

(1998) 05 DEL CK 0045
In the Delhi High Court
Case No : CW.No. 713 of 1997

Sumer Singh (Sep.)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 27-05-1998

Acts Referred:

Citation : (1998) 4 AD 366 : (1998) 74 DLT 15

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. N.L. Bareja, for the Appellant; Mr. K.C. Mittal, for the Respondent

Judgement

K. Ramamoorthy, J.—The genesis of the writ petition is the incident that had occurred on the 20th of June, 1994 at Lukret in Sikkim. The main case against the petitioner by the respondents is that in that incident the petitioner put a punch on the back of N/Sub.Pitha Ram Bhakar.

2. There are two versions; one by the petitioner and the other by the respondents. For appropriate appreciation of the case, it is better to have the version of the petitioner which is in the following terms:-

"That on 20.06.1994, the petitioner along with Sep.Badan Singh and Sep.Dilbagh Singh, all of the same unit were detailed to perform the sentry duties at Lukret in Sikkim. At about 2130 hrs. Nb.Sub.Pitha Ram Bhakar allegedly checked the Sentry on duty. On enquiry from the Guard persons in Gd.Residential Tent, he was told that Sep.BAdan Singh Jat was supposed to be on Sentry duty from 2000 hrs. to 2200 hrs. He accordingly, advised Sep.BAdan Singh to be on Sentry Duty in proper dress and then went away to the nearby tent where Havildar Yogender Singh stayed. After remaining in the tent for about half an hour, he returned back to amn.Gd.post, where he did not find Sep.Badan Singh on duty. He got into residential Gds.tent, where he found all the three above said sentries having their meals. It appears that the JCO ill-treated, the above said sentries being his subordinates, wherein he not only shouted on them but also kicked their food to

the extent that `Dal" was found spilled on the floor and `Chapaties" were lying scattered in the tent. Sep.Badan Singh got excited and hugged the JCO who in turn tried to extricate himself and both the JCO and Sep.Badan Singh fell down on the wooden Platform used for sleeping. During the above said incident, the JCO felt as if someone has punched him in his back. Meanwhile, the JCO and Sep.Badan Singh Jat were got separated. As per evidence on record there is no evidence to indicate that JCO was punched at all. JCO taking Hav.Joginder Singh along with him reported the matter to Maj.Ashjwani Sudan. In the above said report, the JCO reported that minor altercation had taken place amongst the gds. persons and they need to be changed and he did not report about his own misbehaviour with the gds. persons or about the scuffle or he having been given a punch by somebody. The three sentries were replaced by the order of Maj.Sudan and the sentries were sent back for the night rest at about 1.00 a.m. on the night of 20/21 June 1994. On 21st Jun.1994 Maj.Sudan conducted the preliminary investigation and reported the matter to the Bn.HQ."

3. The respondents in their counter-affidavit stated that the petitioner belonged to 5 Battalion in Jat Regiment. The respondents would state:-

"In the year 1994 the unit was located in Sikkim. On 20th Jun 1994 the petitioner along with Sep.Dilbagh Singh and Sep.Badan Singh was detailed as additional guard at Magazine Guard of the Unit located at Lulerp(Sikkim). At about 2130 hours Nb.Sub.Pitha Ram Bhakhar, JCO in charge of the Magazine guard came to the Magazine location and called for the perimeter patrol guard but found no one on duty. On enquiry the JCO found that Ex.Sepoy Badan Singh was supposed to be on duty from 2000 hrs. to 2200 hrs. The JCO in charge told Sepoy Badan Singh to change into uniform and move for duty. After about 30 minutes the JCO went again to check the guard but again found no one on duty. On checking the residential tent the JCO found that the petitioner along with Sepoy Badan Singh and others was having food. The JCO in charge enquired as to why they were having food while on duty leaving the Magazine area unguarded. On being 30 asked, Sepoy Badan Singh caught hold of the JCO in charge and the petitioner punched the JCO in his back."

4. On the 21st of June, 1994, Major Ashwini Sudan conducted preliminary investigations and reported the matter to the Battalion Headquarters. On the 22nd of June, 1994, the petitioner (Sumer Singh), Sepoy Badan Singh and Sepoy Dilbagh Singh were marched before the Commanding Officer (R-4) for the purpose of preliminary hearing, as envisaged under Army Rule 22. At this stage, it is necessary to note the Army Order 70/1984 which gives the guidance to the officers. The same runs as under:-

"Disciplinary process under the Military law commences with Army Rule 22 which lays down that every charge against a person subject to the Army Act, other than an officer, shall be heard in the presence of accused. The accused shall have full liberty to cross-examine any witness against him. This is a mandatory requirement and its non-observance will vitiate any subsequent disciplinary

proceedings."

5. As per the rule and the instructions, the Commanding Officer at the time of the preliminary hearing should inform the accused about the charge. He should examine the witnesses and he should permit the accused to cross-examine them. He must also record a statement from the accused to note about his version of the incident complained of. This is a safeguard provided to the accused. This also would enable the Commanding Officer to dispose of the case. The Commanding Officer has to act with a great sense of responsibility. In this case it is not disputed that the Commanding Officer did not record any statement from the petitioner at the time of the preliminary hearing as required under Army Rule 22. Army Rule 22 reads as under:-

"Hearing of Charge._(1) Every charge against a person subject to the Act other than an officer, shall be heard in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defense.

(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, in his discretion he is satisfied that the charge ought not to be proceeded with.

(3) At the conclusion of the hearing of a charge, if the commanding officer is of opinion that the charge ought to be proceeded with, he shall without unnecessary delay_

(a) dispose of the case summarily u/s 80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary court-martial:

Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender unless either:_

(a) the offence is one which he can try by a summary court-martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline."

6. The Commanding Officer acting under the Army Rule 22 (3) adjourned the case for the purpose of having evidence reduced to writing against all the three accused. The record of the proceedings, as required under Army Order 70/1984,

is in the following terms:-

"RECORD OF PROCEEDING BEFORE

COMMANDING OFFICER UNDER ARMY RULE 22

In the case of 3184781Y Sep.Sumer Singh

(personal 5 JAT particulars of the accused

(Present Unit), attached to_____

(Unit to which attached), vide_____

quote authority).

PROCEEDINGS

1. The charge(s) against the accused has/have been read out, explained to the accused and attached as Annexure I.

2. The accused officer submits that he required/does not require that the charge(s) be heard in accordance with Army Rule 22 (I).

_____ Dt.2 Jun 94 (Signature of accused) Note: (In the case of an officer, if he does not require that the charge(s) be heard as per Army Rule 22(I) and if the Commanding Officer decides accordingly column 3 to 6 may be scored out).

3. Hearing of the charge(s) commenced on 22 Jun 94 at 1030 hrs.

4. The following prosecution witnesses were heard by me in the presence of the accused who was given full liberty to cross examine each of them:-

Date on which Personal Description Whether accused the witness particulars of of cross-examined was heard prosecution documentary the witness or orally by CO witness(es) decline to evidence cross-examine produced (only state if any "Yes" or "declined" before each witness 22 Jun 94 JC-222675K Nb.Sub Pitha Nil Yes Ram Bhakar 22 Jun 94 3169970L Hav. Nil Yes Yogender Singh 5. The accused was informed by me that he was at liberty to make any statement and call any witness in defense. A brief of the statement made by the accused is attached as Annexure II to this form.

6. The following defense witnesses were heard/no witnesses were produced by the accused:-

Date(s) Personal particulars of Description of witnesses in defense documentary evidence produced if any NIL 7. On conclusion of the hearing of the charge(s) I have given the following orders:-

Date of Order Order 22 Jun 94 Evidence to reduced in writing. 8. The above proceeding under Army Rule 22(I) were heard by me in the presence of:-

(a) IC-41611P Maj.Ashwini Sudan - 5 JAT

(b) JC-156036A Sub.Laxman Ram - 5 JAT"

7. A brief of the statement made by the accused at the time of preliminary hearing should have been attached as Annexure "II" but that was not done in this case.

8. The offence report on the basis of which the Commander held the preliminary hearing is as under:-

"AA SEC 40(a)

USING CRIMINAL FORCE TO HIS SUPERIOR OFFICER

in that he, at field on 20 Jun 94 when JC-222675K Nb.Sub.Pitha Ram Bhakar went to check the amn guard at Lukrep he found No.3184781Y Sep.Sumer Singh not on duty. On being asked as to why he was not on duty said, "Kahan batman ko JCO bana diya hai" or words to that effect and hit him with his fist on his back."

9. On the 22nd of June, 1994, the Commanding Officer directed Major Ashwani Sudan to record Summary Evidence. The basis on which the summary of evidence was directed to be recorded was that the petitioner was not on duty at the relevant time. There" is absolutely nothing on record to show that there was any complaint against the petitioner that he was not on duty at the relevant time. Evidence of N/Sub Pitha Ram Bhakar is very clear. He had deposed to two facts and the facts that had emerged out of his deposition would not show that the petitioner was not on duty.

10. If the Commanding Officer had recorded the statement of the petitioner at the time of the preliminary hearing, the Court would be in a position to assess the statement of N/Sub Pitha Ram Bhakar which was recorded on the 22nd of June, 1994. This is the main reason why such a provision has been made in the rule. The charge in the offence report is different and the facts now narrated by the witness are entirely different and, Therefore, the whole basis of the charge stands demolished. The violation committed by the Commanding Officer is of a very serious nature and that was not brought to the notice of the Chief of the Army Staff. In the nature of things, having regard to the work of the Chief of the Army Staff, he has to depend upon his subordinate officers for assistance and if all the relevant facts are not brought to his notice, the entire fault cannot be placed on the Chief of the Army Staff. The object of the Army Rule 22 is that, once the facts are recorded immediately after the incident, that will reflect what exactly had happened and the Commanding Officer would be in a position to consider the matter objectively under Army Rule 22 (3). The Commanding Officer had completely ignored the mandate of the rule. Therefore, whatever that had been done further by the Commanding Officer would not be valid, as stated in the Army Order 70/1984 which has been extracted above. N/Sub.Pitha Ram Bhakar has introduced new facts in his evidence which is as under:-

"JC-222675K Nb.Sub.Pitha Ram Bhakar of 5 Jat having been duly warned states that he identified the accused as No.3184781Y Sep.Sumer Singh and proceeds to say:-

I reached Lukrap Magazine loc at 2130 on 20 Jun 94. On reaching the gd tent loc I did not find any sentry on duty. I called for the sentry. On hearing my voice No.3178143K Sep.Badan Singh Jat came out of the gds residential tent. I asked him as to who was the sentry. He replied that he himself was the sentry. I pointed out to him that he should not be wearing slippers. I also pointed out to him that he was not on duty at the appointed place, in that he was inside his residential tent and improperly dressed. I ordered him to dress up properly and come back on duty for which he was detailed from 2000h to 7200h. On hearing this No.3178143K Sep.Badan Singh Jat went back to his tent and I went to the residential tent of No.3169970L Hav.Yogender Singh. After about half an hour I came out to check the sentry again. I did not find any sentry on duty. I again called for the sentry. When I did not get any response, I went inside the gd. tent to enquire. I found all the three gd. person. eating their food. I asked No.3178143K Sep.Badan Singh Jat as to why he had not proceeded on duty, I told him that the para on sentry duty should have had his food earlier. I also told the gd. party that 2200 hr was too late to have food. On hearing this No.3178143K Sep Badan Singh Jat used abusive language and said, "Main tere ko dekhta hun". He threw the `Chapaties" he was holding in his hand on the grind .He jumped up and move towards me and on reaching near me caught hold of me in a tight embrace. During the ensuing struggle resultant of my effort to extricate myself from his tight grip No.3178143K Sepoy Badan Singh Jat and I fell down on the wooden platform, used as bed, lying nearby. At this juncture someone started punching me in my back. I cannot say whether one or both the other person. punched me in the back. At that I shouted for help saying, "Marya, Marya mai bachao, bachao". On hearing this No.3178143K Sep.Badan Singh Jat let me go from his grasp. Also, No.3169970L Hav.Yogender Singh came running into the tent. No.3178143K Sep.BAdan Singh Jat fell on my feet and started asking for mercy. I told him that after heating a person. any body cannot ask for mercy. No.3178143K Sep.BAdan Singh Jat then move out and stood on sentry duty. I mov back to the tent of No.3169970L Hav.Yogender Singh. I tried to put a call on telex but it was not attended by anyone at the exch. No.3184781Y Sep.Sumer Singh came and started touching my feet and begged for mercy. No.3181308H Sep.Dilbagh Singh also came and asked to be excused. No.3184781Y Sep.Sumer Singh said, "Senior is God and junior is nothing". I told him I don't know English and enquired as to who out of them is No.3181308H Sep.Dilbagh Singh and No.3184781Y Sep.Sumer Singh, had hit me on my back when I was trying to extricate myself from the grip of No.3184781Y Sep.Badan Singh Jat, No.3181308H Sep.Dilbagh Singh and 3184781Y Sep.Sumer Singh, both denied having hit me. It appeared to me that they have taken alcoholic drinks but due to my inability to smell liquor I could not ascertain whether they have taken liquor or not. On my repeated enquiry as to who had punched me in

the back, No.3184781Y Sep.Sumer Singh accepted that he had hit me from the rear. I told No.3184781Y Sep.Sumer Singh to write down his confession. No.3184781Y Sep.Sumer Singh said that he had a cut on his finger hence he was unable to write. I ordered No.3169970L Hav.Yogender Singh to get writing try and write down the confession of No.3184781Y Sep.Sumer Singh and get it signed from him. When No.3169970L Hav.Yogender Singh brought the writing try and started writing the name and No. of No.3184781Y Sep.Sumer Singh, No.3178143K Sep.Badan Singh Jat came with a stick in his hand which he starting jabbing into the left side of my stomach and told No.3181308H Sep.Dilbag Singh and No.3184781Y Sep.Sumer Singh not to give any written confession, he also said, "Apne haath na katne". Meanwhile, No.3184781Y Sep.Sumer Singh and No.3181308H Sep.Dilbag Singh kept on holding my feet and groveling for mercy. I then ordered the whole gd party to go to their coy line in Ciaogang. On being told this all three of them i.e. No.3178143K Sep.Badan Singh Jat, No.3181308H Sep.Dilbag Singh and No.3184781Y Sep.Sumer Singh left for their residential tent. No.3169970L av.Yogender Singh and I then went to Lukrep Arty Exch and tried speaking to Giaogang exch but in vain. When I told the person running Lukrep arty exch that we had tried speaking to him from mag area he told us that there had been no ring received at his end. After this No.3169970L Hav.Yogender Singh and I went to IC-41661P Maj.Ashwini Sudan at Ciaogang. I instructed No.3169970L Hav.Yogender Singh to call for the offer. On doing that we were called inside by IC-41661P aj.Ashwini Sudan. We told him that there had been a minor altercation amongst the gd person. and the gd needed to be changed. At that pt of time I did not mention to IC-41661P Maj.Ashwini Sudan that the gd person had beaten me. IC-41661P Maj.Ashwini Sudan ordered a change of gd and said that this gd should be arrested. He also ordered me to go to the RP CHM and in consultation with him select a new gd party and take them for duty. I went to the RP CHM who after consulting IC-41661P Maj.Ashwini Sudan selected a new gd party and sent it Along with me to mag gd loc. The new gd party replaced the old gd party which went back to its coy line at Ciaogang. In the morning I found an empty Rum bottle lying in the residential tent of the gd. At 0730h on 21 Jun 94, I Along with No.3169162N Hav.Murari Lal went to IC-41661P Maj.Ashwini Sudan. No.3169162N Hav.Murari Lal had gone to the offr to get an amn indent signed. I was accompanying him. Major Ashwini Sudan then enquired from me about the earlier ni incident. Only then did I info him that the gd person had beaten me at ni and it was not a minor altercation amongst gd person that had taken place as had been reported to him initially at ni by me and No.3169970L Hav.Yogender Singh. The offr get angry at me and called for all the three accused at once. After carrying out prelim investigation he reported the matter at once to the unit Adj. After speaking to the Adj. he instructed me and all the three accused i.e. No.3178143K Sep.BAdan Singh Jat, No.3181308H Sep.Dilbag Singh and No.3184781Y Sep.Sumer Singh to reach the TCP for further move to Bn HQ.

The accused wishes to cross-examine the witness and proceeds to do so."

11. If the statement of the petitioner had been recorded by the Commanding Officer at the time of the preliminary hearing on 22.6.1994, the entire context of the Summary Evidence would have taken in a different turn. In the cross-examination N/Sub.Pitha Ram Bhakar denies all the facts which reads as under:

"Q.1. When we had not consumed liquor why did you falsely accuse us of taking liquor?

A. I have only said that I assumed from the actions of the gd person that they had consumed liquor. Since I had not seen them consuming liquor and due to my olfactory capabilities being nil with regard to smelling of liquor. I cannot be sure that the gd person had consumed liquor.

Q.2. When No.3178143K Sep.Badan Singh Jat was standing on duty why did you accuse the gd. party of not having a sentry on duty?

A. No one was on sentry duty when I reached the gd room area.

Q.3. When IC-41661P Maj.Ashwini Sudan had ordered you to arrest the gd person, you did not do so. You say it was because we did not have the belt on us, whereas all of us were properly dressed. Why did you lie?

A. I did not lie. I did not raise everybody's coat and check their belt when I asked for the belt no one out of you gave the belt. Hence, I assumed that you didn't have the belt on you.

Q.4. Why did you snatch the Chapaties from my hand?

A. I did not snatch any Chapaties from your hand.

Q.5. How can you be sure that the liquor bottle found in the gd room belonged to our gd party only? It could have belonged to anyone who had ever stayed in that tent.

A. I am not sure that the Rum bottle found in the gd room belonged to your gd party or not. From the actions of all gd person I had presumed that the gd had consumed liquor. On seeing the Rum bottle I presumed that the gd person had consumed liquor from that Rum bottle. However, I in sp the gd room morning and evening and during my earlier in sp I had not found any empty liquor bottle there.

Q.6. You had met the gd party at TCP Giaogang at 172Sh. After that you were at the Trg Coy loc till 2100h of your own accord. When did you check the gd room on the evening of 20 Jun 94?

A. I did not check the gd room on the evening of 20 Jun 94. However, I had checked it in the morning.

The accused No.3184781Y Sep.Sumer Singh has no further questions from prosecution witness No.1 JC-222675K Nb.Sub.Pitha Ram Bhakar.

The statement has been read to the witness JC-222675K Nb.Sub.Pitha Ram Bhakar and the accused No.3184781Y Sep.Sumer Singh in the language they understand and they sign it as correct."

12. Hav.Yogender Singh, who was examined as prosecution witness No.2, would give a different version of what had happened. His evidence is:

"No.;3169970L Hav.Yogender Singh of 5 JAT having been duly warned stated that he identifies the accused No.3184781Y Sep.Sumer Singh and proceeds to say:-

I, No.3169970L Hav.Yogender Singh move back to Lukrep mag loc along with JC-222675K Nb.Sub.Pitha Ram Bhakar after attending the evening cl of trg coy at Giaogang. We reached Lukrep mag loc around 2130h. On reaching the mag loc JC-222675K Nb.Sub.Pitha Ram Bhakar called for the sentry, meanwhile, I entered my tent. After 5 -7 min JC-222675K Sub.Pitha Ram Bhakar came inside our tent and told No.3172150K NK.Arab Singh to prep some tea. After about 25 min JC-222675K Nb.Sub.Pitha Ram Bhakar went out somewhere. After about 5 - 7 min of his move out I heard him shout, "Marya rai Marya bachao, bhachao". I admit rushed out and heard a lot of noise in the gd room tent. I admit went inside that tent. Inside I found No.3181308H Sep.Dilbag Singh sitting next to his food. No.3184781Y Sep.Sumer Singh was standing next to No.3181308H Dilbag Singh, No.3178143K Sep.Badan Singh Jat was standing in a corner and JC-222675K Nb.Sub.Pitha Ram Bhakar was standing between No.3178143K Sep.Badan Singh Jat and the other two gd person i.e No.3181308H Sep.Dilbag Singh and No.3184781Y Sep.Sumer Singh. I enquired from JC-222675K Nb.Sub.Pitha Ram Bhakar the cause for his shouting. Meanwhile, Sep.Badan Singh Jat went outside the tent. On reaching my tent the JCO narrated the whole incident to me. I got angry at that and called No.318308H Sep.Dilbag Singh and No.3184781Y Sep.Sumer Singh to my tent. They started begging JC-222675K Nb.Sub.Pitha Ram Bhakar to excuse them. JC-222675K Nb.Sub.Pitha Bhakar kept on asking them as to who had punched him. Finally, after sometime No.3184781Y Sep.Sumer Singh accepted that he has given a punch to the JCO. On hearing this, JC-222675K Nb.Sub.Pitha Ram Bhakar told No.3184781Y Sep.Sumer Singh to give his confession in writing. No.3184781Y Sep.Sumer Singh told him that h had a cut in his finger, hence, he could not write. The JCO, JC-222675K Nb.Sub.Pitha Ram Bhakar insert me to write down the confession of No.3184781Y Sep.Sumer Singh. While I started writing No.3184781Y Sep.Sumer Singh's name and No., No.3178143KL Sep.Badan Singh Jat came inside the tent and told No.3181308H Sep.Dilbag Singh and No.3184781Y Sep.Sumer Singh not to give anything in writing and he also said, "Apne haath na katna". He had a stick in his hand which he started jabbing at JC-222675 Nb.Sub.Pitha Ram Bhakar. I don't know whether that stick hit the JCO or not. At this I got angry and shouted for a `Lathi". This scared No.3178143K Sep.Badan Singh Jat and he went away. After this JC-222675K Nb.Sub.Pitha Ram Bhakar and I decided to report the matter to a Sr.Offr. We tried speaking from our tel but could not. We

tried speaking from the Lukrep arty exch in vain. Finally, I dressed up Along with JC-222675 Nb.Sub.Pitha Ram Bhakar went to IC-41661P Maj.Ashwini Sudan at Giaogang. JC-222675K Nb.Sub.Pitha Ram Bhakar insert me to tell only this to IC-41661P Maj.Ashwini Sudan that there had been a minor altercation amongst the gd perks. On being info that a minor altercation had taken place amongst the gd perks, IC-41661 Maj.Ashwini Sudan inert JC 222675K Nb.Sub.Pitha Ram Bhakar to arrest the gd perks and to change the gd perks in consultation with RP CHM. We went to the RP CHM. He detailed new gd which came with us to Lukrep and changed the earlier gd. The above mentioned statement has been read to No.3169970L Hav.Yogender Singh in the language he understands and he signs it as correct."

13. In the cross-examination, Hav.Yogender Singh would state:-

"Q.1. When you reached the Lukrep Magazine loc and Nb.Sub.Pitha Ram Bhakar shouted for a sentry, did No.3178143K Sep.Badan Singh Jat reply back that he was the sentry on duty or not?

A. Yes, he did reply back saying that he was the sentry duty from inside the gd.residential tent.

Q.2. When you entered the guard room, did you see any Dal spilled on the ground and some Chapaties broken and littered on the ground?

A. I did find some Dal spilled on ground. I did not see any Chapaties, however.

Q.3. Did you find JC-222675K Nb.Sub.Pitha Ram Bhakar being beaten by any one of us?

A. I did not see any such beating in the gd. room. However, I did see No.3178143K Sep.Badan Singh Jat jabbing a stick at JC-222675K Nb.Sub.Pitha Ram Bhakar.

Q.4. In your opinion, had all the gd. perks consumed liquor?

A. Yes, I assume so. From their behavior it assumed as if they have consumed liquor.

Q.5. Why did you not report the incident of beating of JC-223675K Nb.Sub.Pitha Ram Bhakar by the gd party to Maj.Ashwani Sudan? Why did you say to him at ni that a minor altercation had taken place between gd perks?

A. I reported the matter of minor altercation amongst gd perks at ni to IC-41661P Maj.Ashwini Sudan because JC-222675K Nk.Sub.Pitha Ram Bhakar had directed me to do so.

Q.6. What time did Nb.Sub.Pitha Ram Bhakar leave for Giaogang Trg Coy loc from Lukrep on 20 Jun 94? Were you there with him at that time?

A. No, I was not there with him at that time and I don't know what time did he leave for Giaogang from Lukrep.

Q.7. Do you know at what time did he reach the Trg Coy loc at Giaogang?

A. No, I don't know.

Q.8. Did Nb.Sub.Pitha Ram Bhakar ask for the belt of guard perks in front of you? or, did he tell you to take their belt?

A. No, he did not do any such action in front of me and nor did he order me to take the belt.

Q.9. Is there any civil liquor shop around Lukrep?

A. I don't drink and I don't have any knowledge on the subject.

Q.10. Were you with Nb.Sub.Pitha Ram when he confiscated the empty liquor bottle from guard room? Were you with him since morning?

A. Yes, I was with the JCO at the time of his confiscating the empty liquor bottle. Also, we had woken up at the same time in the morning and I was with him since then.

The accused has no further questions from the prosecution witness No.2 No.3169970L Hav.Yogender Singh.

The above statement has been read to the individuals i.e. No.3169970L Hav.Yogender Singh and No.3184781Y Sep.Sumer Singh in the language they understand and sign it as correct."

13A. The petitioner gave his statement which is as follows:-

"After recording the statement of prosecution witnesses the accused was cautioned in the presence of JC-177946F Sub Chuna Ram of 5 Jat as under:-

Do you wish to make any statement? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and maybe given in evidence".

The accused No.3184781Y Sep.Sumer Singh wishes to make a statement and proceeds to do so.

No.3181308H Sep.Dilbag Singh and I were having our food in our tent when JC-222675K Nb.Sub.Pitha Ram Bhakar came to our tent. He abused us and said, "Tum itne ranges ho gaye ho ab khana kha rahe ho". His ft hit our bowl of food and its contents got spilled. I don't know whether he deliberately kicked our bowl or it happened involuntarily. After this he snatched the Chapaties which were in my hand. When I took back the `Chapaties" from his hand, he slapped me on the rt check. No.3178143K Sep.Badan Singh Jat who was standing on sentry duty came inside the tent on hearing the noise. No.3169970L Hav.Yogender Singh and No.3179150K Nk.Arab Singh also came in. No.3178143K Sep.Badan Singh Jat went back to his duty outside the tent. JC-222675K Nb.Sub.Pitha Ram Bhakar also went out. I overheard JC-222675K

Nb.Sub.Pitha Ram Bhakar say using abusing terms, "Agar L.Nk.Budh Ram a Coy, He Coy ke teen jawanon ko saja dilwa sakta hai to main to bahut kuchh kar sakta hun". After that JC-222675K Nb.Sub.Pitha Ram Bhakar and No.3169970L Hav.Yogender Singh reported the matter to someone. On their return after reporting the matter we were ordered to move back to our coy bk. On arr of the new gd. we were told by No.3172150K NK.Arab Singh to move back to our Coy loc. No.3172150K NK Arab Singh told us to report to RP CHM he instructed us to report to the Coy CHM at the coy loc and he also told us to ring him up on reaching coy locality. On reaching the coy loc we reported to Hav.Ram Niwas, Offg.CHM. There we came to coy Sr.JCO's room and tried ringing up from their hut in vain. There the coy Sr.JCO told us to go and not to worry about reporting to RP CHM on tale. He would do the needful. After that around 0130h on 21 Jun 94 we came and slept in our barrack."

The statement has been read out to the accused in the language he understands and he signs it as correct."

14. The Commanding Officer issued a certificate on the 22nd of June, 1994 that the petitioner refused to sign Appendix "A". Two witnesses had attested the certificate which is in the following terms:-

"CERTIFICATE

The accused refused to sign on Apex "A" to AO 70/84 in the presence of the following:-

(a) IC-41661P Maj Ashwani Sudan - 5 JAT.

(b) JC-156036A Sub.Laxman Ram - 5 JAT.

1. _____ (IC-41661P Maj.Ashwani Sudan) 2. _____ (JC-156036 Sub.Laxman Ram) Station: Field (KK Bhattacharya) Col.dated: Dated; 22 Jun 94 CO" These two perksons had not been examined.

15. The Commanding Officer had assumed that the petitioner had put a punch on the of JCO when there is no evidence.

16. Shri Yogender Singh, who was the second witness in the Summary Evidence, was examined as third witness in the Summary Court Martial. The Court put the questions and the questions and answers are recorded as follows:-

"No.3169970L Hav.Yogender Singh being sworn is examined by the Court.

Q.1. When you and JC-222675K Nb.Sub.Pitha Ram Bhakar were sitting in your tent, did No.3184781Y Sep.Sumer Singh confess that he had hit Nb.Sub.Pitha Ram Bhakar on his back?

A. Yes, he had confessed hitting the JCO Nb.Sub.Pitha Ram Bhakar.

Q.2. When JC-222675K Nb.Sub.Pitha Ram Bhakar told No.3184781Y Sep.Sumer

Singh that you write your statement, did Sep.Sumer Singh say that he has got injury in his finger?

A. Yes, he said that.

Q.3. When JC-222675K Nb.Sub.Pitha Ram Bhakar told you to write the statement, and you were noting down the name and No., did Sep.Badan Singh Jat say, "Likhit mein kuchh nahin dena, isse hamare haath kat jayange"?

A. Yes, he said that."

17. What is recorded by the Commanding Officer is that the petitioner declined to cross-examine the prosecution witness No.3. A perusal of the deposition of Yogender Singh would show that he does not bring about any facts from which even a semblance of inference could be made about the guilt of the petitioner.

18. Sepoy Dilbagh Singh, who was arraigned along with the petitioner was examined as second witness in the Summary Court Martial. His statement was not recorded at the time of recording of Summary Evidence. How a person, who was accused, is now examined as a witness against the petitioner has not been explained by the Commanding Officer or the respondents in the counter. Mr.N.L.Bareja, learned counsel for the petitioner submitted that the examination of Sepoy Dilbagh Singh at the time of the trial of SCM was contrary to Army Rule 135.

19. The learned counsel for respondents, Mr.K.C.Mittal, submitted that the respondents had acted in accordance with rule.

20. Before I notice the evidence of this witness, it is better to have the Rule 135 itself.

"Calling of witness whose evidence is not contained in summary._

If the prosecutor, or, in the case of a summary court-martial, the court intends to call a witness whose evidence is not contained in any summary or abstract of evidence given to the accused, notice of the intention shall be given to the accused a reasonable time before the witness is called together with an abstract of his proposed evidence; and if such witness is called without such notice or abstract having been given the court shall, if the accused so desires it, either adjourn after taking the evidence of the witness, or allow the cross-examination of such witness to be postponed and the court shall inform the accused of his right to demand such adjournment or

21. According to Mr.Mittal, learned counsel for the respondents, the rule had been complied with but Mr.Bareja, learned counsel for the petitioner submitted that if a witness is to be examined but had not been examined at the time of Summary Evidence, the Court shall inform the accused of his right to demand an adjournment or postponement. and that was not done in this case and that would vitiate the entire proceedings and that such last part of the rule was not followed, cannot be disputed by the respondents. Therefore, the examination of

Sepoy Dilbagh Singh was not valid in law. Therefore, his evidence cannot be looked into at all for any purpose whatsoever. But all the same, even if we look into the evidence, that would only go to prove that the Commanding Officer had somehow made an attempt to bring in evidence to establish the guilt of the accused. The evidence of Dilbagh Singh is as under:-

"No.3181308H Sep.Dilbag Singh being sworn is examined by the Court.

Q.1. When No.3178143K Sep.Badan Singh Jat and JC-222675K Nb.Sub.Pitha Ram Bhakar fall down during the scuffle Nb.Sub.Pitha Ram Bhakar has said that someone has hit him from behind. Can you say who hit him?

A. In the second tent No.3184781Y Sep.Sumer Singh confessed hitting the JCO, JC-222675K Nb.Sub.Pitha Ram Bhakar.

Q.2. When you went to No.3169970L Hav.Yogender Singh's tent did Sep.Sumer Singh confess that he had hit Nb.Sub.Pitha Ram Bhakar from behind on his back in the first tent?

A. Yes, he confessed hitting the JCO.

Q.3. When No.3184781Y Sep.Sumer Singh had confessed that he had hit Nb.Sub.Pitha Ram Bhakar on his back at that time Nb.Sub.Pitha Ram Bhakar had asked Sep.Sumer Singh to write down his statement accordingly. At that time Sep.Sumer Singh said that he had injury on his finger. Was No.3169970L Hav.Yogender Singh asked to write the statement on his behalf?

A. Yes.

Q.4. When No.3169970L Hav.Yogender Singh was writing the statement, No.3178143K Sep.Badan Singh Jat to said Sep.Sumer Singh not to give anything in writing. He said, "Likhit main kuchh mat dena, isse hamare haath kat jayange", Did he say so?

A. Yes, he said that."

This would not bring out anything to point out the guilt to the accused.

22. The JCO, N/Sub Pitha Ram Bhakar gave evidence before the Court and his evidence is as under:-

"Q.1. When you noticed the sentry was not on duty you again went to the gd. res. tent. At that time during fight, did No.31/8143K Sep. Badan Singh Jat grasp you from behind?

A. Yes.

Q.2. When you fell down, did someone hit you from behind?

A. Yes.

Q.3. Can you say who hit you from behind?

A. I was hit by No.3184781Y Sep.Sumer Singh on my back. Sep.Sumer Singh has confessed about it in the second tent where he came subsequently.

Q.4. When No.3184781Y Sep.Sumer Singh confessed of hitting you, who all were present in the tent?

A. At that time, No.3169970L Hav.Yogender Singh and No.3181308H Sep.Dilbagh Singh were present."

His evidence also does not bring home the charge alleged against the petitioner.

23. The learned counsel for respondents, Mr.K.C.Mittal, submitted that the petitioner, who was present at the time of the Summary Court Martial, which is not disputed, did not chose to cross-examine the witness, and Therefore, the evidence recorded should be accepted to be correct. A reading of the evidence recorded at the Summary Evidence and the cross-examination and the evidence recorded at the time of the Summary Court Martial would show that no offence had been made out against the petitioner. The evidence of the witnesses has absolutely been incoherent, totally illogical and not consistent with offence report, not consistent with natural course of human conduct. At the time of the Summary Court Martial, a new case of intoxication was brought in.

24. Mr.Bareja, learned counsel for the petitioner, submitted that Sepoy Badan Singh, who was an eyewitness, had not been examined and that vitiates the proceedings. No Explanation is forthcoming from the respondents as to why Sepoy Badan Singh was not examined at the time of recording of Summary Evidence or at the time of the Summary Court Martial.

25. The learned counsel, Mr.Bareja, submitted that provisions of Army Rule 34 had not been followed. According to the learned counsel for petitioner, the charge-sheet dated 2.7.1994 annexed as B-2 by the proceedings was not furnished to the petitioner and the petitioner was served with a tentative charge-sheet on 1.7.1994 and the final charge-sheet was not given to him. The answer is that what was given is final charge-sheet and the description as "tentative charge-sheet" was a mistake. Mr.Bareja, learned counsel for the petitioner submitted that the time of the offence is stated to be at 21.30 in the charge-sheet but the witnesses speak to a different time and, Therefore, according the learned counsel, the Commanding Officer had not applied his mind to the events. The learned counsel for the petitioner raised various other contentions but I am of the view that in view of the what has been discussed above, it is not necessary to go into the other points.

26. The offence report and the charge-sheet issued on 2.7.1994 are different and they are contradictory to each other and as I noticed above, the Commanding Officer had not followed the Army Rule 22 and the evidence recorded does not disclose any offence. The whole thing is a made-up affair by the Commanding Officer and there is absolutely no evidence on record to sustain the conviction and the sentence and the punishment imposed by the SCM.

27. The learned counsel for the petitioner, Mr.N.L.Bareja, relied on the following rulings:

1. "Prithpal Singh Vs. Union of India & Others" 1984 3 SLR 675 (J&K)

2. "Lt.Col.Prithi Pal Singh Bedi Vs. Union of India & Others

And

Captain Dharam Pal Kukrety & Another Vs. Union of India & Others

And

Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others,

3. Ranjit Thakur Vs. Union of India (UOI) and Others, ,

4. "Nb/Sub Avtar Singh Vs. Union of India & Others" 1989 4 SLR 579 (Delhi)

5. S.N. Mukherjee Vs. Union of India, ,

28. In Prithpal Singh's case 1984 3 SLR 675, the High Court of Jammu & Kashmir had dealt with the scope of Rule 129 of the Army Rules, which deals with Court Martial providing accused, what is called, a friend of the accused. The High Court of Jammu & Kashmir observed:-

"The most important aspect of the case is as to whether the petitioner had pleaded guilty to the charges as is suggested by Mr.Hussain or not Plea of guilt recorded by Lt.Col.Mehta is de hors R.155 of the Army Rules. In the first place the alleged plea of guilt is unsigned by the authorities.

Surprisingly the petitioner also has not signed the alleged plea of guilt. At what stage word "guilty" was recorded against each charge is not known. If it was recorded in presence of the accused-petitioner obviously his signatures would have been obtained on it. Then the minutes of the enquiry should have contained an advice to the petitioner not to plead guilty as enjoined by R.115 of the Army Rules. This important mandate of the Rule has been flagrantly violated. Therefore, the proceedings conducted by the Summary Court Martial which have affected the petitioner's fundamental rights as he is deprived of his job are vitiated. The protection afforded by the procedure should not have been denied to the petitioner if it was intended to proceed against him under the Army Rules. As to whether charges were correct or not as already observed this court cannot go into that aspect of the matter. But certainly this court will set aside the punishment which is awarded to the petitioner on the ground that the decision to punish the petitioner was taken by contravening the mandate of Rules. Such a decision would be arbitrary and shall be violative of the guarantees contained in Art.14 of the Constitution. The argument of the learned counsel for the respondent that the petitioner was not prejudiced in any manner during the Summary Court Martial proceedings is devoid of force. The petitioner has suffered punishment of dismissal from service and the punishment is awarded by conducting proceedings in such a manner which were neither fair nor judicial.

Could the Summary Court Martial observe the Rules governing the conduct of Summary Court Martial in breach. Answer to this question will be emphatic no in view of the glory of the Constitution and rights guaranteed by it."

29. Mr.Bareja, learned counsel for the petitioner submitted that the entire SCM proceedings, as per the record produced, would appear to have been concluded in just an hour. According to the learned counsel, the Commanding Officer had typed out the entire proceedings. He had not taken the signatures of the petitioner in any of the proceedings . Though the petitioner was present at the time of the SCM, he was not asked anything and whole recordings had been made without his knowledge. Therefore, according to Mr.Bareja, the submission by Mr.K.C.Mittal, learned counsel for the respondents, that the fact that the petitioner was present at the time of the Court Martial trial what the petitioner stated would not be correct, cannot be accepted.

30. I am incline to agree with Mr.Bareja because the Commanding Officer had not taken his signatures in any of the proceedings and, as I noticed above, proceedings are typed out. In his letter to the father of the petitioner, the Commanding Officer had given a different version and now the punishment imposed is different in the proceedings. There is no Explanation from the respondents as to why the Commanding Officer did not take the signatures of the petitioner. The same Commanding Officer had recorded the fact on the 22nd of June, 1994 in the presence of witnesses that the petitioner refused to sign but in the Summary Court Martial there is no such recording. Therefore, whatever that stated in the Summary Court Martial proceedings cannot be given any credence at all.

31. In S.N. Mukherjee Vs. Union of India, the Constitution Bench of the Supreme Court had laid down:-

"It must be concluded that except any cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority, exercising judicial or quasi-judicial functions, is required to record the reasons for its decision"

32. Mr.Bareja referred to the following Judgments for the purpose of showing that the punishment imposed is out of all proportion to the offence complained of.

1. "Ex.Naik Sardar Singh Vs. Union of India & Others" AIR 1992 SC 417

2. Bhagat Ram Vs. State of Himachal Pradesh and Others,

33. Mr.K.C.Mittal, learned counsel for the respondents relying up the following Judgment of the Supreme Court contended that once the petitioner had participated in the Summary Court Martial, the pre trial violation cannot be the subject matter of any complaint:"

Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), .

The Supreme Court was concerned with the case of a Major in the Indian Army.

The Supreme Court had referred to the provisions of Rule 22 and had also referred to the judgment in Prithipal Singh's case. Therefore, the judgment of the Supreme Court is not an authority for the proposition that when there has been violation of the rules, the participation of the accused in the Court Martial would render the violation valid.

34. For the foregoing reasons, I have no hesitation in coming to the conclusion that the proceedings of the SCM and the order of the Chief of the Army Staff dated 1.7.1997 cannot be sustained in law. Accordingly, they are quashed.

35. The writ petition is allowed in above terms.

36. The petitioner shall be reinstated in service with all consequential benefits on or before the 31st of July, 1998.

37. There shall be no orders as to costs.