

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NOS. 1388-1389 OF 2019
(DIARY NO. 9218 OF 2016)**

UNION OF INDIA & ORS.

.....APPELLANT(S)

VERSUS

SANDEEP KUMAR ETC.

.....RESPONDENT(S)

W I T H

**CRIMINAL APPEAL NO(S). 1390 OF 2019
(DIARY NO. 7204 OF 2016)**

A N D

**CRIMINAL APPEAL NO(S). 1391 OF 2019
(DIARY NO. 7205 OF 2016)**

J U D G M E N T

HEMANT GUPTA, J.

- 1)** Delay condoned. Appeals admitted.
- 2)** Criminal appeals arising out of Diary No. 9218 of 2016 are filed by the Union of India whereas; criminal appeals arising out of Diary Nos. 7204 of 2016 and 7205 of 2016 are filed by accused - Neeraj Kumar Dhaka and Sandeep Kumar respectively.
- 3)** The challenge in the appeals filed by the Union of India under Section 30 of the Armed Forces Tribunal Act, 2007¹ is to an order passed on December 12, 2013 by the Armed Forces Tribunal² setting aside the order of conviction & sentence and of dismissal

1 Act

2 Tribunal

consequent to District Court Martial³ proceedings conducted against the respondents⁴. The Tribunal passed an order for reinstatement of both the accused but it was also ordered that the accused shall not be entitled to any back wages for the period they were out of service. The other two appeals are against the order passed by the Tribunal declining back wages to the accused in those appeals.

- 4)** The Tribunal found that the findings recorded by the DCM that the charge against the accused was the theft of two pistols [(i) Pistol Browning 9mm, Butt No.1 - Reg. No. T-5251; and (ii) Pistol Browning 9mm, Butt No. 22 - Reg. No. B-3927] on April 6, 2006 but no physical inspection appears to have been done till the loss was found on May 12, 2006. The Tribunal also found that the written confession (Ex.8 and Ex.9) given by the accused is in the presence of entire Squadron, thus, such oral confessions are made to persons in Army cannot be relied upon referring to Army Order No.256 of 1972. It was also held that it is not clear as to whether the accused were in custody as no date is mentioned on the written confessional statements and that there is nothing on record as to how and on whose instance the accused volunteered to reduce in writing the said confessions. The Tribunal found that no recoveries were affected in pursuance of the confessional statements of either of the accused as the pistols had already been recovered. The Tribunal also found that the two slips (Ex.12 and

3 DCM

4 hereinafter referred to as the 'accused'

Ex.15) relied upon by the prosecution were allowed to be proved by the secondary evidence but no evidence was led in regard to existence of any such slip or loss of the said slip. Therefore, no secondary evidence can be allowed. The Tribunal also held that the prosecution case was not put to accused - Sandeep Kumar as required by Army Rule 58 which is akin to statement under Section 313 of the Code of Criminal Procedure, 1973⁵. The Tribunal concluded as under:

“43. From above detailed discussion it is very much clear that the case solely rests upon the alleged confessional statements made by both the petitioners which have not been proved to have been made voluntarily and these did not lead to any recovery and, therefore, cannot be linked with the accused and thus do not satisfy the requirement of Army Order 256 of 1972 referred to above also. There is no other evidence led by the prosecution as against the petitioners and the statements of other witnesses are not very material.”

5) The facts leading to the said order need to be stated:

A report was submitted by 71 Armoured Regiment⁶ to the General Staff Branch of the Army Headquarters regarding loss of two pistols which later led to DCM. The said Regiment was deputed for T-90 Tanks conversion training at Pokhran Firing Range from March 15, 2006 to April 4, 2006. The convoy moved from Patiala to Pokhran whereas weapons were carried in locked boxes. The training and conversion exercise were conducted in general area

5 Code

6 Regiment

Lunkaransar from April 1, 2006 to May 11, 2006. The physical check of weapons was carried out on April 27, 2006 and Officer Commandant of the Squadron Lt. Col. J.G. Gopalan confirmed that there were 50 pistols in 'A' Squadron at the Camp in Biniwarli. The Regiment underwent another exercise from April 30, 2006 to May 2, 2006 in general area Binjarwali. All tanks had to be topped up and prepared for T-90 conversion exercise which commenced on May 3, 2006.

From May 3, 2006 onwards, the Regiment commenced its movement from Binjarwali to general area Bikamsar. The marching out reflected 50 pistols signed by Squadron Commander. Dafedar Vijaypal, member of tank crew handed over his keys to the Senior JCO Risaldar Katar Singh. It is also mentioned in the report that an order was received on May 9, 2006 at 1500 hrs. that all participating crews were to carry weapons. Dafedar Raibir Singh counted 48 pistols. Senior JCO Risaldar Katar Singh did not register the difference nor informed anyone. At the end of conversion exercise, the loss of weapons was reported at 1030 hours on May 13, 2006. It was also reported that Court of Inquiry has been called for on May 18, 2006 to assemble on May 26, 2006. The report is that the loss has occurred between April 27, 2006 at Binjarwali and May 9, 2006 at Mittasar. The report is also to the effect that an FIR No. 644 was lodged with PS Sardarshahar about the loss of weapons. It was also reported that T-90 tank has a three-member crew but the loss of two pistols have minimum impact on the

operational efficiency. The *prima facie* opinion in the report is as under:

“6. Tentative Views of Oc Unit. The loss of wpns, at first look, appears to be due to the negligence of the Kote NKCO, Sr JCO and Sqn Cdr of A Sqn. Theft or some other malafide intention cannot be ruled out at this point of time and all leads are being investigated.”

- 6)** On May 22, 2006 (Ex.26), the Directorate General of Military Intelligence was informed by Commandant of Regiment that the two lost pistols have been found in the exercise area at approximately 1600 hours on May 22, 2006 on the track from Mittasar to Bikamsar. Thus, two different versions have come on record as to how and where the recovery was made. One version is that the pistols were found in general area during ground search whereas, another version is that Dafedar Vijaypal Singh found a cardboard shoebox containing the pistols around the Dhobi (Washerman) area. The stand of the prosecution is that Pankaj Dhaka, brother of accused Neeraj Kumar came to visit his brother at Hisar Military Station on June 18, 2006 who reported the theft of pistols by Neeraj Kumar in association with Sandeep Kumar.
- 7)** The accused were charged on September 26, 2007 under Section 52(a) of the Army Act, 1950⁷ read with Section 34 of the Indian Penal Code, 1860⁸ having committed theft of the two pistols on April 6, 2006. The stand of the prosecution was that the two pistols were stolen on April 6, 2006 when accused were posted at

7 Army Act

8 IPC

Pokharan Field Firing Ranges and were recovered on May 22, 2006 in the area known as Lunkaransar. The Court of Inquiry submitted its report dated May 18, 2006 (Ex.25). Thereafter, both the accused were tried by DCM who held the accused guilty and were convicted and sentenced to undergo rigorous imprisonment for one year and six months and also punishment of dismissal from service.

- 8)** Initially, Sandeep Kumar was represented by Mr. C.S. Dalal, Advocate and Neeraj Kumar Dhaka was represented by Mr. Om Prakash, Advocate in proceedings before the DCM. However, subsequently, Shri C.S. Dalal, Advocate represented both the accused before the DCM.
- 9)** The prime witness of the prosecution is Lt. Col. J.G. Gopalan, Squadron Commander, who appeared as PW-1. He deposed that he informed by Risaldar Katar Singh (PW-7) about the loss of two pistols on May 12, 2006. He stated that during search conducted on May 18, 2006 and May 19, 2006, the handwritten slip (Ex.15) was recovered which is to the effect that the pistols will be located if the Squadron be given pass out for 24 hours and that one officer is also involved. Thereafter, the entire Squadron was sent to out-pass, other than 16 selected personnel who were sent to search pistols. However, it was on May 22, 2006, Dafedar Vijaypal Singh (PW-4) found a shoe box with two pistols. He further deposed that Pankaj Dhaka disclosed before him that his brother Neeraj Kumar has brought two pistols to him and that Neeraj begged before him

to forgive him. The other accused Sandeep who was playing hockey was also called. He stated that the last physical weapon check was done on March 31, 2006 but the report on April 27, 2006 was prepared without physical check. He also deposed that the original handwritten slips (Ex.15) and the photograph of the label pasted on the gift-wrapping paper on the shoebox (Ex.12) were lost in transit and were untraceable but the scanned copies were produced by way of secondary evidence, which was allowed by the DCM. It is in the confessional statements of the accused that the two pistols were stolen on April 6, 2006, that is basis of the charge sheet against the accused.

10) The witness further stated that on June 18, 2006, both the accused were called by Lt. Col. Arvinder Singh, Second-in-Command. Both the accused confessed that they have committed theft of two pistols. The entire 'A' Squadron was called and both the accused confessed before them that they have committed theft of two pistols. The witness has produced handwritten confessional statement of Neeraj Kumar Dhaka (Ex.8) in two pages and also handwritten confessional statement of Sandeep Kumar in four pages (Ex.9) along with statement of Pankaj Dhaka (Ex. 10) in one page. Such confessions were video recorded as well. The transcript of video recording is marked as Ex.39.

11) We have to examine firstly, the finding in respect of secondary evidence. The prosecutor has filed an application to lead secondary

evidence. The defence counsel has submitted that he has no objection to lead secondary evidence in the proceedings recorded. Such proceedings are recorded when the statement of PW 1 was being recorded. The relevant part from the statement of the witness is as under:

“At this stage of the proceedings, the prosecutor submits that the handwritten slip and the label slip affixed to the gift wrapper in which the cardboard shoe box containing two stolen pistols was found, to be produced as evidence in the Court is untraceable.

The Prosecutor submits an application under Section 65 of Indian Evidence Act 1872 for allowing the prosecutor to lead secondary evidence for proving the documents handwritten slip and the label slip affixed to the gift wrapper in which the cardboard shoe box containing two stolen pistols was found. The same is received, read, marked Exhibit ‘13’.”

“The defence counsel, in reply, submits that the handwritten slip and the label slip affixed to the gift wrapper in which the cardboard shoe box containing two stolen pistols was found, in original, should have been available with the prosecution in the copy No. 1 of the Court of Inquiry along with exhibits as produced by the witnesses. Further, the Defence counsel also submits that he has no objection to lead the secondary evidence.

The prosecution, in answer, submits that the Copy No. 1 of the Court of Inquiry does not contain the original documents as exhibits. The same have been handed over to the prosecution. The documents have been lost in transit and are untraceable.”

12) The DCM passed the following order after considering the respective arguments of the parties before it:

“Gentlemen, now you may consider the submission of the prosecution to lead secondary evidence for proving the documents, hand written slip and the label slip affixed to the gift wrapper in which the cardboard shoe

box containing two stolen pistols were found, in the light of the above provisions read before you.

xxx

xxx

xxx

The Court decides to allow the submission of prosecution to lead secondary evidence and to proceed with the trial.”

- 13)** In the cross-examination thereafter, the witness denied the suggestion that Sowar Rakesh Phogat had found two pistols on May 22, 2006 at about 1500 hours. He denied that the pistols were found in general area as the pistols were found at Dhobi table of 'A' Squadron. The witness deposed that the handwritten slip was with him but it was submitted in the Court of Inquiry as an Exhibit to Col. S. Bhardwaj, Commandant, 88 Armoured Regiment. He deposed that original handwritten slip was seen by him and the scanned copy (Ex.15) is the same. The witness deposed that two pistols were wrapped in newspaper sheets. The newspaper cuttings included cutting from newspaper corresponding to Muzzafarnagar area from where accused Sowar Neeraj Kumar Dhaka hails. The witness deposed that the confessional statements Ex. 8, 9 and 10 are exactly the same as produced before the Court of Inquiry. The confessional statements were handwritten by the accused persons voluntarily after having confessed in front of the entire Squadron. There was no force applied on them.
- 14)** The witness denied that the accused persons were kept in the Quarter Guard or they were detained. He admitted that the

procedural lapse has taken place and that the daily, weekly and monthly checks of the weapons have not been done in the prescribed manner. He deposed that they were undergoing conversion training. Hence, the commitment was very heavy. Dafedar Vijay Pal Singh (No 1079855X) was performing various duties at one time, such as that of Kote Non-Commissioned Officer and Tank Commander. The training commitments took a high priority. It was stated that basic faith was that nothing like this can happen. Procedural lapses did take place. To that effect, he and Dafedar Vijay Pal Singh have already been awarded punishments.

15) PW-2 is Risaldar Rai Singh. He is a witness of confession of the accused before the entire Squadron on June 18, 2006. He deposed that cursory weapons check was done on April 27, 2006 as it was believed that all weapons were kept at their respective places.

16) PW-3 is Acting Lance Dafedar Rajender Singh. He stated that he was informed by Risaldar Katar Singh on May 11, 2006 at about 1830 hours that two pistols were deficient. He also deposed that he and Dafedar Baljit Singh found a black polythene bag containing the shoe box on May 22, 2006 containing two stolen pistols. He deposed that accused Neeraj Kumar was granted leave from Pokharan Field Firing Ranges and sent to Hisar whereas Sandeep Kumar made an excuse of stomach ache on April 7, 2006 and later he was shifted to Military Hospital, Jodhpur. He deposed that he has been awarded punishment because of two stolen pistols by both the accused persons. In cross-examination, he admitted that

weapon cleaning was done on April 1, 2006 and not thereafter and that only paper work was done. He further deposed that Risaldar Katar Singh was on leave from April 4, 2006 to April 24, 2006 and he was performing the duties of officiating Senior JCO and Kote JCO. Risaldar Katar Singh was sent on leave in spite of shortage of manpower as he had to vacate family accommodation at Sri Ganganagar to shift his family to new accommodation at Hisar. He deposed that on June 18, 2006, his brother Ranbir Singh came to meet him at Hisar Military Station. The CMP sentry told him that Pankaj Dhaka, brother of accused Neeraj Kumar had come to meet him. He has produced the Guest Register of Regiment where Neeraj Kumar had made an entry writing the details of visit of his brother Pankaj Dhaka (Ex.22). Though, the DCM has given a note that there are cuttings in the Guest Register but perusal of the record shows that there is no cutting in the Guest Register in respect of time and name of the visitor though there seems to be some cuttings in the column of signatures of Risaldar Major as noticed by the Court. He deposed that Neeraj Kumar went to the residence of PW-1 and confessed that he had stolen two pistols along with accused No. 2 and that he confessed the wrongful act to the Squadron Commander. He deposed that both the accused had interacted with each other while on leave. Accused No. 1 Neeraj Kumar was back from leave on May 12, 2006 while the accused No. 2 reported back on May 14, 2006 at Hisar Military Station and later both went to Lunkaransar on May 15, 2006 where 'A' Squadron was

located. It was on May 18, 2006 Lt. Col. Arvinder Singh, Second-in-Command ordered a fall-in and announced that rest be given to all persons of 'A' Squadron. He also said that if any person who has committed mistake can come and personally confess to him or write a slip. It is thereafter on May 19, 2006, Neeraj Kumar kept a handwritten slip on Dhobi table. The accused were keeping a watch if someone picked up the slip but later Neeraj Kumar picked up the slip and gave it to Senior Dafedar Major Sarwan Kumar. He deposed that Pankaj Dhaka has voluntarily given his statement in his presence and in presence of Risaldar Rai Singh. In the cross-examination, he denied having said to mother of Sandeep Kumar that she should forget his son as he has been beaten up.

17) PW-4 is Dafedar Vijaypal Singh has recovered the pistols in a cardboard shoe box. He deposed that he along with Dafedar Baljit Singh found a black polythene bag containing two pistols. He has identified the photograph of the label (Ex.12) pasted on the gift-wrapping paper. He and Dafedar Baljit Singh took the shoe box to Risaldar Katar Singh (PW-7) and Risaldar Rai Singh (PW-2) after waking him up. On opening the shoe box, he found the newspaper cuttings as well as two pistols wrapped separately in newspapers. He informed Lt. Col. J.G. Gopalan, Squadron Commander (PW-1).

18) Risaldar Sarwan Kumar is examined as PW-5. He deposed that deficiency of weapons was told to him by Risaldar Katar Singh. He recognised the handwritten slip marked as Ex.15 and the

signatures and stamp of Capt. Vineet Kumar. He was given this handwriting by accused No.1- Neeraj Kumar on May 19, 2006 as having found the slip on Dhobi table.

19) PW-6 is Lt. Col. Arvinder Singh, Second in Command of the Regiment. He deposed about the handwritten slip (Ex.15) as the one having the same content as the original. He has seen the original as well. He deposed that he sent all persons for two days on out pass. They were to report back on May 21, 2006. He deposed that confessional statements were given by the accused in front of him and the entire Squadron. He deposed that both the accused and Pankaj Dhaka made written confessional statements which were read out to them and video-recorded. He deposed as under:

“I am now shown Exhibit ‘8’, ‘9’ and ‘10’, the written confessional statements of accused No 1, accused No 2 and Master Pankaj Dhaka, brother of accused No 1 respectively, in original. I identify with the Exhibit ‘8’, ‘9’ and ‘10’, and have seen these confessional statements in original, earlier.

The accused persons have made statements at various stages starting from the first verbal confessional statements on 18 Jun 2006 and written confessional statements on 19 Jun 2006. Then, at the Court of Inquiry conducted by the then Commandant, 88 Armoured Regiment and statements made in detail to Commanding Officer, 10 Merchandised Infantry and also at the Summaries of Evidence. Both the accused persons had requested me to save them from civil jail whenever they had interacted with me.”

20) In cross-examination, he deposed that the video-recording of accused persons making their written confessions was made on the

orders of the Commandant of Regiment. The transcription of video was given to the defence counsel duly attested by Lt. Amit Sudan. He deposed that confessional statements (Ex.8 and Ex.9) were not written in his presence whereas verbal confessions of the accused were given in his presence and in presence of the entire 'A' Squadron and the Commandant of the Regiment.

- 21)** He deposed that the accused have made statements at various stages from first verbal confessional statements on June 18, 2006; written confessional statement on June 19, 2006 and then at the Court of Inquiry conducted by the then Commandant, 88 Armoured Regiment and the statements made in detail to the Commanding Officer, 10 Mechanised Infantry and also at the stage of Summary of Evidence.
- 22)** PW-7 is Risaldar Katar Singh. He deposed that weapons were never physically checked between March 31, 2006 and May 9, 2006. He came to know about the loss of two pistols on May 9, 2006 as they were to be issued to crew of the tank. He is a witness to the confessional statement written by both the accused and that the accused confessed about stealing the two pistols in the presence of entire Squadron. The verbal and written confessions were voluntary in nature. He deposed that he believed the two pistols were lost while in transit in the exercise as no pistols were issued to anyone. He recognized the contents of slip, the scanned copy and handwritten slip found at the Dhobi table. He deposed that he

lodged a Daily Diary Report on May 13, 2006 at P.S. Lunkaransar for loss of two pistols as also the cancellation of the report (Ex.37). The Daily Diary Report lodged at P.S. Sardarshahar was cancelled vide Ex.21. He deposed that on June 18, 2006, he was at his residence when the entire 'A' Squadron was made to assemble at the Regiment and he reached the Regiment at 1800 hours. Both the accused were standing in front of entire Squadron. Colonel H.S. Chehal, Commandant; Lt. Col. Arvinder Singh, Second-in-Command and Lt. Col. J.G. Gopalan, Squadron Commander were also present there. Both the accused confessed about stealing of two pistols. They also wrote confessional statement. He is a witness to the confessional statement written by accused Neeraj Kumar. Sowar Krishan Kumar was also present. He and Sowar Atender Dahiya are witnesses of confessional statement of accused Sandeep Kumar.

23) PW-8 is Dafedar Parkash Chand who has video recorded the written confessions of the accused and Pankaj Dhaka on June 19, 2006. He has produced the transcription of the video recording. In cross-examination, he stated that there are no cuts in the video recording and is exactly the same tape that he had recorded on June 19, 2006 and that there is no tampering of the video tape.

24) PW-9 is Colonel S. Bhardwaj, Deputy Project Manager, who was earlier appointed as the Presiding Officer of the Court of Inquiry for the loss of two pistols. He stated that the accused persons deposed before the Court of Inquiry as witnesses and later gave

additional statements in which they confessed their wrongful deed voluntarily. He also stated that the original handwritten slip was shown at the Court of Inquiry and only one scanned copy was taken which was duly attested by Captain Vineet Kumar. He identified that the contents on such slip are the same as in the original document.

25) Pankaj Dhaka, brother of accused Neeraj Kumar has been examined as PW-10. He admitted that he came to meet his brother Neeraj Kumar on June 18, 2006. Acting Lance Dafedar Rajender Singh took him to his brother at Hisar Military Station for 3-4 days. He stated that he did not meet his brother in 3-4 days and did not do anything. The prosecution declared the witness hostile. He stated that he did not make statement at the Court of Inquiry but was physically assaulted and made to sign on every page. He denied having made statement (Ex.42) in English stating that he cannot read English though he had studied English up to Class XII. He deposed that he has given statement as was told to him and such statements were tutored. He admitted his handwriting and signatures (Ex.10) written in Hindi which he admits that he understands. He admits that he had been stated in the statement that there are no cuttings or amendments in the statement. He admits that he was sitting on a chair when video was being recorded. He deposed that he stayed in Regiment for two more days after his statement was video-recorded. He further states that his brother was beaten up in front of him and he was

threatened to give false statement so as to save life of his brother.

26) Last prosecution witness is PW-11 Sowar Atender Dahiya. He is the witness to the confessional statement of Sandeep Kumar (Ex.9). The only question asked in the cross-examination was in respect of presence of Lt. Col. J.G. Gopalan (PW-1) when accused No. 2 had written confessional statement.

27) The Army Rule 58 is to provide an opportunity to an accused to explain the incriminating circumstances appearing against an accused. It does not contemplate that such statement can be of an evidence, which has not been led by the prosecution and that accused has not confronted the prosecution witnesses with such aspect in the cross examination of a witness examined by the prosecution. Rule 58 of the Army Rule reads thus:

“58. Examination of the accused and defence witnesses. (1) (a) In every trial, for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him, the court or the Judge Advocate -

(i) may at any stage, without previously warning the accused, put such questions to him as considers necessary;

(ii) shall, after the close of the case for the prosecution and before he is called on for his defence, question him generally on the case.”

28) In a statement recorded under Rule 58 of the Army Rules, accused No.1 Sowar Neeraj Kumar Dhaka was put handwritten confessional statement (Ex.8) recorded on June 19, 2006 with Risaldar Katar

Singh and Sodar Krishan Kumar as independent witnesses. The accused has stated that the statements made by the prosecution witnesses are false. He denied the incident but admitted that he was doubted because he handed over handwritten slip found on the Dhobi table to Squadron Major Sarwan Kumar. Thereafter, accused No. 1 in his statement stated that he was performing sentry duty from April 4, 2006 to April 11, 2006. He came back to Hisar Military Station on April 11, 2006 and proceeded on leave in the evening of April 14, 2006 and reported back on May 14, 2006. On May 15, 2006, he went back to exercise area at Lunkaransar. He stated that he found a handwritten slip on May 19, 2006 on the Dhobi table in the exercise area at about 0730 hours which he handed over to Squadron Dafedar Major Sarwan Kumar. He was called by Lt. Col. Arvinder Singh (PW-6) who asked him about handwritten slip. Risaldar Katar Singh (PW-7) passed an order of fall-in and all personnel of 'A' Squadron were asked to write the same contents as written on the handwritten slip. Such handwritten samples were handed over to Risaldar Katar Singh (PW-7). It was on June 11, 2006, Lt. Col. Arvinder Singh (PW-6) called him to his office to ask about handwritten slip once again. He accused him of writing of a handwritten slip and stealing of two pistols. He stated that he was confined in the Quarter Guard on June 11, 2006 and was called by Lt. Col. Arvinder Singh (PW-6) to his office at about 1700 hours on June 18, 2006 when he saw Sodar Sandeep Kumar was being beaten up. He was taken to the

office of Lt. Col. J.G. Gopalan (PW-1). There, he was beaten up by Acting Lance Dafedar Rajender Singh (PW-3), Risaldar Katar Singh (PW-7) and also Lt. Col. Arvinder Singh (PW-6). Lt. Col. Arvinder Singh (PW-6) forced him to write a suicide note and also a confessional statement stating that he had stolen two pistols 9mm Browning which he improved later on to say that Lt. Col. Arvinder Singh (PW-6) had given him a performa of the suicide note and confessional statement. He was forced to note down the entire contents on a fresh page and sign it. They also threatened him and told that his brother would be killed if he does not write or state what they told him. He was shown his brother who was sitting in the Clerks Office along with Sowar Atender Dahiya (PW-11).

29) In a statement recorded under Rule 58 of the Army Rule, accused No. 2 Sowar Sandeep Kumar resiled from his earlier statement. He stated that on 18 June 2006, at about 1600 hours, he had come to practice hockey in the Hockey Field. Lieutenant Colonel JG Gopalan, Squadron Commander, came to him and informed him that Lieutenant Colonel Arvinder Singh, Second-in-Command had called him to his office. He was beaten by Lieutenant Colonel Arvinder Singh, Second-in-Command along with about five more persons when he reached office. He was forced to write one suicide note in the office of the Second-in-Command, 71 Armoured Regiment. There were four to five persons who continuously assaulted him. After half an hour, Lieutenant Colonel Arvinder

Singh, Second-in-Command came back and handed him a handwritten performa to be copied verbatim in his handwriting and to be signed by him. He said, later, he was confined to the Quarter Guard. He further stated that on 19 June 2006, he was called in the office of Squadron Commander. He was beaten up, one after the other, by Lieutenant Colonel Arvinder Singh, Second-in-Command, Major Zorawar Singh Gill, Squadron Commander 'B' Squadron, Risaldar Katar Singh, Senior JCO 'A' Squadron, Acting Lance Dafedar Rajender Singh, No.15468978N Lance Dafedar Om Prakash and No.15474706K Sowar Ravinder. They had video recorded his statements which he was forced to give. He was also forced to write two or three pages and sign on them. Later he was confined to the Quarter Guard. Somewhat similar statement is of the Neeraj Kumar, accused No.1.

- 30)** In these facts, the order of Tribunal and the finding of DCM are required to be examined. Firstly, none of the prosecution witnesses were cross-examined in respect of threats or beatings inflicted on any of the two accused. Such statements made under Army Rule 58 are not evidence which can be believed to doubt the findings recorded by DCM in the absence of any such defence put to the witness. The witness, when in witness box, could respond to such plea of the accused. Such statement of the accused under Rule 58 is to explain the circumstances appearing in evidence against him. The accused could not set up a defence with which none of the prosecution witness was confronted with. These statements are not

on oath though he has an option to appear as a witness on oath. Therefore, self-serving statements made when opportunity was given to accused under Army Rule 58 will not create any suspicion on the prosecution witnesses when there is not even a remote suggestion to any of the prosecution witnesses who alone could depose the facts so stated by the accused.

31) The three Judge Bench of this Court in *Ajay Kumar Singh & Ors. v. The Flag Officer Commanding-in-Chief & Ors.*⁹ while hearing an appeal under Section 30 of the Act held that this Court normally does not re-appreciate evidence and is slow to interfere with the findings of the Tribunal unless there is substantial question of public importance, but when the appreciation of evidence is vitiated by serious error, this Court can re-appreciate the evidence and interfere with the findings recorded by the Tribunal. The Court held as under:

“20. ...The evidence adduced by the prosecution must be scrutinised independently of such lapses either in the investigation or by the prosecution or otherwise, the result of the criminal trial would depend upon the level of investigation or the conduct of the prosecution. Criminal trials should not be made casualty for such lapses in the investigation or prosecution. Criminal trials should not be made casualty for such lapses in the investigation or prosecution.

21. The evidence of PW 14 (Manager) and PW 18 (Cashier) identifying the appellants and their evidence as to the identity of the appellants in the test identification parade ought not to have been disbelieved by the Tribunal. In exercise of power under Section 30 of the Armed Forces Tribunal Act, this Court

9 AIR 2016 SC 3528

normally does not reappreciate the evidence and is slow to interfere with the findings of the Tribunal unless there is substantial question of public importance. But when it is found that appreciation of evidence in a given case is vitiated by serious error, this Court can reappreciate the evidence and interfere with the findings..."

- 32)** The question required to be examined is as to whether the Tribunal was within its jurisdiction under Section 15 of the Act to set aside the order of the DCM and to order reinstatement of the accused with further direction of no payment for the intervening period.
- 33)** The Tribunal has set aside the secondary evidence in respect of the written slips (Ex.12 and Ex.15). The learned Tribunal was of the opinion that the prosecution is categorical that the theft of the pistols has taken place on April 6, 2006 but thereafter physical verification was conducted on April 27, 2006 where no loss was reported. Subsequently, an FIR was lodged on May 13, 2006 but suddenly the story of recovery of the pistols wrapped in a cardboard shoe box has been introduced on May 18, 2006. There is also a version that the pistols were recovered while checking in the general area.
- 34)** We find that the findings of the Tribunal are not correct in this respect. It is categorical stand of Lt. Col. J.G. Gopalan, Squadron Commander (PW-1) that the report dated April 27, 2006 was prepared without any physical verification and for such report, he has been punished as well. He has also deposed that there was procedural lapse inasmuch as the report was given on April 27, 2006 without physical verification of the weapons and that there

was no daily, weekly or monthly checking. Risaldar Katar Singh (PW-7) has deposed that report was given that the weapons would be in place as no weapon has been issued to anyone. The suggestions put to the witnesses that physical verification was done on April 27, 2006 or the pistols were recovered in general area have been denied by all the witnesses. The stand of the prosecution that the pistols were stolen on April 6, 2006 is based upon written and oral confession made by the accused. The primary evidence of the prosecution is the confessional statements made by the accused along with the supporting confessional statement made by Pankaj Dhaka, brother of accused Neeraj Kumar.

35) The statement of Pankaj Dhaka that he stayed in the Unit for 3-4 days is not made out as none of the prosecution witnesses have been given such suggestion. The Guest Register (Ex.22) shows the entry of Pankaj Dhaka on June 18, 2006 in the Unit area at Hisar. In the absence of any evidence that he stayed in the Unit for 3-4 days or that he has seen that his brother being given beating is wholly unbelievable. In fact, the witness has deposed that he has not met his brother when he went to the Unit at Hisar. Therefore, the story that he has seen his brother being given beating is made up story when none of the prosecution witnesses have been suggested anything even remotely in this respect.

36) The prosecution case is based upon written confessional

statements made by accused Neeraj Kumar (Ex.8) and Sandeep Kumar (Ex.9). In addition to the confessional statements, oral confessions were made before Lt. Col. J.G. Gopalan, Squadron Commander (PW-1) and Colonel Arvinder Singh, Commandant (PW-6). PW-6 has not been cross-examined in respect of any involuntary nature of the confession or that he is the person who has given beatings to the accused as averred by them in their statements under Rule 58. The accused without asking any question to any of the prosecution witness that they have given beatings as alleged by them in their statements, cannot doubt the consistent evidence of the prosecution witnesses. Therefore, the retraction of the confessional statements made in their statement under Rule 58 is of no consequence when the prosecution witnesses have not been cross-examined in respect of involuntary nature of the confessions. The statement of witnesses of different ranks, could not be doubted by the Tribunal. The findings of the Tribunal are in fact based on *ipse dixit* of the Tribunal.

37) The Tribunal has reproduced Army Order No. 256 of 1972 in its judgment. However, the Tribunal has completely misread such Army Order to hold that the confessional statements are inadmissible having been made to the Army. The relevant extract of the order is reproduced for ready reference:

“1. The Indian Evidence Act, 1872 subject to the provisions of the Army Act, applies to all proceedings before a Court-Martial. Section 25 of the Indian Evidence Act provides that no confession made to a police officer shall be proved as against a person

accused of any offence. Section 26 of the same Act provides that no confession made by any person, whilst he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person. However, facts discovered in consequence of a confession which is itself inadmissible having been made to a police officer, or whilst in the custody of a police officer and not in the immediate presence of a magistrate and so much of the confession as distinctly relates to the facts thereby discovered, may be proved. (Indian Evidence Act Section 27).

xx

xx

xx

4. When a person, subject to the Army Act, makes or it appears he is about to make a confession whilst in the custody of a military police officer, he should first be removed from military police custody and placed in ordinary military custody. He may then be taken before a military officer with a view to having his confession recorded in the manner described in para 3 above. Alternatively, he may be taken by the military police officer before a magistrate, for his confession to be recorded in accordance with Section 164 of the Code of Criminal Procedure.”

38) In terms of Section 1 of the Evidence Act, the provisions of the Evidence Act are not applicable to the Court Martial convened under the Army Act, the Naval Discipline Act, the Indian Navy (Discipline) Act, 1934 or the Air Force Act. But in terms of Section 133 of the Act, the Evidence Act apply to all proceedings before a Court Martial subject to the provisions of the said Act. In terms of Section 133 of the Act read with Section 25 of the Evidence Act, the statement made before a Police Officer such as Military Police Officer alone is inadmissible in evidence and not the statement made before the other persons.

- 39)** In the present case, Lt. Col. J.G. Gopalan (PW-1) is the Squadron Commander before whom the accused has made oral confession. He has taken the accused to PW-6 Col. Arvinder Singh, Second-in-Command. Under the orders of Lt. Col. J.G. Gopalan (PW-1) and Col. Arvinder Singh (PW-6), the accused confessed before the entire Squadron on June 18, 2006. It was on June 19, 2006, the accused have given a written confession in their handwriting. Recording of such written confession is video-recorded as well. Therefore, such confession is not hit by Section 25 of the Evidence Act read with Section 133 of the Act and Army Order No. 265 of 1972.
- 40)** Thus, the office order distinguishing a Military Police Officer is separate and distinct from an Officer of the Army. Such distinction has been conveniently overruled by the Tribunal. The confessional statement made by the accused before Military Police Officer alone is not admissible but the statement made before an Army Officer is not hit by the provisions of Section 25 of the Indian Evidence Act, 1872¹⁰. In fact, such statement is made before the entire Squadron apart before different officers coupled with written confession which was video recorded as well.
- 41)** The accused have tried to create doubt on the prosecution story on the basis of the fact that the originals of handwritten slip have not been produced. Lt. Col. J.G. Gopalan (PW-1) has deposed that original of such slip has been lost during transit whereas the

10 Evidence Act

scanned copy is the true copy of the original which the witness has seen. Such statement is supported by statements of Risaldar Sarwan Kumar (PW-5) who has found the slip and Dafedar Vijaypal Singh (PW-4) who has recovered the cardboard shoebox. Still further, before the DCM, the learned counsel for the accused have not disputed the production of the slips by way of secondary evidence. Therefore, we find no reason not to take into consideration such slips in evidence as Lt. Col. J.G. Gopalan (PW-1) and Col. Arvinder Singh (PW-6) are the persons who have seen the originals and have also deposed that the scanned copies are the same as of originals. Therefore, we find that the Tribunal erred in law in reversing the findings recorded by the DCM while exercising appellate jurisdiction under Section 15 of the Act.

42) The argument of Mr. Malik that since the prosecution has not put the incriminating circumstances appearing in the evidence to the accused under Rule 58 of the Army Rules, therefore, the conviction was rightly set aside by the Tribunal. It may be stated that incriminating circumstance of written confessional statement was put to accused Neeraj Kumar and thereafter, he has given a detailed unsworn statement running into more than five pages as reproduced above. Similarly, accused Sandeep Kumar has also given his unsworn statement in more than six pages, the summary of which is reproduced above. Though, the incriminating circumstance should have been put to the accused in terms of Rule 58 of the Army Rules which is akin to Section 313 of the Code but,

the detailed explanation given by the accused rules out any prejudice caused to them on account of absence of specific incriminating circumstances put to the accused.

43) This Court in *Keya Mukherjee v. Magma Leasing Limited & Anr.*¹¹ while referring to earlier three Judge Bench judgment in *Jai Dev & Anr. v. State of Punjab*¹², as to whether the accused has been given an opportunity to say what he wanted to say in respect of prosecution against him, held as under:

“17. The above approach shows that some dilution of the rigour of the provision can be made even in the light of a contention raised by the accused that non-questioning him on a vital circumstance by the trial court has caused prejudice to him. The explanation offered by the counsel of the accused at the appellate stage was held to be a sufficient substitute for the answers given by the accused himself.

18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is ‘for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him’. In *Jai Dev v. State of Punjab* [AIR 1963 SC 612] Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focused on the ultimate test in determining whether the provision has been fairly complied with. He observed thus: (AIR p. 620, para 21)

‘21. ... The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.’

11 (2008) 8 SCC 447

12 AIR 1963 SC 612

19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim *audi alteram partem*. The word 'may' in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him."

44) In a later judgment in ***Nar Singh v. State of Haryana***¹³, this Court referred earlier judgments of this Court in ***Wasim Khan v. State of U.P.***¹⁴, ***Bhoor Singh v. State of Punjab***¹⁵ and ***Santosh Kumar Singh v. State***¹⁶ to hold as under:

"20. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance with Section 313 CrPC has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 CrPC, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 CrPC. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove

13 (2015) 1 SCC 496

14 AIR 1956 SC 400

15 AIR 1974 SC 1256

16 (2010) 9 SCC 747

that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. The facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.”

- 45)** Since the accused have given detailed statements touching the incriminating circumstances appearing in prosecution evidence and also retracted confessional statements made by them, it cannot be said that putting of incriminating circumstances to the accused have caused any prejudice to the accused.
- 46)** Section 15 of the Act confers wide power on the Tribunal so as to allow an appeal against conviction by a Court Martial where the finding of the Court Martial is legally not sustainable due to any reason; the finding involves wrong decision on a question of law or there was a material irregularity in the course of the trial resulting in miscarriage of justice. Even though the power of the Tribunal is wide but it is not merely a different opinion on the appreciation of the evidence to interfere with the findings recorded by the Court Martial. The first ground of interference is whether the finding of the Court Martial is “legally not sustainable”. Therefore, to exercise such power, there has to be error of law by the Court Martial which would confer jurisdiction on the Tribunal to interfere against the conviction recorded by the Court Martial. The second ground is “wrong application on a question of law”. However, the Tribunal, in the present case, has committed grave error in interfering with the

finding of the Court Martial by misreading an Army Order. There is no material irregularity pointed out by the Tribunal inasmuch as the irregularity pointed out is with regard to confessional statements by Military Officer which is not a bar either under the Evidence Act or under the Army Order issued under the Act. The Tribunal could re-appreciate evidence to find out if any findings of the Court Martial is *legally not sustainable* due to any reason; or that the finding involves *wrong decision on a question of law* or there was a *material irregularity in the course of the trial resulting in miscarriage of justice*. But such wide powers do not confer jurisdiction to the Tribunal to reverse the findings merely because it finds that different view is possible.

47) In view thereof, we find that the Tribunal exceeded its jurisdiction while setting aside the order of conviction passed by the DCM.

48) Consequently, criminal appeals arising out of Diary No.9218 of 2016 filed by the Union of India are allowed, whereas, the criminal appeals arising out of Diary Nos.7204 of 2016 and 7205 of 2016 filed by Neeraj Kumar Dhaka and Sandeep Kumar respectively are dismissed. However, the sentence imposed upon the accused is reduced to the extent they had already undergone.

.....J.
(L. NAGESWARA RAO)

.....J.
(HEMANT GUPTA)

**NEW DELHI;
SEPTEMBER 13, 2019.**