
(1999) 01 DEL CK 0002
In the Delhi High Court
Case No : C.W.P. No. 999/92

B.N. Jha Deputy Commandant

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 12-01-1999

Acts Referred:

Citation : (1999) 48 DRJ 700

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. R.P. Sharma and Mr. S.B. Dwivedi, for the Appellant; Mr. Keshav Dayal, Mr. P. Dayal and Ms Jyoti Singh Advs., for the Respondent

Judgement

K. Ramamoorthy, J.—The petitioner has challenged in the writ petition the punishment of dismissal imposed on him by the General Security Force Court (hereinafter called "Court") which was confirmed by the Director General of Border Security Force. In the year 1989-90 the petitioner was posted as Dy. Com- mandant in the Training Centre and School in Hazaribagh, Bihar. There are three Wings in the Centre :

1. Adm Wing, B.T.C. (Basic Training Centre)
2. S.T.S. (Specialist Training School)
3. S.T.C. (Subsidiary Training Centre).

All the said Units are located in the same Campus in Hazari Bagh headed by Dy. Inspector General, Border Security Force named as the Commandant. (DIG T.C.S.). It came to light, according to the respondents, that the petitioner had received illegal gratification from two candidates who appeared for recruitment for being appointed as Constables. On that information to ascertain necessary facts for further proceedings against the petitioner on 7.9.1990 a charge-sheet was issued to him and on the same day the Commandant of the Basic Training Centre (one of the Units of Training Centre and School) passed an order for the

recording of the evidence. The charge-sheet reads as under :-

CHARGE SHEET

The accused IRLA No. 2199, Shri B.N. Jha, Dy Comet of 127 Bn BSF attached with TC & S Hazaribagh is charged with:-

First Charge DIRECTLY AEPTING FOR HIMSELF GRATI BSF Act FICATION AS A MOTIVE FOR PROCURING THE Sec- 41(e) ENROLMENT OF A PERSON IN THE SERVICE. in that he,

at village Singoun, Distt Madhubani (Bihar) on or about 12 June 1990, accepted a sum of Rs.4,000/- (Rupees four thousand only) for procuring the enrolment of No. 90401117 Rect/Const Bhavesh Kumar Jha of STC Hazaribagh.

Second Charge DIRECTLY AEPTING FOR HIMSELF GRATI BSF Act FICATION AS A MOTIVE FOR PROCURING THE Sec- 41(e) ENROLMENT OF A PERSON IN THE SERVICE.

in that he,

at TC&S BSF Hazaribagh, during July 1990, accepted a sum of Rs.1,000/- (Rupees One thousand only) for procuring the enrolment of No. 90401117 Rect/Const Bhavesh Kumar Jha of STC BSF Hazari bagh."

2. A diary of events culminating in filing the writ petition could be given in the following terms :-

7.9.1990 Sh. J.C. Bakshi was examined as witness No. 1. 8.9.1990 Sh. Raj Singh was examined as witness No. 2. 8.9.1990 Dr. Nirmal Kumar was examined as witness No. 3. 18.9.1990 Sh. Bhavesh Kumar Jha was examined as witness No. 4. 18.9.1990 Const. Santosh Kumar Jha was examined as witness No. 5. 20.9.1990 H.C. Waryam Singh was examined as witness No. 6. 20.9.1990 Sh. G.S. Rana, Asstt. Commandant was examined as witness No. 7. 22.9.1990 Sh. Shiv Singh Rawat was examined as witness No. 8. 22.9.1990 Subedar Prem Lal was examined as witness No. 9. 24.9.1990 S.I. Sylvanias Ekka was examined as witness No. 10. 04.10.1990 SI Sher Bahadur Bhujel was examined as witness No. 11. 08.10.1990 Clerk, S.P. Singh was examined as witness No. 12. 08.10.1990 Sh. D. Chidambaram was examined as witness No. 13. 25.10.1990 The statement of the petitioner was recorded. 25.10.1990 Sh. Jagbir Singh was examined as defense witness. 26.10.1990 The Commandant of the B.T.C. recorded the statement and issued a certificate under Rule 48 of the B.S.F. Rules, 1969. The same is as under : "As already mentioned, as per Rule 52 of Border Security Force Rules the present Commandant Shri V.S. Sirohi as DIG/Commandant complied with all the formalities and applied his mind on the recording of evidence before forwarding it to the next higher authority."

3. On 29.10.1990 the petitioner made a representation to DIG, which is as under :

"It is submitted that my statement was finished on 25th Oct. 90 and I had requested for 05 days to produce all the witnesses except Shri GPS Dhillon, Comet. R/C S.K. Chaudhary and Shri Pramod. I had requested to call these three witnesses departmentally. Total 8 defense witness were to be produced out of above, statement of one witness named ASI/LDC Jagbir Singh of Adm was recorded on 25th. The statement of Sh. Surender Kr. Jha was not recorded being irrelevant as told by the RO on 26th though he had come on 25th. One witness Shri J.N. Jha had also come on 27th timely but his statement was also not recorded being irrelevant, other 3 witnesses names Shri Tirpit Jha F/o R/C Santosh Kr. Jha, Shri Naresh Jha, F/o R/C Bhawesh Kr. Jha and Shri Ravendra Nath Jha have also come but their statements were not recorded by the RO and has intimated me on my request that he had already closed ROE on 26th Oct. 90 and further no statement can be recorded. On 25th Oct. I was not informed that defense witnesses called within 5 days will not be accepted and as such I have called all the witnesses.

In view of above, it is requested that the statement of all the 3 witnesses may kindly be allowed to be got recorded otherwise they will be sent back by 30th Oct. 90 to their respective place."

4. On 5.11.1990 the petitioner made a representation to the Inspector General, Border Security Force which reads as under :

"It is submitted that a ROE ordered against me by the DIG & Comet TC&SH/Bagh allegedly for accepting Rs.6,000/ directly from R/C Bhawesh Kr Jha and Rs.5000/ indirectly from R/C Santosh Kr Jha for their recruitment in the BSF was held from 07 Sept 90 to 25th Oct '90. After my statement on 25th, I was asked by the Recording Officer to produce defense witness if any. I named 9 defense witnesses and requested for 05 days time for producing them except Shri GPS Dhillon, Cods Adm, R/C S.K. Chaudhary, STCH/Bagh and Shri Pramod to call them departmentally. Two defense witnesses were present out of which the statement of one was recorded on 25th Oct and the other when again produced on 26th Oct. for the statement same was not recorded being irrelevant as told by the Recording Officer one defense witness reported on 27th Oct but his statement was also not recorded due to reason as above. On 28th Oct. two more defense witnesses, the parents of recruits constable Bhawesh Kr Jha and Santosh Kr Jha also reached and one remaining defense witness reported on 29th morning but no statement of any defense witness was recorded and when I requested to Recording Officer on 29th Oct morning about the arrival of the defense witness, he informed me that he had already closed the ROE on 26th Oct. '90 and as such no further statement could be recorded. However he did not inform me on 25th Oct that no time could be given when I had requested him for 05 days time to call and produce all the witnesses though all the witness were made available within 03 days only. Had he informed me on 25th that no time could be given, I would have not called them for their statement.

I also requested DIG & Comet TC&SH/Bagh on 29th Oct that my all the defense

witnesses have come and their statement may please be got recorded but I could not get reply. However on my personal request to told me that I could produce the defense witnesses in the court if required and at this stage the statement of defense witnesses could not be recorded since the ROE had been closed as intimated by the Recording Officer.

In view of above facts, it is requested that I may be allowed to call again all the defense witness and their statement may please be got recorded to clear the factual position of the case.

Submitted for perusal and favourable an action please."

5. On 21.1.1992 form of order for the assembly of the General Security Force Court.

6. On 3.2.1992 Charge Sheet was issued to the petitioner, which is as under :

CHARGE SHEET The accused IRLA No. 2199, Shri B.N. Jha, Dy Comet of 127 Bn BSF attached with TC & S Hazaribagh is charged with: First Charge DIRECTLY AEPTING FOR HIMSELF GRATI BSF Act FICATION AS A MOTIVE FOR PROCURING THE Sec 41(e) ENROLMENT OF A PERSON IN THE SERVICE. in that he, at village Singoun, Distt Madhubani (Bihar) on or about 12 June 1990, accepted a sum of Rs.4,000/ (Rupees four thousand only) for procuring the enrolment of No. 90401117 Rect/Const Bhavesh Kumar Jha of STC Hazaribagh. Second Charge DIRECTLY AEPTING FOR HIMSELF GRATI BSF Act FICATION AS A MOTIVE FOR PROCURING THE Sec 41(e) ENROLMENT OF A PERSON IN THE SERVICE. in that he, at TC&S BSF Hazaribagh, during July 1990, accepted a sum of Rs.1,000/ (Rupees One thousand only) for procuring the enrolment of No. 90401117 Rect/Const Bhavesh Kumar Jha of STC BSF Hazari bagh."

7. On 3.2.1992 form of order for the assembly of the General Security Force Court, which reads as under:

Order by Shri Net Ram Singh, Inspector General (HQ) Directorate General, Border Security Force, New Delhi.

Place : New Delhi 03 Dated, Feb 92.

The details of officers as mentioned below will assemble at TC&S, Hazaribagh on the 08 day of February, 1992 for the purpose of trying by a General Security Force Court, the accused person named in the margin.

The senior officer to sit as Presiding Officer.

MEMBERS

1. Sh. H.S. Gill, Addl DIGSTC BSF Hazaribagh.
2. Sh. B.S. Tehlan, DC, 21/C133 BN BSF
3. Sh. H.S.Indulia, DC _ TC&S Hazaribagh.

4. Sh. P.N. Das, DC, JAD (MT)SHO Krishna Nagar.

5. Sh. R.P. Singh, DC 163 BN BSF

WAITING MEMBERS

1. Sh. Harbhajan Singh, DCTC&S Hazaribagh.

2. Sh. P. K. Wahal, DC TC&S Hazaribagh.

LAW OFFICER

1. Sh. Kuldeep Saini, JAD (Law) HQ DG BSF is appointed as Law Officer.

PROSECUTORS

1. Sh. Rajender Pandey, JAD (Law)Ftr HQ SB.

2. Sh. R.R. Sharma, Asstt. Comet. TC&S Hazaribagh are appointed as Prosecutors.

The accused will be warned and all witnesses duly required to attend.

In the opinion of the convening officer, it is not practicable to appoint officers of different units.

The convening order dated 21 Jan 1992 and Order appointing the Prosecutor dated 13.1.92 are hereby cancelled.

The proceedings (of which only two copies are required) will be forwarded to the Chief Law Officer, HQrs, Directorate General, Border Security Force New Delhi.

Signed this 03 day of February 1992."

The trial went on from 8.2.1992 to 26.2.1992 before the Court. On 27.2.1992 Mr. Kuldeep Saini, JAD, (Law) submitted a written closing address. The findings of the Court would read as under:

"The Court is closed for the consideration of the findings.

The Court find that the accused IRLA No.2199 Shri B.J. Jha, Deputy Commandant of 127 Battalion, Border Security Force, attached with Training Centre School, BSF, Hazaribagh is guilty of both the charges."

In the same page we find the announcement of findings.

8. The Sentence reads as under :

"The Court sentence the accused IRLA No.2199 Shri B.N. Jha, Deputy Commandant of 127 Battalion, Border Security Force, attached with Training Centre and School, BSF, Hazaribagh, to dismissal from the service."

The announcement of the sentence was done the same day and the same reads as under :

"The Court being reopened, the accused is again brought before it. The sentence is announced in open Court as being subject to confirmation.

Signed at TC & S, BSF, Hazaribagh, on this 27th day February 1992."

9. On 6.3.1992 the Inspector General HQ transmitted the papers to the superior authority for confirmation. On 8.3.1992 the petitioner presented the writ petition in this Court challenging the findings by the Court.

10. On 18.3.1992 the Director General, Border Security Force confirmed the finding and sentence of the Court.

The writ petition was presented in this Court on the 6th of March 1992.

11. Mr. R.P. Sharma, the learned counsel for the petitioner formulated his points thus :

(i) Rule 46 of the Border Security Force Rules, 1969 had not been followed by the authority concerned.

In this connection Rule 16 has also to be noted.

(ii) The Commandant should have heard the parties and, Therefore, the provisions of Rules 44 and 45B had completely been ignored and the protection given to the petitioner had been thrown into the winds.

(iii) Provisions of Rule 48 had not been adhered to in ROE.

(iv) The mandate of Rule 51A had been ignored.

(v) The procedure prescribed under Rule 59 has not been followed.

(vi) Constitution of the Court was illegal.

(vii) The Members of the Court were entertained in a dinner on 20.3.1992 where the Officers in charge of the prosecution had participated which was contrary to the Rules and that had affected the impartiality of the Members of the Court.

(viii) There was a misdirection by the Law Officer, JAD (Law) to the Court.

(ix) The Court had rested its conclusion on the alleged extra judicial confession which has not been proved.

(x) The prosecution had not proved that the petitioner had confessed to the guilt.

(xi) Assuming that there was extra judicial confession before the DIG (P.W.13), the alleged confession was before an authority, obtained by using the official position and, Therefore, it was not admissible in evidence u/s 24 of the Indian Evidence Act, 1872.

(xii) The finding by the Court is not based on any evidence at all.

(xiii) No authority properly instructed in law would come to the conclusion arrived at by the Court.

(xiv) The finding by the Court is vitiated by illegality, irrationality and also the punishment imposed was out of all proper proportion to the offence alleged against the petitioner.

12. Mr. Keshav Dayal, the learned senior counsel for the respondents submitted:

(i) the respondents had acted in accordance with the provisions of the Border Security Force Act, 1968 and the Border Security Force Rules 1969.

(ii) the petitioner was given full opportunity to defend himself in the case.

(iii) the petitioner was permitted to have a counsel to defend him in the trial.

(iv) the Court had come to a right conclusion on the basis of the materials available on record and it cannot be said that the finding is not based on any evidence.

(v) This Court sitting under Article 226 of the Constitution of India cannot be invited to go into the question of sufficiency of evidence.

(vi) The petitioner had confessed before Mr. Garcha, DIG, the Commandant T.C.S. and that Commandant was examined as P.W.13 before the Court and the petitioner had cross examined him and, Therefore, the Court on proper assessment of the evidence of P.W.13 took into account the confession in arriving at the finding.

(vii) the petitioner had raised objection to the constitution of the Court and other objects on other points and they were considered by the Court and, Therefore, the petitioner cannot have of any grievance.

(viii) Having regard to the gravity of the charges against the petitioner, he had been let off lightly by the Court and the doctrine of proportionality would not apply to the facts of the case.

(ix) The petitioner has not made out any case for interference by this Court.

13. The point relating to the violation of the Rule 46 of the Border Security Force Rules 1969 can be dealt with in the first instance. The learned counsel for the petitioner Mr. R.P. Sharma submitted that the Commandant T.C.S. Mr. Garcha had no power to deal with the case of the petitioner because by his own act of projecting a confession before him he was to be a witness in the trial against the petitioner.

14. Just to appreciate the contention, it is necessary to notice the position of the T.C.S. vis a vis the other three units under the control of the Commandant. It is not disputed that the Commandant T.C.S. is the controlling head of all the Units. But what is stated by the respondents is that the Commandant of each of the Units would have power to take action against any delinquent officer under his control. The petitioner is alleged to have committed the offence in June-July 1990. It is the case of the respondents that the petitioner had confessed before the DIG Mr. Garcha, the Commandant of T.C.S., Therefore, in July 1990 Mr. Garcha,

DIG was not within his rights to deal with the case of the petitioner. The moment the DIG was aware of the fact that he was likely to be a witness he must have acted under Rules 46 of the rules. The same reads as under:

"46. Attachment to another unit: The Commandant shall not deal with any case:

(i) where the offence with which the accused is charged is against the Commandant himself, or

(ii) where the Commandant is himself a witness in the case against the accused, or

(iii) where the Commandant is otherwise personally interested in the case and the accused shall be attached to another battalion or unit for disposal of the case under the order of the Deputy Inspector General:

Provided that a Commandant shall not be disqualified from hearing a charge merely because the offence was committed against the property of a Force Mess, band or institution of which the Commandant is a member or trustee or because the offence is one of disobedience of such Commandant's orders."

15. What is submitted on behalf of the respondents is that the Commandant B.T.S. was competent to initiate proceedings against the petitioner but the respondents had once referred to an order passed by Mr. Garcha, DIG directing the Commandant, B.T.S. to take action against the petitioner and on the strength of that order the Commandant, B.T.S. had recorded evidence. Mr. Garcha, DIG, Commandant T.C.S. knew that he would be cited as a witness in the event of any trial being held against the petitioner and, Therefore, he had acted under Rule 16 (7). Rule 16 reads as under :

"16. Command : (1) An officer appointed to command shall have the power of command over all officers and men, irrespective of seniority placed under his command.

2(a) in the contingency of an officer being unable to exercise the command, to which he has been appointed, due to any reason, the command shall devolve on the second in command, if one has been so appointed.

(b) If no second in command has been appointed, it shall devolve on the officer who may be appointed to officiate by the immediate superior of the officer unable to exercise command.

(c) If no such officer has been so appointed, command shall devolve on the senior most officer present.

(d) The inability of an officer to exercise command and its assumption by any other officer in accordance with this subrule shall be immediately reported to Force Headquarters by the officer who has assumed command.

(3) If persons belonging to different battalions and units are working together:

(i) in regard to the specific task on which they are engaged, the officer appointed to command or in his absence the senior most officer present shall exercise command over all such persons.

(ii) in all other matters the senior officer belonging to each battalion shall exercise command over persons belonging to his battalion.

(4) When officers and other persons belonging to the Force are taken prisoner by an enemy the existing relations of superior and subordinate and the duty of obedience shall remain unaltered and any person guilty of indiscipline or insubordination in this behalf shall, after his release be liable for punishment.

(5) Disciplinary powers over a person subject to the Act shall be exercised by the Commandant of the battalion or unit to which such a person belongs or the officer on whom command has devolved in accordance with subrule (2).

(6) Where such a person is doing detachment duty, including attendance at a course of instruction the Commandant of the battalion, unit, centre or establishment with which he is doing such duty shall also have all the disciplinary power of a Commandant.

(7) The Director General, the Inspector General and the Deputy Inspector General may specify one or more officers of the staff who shall exercise the disciplinary powers of a Commandant in respect of persons belonging to or doing detachment duty at their respective Headquarters."

16. It is not the case of the respondents that the Commandant, B.T.S. acted under Rule 16(5). Therefore, under the law, the Commandant, T.C.S. Mr. Garcha ought to have issued orders transferring the petitioner to an independent battalion or unit so that the petitioner could be proceeded against untrammelled by any prejudice or bias on the part of the authority taking action. Mr. Garcha, DIG Commandant, T.C.S. was duty bound to act in accordance with the Rule 46. If Mr. M.S. Arya, Commandant, B.T.S. could continue the proceedings against the petitioner, it is inexplicable as to why the petitioner sent back to T.C.S. after Mr. Garcha had retired from service. The authorities must have been aware of the scope of Rule 16 (5) and 16 (7). From what had been done the inference is clear that Mr. Garcha, DIG did not want to take any action because he had his own doubts about the guilt of the petitioner. Therefore, he put the petitioner in B.T.S. It is stated in the counter affidavit :

"I say that on 11.5.1988 the petitioner was posted to BSF, TC &S Hazaribagh and was further posted to Basic Training Centre of the TC&S Hazaribagh on 19.7.1990 by the DIG, BSF TC&S Hazaribagh. The BSF Training Centre & School, Hazaribagh is a Training Institu corporation comprising of the following wings:

(a) Basic Training Centre

(b) Specialist Training Centre & School

(c) Administrative Wing.

The TC&S as a whole commanded by an officer of the rank of Deputy Inspector General. The three wrings mentioned above are commanded by the Officers of the rank of Commandants and they exercise disciplinary powers of Commandant over the members of the Force placed under them."

17. Mr. Garcha, DIG must have come forward to bring on record the alleged confession if really the petitioner had met him and had made the confession. It was only on 19.7.1990 Mr. Garcha, DIG, T.C.S. had sent the petitioner to B.T.S. It may be noted here that Mr. Garcha, DIG was informed about the alleged offence on the 17th July 1990. He knew that he was going to retire w.e.f. 31.10.1990 and, Therefore, he did not want to initiate the action. If the factum of confession is true then DIG must have acted under Rule 46. The DIG had no power to authorise an officer his Commandant to proceed against the petitioner. The object of Rule 46 is that once the Commandant of a person accused is likely to be a witness against the delinquent and in accordance with the principles of fair play and justice an independent authority equivalent to the rank of a Commandant who is not under the control of the Commandant has to take action so that the officer concerned could be dealt with impartially. If what Mr. Garcha states about the confession is not true even then his action was not warranted in law. The protection given to the petitioner had been taken away by the way in which the Commandant had directed Mr. M.S. Arya, Commandant, B.T.S. to proceed further in the matter. The case of the respondents that Mr. Arya, the Commandant, B.T.S. who had independent charge was well within his power to proceed against the petitioner is not at all correct. Mr. M.S. Arya though Commandant B.T.S. was acting under the power and control of Mr. Garcha, the DIG and that fact, as I had noticed above, is admitted by the respondents. I am of the view that a very valuable right in the form of protection from bias had been denied to the petitioner. The Supreme Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, had categorically laid down that if there had been violation of the rules, subsequent proceedings would stand vitiated.

18. I shall now go to the issuance of the charge and hearing of the same. The moment a Commandant had knowledge of any offence committed by a subordinate, he must act under Rule 44 of the Rules issuing charge. Such an authority was issued on 7.9.1990 which had already been extracted. Thereafter, the Commandant should proceed under Rule 45B of the Border Security Rules, 1969. Rule 45B reads as under:

"45B. Hearing the charge against an Officer and a Subordinate Officer.

(1) (a) The charge against an officer or a Subordinate officer shall be heard by his Commandant;

Provided that charge against a Commandant, a Deputy Inspector General or an Inspector General may be heard either by an officer commanding a Unit or Headquarters to which the accused may be posted or attached or by the Deputy

Inspector General, or his Inspector General or as the case may be, the Director General.

(b) The charge sheet and statements of witnesses if recorded and relevant documents, if any, shall be read over to the accused;

Provided that where written statements of witnesses are not available, the officer hearing the charge shall hear as many witnesses as he may consider essential to enable him to know about the case.

(c) The accused shall be given an opportunity to make a statement in his defense.

(2) After hearing the charge under subrule (1), the officer who heard the charge may :

(i) Dismiss the charge; or

(ii) Remand the accused, for preparation of a record of evidence or preparation of abstract of evidence against the accused:

Provided that he shall dismiss the charge if in his opinion the charge is not proved or may dismiss it if he considers that because of the previous character of the accused and the nature of the charge against him, it is not advisable to proceed further with it:

Provided further that in case of all offences punishable with death, a record of evidence shall be prepared."

19. Till 9.7.1990 assuming the stand taken by the respondents to be correct, the petitioner was under the Commandant of Mr. Garcha, DIG. Without following the procedure prescribed, the Commandant Mr. Arya issued an order directing the recording of evidence which has already been extracted. The Commandant can direct recording of evidence after hearing the accused under Rule 45B. There is absolutely nothing on record to show that Rule 45B was followed. A very valuable right was denied to the petitioner. Therefore, subsequent proceedings taken by the Commandant under Rule 48 would be void in law. In the light of the law laid down by the Supreme Court the other points raised by the learned counsel for the petitioner need not at all be gone into but Mr. Keshav Dayal, the learned senior counsel for the respondents submitted that the Court had examined a number of witnesses including P.W.13 DIG Mr. Garcha and the petitioner had sufficient opportunity to cross examine the witnesses and on the basis of the evidence the Court can come to the conclusion that the petitioner was guilty of the offence alleged and, Therefore, the petitioner is not entitled to invoke the extra ordinary jurisdiction of this Court under Article 226.

20. Mr. R.P. Sharma, the learned counsel for the petitioner, submitted, which I have noticed, that the finding arrived at by the Court is not supported by any evidence at all. Therefore, I felt it necessary to go into the question whether the finding is based on any evidence.

21. It is well settled that Court can consider the evidence to find out that there was any basis for the findings arrived at by the Court. It is in this view I had embarked on the consideration of the evidence adduced before the Court. What transpires from the evidence is that P.W.9 (Sh. Bhawesh Kumar Jha) was recruited as Constable at Madhubani (State of Bihar) in the meeting of the Recruitment Board held between 25th to 27th June 1990. He was selected and he reported for duty on 1.7.1990 and joined Coy on 2.7.1990. H.C. Prabhati Ram at about 7 to 8 in the morning of the 15th of July 1990 informed H.C. Waryam Singh (P.W.3) that a sum of Rs. 2,000/ belonging to Constable Bhavesh Kumar Jha (P.W.9) had been stolen. But Prabhati Ram was not examined. H.C. Waryam Singh reported the matter to P.W.2 Sher Bahadur Bhujel. At what time he reported to P.W.2 he has not been able to say. P.W.3 does not say that P.W.2 came to Coy Lines but P.W.2 would say that when he was on the Coy Lines P.W.3 reported the matter to him. According to P.W.2 he was in Coy Lines 6.30 hours whereas P.W.3 got the information after 7 A.M. He would say :

"On 16 July 1990, around 2100 hrs, I was called by the Coy Comdr in the coy lines and was asked to fall in all the recruits and Staff.

The recruits of No. 27 batch and No. 22 were made to fall in separately and the Staff members on other side. I found that recruit Constable Bhavesh Kumar Jha of batch No. 27 was not present. I gave the report of that fall in to the Coy Comdr, Mr. G S Rana Asstt Comet and also told him that Constable Bhavesh Kumar Jha of batch No. 27 was found absent."

P.W.3 would admit :

"If a recruit is found absent during a roll call, his whereabouts are checked from the other recruits of his batch. His bedding is also checked and after becoming certain that the said person has deserted, a report is entered in the general diary and also reported to the Coy Comdr. I was also following the same procedure when I was the CHM of B Coy."

He would also say :

"I had briefed the recruits of No. 27 batch that they should not keep the valuable items with them. I also told them that if they were having more than Rs. 100/ or Rs. 200/, they should deposit their money with the Coy Comdr for safe custody."

About the witness P.W.9 being present at the time of the roll call, the witness would state:

"On 16 July 1990, in the normal evening roll call also Const Bhavesh Kumar Jha was found absent.

I came to know through other recruits that Constable Bhavesh Kumar Jha was there only sometimes ago. That was the reason I did not report about his absence from the evening roll call to the Coy Comdr."

He would admit :

"It is correct that I forgot to mention at the time of ROE that Mr. G S Rana had enquired from the recruits in special roll call as to whether they were harassed or beaten by the staff or not. It is also incorrect to suggest that I have been directed by some body to include the above portion in my statement before the Court."

22. From this evidence it does not require any elaborate argument to come to the conclusion that the witness is not speaking the truth.

23. P.W.2 (Sher Bahadur Bhujel) was the Platoon Commander who received information from P.W.3. He would state :

"On 15 July 1990, in the morning, I went to the coy lines of B Coy. There HC Waryam Singh, the then CHM of my coy, reported tome that one Recruit Constable Bhavesh Kumar Jha had reported to him that Rs.2000/ had been stolen from his box."

The case against the petitioner that would emerge out could have seen in the words of P.W.2 :

"On my enquiry from Constable Bhavesh Kumar Jha, he told me that his Rs.2000/ had been stolen from his box. I further enquired from him as to how much money he was having with him. He told me that he was having Rs.8500/ only. He further told me that earlier he was having Rs.4500/ only but later on he received Rs.4000/ also. I enquired from Constable Bhavesh Kumar Jha about his balance amount as he had lost Rs. 2000/ only. He told me that he had paid Rs. 350/ as security in the coy mess, spent Rs. 150/ as personal expenditure and gave Rs.6000/ to Mr. B N Jha, Dy Comet. On my enquiry from Constable Bhavesh Kumar Jha as to whether he knew Mr. B.N. Jha Dy. Comet, he replied in the affirmative. He also told me that his residence was ahead of the diary farm and puts `Ashoka Stambh" on his shoulders."

23. Thus, the whole thing according to the prosecution started snow balling against the petitioner on the alleged loss of money by the Constable Bhavesh Kumar Jha P.W.9. It has to be noticed at the stage that the most crucial fact whether P.W.9 had any money at all at that time had not been ascertained and no finding had been rendered by the Court on this point.

24. Everybody concerned had assumed that there was theft of money, a wrong premise had led to take action against the petitioner. The unfolding of the events which ended in an action being initiated against the petitioner, as stated by this witness, is somewhat interesting and it requires consideration. P.W.2 said:

"Then I checked the box of Recruit Constable Bhavesh Kumar Jha. The lock of his box was found broken. There was no money in the box except some clothes. The stolen money could not be found ever after my further enquiry from those recruits. Then I thought of reporting that matter to Mr. G S Rana, Asstt Comet, the then Coy Comdr of our Coy. I kept on waiting for him in the coy lines for quite sometime but he did not turn up. Thereafter I started fro his residence and

enroute, I met Mr. G S Rana near the Quarter Guard around 1000 hrs. I reported to Mr. G S Rana whatever was told to me by Recruit Constable Bhavesh Kumar Jha. Thereafter, I Along with Mr. G S Rana came to the coy lines. He started making his own enquiries from the recruits about the stolen money and I left for the training of the recruits of other batch."

25. If there had been corroboration of the evidence of P.W.2 and other witnesses and the ultimate picture is clear then there is no difficulty in coming to the conclusion against the petitioner, but if there is no corroboration and on a consideration of the evidence one could discern that the witnesses are not speaking the truth, on the basis of the evidence of the witnesses no conclusion of the guilt of the petitioner could be arrived at, any finding in that setting could be characterised as a finding based on no evidence. P.W.2 would admit :

"When I met Coy Comdr near the Quarter Guard that time I had told him the complete details what ever was told to me by Constable Bhavesh Kumar Jha. I do not remember as to whether or not I had stated at the time of ROE that I also told the Coy Comdr about the payment of Rs.6000/ to the accused as was told to me by Constable Bhavesh Kumar Jha."

26. From this what would emerge is that the witness had not been consistent in his statement. About what happened in July 1990, the witness would candidly admit :

"I neither checked the box of Constable Santosh Kumar Jha nor of any other recruit.

I did not take possession of the broken lock of the box of Con stable Bhavesh Kumar Jha."

25. As a policeman he should have taken steps to ascertain the truth. That was not done. P.W.2 would also admit that he did not enquire from P.W.3 (HC Waryam Singh) whether he had come to know of the theft of the money belonging to constable Bhavesh Kumar Jha (P.W.9).

26. It was P.W.1 Mr. G.S. Rana, Dy. Commandant, STC, BSF, Hazaribagh who received information from P.W.2. It is of interest to notice as to what this witness had spoken to about the events. According to him, while he was going towards Coy line at about 1030 hours on 15th of July 1990 he met P.W.2 Sher Bahadur near the Quarter Guard. P.W.1 would state:

"He reported to me that Rs. 2000/ belonging to Recruit Constable Bhavesh Kumar Jha had been stolen from his box, which was kept in his tent. He also told me that Recruit Constable Bhavesh Kumar Jha had told him that he had brought Rs. 8500/ from his house and out of that amount he had paid Rs. 5000/ and Rs.1000/ on two occasions to Mr. B.N. Jha, Dy. Comet."

27. As a Dy. Commandant P.W.1 had not taken efforts to find out whether the case of P.W.9 that he had Rs. 2,000/ at the relevant time was true or not. P.W.9

would admit "It is correct to suggest that on 15.7.1990 I had not told any body about giving of gratification to the accused." Therefore, the version of P.W.1 and P.W.2 should have been considered in the light of evidence of P.W.9 by the Court.

28. P.W.1 would further state:

"I suspected that out of those recruits only some might have stolen the money."

Admittedly, the witness did not verify how did P.W.9 come to have Rs. 2,000/ on the 14th of July 1990 in spite of specific instructions given to the recruits. The witness would further state :

"On my enquiry, Constable Bhavesh Kumar Jha reached to the conclusion that he had lost about Rs.1700/ only and not Rs.2000/ as earlier reported by him. He reached to this conclusion after calculating, the amount which he had brought from his house and by subtracting the amount which he had paid or spent there."

29. The attitude of the witness is somewhat strange. When according to him a very serious offence alleged to have been committed by a Dy. Commandant had come to his notice he must have reported the matter to the Commandant. Instead, what he did, could be had, in his own words:

"On hearing the report of SI Sher Bahadur Bhujal, I got alarmed and thought of recording the statement of Recruit Constable Bhavesh Kumar Jha. On reaching the Coy Office, I got the tape recorder through some one from my house and prepared it for recording."

Thereafter, according to the witness:

"I went to my Coy Office and put on the tape recorder in a concealed manner."

Why did he do so is not explained. The witness became more inquisitive, absolutely oblivious to his obligations and duties to bring to the notice of his superior authority about the alleged theft. He had no powers to tell to direct the recruits to pool the money without conclusive proof of possession of money P.W.1 and the theft thereof. P.W.1 had taken upon him the role of an investigating authority. He would say:

"I called Const Bhavesh Kumar Jha in my Office and asked other Staff to leave. He step by step told me the happenings from the time of his enrolment to the theft of his money and the same was recorded by me. While narrating those happenings he told me that he had brought Rs. 8500/ from his father, out of that amount he paid Rs.5000/ to the accused at one time and Rs.1000/ at another time. He also told me that he was asked by the accused to pay the balance of Rs.1000/ as earlier promised by him. On my enquiry as to why he had not paid the balance amount to the accused, Constable Bhavesh Kumar Jha told me that he wanted to save that money. After briefing my Staff, I left for my residence."

The witness had listened to the recorded statement.

30. On the 15th of July 1990 the witness did not report the matter to the higher

authorities. According to him, he wanted to collect more evidence in support of the statement of Constable Bhavesh Kumar Jha (P.W.9).

31. Even on 16.7.1990 the witness did not care to inform the higher authorities. He would admit:

"on 16.7.1990 in the night I had not given any report to Commandant J.S. Bakshi after coming back from the Coy lines."

He would admit:

"It is correct that no case was registered regarding the theft of Rs.1,700/."

The witness would further state :

"On 16 July 90, around 2100 or 2115 hrs, I received a telephone call from Mr. J S Bakshi, the then Commandant STC. He asked me to enquire as to whether the recruits of my coy were being harassed by the CHM. I told him that there was no such matter as I had come from the lines around 1930 hrs only. He directed me to go to coy lines and find out the details. Accordingly, I went to coy lines at about 2130 hrs and the whole coy personnel were made to fall in. HC Waryam Singh reported to me that all the recruits were present except Recruit Constable Bhavesh Kumar Jha. I enquired from the recruits as to whether any of them was harassed by the Staff to which they denied. Thereafter, I sent all my staff from there and again talked to the recruits. While I was talking to them, at about 2215 hrs, Recruit Constable Bhavesh Kumar Jha came there. He was putting on a civic pant and a white cotton vest. I enquired from him as to from where he was coming. He replied that he had gone for the working in the evening, from there he had gone to the residence of the accused and was return ing from there."

The witness would further say that at that time Raj Singh (P.W.5) Dy. Commandant had come there. The witness had given his version to P.W.5 and he had also asked P.W.9 to narrate the events to P.W.5. Both the witnesses P.W.1 and P.W.5 went to the Coy Office to ask P.W.9 about his story. It is to be noticed that the witness showed a lot of enthusiasm in the matter. He would say :

"While narrating those happenings, recruit Constable Bhavesh Kumar Jha also told us that before his enrolment in BSF he had paid Rs. 4100/ to the accused, which he had not told tome earlier."

Therefore, P.W.1 had not been consistent but incident of theft of money had been put forth to give a colour of reality to the facts emerging out of it. The point to be considered is whether the version of the witness could be considered to be proved. In the crossexamination when he was confronted with the statement he had made at the time of the ROE it is recorded by the Court :

"The witness is now shown a portion of his statement in the ROE, where it is recorded `his father paid Rs. 4100/ to Mr. B N Jha, the accused prior to his enrolment at Madhubani".

The witness who was posing himself a crusader against corruption did not take care to examine the father nor did he ask P.W.9 to bring his father for examination. The witness would further admit, as could be seen what is recorded by the Court :

"The witness says that at that time also he had stated that Rs. 4100/ were paid to the accused by Constable Bhavesh Kumar Jha and not by his father. He further says that he might not have heard properly the statement which was read over to him by the Recording Officer or by mistake he might have wrongly mentioned about this fact before the Recording Officer."

32. The Court ought to have considered the totality of the deposition of the witness in arriving at the conclusion. From what is extracted above it would be clear to anyone properly instructed in law having regard to the basic principles of evidence that the witness was not at all speaking the truth. Nay, there was every attempt on his part to hide facts from the Court.

33. The witness would speak about taking the custody of currency notes and two items of dress materials to show that they were alleged to have given by the accused to P.W.9 when P.W.9 visited the petitioner while P.W.9 was undergoing training. This has to be projected to give an air of verisimilitude to the theory of the prosecution about the visit of P.W.9 to the accused on that day. The whole thing is absolutely unfounded to prove case of the petitioner receiving money as illegal gratification and such a theory is not at all necessary and there is nothing to show that P.W.9 had visited the accused on the particular day and P.W.9 was given the dress materials to the petitioner. All facts have been assumed by the Court. The recounting of events of this witness P.W.1 would betray the type of person he is. He would say :

"On 17 July 1990, at PT time, myself and Mr. Raj Singh reported to Mr. J S Bakshi, the then Commandant STC BSF Hazaribagh about all the happenings. He also called Recruit Constable Bhavesh Kumar Jha in my coy office and heard him. Constable Bhavesh Kumar Jha again narrated the complete happenings to him. On the same day, at about 1030 hrs, Mr. BS. Garcha, the then DIG and Commandant BSF TC & S Hazari Bagh also came to my office. Recruit Constable Bhavesh Kumar Jha again narrated to him about all the happenings. Thereafter, I had taken the recorded tape containing the statement of Constable Bhavesh Kumar Jha to Mr. J S Bakshi at about 1130 hrs. He heard the said tape and then directed me to rerecord the statement of Constable Bhavesh Kumar Jha as the statement was not properly audible. Thereafter, on the same day at about 1500 hrs, I again tape recorded the statement of Constable Bhavesh Kumar Jha in the recreation room. I handed over the said recorded tape to Mr. J S Bakshi, in the evening."

When the witness had taken the care to record the statement of P.W.9 in a tape recorder he has not been able to say why the dress materials could not be kept in safe custody before production at the time of the trial of the case. His

Explanation is "I believed Constable Bhavesh Kumar Jha and whatever he had stated before me." The witness has not been able to say which of the version of P.W.9, whether what P.W.9 stated at the time of the witness tape recording his statement or what the witness himself had stated at the time of recording of evidence to be true. If what the witness had stated is true, he had acted in a manner contrary to what was expected of him. He would state:

"I did not report the matter to the higher authority on the same day as I wanted to collect more evidence in support of the state ment of Constable Bhavesh Kumar Jha. I became more sure about the statement of Constable Bhavesh Kumar Jha when he told me that he had returned from the residence of the accused and explained the whole happenings in presence of Mr. Raj Singh DC.

On 15 July 1990, after recording the statement of Constable Bhavesh Kumar Jha I had not put any guard over him."

About the absence of P.W.9 in the Coy in the evening of 16.7.1990 no Explanation is forth coming. If a constable absented himself at the time of the roll call that itself is considered as a serious offence. The officer concerned did not know whether P.W.9 was present at the time of the roll call on 16.7.1990. The witness would say :

"The working timings of the recruits are generally from 1500 hrs to 1700 hrs. It is correct that after the working, the recruits are required to report back in the coy lines for the evening roll call."

Therefore, the prosecution had not proved the fact that P.W.9 was absent at the time of roll call on 16.7.1990. There is no evidence to show that he was absent at the time. Yet, another fact to be taken note of to show that P.W.1 is not telling the truth would be evident from his evidence:

"Constable Bhavesh Kumar Jha had not specified the dates on which he had made payments to the accused but he told me that he made said payments after his arrival in the camp and before the theft of his money."

34. This is quite contrary to what he had stated at the time of ROE which has already been extracted. Therefore, the deposition of P.W.1 does not show anything from which it could be said that the needle of guilt turned towards the petitioner.

35. P.W.2 is Subedar Sher Bahadur Bhujel, a Platoon Commandant. He would say in the chief examination :

"On 15 July 1990, in the morning, I went to the coy lines of B Coy. There HC Waryam Singh, the then CHM of my coy, reported to me that one Recruit Constable Bhavesh Kumar Jha had reported to him that Rs. 2000/ had been stolen from his box."

But P.W.9 would say:

"It is correct to suggest that on 15.7.1990 I had not told any body about giving of gratification to the accused."

His information was that what was stolen was Rs.2,000/ and not Rs. 1,700/ or Rs. 1,500/. It is of interest to notice what he would say and what he did :

"On my enquiry from Constable Bhavesh Kumar Jha, he told me that his Rs. 2000/ had been stolen from his box. I further enquired from him as to how much money he was having with him. He told me that he was having Rs. 8500/ only. He further told me that earlier he was having Rs. 4500/ only but later on he received Rs. 4000/ also. I enquired from Constable Bhavesh Kumar Jha about his balance amount as he had lost Rs. 2000/ only. He told me that he had paid Rs. 350/ as security in the coy mess, spent Rs. 150/ as personal expenditure and gave Rs. 6000/ to Mr. B N Jha, Dy Comet. On my enquiry from Constable Bhavesh Kumar Jha as to whether he knew Mr. B.N. Jha Dy Comet, he replied in the affirmative. He also told me that his residence was ahead of the diary farm and puts `Ashok Stambh" on his shoulders."

In his anxiety to probe further in the matter he would say :

"Then I checked the box of Recruit Constable Bhavesh Kumar Jha. The lock of his box was found broken. There was no money in the box except some clothes. The stolen money could not be found ever after my further enquiry from those recruits. Then I thought of reporting that matter to Mr. G S Rana, Asstt Comet, the then Coy Comdr of our Coy. I kept on waiting for him in the coy lines for quite sometime but he did not turn up. Thereafter I started fro his residence and enroute, I met Mr. G S Rana near the Quarter Guard around 1000 hrs. I reported to Mr. G S Rana whatever was told to me by Recruit Constable Bhavesh Kumar Jha. Thereafter, I Along with Mr. G S Rana came to the coy lines. He started making his own enquiries from the recruits about the stolen money and I left for the training of the recruits of other batch."

In the crossexamination he would admit:

"I neither checked the box of Constable Santosh Kumar Jha nor of any other recruit."

36. In the chief examination he had said :

"On my enquiry, Constable Bhavesh Kumar Jha also told me that he had a doubt about the money being stolen by Constable Santosh Kumar Jha."

The witness had not kept in mind the version of P.W.9 that both he and P.W.11 had kept their money in the box of P.W.9. When a serious matter had to be investigated, the witness would say:

"I did not take possession of the broken lock of the box of Constable Bhavesh Kumar Jha."

The witness would admit :

"I did not enquire from HC Waryam Singh as to what time he came to know about the theft of the money belonging to Constable Bhavesh Kumar Jha."

But P.W.3 would say:

"H.C. Prabhati Ram had reported to me about the theft of the money on 15.7.1990 around 07000800 hrs but I do not remember the exact time."

H.C. Prabhati Ram has not been examined. No Explanation has been given. P.W.2 in his evidence says that he met P.W.1 Mr. G.S. Rana at about 1000 hrs.

37. P.W.3 is H.C. Waryam Singh. He says that on the 15th of July 1990 HC Prabhati Ram informed him about the theft of Rs. 2,000/ belonging to P.W.9. He has not been able to say that at what time he informed P.W.2. About the absence of P.W.9 at the time of the roll call P.W.3 would say :

"On 16 July 1990, around 2100 hrs, I was called by the Coy Comdr in the coy lines and was asked to fall in all the recruits and Staff.

The recruits of No. 27 batch and No. 22 batch were made to fall in separately and the Staff members on other side. I found that recruit Constable Bhavesh Kumar Jha of batch No. 27 was not present. I gave the report of that fall in to the Coy Comdr, Mr. G S Rana Asstt Comet and also told him that Constable Bhavesh Kumar Jha of batch No. 27 was found absent."

The witness is able to give us the procedure to be followed if a recruit does not attend the roll call :

"If a recruit is found absent during a roll call, his whereabouts are checked from the other recruits of his batch. His bedding is also checked and after becoming certain that the said person has deserted, a report is entered in the general diary and also reported to the Coy Comdr. I was also following the same procedure when I was the CHM of B Coy."

I had pointed out above the officer concerned had not taken any effort to find out the truth whether P.W.1 was absent at the time of roll call, the witness would say that he had given instructions to the recruit about the keeping of valuable items :

"I had briefed the recruits of No. 27 batch that they should not keep the valuable items with them. I also told them that if they were having more than Rs. 100/ or Rs. 200/, they should deposit their money with the Coy Comdr for safe custody."

With reference to every material fact about his meeting Dy. commandant G.S. Rana P.W.1 he would say:

"I do not remember the exact time when Mr. G.S. Rana had come to the Coy Lines on 16.7.1990, but that could be around 2030 hrs or 2100 hrs."

The witness was shown his statement at the time of ROE the Court had recorded the same :

"The witness is now shown a portion of his statement in the ROE where in answer to question No. 2 by the accused, he had replied at about 2030 hrs on 16 Jul 1990 Coy Comdr, Mr. G.S. Rana AC had fall in our whole Coy and at that time R/C Bhavesh Kumar Jha was found absent."

The witness would justify in not taking any action against P.W.9 or reporting his absence to his immediate superior officer about P.W.9 being absent at the time of the roll call while answering a question put by Court, he would say:

"On 16 July 1990, in the normal evening roll call also Const Bhavesh Kumar was found absent. I came to know through other recruits that Constable Bhavesh Kumar Jha was there only some times ago. That was the reason I did not report about his absence from the evening roll call to the Coy Comdr."

From this, it is evident that the witness is not telling the truth.

38. shall now take up the evidence of P.W.4 Mr. J.S. Bakshi, Commandant (DIG TC & S) BSF, Hazaribagh. As per the evidence of this witness, he received phone call on the 16th July 1990 at about 21.15 hours from Dr. Nirmal Kumar (P.W.8). The information was that the Under officers of B Coy of STC BSF were committing atrocities on the recruits and some of the recruits were injured. On getting this information, according to the witness, he contacted P.W.5 (Raj Singh, Dy. Commandant) on phone. He would say:

"On hearing that report, I immediately contacted Mr. Raj Singh Dy Comet on telephone. I could contact him in BSF Cinema hall where he was watching a movie. I told Mr. Raj Singh to immediately go to BSF Hospital as well as B Coy lines and let me know the de tailed facts. Thereafter, I contacted Mr. G S Rana on telephone and directed him to immediately to go the B Coy lines and find out the details. Since there was no telephone at the residence of Mr. G.S. Rana, he was called at the residence of Quarter Master of STC, where telephone was available.

In the crossexamination, he would give a different version :

"I had earlier given a statement regarding this case at the time of ROE. I had signed my statement in token of its correctness after having gone through it.

The witness is now shown his statement in the ROE where he points out and identifies his signatures.

The witness is now shown a portion of his statement in the ROE, where it is recorded "I immediately contacted Mr. Raj Singh Dy Comet and G S Rana Asstt Comet on telephone and directed them to visit the Hospital and the coy lines immediately and let me know the detailed facts". The witness says that at the time of ROE also he had stated that he had directed Mr. Raj Singh to visit hospital and coy lines and had directed Mr. G.S. Rana to visit Coy lines, but it was recorded by the Recording Officer in above manner."

In the crossexamination he would say something new :

"Mr. Raj Singh Dy Comet had given me a report on telephone about the happenings on 16th July 1990, around 2300 hrs. I do not know from where he had given a ring to me."

In the chief examination the witness had stated that Mr. Raj Singh, DC reported to him. According to the witness, that Raj Singh had reported that there was no such report about beating but the recruits were given routine punishment to detect the stolen amount of Rs.1,500/, belonging to recruit Constable Bhavesh Kumar Jha. The witness would further add:

"He further told me that Constable Bhavesh Kumar Jha had told him in the presence of Mr. G. S. Rana that he had brought Rs. 8500/ from his house and out of that amount he was told by his father to pay Rs. 7000/ to Mr. B.N. Jha, Dy Comet as he had helped him in getting enrolled in BSF."

This is all hearsay. The witness would further say :

"Mr. Raj Singh also told me that he was told by Const Bhavesh Kumar Jha to have paid Rs.5000/ to the accused about one week prior to that day. He further told me that after about 2 days of the said payment to accused, one Constable of Adm Wing had come to Constable Bhavesh Kumar Jha to collect money for the accused and he paid Rs. 1000/ to him for handing over to the accused."

The witness would go on to say that he heard from Mr. G.S. Rana (P.W.1) :

"Mr. G.S. Rana told me that Constable Bhavesh Kumar Jha had also told me that prior to his recruitment in BSF he had paid Rs. 4000/ to the accused after taking from his father. He also told me that he had recorded the statement of Const Bhavesh Kumar Jha on a cassette."

But P.W.1 Mr. G.S. Rana had stated :

"On 17 July 1990, at PT time, myself and Mr. Raj Singh reported to Mr. J S Bakshi, the then Commandant STC BSF Hazaribagh about all the happenings. He also called Recruit Constable Bhavesh Kumar Jha in my coy office and heard him. Constable Bhavesh Kumar Jha again narrated the complete happenings to him."

Attempting to project a ring of truth in his version, the witness would state :

"I talked to Const Bhavesh Kumar Jha in presence of Mr. Raj Singh and Mr. G.S. Rana. He told me almost the same things which were earlier told to me by Mr. Raj Singh and Mr. G.S. Rana. Const Bhavesh Kumar Jha also told me that last evening the accused had called him at his residence and told me that the amount of Rs. 10,000/ which he had paid to the accused was known to every one so he should write an application stating that whatever he had stated earlier regarding this case was all false."

The witness would admit that on the 17th of July 1990 he had informed the DSIG that Dr. Nirmal Kumar had given a wrong report that the recruits of B Coy were being beaten by the Under officers of the B Coy and Dr. Nirmal Kumar had

concocted the whole facts. From this it is clear that there was no theft and the theory of search and the enquiry of recruits were all a myth. The witness would also admit about the person who had received Rs.1,000/ from P.W.9. He would state :

"We had made efforts to find out the person of Adm Wing who collected Rs. 1000/ from Constable Bhavesh Kumar Jha, but that person could not be located because of insufficient information."

The witness would go to the extent of saying that in the ROE his statement was not correctly recorded. The Court had recorded his statement in the following manner:

"The witness is now shown a portion of his statement in the ROE where it is recorded `Mr. G. S. Rana further told me that his investigation had also revealed that father of Bhavesh Kumar Jha had already paid a sum of Rs. 4000/ to the accused for recruit ment of his son". The witness says that at the time of ROE also he had stated that he was told by Mr. G.S. Rana that father of Bhavesh Kumar Jha had paid Rs.4000/ to Bhavesh Kumar, which were handed over to the accused by Recruit Constable Bhavesh Kumar Jha, but it was recorded in the above manner by the Recording Officer."

The witness would admit :

"I had heard the cassette on which the statement of Constable Bhavesh Kumar Jha was recorded by Mr. G.S. Rana. that cassette contained almost the same statement which was narrated before me by Constable Bhavesh Kumar Jha."

But yet the cassette has not been forthcoming. The witness would admit:

"On 17th July, around 1500 hrs, Mr. G.S. Rana had brought a cassette tome in which the statement of Constable Bhavesh Kumar Jha was recorded by him. The recording on that cassette was not properly audible, Therefore, I asked him to retape the statement of Constable Bhavesh Kumar Jha. Mr. G.S. Rana brought the other recorded cassette on the same day around 1600 hrs.

On 17 July 1990, around 0730 hrs, I reported the said incident to Mr. B.S. Garcha, the then DIG at his residence."

39. If the cassette had been produced, the statement made by P.W.9 would have been available to the Court and the correct facts would have come to light. For reasons best known to the prosecution the cassette was withheld from the Court. The entire evidence of P.W.4 is not at all reliable. It is not at all acceptable in law.

40. P.W.5 is Mr. Raj Singh, Dy. Commandant. He would speak to the fact that there was a telephone call from P.W.4 Mr. J.S. Bakshi. When Mr. J.S. Bakshi had reported to the DIG that Dr. Nirmal Kumar P.W.8 had given a false information, he would state:

"Consequently on being informed by those recruits that they were not beaten but

were given routine collective punishment i.e. bend stretch etc. for detecting the stolen amount of Rs. 1500/ belonging to Const Bhavesh Kumar Jha, I reported that matter to my Commandant on telephone. "Therefore, the inference is clear that the witness is not speaking the truth. This witness would narrate about what P.W.9 had told him on the assurance given by this witness about his position :

"Const Bhavesh Kumar Jha was initially afraid of stating any thing. On my enquiry, he told me that if he would state anything against the accused then the other recruits from Madhubani area, to which area the accused also belonged would harass him. I assured him that he should not be afraid of speaking the truth. After my assurance, Constable Bhavesh Kumar Jha told me that he was given Rs. 8500/ by his father when he had come for training, with the direction that he should hand over Rs. 7000/ to the accused, who had helped him in getting enrolled. He further told me that after about 2 or 3 days of his arrival in the BSF Camp, he had given Rs. 5000/ to the accused. He further told me that after about one week of the said payment, he had again sent Rs. 1000/ to the accused through some one. Constable Bhavesh Kumar Jha also told me that on that day i.e. 16 July 1990, the accused had called him at his residence and asked him to run away from there as he had disclosed about the money transaction to the coy personnel."

In the cross-examination, the witness would state:

"I did not ask Constable Bhavesh Kumar Jha as to why he had gone to the residence of the accused on 16th July 1990."

He would further state :

"On 17th July 90, in the afternoon, I heard the cassette on which the statement of Ct Bhavesh Kumar Jha was recorded by Mr. G.S. Rana. In that cassette almost the same statement of Const Bhavesh Kumar Jha was recorded which he had told to me on the previous night."

As I had noticed above, the cassette was not produced before the Court. In the cross-examination, he would admit:

"I had not made any enquiry from the CMH regarding beating of the recruits."

The witness would say :

"It is correct that at the time of ROE I had stated that I was told by Constable Bhavesh Kumar Jha that he personally paid Rs. 6000/ to the accused within about one week of his arrival in the camp. The witness further says that immediately after giving his statement he realised his mistake and then told the Recording Officer that by mistake he had mentioned Rs.6000/ instead of Rs.5000/ in his statement. The witness further says that since the Recording Officer was recording the statement of other witness he was directed by him to come after his examination. So on the next day, he had made addition statement before Recording Officer."

This would clearly show that the witness is prepared to change his version at any time and he has no regard for truth. In the chief examination he had stated that on the 16th of July 1990 at about 2115 hrs he received a phone call from Mr. J. S. Bakshi P.W.4 (Commandant). He had met P.W.9 in the night. According to him, he knew that P.W.9 had gone to the residence of the petitioner. But being a Dy. Commandant he would candidly say :

"I came to know that Const Bhavesh Kumar Jha was found absent during the evening roll call, which used to be taken around 1900 hrs. I do not know what time he returned from the residence of the accused."

41. Considering the evidence of P.W.5 as a whole, one gets the impression that he is not telling the truth. As a Dy. Commandant he must have taken the necessary precautions while enquiring into the matter and should have taken care to ascertain facts correctly. His evidence is absolutely unreliable. No material fact worth while could be culled from his evidence.

42. P.W.6 is Mr. Prem Lal, Asstt. Commandant. He was a member of the Recruitment Board at Mokama, Samastipur and Madhubani from 18.6.1990 to 27.6.1990. He gives the names of officers in the Selection Board :

"Mr. GPS Dhillon Commandant (Adm) of TC & S Hazaribagh was the Presiding Officer of that recruitment board and the other members were Mr. S.S. Rawat AC, Dr. Nirmal Kumar and SI S. Ekka."

He would say that the petitioner was in the Stadium at the time of selection. He would admit :

"It is correct that I was not knowing the accused prior to 25 June 1990."

42. 7th witness for the prosecution is Subedar S. Ekka. He was a member of the Recruitment Board. He would say that the petitioner was present at the Stadium when there was a tea break at 11.30 hrs. In the cross-examination, he would state:

"I had not noted down timings stated by me regarding the visits of the accused at Madhubani."

He would admit:

"neither the accused nor any member of the Recruitment Board had asked me to help any candidate."

This was the answer given by him to the question put by the Court.

43. 8th witness is Dr. Nirmal Kumar. He refers to the fact that he was one of the members of the Recruitment Board along with :

"The Presiding Officer of that board was Mr. GPS Dhillon, commandant and other members were Mr. S.S. Rawat, AC, Subedar Prem Lal and SI S Ekka."

He would state that he met the petitioner for the first time at Madhubani. He would admit:

"neither the accused nor any other person had approached me for any favor to any candidate".

Here also, question was put to the witness by the Court. Neither the evidence of 7th witness nor the evidence of 8th witness would throw any light on the offence alleged against the petitioner. The presence of the petitioner at the time of the selection when he was not a member of the Selection Board is not at all relevant and that by itself would not prove the case against the petitioner.

44. The 9th witness for the prosecution is Constable Bhavesh Kumar Jha. He is the person through whom the story of theft of money was sought to be woven to bring to the fore the charge against the petitioner. According to him, he was undergoing basic training, STC, BSF, Hazaribagh from 1.7.1990. He would admit:

"It is correct that after the theft of money on 15.7.1990 of recruits of my batch including me were kept under watch."

If this is correct, no Explanation is given by the prosecution why he was not present at the time of the roll call and what was the action taken against him for his not present at the time of the roll call. Therefore, the case of the prosecution that P.W.9 had left the coy and had met the petitioner in his residence loses its credibility. The prosecution has not been consistent in its case. The witness would admit:

"It is correct that I had not stated at the time of ROE that the accused had asked me to desert when I had gone to his residence on 16.7.1990."

But P.W.4 Mr. J.S. Bakshi would say in his chief examination "Constable Bhavesh Kumar Jha also told me that he had gone to the Coy Lines for informing CHM about his intention to desert". P.W.4 would further admit in the cross examination:

"I did not enquire from Constable Bhavesh Kumar Jha as to whether he met H.C. Waryam Singh and reported about his intention to desert nor I confirmed it from H.C. Waryam Singh."

It has to be noticed here that H.C. Waryam Singh has not at all spoken about the intention of P.W.9 to desert.

45. P.W.9 would further admit:

"on 15.7.1990 in the morning I had told to CHM and HC Prabhati Ram that my Rs. 2,000/ had been stolen. It is incorrect to suggest that I had told to HC Prabhati Ram that stolen amount was Rs. 1,500/ only. It is incorrect to suggest that I had told to Mr. J.S. Bakshi that the stolen amount was Rs. 1,500/ only."

46. This witness has been giving different versions to different persons. There is absolutely no material to show that he had any money at all. The witness would

admit:

"when I checked my box after the theft of money I found Rs. 150/ in the pocket of my shirt. I had kept that amount separately in the box."

Therefore, he was not sure about how much money he had with him in the box. The witness would say:

"I came to know about the recruitment of constables in BSF at Madhubani about 2 or 4 days before 25.6.1990."

He does not give the date on which he applied for recruitment. He does not say that even before he came to know about the recruitment he had approached the petitioner for help. But he would say that he met the petitioner in the first week of June 1990 long before he came to know about the recruitment but he would say:

"It is correct that after about 4 or 5 days of my reporting in the camp, all the recruits of my batch including me were physically measured by Mr. B. S. Garcha, the then DIG TC & S BSF Hazaribagh."

Therefore, the theory of the prosecution that DIG Mr. Garcha on coming to know about the act of the petitioner measured the chest of P.W.9 is not at all plausible. The witness would further say that P.W.4 enquired him at about 1700 hours on 17th July 1990 whereas P.W.4 would not give any time. Therefore, the prosecution had not at all been able to present any clear picture about the case and the links in the chain of events are missing.

47. The evidence of P.W.9 about his meeting the petitioner should have been considered in the backdrop of events narrated by P.Ws 1 to 5 and P.W.9. P.W.9 would come forward with the case that Ravinder Nath Jha took him to the residence of the petitioner for the first time. The witness would say:

"I do not remember the date on which I had met the accused at his residence in the month of June 90. When I met the accused for the first time, I had asked him as to how much money I had to pay for getting a job. The accused told me that I should pay half of the amount i.e. Rs.5000/ in advance. After about 4 or 5 days of that meeting, I again met the accused at his house on 12 June 90. After receiving Rs. 4000/, the accused had assured me that he would help me in getting enrolled in BSF either at Hazaribagh or at Madhubani."

What he further states is noteworthy :

"I do not remember the date on which Mr. Ravinder Nath Jha had taken me to the residence of the accused, but I am sure that he had met me around 1200 hrs on that day. He had met me around 10 or 12 days after my reporting in the camp."

What P.W.9 wanted to convey was that for the first time he met the petitioner only after his arrival at the camp and his case that he met the petitioner in June

1990 was given a go by. His evidence would completely belie the case of the prosecution. He would say:

"It is incorrect to suggest that I had told SI S.B. Bhujel that I had brought Rs. 4000/ once and subsequently Rs.4500/.

It is correct that I had told SI S.B. Bhujel that I had paid Rs.6000/ to the accused.

It is correct that I had told Mr. G.S. Rana that I had paid Rs. 5000/ to the accused through Mr. Pramod.

My father had also accompanied me to the residence of the accused, when Rs.4000/ were paid to the accused."

He would further say:

"It is correct that I had told Mr. G.S. Rana that rs.4100/ were paid to the accused by my father, but the fact remains that I paid Rs. 4000/ to the accused."

Therefore, the witness is categorical in his statement that it was the father who paid Rs.4,100/ to the petitioner but the case of the prosecution is totally different. The witness would change his version and would say:

"It is incorrect to suggest that I had told Mr. J.S. Bakshi that I paid the amount of Rs.5000/ to the accused personally and Rs.1000/ was paid to the accused through some Constable of Adm Wing."

He would admit:

"It is correct that I had not stated at the time of ROE that when I met the accused at his house for the first time, the accused had demanded Rs.5000/ from me i.e. half the amount, for getting me a job."

But in the chief examination the witness had stated :

"When I went to the residence of the accused, the accused after measuring my chest and height told me that I could get a job. The house of the accused is in village Singoun which is about 15 Kms from my village Belhwar in Distt Madhubani. Thereafter, I came back to my house. I again went to the residence of the accused on 12 June 90, and gave him Rs.4000/ for getting me a job."

According to the witness:

"After about 3 or 4 days of the payment of Rs.1000/ to the accused, somebody had stolen Rs.1700/ from my box, which was kept in my tent."

He would further say:

"After about 2 days of the theft of that money, one person came to me, whom I do not know and took me to the residence of the accused. There the accused gave me Rs.500/, a pant and a shirt and asked me to run away from there. The

accused also told me that if I did not run away from there, then my job as well as the job of the accused would be lost."

48. An analysis of the evidence of P.W.9 would show that he is not speaking the truth and he is uttering falsehood.

49. P.W.10 is S.P. Singh, an Establishment Clerk in TCS, BSF Hazaribagh. He has been examined to show that the petitioner was on leave from firstly 21.5.1990 to 19.6.1990. The petitioner extended his leave up to 30.6.1990.

50. P.W.11 is Constable Santosh Kumar Jha. He would frankly state:

"It is correct that I was told to give same statement, which I had given earlier at the time of ROE, otherwise I would be given punishment."

He would admit:

"It is correct that I had not brought any amount from my house for paying to any person.

On 14 July 90, at about 0800 hrs, Constable Bhavesh Kumar Jha told me that his Rs.1700/ had been stolen."

The witness would relate as to what happened at the time of the enquiry by Mr. G.S. Rana P.W.1 :

"On 15 July 1990, Mr. G.S. Rana, AC, the then our Coy Comdr, had enquired from us about the stolen money. I told Mr. G.S. Rana that Constable Bhavesh Kumar Jha had brought only Rs. 700/ or Rs. 800/ and out of that amount he had deposited Rs. 350/ as mess security. I also told Mr. G.S. Rana that Const Bhavesh Kumar Jha's money could not be stolen as he was not having so much money with him. On hearing that Const Bhavesh Kumar Jha told Mr. G.S. Rana in my presence that I had also brought Rs.5000/ from my house. Thereafter, Mr. G.S. Rana directed me and Const Bhavesh Kumar Jha to go out of that room. He had asked the CHM to keep us separately. Thereafter, Constable Bhavesh Kumar Jha and myself were separately accommodated in a room and a guard was also posted there. After that, Constable Bhavesh Kumar Jha and myself were beaten by HC Prabhati Ram and HC Kishan with a stick."

He would further say :

"On 17 July 1990, at about 1000 hrs, Mr. G.S. Rana again enquired from me and at that time I told him that I had brought Rs.5000/ from my house. I also told him that I had paid Rs.5000/ to Mr. Pramod as that name was suggested to me by Constable Bhavesh Kumar Jha."

A reading of the evidence would clearly show that he is not telling the truth. The witness would further say:

"On the next day, my statement was tape recorded by Mr. G.S. Rana. I was asked by Mr. G.S. Rana to make the same statement, which I had made in his

Office regarding payment of Rs.5000/. Before recording of my statement at the time of ROE, the same tape was played on the tape recorder by Mr. G.S. Rana in presence of Mr. J.S. Bakshi. Mr. G.S. Rana told me that I should remember the statement which was tape recorded by him and then I should depose on the same lines before the Recording Officer in the ROE."

The tape recorded statement of this witness has also not been produced. The witness would candidly say:

"Mr. G.S. Rana had told me to depose on the same lines as recorded in the tape, otherwise my service would be endangered. I had also deposed on the same lines at the time of ROE as I was confined for the last about two months."

This aspect had not at all been adverted to by the Law Officer while presenting his written submissions to the Court. In the chief examination, the witness would state:

"It is correct that I was told to give same statement, which I had given earlier at the time of ROE, otherwise I would be given punishment."

This cannot be true. He would further state:

"On 12 or 13 July 1990, one person named Pramod has come to me. Consequently on being told by Mr. Pramod that he wanted Rs.5000/ for paying to Jha Sahib, I paid the money to him. After taking that money he left the place."

In the cross examination he would say:

"I do not know any person of my village with name Pramod."

In the chief examination, he would say:

"I got enrolled in BSF at Madhubani. There the recruitment had taken place from 23 June 90 to 27 June 90. I came to SWTC BSF Hazaribagh for basic training either on 30th June or 1st July 1990. When I had started for the BSF Camp Meru, my father had given me Rs.5000/ with the instructions that the same be handed over to a person who would give his reference. In addition to Rs.5000/, he had also given me Rs. 700/ for my personal expenditure."

54. Therefore, no person properly instructed in law would place any reliance on the false testimony of P.W. 11.

55. P.W. 12 is SI D. Chidambaram. He was examined to say that a person named Pramod Mishra had visited the camp to meet the petitioner. The witness would state :

"One person named Mr. Pramod Mishra had visited the accused twice, first time on 1st July 90 and second time on 15 July 90."

The Court itself observed :

"The Court observe that name of Mr. Pramod Mishra seems to be entered later on

and there is overwriting while writing his name."

The Court itself further observed :

"The Court observe that there is overwriting in the signature of the guest and there is no time mentioned when those guest left the Camp. The said entry is also perused by the Defending Officer.

The Court observe that there is overwriting in the name of Mr. R.N. Jha and name of the village."

Therefore, nothing turns on the evidence of this witness.

56. P.W.13 is Mr. B.S. Garcha, Ex. DIG of BSF. His statement was not recorded at the time of ROE. This witness would admit :

"It is correct to suggest that I never thought that I could be an important witness in this case."

He would admit :

"I had not noted down the dates and timings, which I have been mentioned in my statement before the Court. I am stating the dates and timings out of my memory."

It has already been noted as to how the petitioner was transferred after 16.7.1990. As per the evidence of P.W.9 the money was stolen on 14.7.1990. On the 15th of July 1990, according to the prosecution, the news about the theft had come out. On the 15th of July 1990 this witness was the Commandant to the petitioner, assuming that Mr. M.S. Arya was the Commandant after the 16th July 1990 the witness would say :

"I was not the Commandant for the accused at the relevant time. Mr. M.S. Arya, the then Commandant BTC, was the Commandant of the accused."

The witness would frankly admit :

"When I had directed Mr. M.S. Arya, the then Commandant, BTC, to take disciplinary action against the accused, I did not disclose to him, whatever I knew about this case."

The witness states that P.W.4 Mr. J.S. Bakshi had sent a written report to him. That is not produced. This witness has not been able to give any Explanation. As a leader of the Camp, he had not taken any steps to find out whether P.W.9 and P.W.14 had contradicted themselves. Money alleged to have been collected from other recruits were returned to them by P.W.4 Mr. J.S. Bakshi. The DIG had not enquired into the matter as to how P.W.4 could collect money from the recruits by using his position. With reference to the very important aspect of confession, this witness and P.W.4 Mr. J.S. Bakshi would give contradictory versions. This witness stated :

"On 17 July 90, at about 0930 hrs, when I was in my office, I received a call on intercom from Mr. J.S. Bakshi. He told me that the accused had come to him and had apologised to him for having received the money. He further told me that he had advised the accused to meet me in this regard."

What emerges out of this is that the petitioner met P.W.4 at 9.30 A.M. on 17th July 1990 and had apologised to him whereupon the P.W.4 had advised the petitioner to meet P.W.13. At that time, P.W.4 had not contacted P.W.13. What P.W.4 would state is that at the time of the alleged meeting between the petitioner and P.W.4 the latter had reported the matter to P.W.13:

"On 17th July 90, at about 0930 hrs, while I was sitting in my Office, the accused came there and informed me that in STC people were levelling allegations against him that he had been paid money for the recruitment of Constable. I told the accused that he was thickly involved in the case as some other recruits might also name him for having received the money for enrolment. The accused apologetically requested me to help him out and hush up the case. I told the accused that since I had already reported the matter to the DIG, so he could approach the DIG and ask for pardon."

57. Therefore, P.W.13 was aware of the facts that when the petitioner alleged to have met after 0930 hrs on the 17th of July 1990. Yet, according to him when he asked Mr. M.S. Arya to record evidence he did not inform anything about the matter. According to P.W.13 he did not think that he would be an important witness in the case. The witness had sent for Mr. G.S. Dhillon also. P.W.13 would narrate the events in the following way:

"After about 5 minutes, the accused came to me with tears in his eyes and stood to the right of my table. The accused told me that he would tell the truth if I could give him assurance not to take any action against him. I told the accused that I could not give him any assurance without knowing the facts. The accused started weeping and then told me that he would narrate the whole happenings. The accused told me that while he was on leave, one boy contacted him for his recruitment in BSF. The accused further told me that he had talked to Mr. G.P.S. Dhillon, Presiding Officer of the recruitment board, about the recruitment of said boy. The accused further told me that Mr. GPS Dhillon had given his concurrence to him for the recruitment of said boy. The accused also told me that thereafter, said candidate namely Bhavesh Kumar was recruited in the BSF. The accused further told me that he had received Rs.6000/- from Constable Bhavesh Kumar after his arrival at Hazaribagh for training. The accused also told me that out of Rs.6000/-, he had given Rs.5,000/-. The accused admitted before me that he had also received Rs.4000/- from Const Bhavesh Kumar before his recruitment in BSF. Then I asked the accused that would he be ready to say the same thing before Mr. GPS Dhillon, Commandant, if he would be called there. The accused told me that he was ready to say so even in presence of Mr. GP S Dhillon, Commandant. Then I had asked Mr. GPS Dhillon, on intercom to immediately come to my office. After his arrival, I made the accused and Mr. Dhillon to sit, in front of me. Then I

told the accused to say before Mr. GPS Dhillon, the same thing which he was telling me earlier about him. The accused told Mr. GPS Dhillon that he (the accused) had given him Rs.5000/, while he (Mr. GPS Dhillon) was sitting in his office. Mr. GPS denied having received any money from the accused. Then the accused further clarified to Mr. GPS Dhillon that he had given him Rs.5000/ in an envelope. Mr. GPS Dhillon, even then denied of having received any amount from the accused. But I noticed that when the accused had told Mr. GPS Dhillon that he had received said amount from him, Mr. GPS Dhillon had started fumbling. I told Mr. GPS Dhillon that he should be ashamed of himself as his subordinate was telling those things on his face."

The witness who was a DIG and a Commandant without verifying facts and without knowing the implications what he was deposing, would state :

"After talking to them for sometime, I send them away and I left for my routine round of the training area. During my round, when I was near STC lines at about 11 hrs, I saw Mr. J.S. Bakshi, Commandant standing with some recruits in the Boys Office. I got down from my jeep and Mr. J.S. Bakshi came forward to receive me. Mr. Raj Singh, Dy Comet and Mr. G.S. Rana, AC were also there. Mr. J.S. Bakshi took me to the B Coy's office. On my enquiry, he told me that he was finding out the details from the recruits about the said case. Thereafter, on my asking, Constable Bhavesh Kumar Jha was brought before me. Constable Bhavesh Kumar Jha told me that prior to his recruitment, he Along with his father had gone to the residence of the accused, in District Madhubani and had given Rs.4000/ to the accused. He further told me that he and his father also promised to pay another Rs.7000/ to the accused after his enrolment. He further told me that after about one week of his arrival in the camp, he received a message of the accused for payment of amount through some person, whom he knew. He also told me that he paid Rs.5000/ to that person for handing over to the accused. On my enquiry, as to how he knew that man, Constable Bhavesh Kumar Jha told me that that person belongs to their area and he was the middle man, who knew about this deal. Constable Bhavesh Kumar Jha further told me that after about two days, he again received a message from the accused about the payment of balance amount He further told me that after enquiring about the residence of the accused, he went to his residence and paid Rs.1000/ to the accused. He had also told me about the stolen part of the money. Thereafter, I came back to my office and told Mr. J.S. Bakshi to further enquire into the matter as I thought there might be some more boys involved in that case."

P.W.13 should have directed his officers, as I had mentioned above to make thorough enquiry about the version of P.W.9, the DIG had proceeded to deal with the petitioner without any founda corporation in law. Mr. GPS Dhillon was examined by the petitioner as D.W.4. According to P.W.13 the alleged confession by the petitioner was in the presence of D.W.4. But D.W.4 has denied every thing. D.W.4 would state :

"During first week of July 90, all the recruits, who were recruited by our board

were made to fall in near the main Office and those recruits were seen by me as well as Mr. B.S. Garcha, the then DIG, BSF TC & S Hazaribagh. Dr. Nirmal Kumar and the Adjutant were also present there. Mr. B.S. Garcha had also taken the physical measurements of some of the candidates. One of the candidate was rejected by Mr. B.S. Garcha as that candidate was having elongated head.

On 19th or 20th July 1990, Mr. B.S. Garcha had called me in his office. He told me that there were allegations against recruit ment board that they had taken money during recruitment. I told him that there was no such thing. Mr. B.S. Garcha again enquired from me as to whether the accused had given any money to me for recruitment. I told him that the accused had not offered me any money. Mr. B.S. Garcha then again asked me as to whether I could say that the accused had offered me money, which I had refused. I replied that why should I say so, since the accused had not offered me any money. Thereafter, Mr. B.S. Garcha told me that he would see me alter on and I left his office. During that conversation the accused was not present in the office of Mr. B.S. Garcha."

The witness denied having met P.W.13 in the morning of 17th of July 1990 and would state :

"It is incorrect to suggest that on 17 July 90, in the morning, Mr. B.S. Garcha had called me in his Office and had confronted me to the accused."

The Court had decided to recall Mr. G.S. Rana P.W.1 in the interests of justice. Instead of helping the prosecution, what he had stated at this time would completely demolish the case of the prosecution. He stated :

"Constable Bhavesh Kumar Jha and Constable Santosh Kumar Jha were kept separately in a room from 17 Jul 90 as they had reported tome that they were receiving threats from the accused.

They were kept under watch and for that purpose the under Officers were detailed turn by turn. Those under Officers were not staying in the room, Along with Constable Bhavesh Kumar Jha and Constable Santosh Kumar Jha. Both of them were regularly attend ing the training and evening working.

On 17 July 90, in the evening, I had called Constable Santosh Kumar Jha to enquire about the theft case in presence of Constable Bhavesh Kumar Jha. Constable Santosh Kumar Jha had voluntarily made a statement before me. He told me that he had paid Rs.5000/ to the accused through a civilian named Pramod. On the next day, I had tape recorded his statement also.

I never asked Constable Santosh Kumar Jha to depose in the ROE on the same lines on which his previous statement was tape recorded, otherwise he would be punished.

The fathers of Constable Santosh Kumar Jha and Constable Bhavesh Kumar Jha had come to the lines around 17 Aug 90 and they were allowed to meet their sons. I do not remember as to whether on other occasions also they had visited

STC lines.

The recruits were given mass punishment on 15 Jul 90, to detect the theft case. Thereafter, they were neither given any punishment nor beaten by any of the staff member."

In the cross-examination, he would admit :

"No register was maintained in which the names of under Officers, who were detailed for keeping watch on Constable Santosh Kumar Jha and Constable Bhavesh Kumar Jha were noted. No document was maintained to show that they both were kept in a separate room on 17th July 90 only, as they had not committed any crime."

58. On 27.2.1992 the Law Officer, as mentioned by me, had given a summing up in writing to the Court.

59. In all these matters it is all assumed that what is stated in the summing up by the Law Officer would give the correct picture of the entire case and invariably the Court would rest its view on the summing up. This would give an idea about what was presented before Court. As I analysed the entire evidence to appreciate the same, I am of the view that the entire summing up is to be extracted :

"Summing up by the Law Officer in the case of IRLA No. 2199 Mr. B. N. Jha by Comet of 127 Bn BSF attached with TC & H H/Bagh.

You have heard the prosecution and defense witnesses and the closing address of defense as well as the Prosecution. It now becomes my duty to explain to you the law involved in this case and also the charges on which the accused is arraigned. I will also briefly sum up the evidence before you. But before I proceed further I must make it quite clear to you that you are the sole judges of the facts as well as the law. It is not my duty to express any opinion on any question of fact. If during the course of my summing up I do express any such opinion inadvertently or show any leaning of view, you may disregard that completely.

2. In deciding questions of fact, you have to devote considerable attention to the evidence that you have had in the course of this trial. In addition to that, you may also take judicial notice of certain facts which may be in your general knowledge as officers of the Force.

3. It is a cardinal principle of law that an accused is presumed to be innocent until his guilt is proved. It is the duty of the Prosecution to prove beyond reasonable doubt, the guilt of the accused and it is not for the accused to prove his innocence. The reasonable doubt is a doubt which makes you hesitate as to correctness of the conclusion which you may arrive at. If you have any such doubt you must resolve it in favor of the accused.

4. Gentlemen, in order to enable you to decide, whether a fact is proved or not, I

would draw your attention to the definition of "proved", "disproved" and "not proved" as given in Section 3 of IEA (read). It will be observed that proof of any fact required by law does not mean proof of a rigid mathematical demonstration, because that is impossible. The requirement of the law is that the evidence should be such as would induce a reasonable man to come to a conclusion. Further, the law does not lay down any standard of the quantum of evidence that is required to prove the fact. Section 134 of the Indian Evidence Act clearly provides that no particular number of witnesses, shall in any case, be required for the proof of any fact. Even the testimony of a single witness, if believed, is enough for deciding an issue.

5. While considering the evidence you have also to devote consideration to the statement and the answers given by the accused in reply to questions put to him by the Court under BSF Rule 93. Merely because the accused was not on oath, you need not think that his statement and answers were not important. You must consider them in the light of facts which you consider as proved or disproved.

6. In order to refresh your memory, I shall now read out to you the charge sheet (read). The accused is arraigned on two charges both u/s 41(e) of the BSF Act for directly accepting for himself gratification as a motive for procuring the enrolment of a person in the service. I shall now discuss the meaning of some of the words which will help you in deciding the issues.

7. Gentlemen, the word "Gratification" means tip or bribe i.e. something offered to influence the judgment unduly or corrupts the conduct and is not restricted to the payment of pecuniary gratification or to gratification estimable in terms of money. The motive or reward mentioned in Section 41(e) of the BSF Act is the consideration for procuring the enrolment of any person or leave of absence or promotion or any other advantage or indulgence for any person in the service. The motive or reward may be given in any form and it may be called by any name, but it is a bribe if it is received under the promise or on the understanding of any official favor or disfavours. It is also not necessary that the enrolment or other object should be actually fulfilled.

The word "motive" evidently refers to a future act, while the word "reward" is manifestly intended to apply to "past service".

8. Gentlemen, I will now again invite your kind attention to the law relating to the evidence of accomplice and confession which I have discussed earlier in the proceedings (read).

9. I will now briefly discuss the Prosecution and defense Cases.

PROSECUTION CASE

The prosecution case in brief is that the accused while on leave, during June 90, had agreed to help Constable Bhavesh Kumar Jha for recruitment in BSF, when said person approached him at his residence. That time the accused demanded Rs. 5000/ from him as half of the gratification amount. On 12 June 90, Constable

Bhavesh Kumar Jha went to the residence of the accused and paid Rs.4000/ to him. Later on, he appeared before the recruitment board at Madhubani from 25 to 27 June 1990 and that time the accused was also present there. When he got the call letter, the accused had asked him for the balance amount of Rs.7000/. Constable Bhavesh Kumar Jha reported for training at STC BSF Hazari bagh on 1st July 1990. After about a week or so he paid Rs.5000/ to the accused through one civilian named Pramod, who had approached him in this regard. After 2/3 days he personally paid Rs.1000/ to the accused at his residence in Meru Camp, on receiving message from the accused. On 15 July 1990, the amount of Rs.1700/ belonging to said Constable was stolen by some one from his box. At the time of enquiry of the stolen amount, he revealed the fact of said payments to the accused. He also narrated those facts before Mr. J.S. Bakshi and Mr. B.S. Garcha. On 17 July 1990, the accused went to Mr. J.S. Bakshi and apologetically requested him to hush up the case and the accused also confessed his guilt before Mr. B.S. Garcha, the then DIG. As per prosecution the accused has directly accepted for himself the gratification from Constable Bhavesh Kumar Jha on two occasions for procuring his enrolment in BSF.

defense CASE

The defense case in brief is total denial of both the charges. According to defense, on 25 Jun 90, the accused came to know at Madhubani that the recruitment for the BSF was going on in the stadium. Thereafter, he went to the stadium and invited the officers of recruitment board for dinner at his house in village. That time Mr. GPS Dhillon, Commandant sought his help in selecting and purchasing some Mithala paintings. On 26 June 90, the accused again went to the circuit house in the evening and apprised the Presiding Officer about the villages from where Mithala painting could be procured and also invited them for dinner. The Officers of the recruitment board had dinner at his house and enroute they saw some Mithala paintings in two villages. On 27 June 90, the accused brought a person with paintings to the Presiding Officer, who asked the accused to also bring two design books, so that those could be shown to the DIG for placing the final order. In the afternoon, the accused brought those design books and he along with his family took a lift in the recruitment party bus up to Meru Camp. As per the accused Constable Bhavesh Kumar had never approached him and made any payment for his recruitment in BSF. The defense has also brought out that the accused has been falsely implicated in this case by some vested interests.

10. Before you find the accused guilty of the charges, you have to satisfy yourselves affirmatively on the following ingredients of the charges, separately raised for your consideration and decision.

First Charge

(i) That the accused IRLA No. 2199 Mr. B.N. Jha Dy Comet, at village Singoun, District Madhubani (Bihar), on or about 12 June 1990, accepted a sum of

Rs.4000/ for procuring the enrolment of No. 90401117 Recruit Constable Bhavesh Kumar Jha of STC BSF Hazaribagh.

(ii) That the accused accepted the said amount as a motive for procuring the enrolment of said Recruit Constable Bhavesh Kumar Jha as Constable in BSF.

Second Charge

(i) That the accused IRLA No. 2199 Mr. B.N. Jha Dy Comet, at TC & S, BSF, Hazaribagh, during July 1990, accepted a sum of Rs.1000/ for procuring the enrolment of No. 90401117 Recruit Constable Bhavesh Kumar Jha of STC BSF Hazaribagh.

(ii) That the accused accepted the said amount as a motive for procuring the enrolment of said recruit Constable Bhavesh Kumar Jha as Constable in BSF.

11. Gentlemen, I will now discuss the issues of both the charges.

First issue of first and second charge.

According to Constable Bhavesh Kumar Jha (PW9), in the month of June 90, he had gone to the house of the accused in village Singoun, which is about 15 kms away from his village. There he met the accused and the accused after measuring his chest and height told him that he could get a job. He has also brought out in cross examination that when he met the accused he enquired from him as to how much money he had to pay for getting a job. The accused told him that he should pay half of the amount i.e. Rs.5000/ in advance. He has also stated that after about 4 or 5 days of that meeting, he again met the accused at his house on 12 June 90 and gave him Rs.4000/ for getting a job. After receiving Rs.4000/, the accused had assured him that he would help him in getting enrolled in BSF either at Hazaribagh or at Madhubani.

Constable Bhavesh Kumar Jha has further stated that he appeared in the recruitment held at Madhubani from 25 to 27 June 90. On 27 June 90, the accused met him at Madhubani and asked him to pay the balance amount of Rs.7000/. He has also stated that he had to pay Rs.11000/ in total to the accused for helping him in getting enrolled in BSF. He had to pay Rs.7000/ to the accused after joining the training. The witness has also stated that on first July 90, he reported for training at STC BSF Hazaribagh. After about 5 days of his joining, one person named Pramod came to him and demanded money for the accused. He has further stated that he was having Rs.8500/ with him but he did not pay any money to Pramod as it was night time. On the next day, Mr. Pramod again came to him. Consequently on being informed by that person that the accused was again asking for money, he paid Rs.5000/ to him. He has further stated that after about 2/3 days he again came to him and asked for the balance amount. He did not pay any money to him instead he personally went to the residence of the accused and gave him Rs.1000/. During cross examination Constable Bhavesh Kumar Jha has also brought out that he was taken to the residence of the accused at Meru Camp by Mr. Ravinder Nath Jha. He has further

stated that he does not remember the date on which Mr. Ravinder Nath Jha had taken him to the residence of the accused but Mr. Ravinder Nath Jha had met him about 10 or 12 days after his reporting for raining in the camp. He has further stated that on that very day, he paid Rs.1000/ to the accused, but not in presence of Mr. Ravinder Nath Jha as he was out side the residence of the accused. He has also brought out that he came to know through Mr. Ravinder Nath Jha that the accused could help him in getting a job. However, Mr. Ravinder Nath Jha (DW2) has stated that he neither visited Meru Camp nor knew the accused before last week of Oct 90, when he was brought from his factory to Meru Camp by the son of the accused. In cross examination this witness has brought out that he does not know the house number and the street number where he is staying since July 88.

Gentlemen, you may consider and decide as to whether a person would not be knowing the complete address, where he is staying for so many years. He has also denied that he had visited Meru Camp on 11 July 90. Gentlemen, you may consider and decide as to how a person would know the address of this witness as mentioned in exhibit "P3". You also consider and decide as to whether or not a person would come with a stranger as has been deposed by this witness.

Constable Bhavesh Kumar Jha has also stated that after about 3/4 days of the payment of Rs.1000/ to the accused, some body had stolen Rs.1700/ from his box, which was kept in his tent. Accordingly, he reported the theft of said amount to HC Waryam Singh (PW3), who in turn took him to Mr. G.S. Rana (PW1). He has further stated that Mr. G.S. Rana asked SI S.S. Bhujel (PW2) to enquire into the matter.

Constable Bhavesh Kumar Jha has further stated that after about two days of the theft of his money, one person met him near Canteen and took him to the residence of the accused. There the accused gave him Rs.500/, a pant and a shirt and asked him to run away from there. He has further stated that the accused also told him that if he did not run away from there when his job as well as the job of the accused would be lost. During cross examination, he has brought out that when he came out of the residence of the accused that time one person who had consumed liquor started taking him towards the gate. He thought that, that person might do anything to him so he dodged him and ran towards the coy lines. Enroute, he also removed his shirt to change his identify so that, that person could not trace him. Constable Bhavesh Kumar Jha has further stated that he removed his shirt and kept it in the pocket of the pant which he a wearing. When he went to the coy lines he found Mr. G.S. Rana and Mr. Raj Singh and the coy personnel fallen before them. He gave that pant, shirt and Rs.500/ to the coy comdr when asked by him. Constable Bhavesh Kumar Jha has also stated that Mr. J.S. Bakshi (PW4) and the then DIG (PW13) had also enquired from him about the happenings and he narrated to them all the happenings including payment of gratification to the accused.

According to Mr. G.S. Rana (PW1), on 15 July 90, at about 1030 hrs, while he

was going towards the coy lines, enroute he met SI S.B. Bhujel (PW2), near the Quarterguard. PW2 reported to him that Rs.2000/ belonging to Recruit Constable Bhavesh Kumar Jha had been stolen from his box. He also told him that Constable Bhavesh Kumar Jha had brought Rs.8500/ from his house and out of that amount he had paid Rs.5,000/ and Rs.1000/ on two occasions to the accused. The statement of PW1 is also corroborated in material particulars by Mr. S.B. Bhujel (PW2).

Mr. G.S. Rana has also stated that on his enquiry from Constable Bhavesh Kumar Jha (PW9), PW9 reached to the conclusion that he had lost Rs.1700/ only and not Rs.2000/ as earlier reported by him. He has also stated that PW9 told him that he had brought Rs.8500/ from his father out of that amount he paid Rs.5000/ to the accused at one time and Rs.1000/ at another time. He has also stated that he also tape recorded that conversation between him and PW9.

Mr. G.S. Rana (PW1) has further stated that on 16 July 90, at around 2100 hrs, he received a telephone call from Mr. J.S. Bakshi (PW4), to enquire if the recruits of his coy were being harassed by the CHM. Accordingly, he went to the coy line at about 2130 hrs and the whole coy personnel were made to fall in at that time, Constable Bhavesh Kumar Jha was found absent. He had further stated that while he was talking to the recruits at about 2215 hrs, Recruit/Const Bhavesh Kumar (PW9) came there. On his enquiry, PW9 told him that he had gone for the evening working and from there he had gone to the residence of the accused and was returning from there. The witness has further stated that when he was talking to PW9 in the meantime, Mr. Raj Singh (PW5) came there and talked to the recruits. Mr. G.S. Rana has further stated that Constable Bhavesh Kumar Jha (PW9) also narrated those happenings which he had told to him, even before Mr. Raj Singh (PW5). He has further stated that at that time Constable Bhavesh Kumar (PW9) also told them that before his enrolment in BSF he had paid Rs.4100/ to the accused. He has further stated that Constable Bhavesh Kumar Jha (PW9) had also shown them Rs.500/, a pant and a shirt which were given to PW9 by the accused for facilitating his escape from the camp. He also produced those items, i.e. Rs.500/ (exhibit "M to M4") a shirt (Exhibit "N") and pant (Exhibit "O"), before the Court. He has further stated that on 17 July 90, at PT time, he and Mr. Raj Singh (PW5) reported the matter to Mr. J.S. Bakshi (PW4), who also talked to Ct Bhavesh Kumar Jha in their presence. He has further stated that on the same day, at about 1030 hrs, Mr. B.S. Garcha (PW13) also came to his office and talked to Constable Bhavesh Kumar Jha (PW9). The witness has further stated that on 17 July 90, at about 1500 hrs, he again tape recorded the state ment of Ct Bhavesh Kumar Jha (PW9) on instructions of Mr. J.S. Bakshi (PW4) as the earlier recording was not properly audible. The statement of Mr. G.S. Rana(PW1) has also been corroborated by Mr. Raj Singh (PW5) and Mr. J.S. Bakshi (PW4). However, they had stated that the stolen amount of Constable Bhavesh Kumar Jha was Rs.1500/.

Mr. Raj Singh (PW5) has stated that initially Ct Bhavesh Kumar Jha was afraid of

stating anything. On his enquiry, PW9 told him that if he would state anything against the accused, the other recruits from Madhubani area would harass him. He assured him that he should not be afraid of speaking the truth. After his assurance only Ct Bhavesh Kumar Jha (PW9) told him about the happenings. He has further stated that Ct Bhavesh Kumar Jha told him that he had brought Rs.8500/ from his house and after about 2/3 days of his arrival in the BSF Campus he had given Rs.5000/ to the accused. He had further stated that PW9 had also told him that after about one week of said payment, he had again sent Rs.1000/ to the accused through some one. Mr. J.S. Bakshi (PW4) had also stated on the same lines. But Ct Bhavesh Kumar Jha (PW 9), during his cross examination has denied that he told Mr. J.S. Bakshi (PW4) that the stolen amount was Rs.1500/. PW9 has also denied that he told Mr. J.S. Bakshi (PW4) that he paid Rs.5000/ personally and Rs.1000/ was paid to the accused through some Constable of Adm Wing. Gentlemen, you may consider and decide as to whether Constable Bhavesh Kumar is not telling the truth or Mr. J.S. Bakshi (PW4) and Mr. Raj Singh (PW5) could not properly recollect the facts.

Mr. J.S. Bakshi (PW4) has also stated that on 17 July 90, during PT time, Mr. G.S. Rana told him in presence of Constable Bhavesh Kumar Jha that Constable Bhavesh Kumar Jha had also told him that prior to his recruitment in BSF he had paid Rs.4000/ to the accused after taking from his father. He has further stated that Constable Bhavesh Kumar Jha told him almost the same things which were earlier told to him by Mr. G.S. Rana (Pw1) and by Mr. Raj Singh (PW5). He had also stated that on 17 July 90, at about 0930 hrs, the accused came to his office and informed that in STC people were levelling allegations that he (the accused) had been paid money for recruitment of Constable. PW4 had further stated that he told the accused that the accused was thickly involved in this case as some other recruits may also name him for having received the money for enrolment. PW4 has also stated that the accused apologetically requested him to help him (the accused) out and hush up the case. He also told the accused that since he had already reported the matter to the DIG so that he could approach the DIG and ask for pardon.

According to Mr. B.S. Garcha (PW13), on 17 July 90, at about 0930 hrs, the accused came to his office with tears in his eyes and stood to the right of his table. The accused told him that he would tell the truth if he could give assurance for not taking any action against the accused. He has further stated that he told the accused that he could not give any assurance without knowing the facts. On that the accused started weeping and then narrated before him the whole happenings. He has further stated that the accused told him that while he was on leave one boy contacted him for his recruitment in BSF. The accused further told him that he had talked to Mr. GPS Dhillon (DW4), the Pre siding Officer of the recruitment board about recruitment of said boy, who had also given his concurrence. Pw13 has further stated that the accused also told him that the said candidate namely Bhavesh Kumar was recruited in BSF. The accused further told him that he had received Rs.6000/ from Constable Bhavesh

Kumar after his arrival at Hazaribagh for training. The accused further told him that out of Rs.6000/, he had given Rs.5000/ to Mr. GPS Dhillon (DW4) and retained Rs.1000/ with him. The witness has further stated that when he asked the accused, if he was speaking the truth, the accused replied in the affirmative. He has further stated that then he asked the accused had he not received Rs.4000/ from said Constable prior to his recruitment, in addition to Rs.6000/ and the accused admitted before him that he had also received Rs.4000/ from Ct Bhavesh Kumar Jha before his recruitment in BSF. He has further stated that he called Mr. GPS Dhillon (DW4) in his office and confronted him to the accused, but Mr. GPS Dhillon denied of having received any amount from the accused.

Mr. B.S. Garcha has also stated that on 17 July 90, at about 1100 hrs, when he was on his routine round of the training area, he went to the B Coy's office of STC. There he talked to Constable Bhavesh Kumar (PW9). He has further stated that PW9 told him that prior to his recruitment, he along with his father had gone to the residence of the accused in District Madhubani and had given Rs.4000/ to the accused. He has further stated that PW9 told him that he and his father also promised to pay another Rs.7000/ to the accused after his enrolment. PW9 further told him that after about one week of his arrival in the camp, he received a message for payment of amount, through some person whom he knew. PW9 further told him that he had paid Rs.5000/ to that person for handing over to the accused. PW9 also stated that after about two days, he again received a message from the accused about payment of balance amount. Thereafter, PW9 after enquiring about the residence of the accused, he went to his residence and paid Rs.1000/ to the accused.

According to Mr. G.P.S. Dhillon (DW4), on 17 July 90, he did not go to the office of Mr. B.S. Garcha (PW13). He (DW4) has further stated that on 19 or 20 July 90, Mr. B.S. Garcha (PW13) had called him in his office and told him that there were allegations against recruitment board that they had taken money during recruitment. He has further stated that he told PW13 that there was no such thing. He has further stated that PW13 again enquired from him as to whether the accused had given any money to him for the recruitment, which he denied. He has further stated that PW13 again asked him as to whether he could say that the accused had offered him (DW4) money, which he had refused. He has further stated that he told PW13 as to why he should say so since the accused had not offered him any money. He has also stated that during that conversation the accused was not present in the office of PW13. Gentlemen, you may consider and decide that out of Mr. Garcha (PW13) and Mr. Dhillon (DW4), who is falsely deposing before the Court. There is nothing on record to suggest that PW13 was having any enmity either with the accused or Mr. Dhillon (DW4).

The defense has brought out that Ct Bhavesh Kumar Jha(PW9) has alleged that he met the accused at this residence in village Singoun on 5th June 90, but on that day the accused was not present in his village. The accused has brought

that on 3rd June 90, he Along with his wife had gone to village Khatuna for attending the marriage of the daughter of his friend, Mr. Rup Narayan Jha (DW3). The accused has further brought out that he returned to his village on 6th June 90, after attending the said marriage. This has also been corroborated by Mr. Rup Narayan Jha (DW3). During cross-examination, DW3 has brought out that he met the accused last during the marriage of his daughter, but in the Court question, he stated that on 7th Feb 92, also he had visited Meru Camp and met the accused.

The accused has also brought out that on 11 June 90, he Along with his co-villagers, Mr. Uma Kant Jha (DW1) and Mr. Bikal Nath Jha left for Patna to meet Mr. Kumud Ranjan Jha, MLA of his constituency. The accused has also brought out that on 12 June 90, in the evening, they left Patna by bus and reached Madhubani at about 2300 hrs. Therefore, he (the accused) was not present at his residence on the alleged date of payment of Rs.4000/- by Constable Bhavesh Kumar Jha (PW9). The statement of the accused in this regard has also been corroborated by Mr. Uma Kant Jha (DW 1). Gentlemen, the accused in his detailed statement at the time of ROE (Exhibit "Q") has not mentioned the name of any villager, who accompanied him to Patna on the said date.

The accused has also brought out that he learnt about the recruitment of BSF at Madhubani town on 25 June 90, where he had gone for registration of sale deed. he has also brought out that since officers of the BSF were his colleagues, he went to meet them and invited them for lunch or dinner. He has also mentioned in his statement that Mr. GPS Dhillon sought his help in selection and purchase of Mithala paintings. He left that place and again met DW4 in the evening, when the recruitment party was leaving the stadium. The accused has also brought out that Mr. Dhillon (DW4) had agreed to come with other officers to his village for dinner on the following day. On 26 June 90, in the evening, he went to the rest house and then he Along with DW4 proceeded for his village at about 1930 hrs because enroute, DW4 had to see and select Mithala paintings. The accused has further mentioned that after seeing and selecting painting Mr. Dhillon asked him to bring few pieces of paintings on the following morning. Accordingly, on 27 June 90, at about 0830 hrs, he Along with Mr. Surya Kant Datta and with few pieces of painting met Mr. Dhillon in the inspection bungalow. The accused has also brought out that DW4 had purchased two pieces of paintings as sample and asked him to bring two design books which he had seen on 26 June 90, so that final order could be placed after approval of the DIG. Thereafter, he left for his village at about 0900 hrs. The accused has also brought out that on 27 June 90, at about 1445 hrs, he along with his family reached inspection bungalow and then from there came to Meru Camp on 28 June 1990, in the recruitment party bus. This statement of accused is also corroborated by Mr. GPS Dhillon (DW4).

According to Mr. Prem Lal (PW6), he had seen the accused on 25 June 90, in the stadium at Madhubani from about 0930 hrs to around 1330 hrs and again in the afternoon, from about 1500 hrs to 1800 hrs. He has also stated that on 26 June

90, he again saw the accused in the stadium from around 0900 hrs to around 1230 hrs. He has further stated that on the same day, at about 1530 hrs, he again saw the accused in the guest house, where Dr Nirmal Kumar was medically examining the candidates and the accused remained there for about 1 hour. He has also stated that on 27 July 90, at about 0900 hrs, the accused had again come to the guest house and remained there for about one hour and then left with Mr. GPS Dhillon. However, Mr. GPS Dhillon (DW4) has denied that he had gone somewhere from the rest house on 27 June 90, from 0915 hrs to 1130 hrs. Sub S Ekka (PW7) had also corroborated the statement of Mr. Prem Lal (PW6) in material particulars. Gentlemen, you may consider and decide as to why PW6 and PW7 would falsely depose against the accused. There is nothing on record to suggest that they had any enmity with the accused.

The defense has also brought out that no reliance can be placed on the uncorroborated testimony of Ct Bhavesh Kumar Jha (PW9) as he is an accomplice. Gentlemen, I have already discussed the law relating to the evidence of accomplice (page Nos. 112114 of proceedings). I have also discussed there the nature of corroboration required to the testimony of an accomplice witness. You please keep that discussion in mind while deciding this first issue of both the charges.

The defense has also brought out that the DIG was admittedly a person in authority and according to his own testimony, the accused before making the confession, had sought an assurance from him that he would not take any action against him. He told the accused that he could not assure him until he heard the facts and then only the accused blurted out. This rendered the alleged confessional statement irrelevant within the meaning of Section 24 of IEA. Gentlemen, I have already discussed the law relating to confession (Page 114116 of the proceedings), you please keep that discussion in mind while deciding this first issue of both the charges. To attract the provisions of Section 24 of IEA, the following facts have to be established:

- (a) that the confession has been made by an accused person to a person in authority;
- (b) that it must appear to the Court that the confession has been obtained by reason of any inducement, threat or promise proceeding from a person in authority;
- (c) that the inducement, threat or promise must have reference to the charge against the accused person; and
- (d) that the inducement, threat or promise must, in the opinion of the Court, be such that the accused, in making the confession, believed or supposed that, by making it, he would gain any advantage or avoid any evil of temporal nature in reference to the proceeding against him. Gentlemen, if after above, discussion and other evidence on record you come to the conclusion that the provision of S 24 of IEA are attracted in this case, you should totally exclude the said

confession out of your consideration while deciding the first issue of both the charges.

Gentlemen, I have discussed the first issue of both the charges in detail, you please decide these issues keeping in view the above discussion and other evidence on record. If you conclude that first issue of the first charge or first issue of the said second charge is not proved then the accused is entitled for acquittal of that charge. Otherwise, you shall consider the second issue of both the charges.

Second issue of first and second charge Gentlemen, I will not discuss this issue of first and second charge in detail as I have already discussed some of the points of this issue, while discussing the first issue of both the charges. I have already discussed in para 7 of my summing up some of the words, which will help you in deciding this issue. You only have to decide keeping in view the above discussion and evidence on record as to whether the accused accepted the said amount as a motive for procuring the enrolment of Constable Bhavesh Kumar Jha (PW9) as Constable in BSF or not. You need not consider the point as to whether the accused was in a position to help that candidate or not. If you conclude that this issue of the first or second charge is proved, then the accused is guilty of that charge. If you conclude that this issue of first or second charge is not proved, then the accused is guilty of that charge. If you conclude that this issue of first or second charge is not proved and it is not open for you on the evidence to make a special finding under either section 93 of BSF Act or BSF Rule 99(4), in that case the accused is entitled for acquittal of that charge. If this issue of the first charge as well as second charge is not proved then you shall acquit the accused.

12. You might have observed some contradictions and discrepancies in the statement of various prosecution and defense witnesses. While appreciating the evidence you may keep the following guide lines into consideration :

Appreciation of Evidence After a witness has made a statement admissible in evidence, the question whether it should be believed or not is essentially a question of fact. Neither evidence act nor any other act lays down any law governing the question which statement of the witness should be believed and which should not be believed. For weighing evidence and drawing inferences from it there can be no canon. Common sense and shrewdness must be brought to bear upon the facts elicited in every case and each case presents its own peculiarities. It is permissible for a Court to accept one part of the statement made by the witness and reject the other. It is duty of Criminal Courts to scrutinise the evidence carefully and decide which part is true and which is not. Some of the factors and tests on which appreciation of evidence depends are probabilities, integrity and status, bias, interest or independence of witness, the test of cross examination, consistency of the story with itself and with the circumstances of the case, power of observation of witnesses, opportunities he had of observing the incident or matter narrated, powers of memory and

narration, time elapsed between the incident narrated and the time of evidence, and corroboration of testimony of witnesses.

Gentlemen, generally speaking oral testimony in a criminal case may be classified into three categories, namely:

- (i) Wholly reliable,
- (ii) Wholly unreliable,
- (iii) Neither wholly reliable nor wholly unreliable.

It is the third category of cases that the Court has to be circumspect and has to look for the corroboration in material particulars by reliable testimony of other witnesses.

13. You have heard the witnesses and had opportunity of observing their demeanour whilst they gave their testimony. It is for you to judge and the weight to be attached to each piece of evidence, considered in the light of your knowledge of human nature and conduct and to accept or reject any part of such evidence as you deem fit.

14. You have heard the closing addresses of the learned defense Counsel and the learned Prosecutor. I have to advise you in this connection that these addresses are not evidence, these are mere arguments and inferences offered for your consideration and acceptance and you may take them in that light alone.

The learned defense Counsel in his closing address has brought out some points regarding violation of some BSF Rules and irregularity in pretrial procedure. I will not discuss those points now as these points have already been considered at the appropriate stage by the Court and rejected. The defense Counsel has also brought out that there are two Courts in existence for trying the same accused on the same charges, one which assembled on 3rd Feb 92 and the other which assembled on 8 Feb 92. Gentlemen, the accused was informed on 5 Feb 92 that the earlier convening order dated 21 Jan 92 was cancelled by the convening authority on 3rd Feb 92 itself. In the other convening order dated 3rd Feb 92, the convening authority has also mentioned that convening order dated 21 Jan 92 has been cancelled, so there is no question of existence of first Court. The defense Counsel has quoted some judgments of the Hon'ble Supreme Court which require your full consideration while deciding the issue of the charges.

15. In my summing up I have referred to some important aspect of the case. The record of the case is before you. In case you entertain any doubt as regards any facts having been stated in the evidence you may refer to it.

16. If upon any matter which you have to consider there exists in your minds "reasonable doubt" then the doubt must be resolved in favor of the accused. It is not possible in judicial proceedings to prove facts with mathematical precision and certainty nor does the law require it. The degree of certainty upon which you as wise and prudent men of the world would act in the important affairs of your

private life is alone required of you.

Now Gentlemen, I advise you to close the Court and consider your findings."

60. On a perusal of the evidence and considering the depositions of the witnesses, having regard to the well settled principles and normal course of human conduct, I am of the view that there is no evidence against the petitioner and the finding rendered by the Court is based on no evidence. What the Constitution Bench of the Supreme Court had observed in *Union of India (UOI) Vs. H.C. Goel*, that scrupulous care should be taken to see that the innocent are not punished should always be borne in mind. The main plank on which the prosecution had pegged its case is the evidence of P.W.13 to prove the case of confession. An analysis of his evidence and evidence of D.W.4 would show that confession has not been proved at all. The narration of facts by P.W.13 is not at all acceptable and his evidence is not at all reliable. His attitude at the time of the alleged confession and the subsequent conduct of the witness would throw considerable doubt on the factum of confession. It was incumbent upon the prosecution to prove that there was a confession as a matter of fact before its admissibility could be decided. In the instant case, the Court had completely misunderstood the scope of confession. In AIR 1939 47 (Privy Council) , the Privy Council considered the scope of expression "confession" and observed :

"No statement that contains self exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of agraely incriminating fact, even a conclusively incriminating fact, is not of itself a confession."

61. The Supreme Court approved of the statement of law propounded by the Privy Council on the scope of the expression confession in *Kanda Padayachi alias Kandaswamy Vs. State of Tamil Nadu*, :

"The expression `confession' has not been defined in the Evidence Act. But Stephen in his Digest of the Law of Evidence defined it as an admission made at any time by a person charged with crime stating or suggesting the inference that he committed a crime. Straight, J. in *R.V. Jagrup* (1885) 7 All 646 and Chandawar kar, J. in *R.V. Santya Bandhu* (1909) 11 Bom LR 633 however, did not accept such a wide definition and gave a narrower meaning to the expression `confession' holding that only a statement which was a direct acknowledgement of guilt would amount to confession and did not include merely inculpatory admission which falls short of being admission of guilt. The question as to the meaning of `confession' was ultimately settled in 1939 by the Privy Council in AIR 1939 47 (Privy Council) wherein at Page 81 Lord Atkin laid down that no statement containing self exculpatory matter could amount to confession if the exculpatory statement was of some fact which if true could negative the offence alleged to be confessed. He observed :

"Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused death with no Explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Article 22 of Stephen's Digest of the Law of Evidence which defines a confession as an admission made at any time by a person charged with crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles: confession secured by inducement made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872; and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed" the crime".

As held by the Privy Council, a confession has to be a direct acknowledgement of the guilt of the offence in question and such as would be sufficient by itself for conviction. If it falls short of such a plenary acknowledgment of guilt it would not be a confession even though the statement is of some incriminating fact which taken along with other evidence tends to prove his guilt. Such a statement is admission but not confession. Such a definition was brought out by Chandwarkar, J., in *R. Vs. Santya Bandhu* (1909) 11 Bom LR 633 by distinguishing a statement giving rise to an inference of guilt and a statement directly admitting the crime in question.

In *Palvinder Kaur Vs. The State of Punjab (Rup Singh-Caveator)*, the statement made by the accused was that she had placed her husband's dead body in a trunk and had carried it in a jeep and thrown it into a well. But with regard to the cause of death, the statement was that her husband had accidentally taken a poisonous substance erroneously thinking that to be a medicine. This Court referred to AIR 1939 47 (Privy Council) and the dictum of Lord Atkin and held that a statement which contained self exculpatory matter could not amount to a confession if the exculpatory matter is of some fact which if true would negative the offence alleged to be confessed. But the Court added that a statement to be a confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence, and that an admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. In *Om Prakash Vs. State of U. P.*, the appellant was convicted under S. 161 read with S.109 of the Penal Code. Two statements made by him, Exs. P.3 and P.4, to the Assistant Agricultural Engineer, Aligarh were relied upon as confessions of bribery having been given by him to public servants and upon which the High Court had based his conviction. This Court set aside the

conviction holding that neither of the two documents amounted to a plenary acknowledgement of the offence, that the statements were capable of being construed as complaints by him of having been cheated by the public servants named therein and that at best they might arouse suspicion that he had bribed them. In this conclusion, the Court approvingly cited Pakala Narayana Swami's case and relied on the meaning of the word "confession" given therein by Lord Atkin. In *Faddi Vs. The State of Madhya Pradesh*, the appellant filed a first information report on the basis of which the dead body of his step son was recovered and three persons were arrested. As a result of the investigation, however, the appellant was arrested and was sent up for trial which resulted in his conviction and a sentence of death. In an appeal before this Court, he contended that the first information report ought not to have been admitted by reason of Section 25 of the Evidence Act and Section 162 of the Criminal Procedure Code. The contention was rejected on the ground that neither of the two provisions barred the admissibility of the first information report as that report was only an admission by the appellant of certain facts which had a bearing on the question as to how and by whom the murder was committed and whether the statement of the appellant in the Court denying the evidence of certain prosecution witnesses was correct or not. Such admissions were admissible u/s 21 of the Evidence Act and as such could be proved against the accused.

It is true that in *Queen Empress Vs. Nana* (1889) 14 Bom 260 the Bombay High Court, following Stephen's definition of confession, held that a statement suggesting the inference that the prisoner had committed the crime would amount to confession. Such a definition would no longer be accepted in the light of AIR 1939 47 (Privy Council) and the approval of that decision by this Court in *Palvinder Kaur's* case. In *State of U.P. Vs. Deoman Upadhyaya*, Shah, J. (as he then was) referred to a confession as a statement made by a person "stating or suggesting the inference that he had committed a crime". From that isolated observation, it is difficult to say whether he widened the definition than the one given by the Privy Council. But he did not include in the expression "confession" an admission of a fact, however incriminating which by itself would not be enough to prove the guilt of the crime in question, although it might, together with the other evidence on record, lead to the conclusion of the guilt of the accused person. In a later case of *Aghnoo Nagesia Vs. State of Bihar*, Bachawat, J., after referring to Lord Atkin's observations in *Pakala Narayana Swami's* case and their approval in *Palvinder Kaur Vs. The State of Punjab* (Rup Singh-Caveator), define a confession as "an admission of the offence by a person charged with the offence". It is thus clear that an admission of a fact however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act."

62. In the light of the law laid down by the Supreme Court, I am of the view that the evidence of P.W.13 does not satisfy the requirement of law and the

prosecution has not proved the factum of confession.

63. The learned counsel for the petitioner Mr. R. P. Sharma referred to the following authorities:

1. Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, .
2. S. Bhagat Vs. Union of India, AIR 1982 S.C. 191.
3. Lance Dafedar Laxman Vs. Union of India and Others, .
4. Gajender Singh Vs. U.O.I., 1997 IV AD (Delhi) 582.
5. Brij Mohan @ Mohan @ Pappu Vs. State 1997 4 AD (Delhi) 586.
6. Bhuweshwar Singh Vs. Union of India and Others 1993 (5) S.L.R. 44.
7. Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others, .
8. Hukam Singh Vs. State(Thru.Delhi Admn.) 1993 3 AD (Delhi) 497.
9. Col. S.J. Chowdhary Vs. State through C.B.I. 1984 C.C.C. 266.
10. Panalal Damodar Rathi Vs. State of Maharashtra, .
11. Bhuneshwar Prasad Singh Vs. The State of Bihar, .
12. Municipal Corporation of Delhi Vs. The Sub Judge & Another 1997 2 AD (Delhi) 321.
13. The State of Uttar Pradesh Vs. Mohammad Nooh, .
14. Trilochan Joshi and others Vs. Union of India and others 1983 C.C.C. 249.
15. Lt. Col. Satish Kumar Sharma Vs. Union of India and Others 1991 (2) SCT 61.
16. Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, .
17. Ranjit Thakur Vs. Union of India (UOI) and Others, .
18. Mewa Singh (Subedar) Vs. Union of India 1997 6 AD (Delhi) 726.
19. Ex. Major Harpal Singh Vs. Union of India and Others, C.W. No. 1570/88 decided on 19.3.1996 by J.K. Mehra, J.
20. Lt. Col. V.K. Johar Vs. Union of India and Others, Civil Misc. Writ No. 25404/90, decided on 17.5.1991 by Justice Ravi S. Dhavan (Allahabad H.C.)

64. The learned senior counsel Mr. Keshav Dayal for the respondents referred to the following authorities :

1. Sukhwinder Singh Vs. Union of India 1996 4 AD (Delhi) 673.
2. Major Mohamad Sheikh Vs. Union of India & Ors. 1996 1 AD (Delhi) 162.
3. S.N. Mukherjee Vs. Union of India, .

4. Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, .
5. Major General Inder Jit Kumar Vs. Union of India and others AIR 1997 S.C. 2085.
6. Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), .
7. Capt. Ram Kumar Vs. Chief of the Army Staff, .
8. Panalal Damodar Rathi Vs. State of Maharashtra, .
9. Union of India and another Vs. Ex Constable Amrik Singh, .
10. Major G.S. Sodhi Vs. Union of India (UOI), .

65. The propositions laid down therein need not be expatiated and it is only in the light of the principles laid down by the Supreme Court I had proceeded to consider the matter. This is a case of no evidence. I had also referred to the decision of the Supreme Court in Goyal's case.

66. Mr. Keshav Dayal, the learned senior counsel submitted that the petitioner has got an effective alternative remedy u/s 164 of the Army Act,1950. The matter has been pending here for six years and on the facts and circumstances I am not inclined to accept the submission of Mr. Keshav Dayal, the learned senior counsel for the respondents that the petitioner should be asked to exhaust his alternative remedy.

67. Accordingly, I have no hesitation in coming to the conclusion that the finding rendered by the Court cannot be sustained and the punishment imposed on the petitioner is not at all justified in law.

68. The writ petition is, accordingly, allowed. The finding and the sentence imposed by the Court are quashed. The petitioner shall be entitled to all the consequential benefits. There shall be no order as to costs.