down the sandalwood trees and they did so believing the same as an order. Therefore, it does not appear to be a case of dishonest intention on the part of the applicant.

24. It is also significant to mention that the applicant was in custody much prior to the holding of summary court martial and was brought as such before the court at the time of Summary Court Martial proceeding. He had therefore no independent advice and legal assistance at that point of time. The next friend appointed by the summary court martial to act for the applicant was Major O.P.Sharma, who was not of much help to the applicant due to the simple reason that he had no adequate legal acumen. In such circumstances, the plea of guilt allegedly made by the applicant could not be said to free from inducement, threat or promise. No doubt, it was a summary court martial. But, after all, the trial ought to have been held in a just and fair manner, so as to provide not only an independent legal assistance to the applicant/(accused) and an opportunity to defend himself properly but also to exclude possibility of inducement, threat or promise in obtaining his plea of guilt, especially when a possibility, as already observed, could not be ruled out that certain senior personnels had been involved behind the entire episode who used the applicant and other recruit as tools. But the summary court martial, instead

of adopting a pragmatic, reasonable and just approach keeping in the view the background in which the incident was committed, adopted a short cut formula to dispose of the matter on the basis of the alleged plea of guilt.

25. Apart from the aforesaid, it is also necessary to specify that the sketch map filed on behalf of the respondents discloses the places C1091, C1092, C1094, where the sandal trees had been cut down. The logs of sandalwood in seven pieces had been kept at the place marked as 'X' adjacent to guardpost 53 and 55 which was much away from the guard post 57 where the applicant was allegedly deployed. Therefore, the guards who had been deputed during the period of 24 hours at guard posts 53 and 55 and also at the other nearby posts, were the most natural and important witnesses. But none of the guards so deputed seem to have been subjected to probe either during the summary of evidence, or the summary court martial, or even prior thereto during the interrogation.

26. It is also significant to mention that reading and explaining the summary of evidence to the applicant after recording his alleged plea of guilt is also one of the

requirements of the procedure to be observed for a valid summary court martial, as per Rule 116 of the Army Rules, 1954. If the summary of evidence is not read over and explained to the accused, it amounts to a serious lapse on the part of the Judge presiding over the summary court martial and as such it affects the ultimate conclusion of the trial. In the present matter, Col.A.K.Jha, the Judge, prepared the proceedings of the summary court martial on a printed proforma wherein it was printed "the summary of evidence is read (translated), explained, marked Signed by the court, attached to the proceedings". The said proforma was filled in by Col.A.K.Jha by writing the words "Exhibit 1" in the blank which he signed but did not obtain any signature of the applicant. The aforesaid printed sentence does not disclose as to whom the summary of evidence was read and explained, whether it was read over or explained to the accused or some other person is not clear. In this view of the matter, it can be safely held that the summary of evidence was not read over and explained to the accused/applicant and the Commanding Officer Col.A.K.Jha only filled in the blank by writing the words "Exhibit 1".

27. No doubt, in the reply statement, it is mentioned that a Court of Inquiry was also held but the respondents have not filed any findings of the Court of Inquiry, therefore, it does not appear to be a case where the Court of Inquiry had been held. Keeping in view the facts and circumstances narrated herein before, the proper course for the Commanding Officer, was to hold a thorough Court of Inquiry to find out the real culprits who had made the design for commission of the offence and used the two new recruits as tools to fulfil their desires.

28. It is also relevant to mention that the applicant had brought the entire matter before the Chief of Army Staff under Section 164 of the Army Act, but the Chief of Army Staff instead of giving due consideration to the aforesaid relevant aspects of the matter and dismissed the petition on altogether irrelevant grounds.

29. I am, therefore, of the view that the Summary Court Martial was not justified in holding the applicant guilty only on the basis of his statement, which was not in any way free from inducement, threat or promise.

30. For the reasons stated above, I am of the view that the order of the Summary Court Martial dismissing the applicant from the service after holding him guilty of the charge was not proper and is liable to be quashed.

Sd/-

JUSTICE SHRI KANT TRIPATHI,
MEMBER (J)

ORDER OF THE BENCH

31. In view of the aforesaid discussion, the Original Application is allowed. The order of the Summary Court Martial holding the applicant guilty and accordingly dismissing him from the service is quashed. The respondents are directed to reinstate the applicant as recruit and allow him to complete the training and after completion of the training successfully, induct him into regular service of the Army, with original seniority. It will however, be open to the respondents to have the matter investigated afresh, so as to trace out the real culprit/s involved in committing the above offence of theft.

32. No order as to costs.

33. Issue free copy of this order to both side.

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

Sd/-
JUSTICE SHRI KANT TRIPATHI,
MEMBER (J)

sv/DK.

(True copy)

Prl. Private Secretary