

FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL , KOLKATA BENCH

APPLICATION NO :OA NO.100 OF 2011

ON THIS 30<sup>th</sup> DAY OF AUGUST, 2012

CORAM

HON'BLE JUSTICE H N SARMA , MEMBER (JUDICIAL )

HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

SHRI R Nasik Raja ,  
Permanent resident of village Munchirai, P.O. Pathukkadai,  
Tehsil: Vilavancode, Dist. Kanyakumari, Tamil Nadu.  
Presently residing at Care of Mr. Ajay Jalan, Trade & Technology  
Private Limited, 304, Sikkim House, 4/1, Middleton Street,  
Kolkata – 700 071.

.....Appellant

-VS-

1. Union of India through  
The Secretary , Ministry of Defence,  
South Block,  
New Delhi – 110 011.
2. The Chief of Army Staff,  
Integrated HQ of MoD (Army),  
DHQ PO,  
New Delhi – 110 011.
3. Adjutant General,  
Integrated HQ of MoD (Army),  
DHQ PO,  
New Delhi – 110 011

..... Respondents

For the petitioner : Mr. Sandip Kumar Bhattacharyya , Advocate

For the respondents : Mr. Dipak Kumar Mukherjee , Advocate

### JUDGEMENT AND ORDER

#### Per HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

The appellant Ex Havilder R Nasik Raja of 80 Field Regiment was enrolled on 12.12.1994. Subsequent to an incident on 5.8.2006 that happened in his Unit i.e. 80 Field Regiment, while at Satwari, Jammu, the appellant was charged, for assaulting his superior officer, Lt. Col. S K Jaini, Second-in- Command (2 I/C) of his Regiment with a loaded weapon pointing at him and saying "humbhi kutch kar sakte hai", under Section 40(a) of the Army Act, 1950. For the above offence the appellant was tried by a Summary Court Martial (SCM) on 29.08.2006 and awarded the punishment of 'reduction to rank and dismissal from service'. Being aggrieved with the ibid SCM sentence and having exhausted all other options like petition to COAS under Section 164(2) of Army Act, he approached this Tribunal with this appeal against the said SCM praying to set aside the SCM verdict.

2. The appellant in his appeal has stated that his father was an ex serviceman who died in the year 1988 and had plenty of domestic problems. Despite of such family problems he continued to serve in his unit and was deployed in J&K (Satwari, Jammu) since December, 2004. Being an area under insurgency, he, as per orders, was to carry weapon at all times. On 05.08.2006, the appellant attended the Sainik Sammelan of the Unit and for the purpose of ceremonial convenience, borrowed the INSAS rifle of one of his junior colleague i.e. 151719953 Gunner/Svy Dinu G , because his own personal weapon was a carbine which was not suitable for ceremonial purpose. During the Sainik Sammelan the appellant was admonished by Lt. Col. Jaini, 2-I-C of the Unit for not having proper haircut. The appellant replied to him that he had a hair cut, but in civil area. He was subjected to such admonishment in front of the whole regiment. The appellant submits that being a Havildar, he felt slighted for such humiliation in public in presence of his subordinates. The 2 I/C Lt. Col. Jaini did not appreciate his answer and the manner in which he, as a subordinate, had answered him and therefore directed his Battery



Commander (immediate superior officer of the appellant) to take action against him. Soon after the sainik sammelan, the appellant was called to the office of the 2 I/C Lt. Col. Jaini on the same day at around 9.40 AM and accordingly he entered the office of the 2 I/C with his INSAS rifle hung on his shoulder. There in the office he was confronted with the same question of not taking proper hair cut to which the appellant admits to have replied "aap mere piche kiun pare ho". He further submits in his application that immediately thereafter he found the Adjutant Captain Sandip Nagpal, the JA, Subedar Murugesan R also entered the office of the 2 I/C and Subedar Murugesan was directed by the 2 I/C to take away his weapon. His weapon was thus taken away. Sub Murugesan along with the 2 I/C and Adjutant left the office of the 2-I-C to report the matter to the Commanding Officer Col. K D S Sahney

3. The applicant was also taken to the office of the Commanding Officer and was immediately told that his INSAS rifle was loaded with a bullet in the chamber with safety catch in "R" position. He was asked as to why he had pointed this loaded weapon and threatened the 2 I/C by uttering words like "hum bhi kuch kar sakte hai". The appellant submits that he was surprised with such fabricated allegations and version of the incident which he stoutly denies.

4. Soon after that incident on the same day i.e. on the 5<sup>th</sup> August, 2006 the appellant was sent to the Military Hospital for psychiatric check up but Military Hospital declared him medically fit and discharged him after 17 days on 21.08.2006. Thereafter the summary of evidence was recorded on 23.08.2006 and, as submitted by the appellant, was completed within one hour on the same day. The SCM against him was held on 29.08.2006 in which he was stated to have 'pleaded guilty' and was inflicted the punishment of (a) reduced to rank; and (b) dismissal from service.

5. On receipt of the sentence the applicant submitted a petition to the COAS for revision under Section 164(2) of the Army Act on 12.10.2006. However, the said petition was rejected by the COAS on 14.07.2007.

6. The appellant is represented by learned counsel, Mr. Sandip Kumar Bhattacharyya. In the application of the appellant he has contested that his plea to the COAS under Section 164(2) of the Army Act was rejected without application of mind and against natural justice. In the said application he has also submitted that Lt. Col. Jaini, the 2-I-C was out to fix him and therefore he alleged that the fabricated charge was framed. To substantiate the above, the applicant has submitted that mandatory



provisions of the Army Act and Army Rules were flouted in conduct of SCM. Besides other reasons that have been submitted listed in para 5 pages 10 and 11 of the application, the major points that the learned counsel for the applicant Mr. Bhattacharyya pointed out on behalf of the appellant are as under:-

- (a) The undue hurry and the manner in which the appellant was dealt with after commission of the alleged offence and then trial by SCM reveals that the aspect of natural justice was violated because the entire process was unduly hastened and the entire incident of alleged assault was fabricated. To substantiate his point he submitted that had he indeed committed such an offence pointing a loaded weapon to a superior officer of the rank of Lt. Col., the logical action should have been to immediately disarm him, arrest him, seize the weapon and then proceed with him as per rules. In the instant case, however he brought to our notice that the appellant was reportedly disarmed and then sent to the military hospital for psychiatric check up without subjecting him to any sort of arrest after committing such a grave offence under Section 40(a) of the Army Act as has been alleged. He further brought to our notice that subsequent to his discharge from hospital on 21.08.2006, as would be evident from the SCM records, summary of evidence was ordered on 22.08.2006 at 12.30 hrs. **(confirmed from SCM records)** without going through the process of court of inquiry. The summary of evidence was recorded on 23.08.2006 and the officer submitted the same to the Commanding Officer on 24.08.2006. Subsequently on 24.08.2006 itself regimental order was published for convening of summary court martial (RO No. 319/2006) on 24.8.2006. As per this order, the SCM was to assemble on 29.08.2006. The SCM was held on 29.08.2006 and having pleaded guilty the appellant was punished with reduction to rank and dismissal from service. Before the SCM, the applicant was entitled to a copy of the charge-sheet and summary of evidence on 24.08.2006, which, as submitted by Mr. Bhattacharyya, was not given to him.
- (b) The learned counsel of the appellant has also raised few other issues of grave injustice besides the undue hurry in conduct of the SCM. Firstly he submitted that the only Exhibit produced at the S of E and SCM was a copy of the hospital discharge slip indicating that he was admitted on 05.08.2006 and discharged on 21.08.2006 at 1800 hrs. He was evaluated fit in all respects and needed no further observation of treatment **(confirmed from SCM**



proceedings). Mr. Bhattacharyya at this point categorically brings to our notice that the weapon, which was allegedly used by the appellant to threaten the superior officer with a round loaded in it, was not produced as an Exhibit at any stage during summary of evidence or during SCM trial. The bullet and the magazine of the alleged weapon were also not produced during any stage of the trial. These, according to the learned counsel, were important exhibits of material evidence to substantiate the charge for which the appellant has been found guilty.

(c) In the SCM proceedings, the appellant has pleaded guilty, as has been recorded; but the recording stated 'pleaded guilty of the said charge'. The Court, however, considered him of being 'guilty' and the SCM proceeded in a procedure as it should be for a case where the accused had pleaded 'guilty'. Further the learned counsel for the appellant, after opposing the court martial records, submits that in the very next page of the SCM proceeding the appellant, has stated that 'did not point the weapon.' Mr. Bhattacharyya further argues that although such an answer was given with reference to the charges or in mitigation of punishment, it was a clear contradiction to the earlier answer of 'pleading guilty'. Moreover, he brings to our notice that it is evident from the statement of the appellant in the summary of evidence (statement of the accused) that he did not point the weapon, the weapon was not loaded and he was not guilty of the charge of assaulting superior officer under Section 40A of the Army Act. Therefore there is a grave doubt to absolute indication that the entire proceeding, according to the counsel, were manipulated and the appellant's signature obtained so as to dismiss him from service through the modalities of a framed SCM, as put forth by the learned counsel for the appellant.

7. Mr. Bhattacharyya, in order to further substantiate the sinister motive of the authorities, submits that if the offence committed by the appellant was so severe as assaulting a superior officer by threatening him with life with a loaded rifle pointed at him, then in that case the punishment ought to have been far more severe than mere dismissal from service. It would have deserved reporting the matter to the higher authorities and convening of a District Court Martial (DCM) or a GCM. Here in this case, however, the authorities in 80 Field Regiment, according to him, hurriedly tried everything to just



throw him out of the Unit. They perhaps tried first to declare him as a psychiatric patient and board him out medically but it failed since the medical authorities found he was absolutely fit. It is then within a week of his discharge from hospital, he was dismissed through a SCM after completing all the formalities in just 4-5 days. The whole process, according to the learned counsel for the appellant, would not stand the scrutiny of natural justice besides the other technical latches that are evident from conduct of the SCM.

8. The learned counsel for the appellant brought to our notice contradiction between the statements of witnesses examined in the summary of evidence. To that extent he brought to our notice that witness No. 1 Lt. Col. Jaini in para 6 of his statement as PW 1 says " I called my runner ..... D Prabhu and summoned Sub Murugesan , Sub Major Philip Samuel and Adjutant Capt. Sandip Nagpal .....". But when compared with the statement of D Prabhu as witness No. 5, there bears no corroboration of such direction being given to him by the 2 I/C. In fact in his statement D Prabhu (PW 5) states that he went to call on L/NK Suresh C . There are also other contradiction which was pointed out between PW-2 and 3 in the summary of evidence. PW-3 in his statement states that on being called at 1015 hrs. at 2 I/C office he saw Sub Maj Philip Samuel, Sub Murugesan and the appellant (Nasik Raja) were standing there. The office runner of 2 I/C D Prabhu (PW 5) does not corroborate this aspect also.

9. It has further been submitted by Mr. Bhattacharyya that it is evident from the summary of evidence and statements of witness No. 1 and 3 that the Sub Major Philip Samuel was present in the 2 I/C office having been called by him. He would also have been present in the CO's office as the appellant was taken there. It is further clear from the statement of PW 1 and 3 that the Battery Commander of Hav Nasik Raja (appellant) was told by Lt. Col. Jaini the 2-I-C to take appropriate action against Hav Nasik Raja for his un-military like behavior. Despite that, Mr. Bhattacharyya submits that there was no reason for the 2 I/C to again call the appellant with a view to counsel him for the same purpose. Lt. Col. Jaini in his own statement as PW-1 (Para 5 of the statement) called the appellant to his office to counsel him for his un-military like behavior. Therefore, it is evident , according to him, that he was indeed after the appellant to punish him by some means or the other. He could not have been punished twice for the same alleged offence both by counseling by the 2-I-C and also by appropriate action by the Battery Commander!



10 Mr. Bhattacharyya also brought to our notice that the Sub Major of the Unit and the Battery Commander who is of the rank of a Major and the immediate superior officer of the appellant were conveniently not called by the prosecution to depose in the summary of evidence who, according to him, were vital and credible officer witnesses even from the point of view of prosecution. But perhaps they were not toeing the line of Lt. Col. Jaini, as assumed by him.

11. Learned counsel for the appellant brought to our notice that the printed portion in the SCM proceeding that brings out the verbatim of the certificates as obtainable in under Section 115(2) should actually have been placed before asking question No. 1 in the arraignment and not after asking the questions.

12. Learned counsel also brought to our notice that in page J of the SCM proceeding the signature of the accused has not been obtained, thus keeping the accused in dark with regard to the punishment that was to be promulgated against him later.

13. The learned counsel summed up his argument by submitting that the appellant was not at all given adequate time to prepare his defence. Everything was carried out in a very hurried manner without any consideration to the process of natural justice and keeping the accused in dark at all times. He in his petition as well as during his oral argument submitted that the accused, in this case the appellant, was not given the facilities of the interpreter during the summary of evidence, not provided with a Hindi/Tamil copy of the summary of evidence and even during the trial he did not find adequate assistance to explain him the details of proceeding except for asking him to sign on the dotted lines. The prayer of the appellant therefore as contained in para 8 of the OA relates to quashing and setting aside the punishment awarded to the appellant in the SCM, quash and set aside the order dated 14.07.2007 being reply of the Chief of Army Staff turning down his prayer under Rule 164. This rejection order was communicated to the appellant vide Army HQ letter dated 18.07.2007, which is the impugned order.

14. Besides the above, the appellant has also prayed for reinstatement into service with all consequential benefits including pay and allowances for the intervening period and costs.

15. Condonation of delay for this application was sought and obtained by the appellant through his prayer in MA No. 29/2011 which was disposed on contest and the said MA was allowed vide this Tribunal Order dated 01.12.2011.



16. While contesting the main application i.e. OA No. 100/2011, Mr. Dipak Kumar Mukherjee, learned counsel on behalf of the respondents, in the affidavit in opposition has agreed to the facts on records. He also admits to the fact that on 05.08.2006 the appellant was admonished by the 2 I/C Lt. Col. Jaini along with 4-5 other jawans for their improper hair cut. He has reiterated that the appellant was not the only one who was checked. Considering the insurgency situation in the area where the Unit was located, the 2 I/C intended to tell the appellant that they should not go to the market for hair cut but get it done by unit barber. The appellant however replied in an insolent manner for which the 2-I-C directed the Battery Commander to take appropriate action.

17. As regards the subsequent incidence, the interview by the 2 I/C, Lt. Col. Jaini, in which the appellant was called to his office, the respondents in their affidavits state that the appellant entered the office with a fully loaded weapon (INSAS Rifle) with safety catch on 'R' and started arguing with the 2 I/C in a threatening manner with the rifle pointed at him. Thereafter he was disarmed. The statement that appeared in the summary of evidence (PW-1) are generally the contents of the affidavit in opposition. Mr. Mukherjee also concedes that the appellant, after being seen by the C.O, was immediately sent to the military hospital (166 MH) for psychiatric check up, but returned on 21.08.2006 fully fit. Thereafter the sequence of dates with regard to the conduct of SCM is concurred by the respondents.

18. They have also agreed to the award of sentence to the reduction of rank and dismissal from service. His petition under Section 164(2) of the Army Act was rejected vide order dated 14.07.2007 by the COAS.

19. The respondents denied that the 2 I/C was holding grudge or allegations for the appellant for any reason, thus contesting the allegation 'dislike' by the 2 I/C for the appellant. In fact, he further submits that it was the 2I/C who had recommended the application of the appellant for a posting to his home town so as to mitigate his family problem. To the contrary, the respondents in their affidavit in opposition submit, that the 2 I/C was very sympathetic to the appellant. As regards the incident on 5.8.2006, it was a routine discipline check and it had nothing to do with any personal like or dislike.

20. As regards carrying of personal weapon, the respondents deny the contentions of the appellant that he was required to borrow the INSAS rifle for any ceremonial work. In fact he could not find his own personal weapon, which was a 9 mm carbine, and the fact that he borrowed a 5.56 mm INSAS rifle



from another soldier was grossly improper. This breach of rule according to him was overlooked by the SCM, since he was being charged for a more serious offence.

21. The respondents admit that the appellant was called to the office of the 2 I/C for counseling on 05.08.2006 but at the same time they also admit that the 2 I/C had directed the Battery Commander to take action against the appellant as the hair cut defaulter and his un-military like conduct, when he was checked for improper hair cut. Both actions were directed for the same offence.

22. The respondents in their affidavit in opposition deny the defects and the irregularities in the SCM, that were pointed out by the appellant, but would say that they would continue to rely on the SCM proceedings and the defects were very minor, if any, which are ignorable under Army Rule 149.

23. As regards the summary of evidence, the respondents contest that there was any undue hurry at any stage and submit that the summary of evidence was conducted in a very smooth and proper manner in accordance with law. With regards to language used in the S of E, they rely on Army Rule Section 23(4) that stipulates the requirement of English. Notwithstanding, the respondents submit that all proceedings were adequately translated into Hindi or in the language that the appellant understood. Therefore the contention of the appellant that he did not understand the details of the proceedings at any stage was not true. It has been further substantiated by the respondents that the appellant was a surveyor by trade and his fundamental knowledge in English was adequate.

24. Mr. Mukherjee both in his affidavit and during his oral submission, contested the points of inadequate time for preparation of defence, as brought out by the learned counsel for the appellant. To this effect, Mr. Mukherjee clarified that the appellant was given adequate time to prepare his defence at every stage. In fact for the SCM he was given more than 96 hours to prepare his defence and he never asked for any more time.

25. He also contested the points raised by the appellant that the Chief of Army Staff rejected his petition under Section 164 with inadequate application of mind in an unjust manner. In fact, according to him, the petition was rejected as it was devoid of merit and substance and the finding of the Court was based on cogent and reliable evidence.

26. In view of the above, the learned counsel for the respondents brought out that the application should be dismissed for lack of substance.



27. The respondents on the direction of the Bench submitted the complete Court Martial Proceedings, the SCM case file as received from the Record Office and also a copy of the advice of the DJAG HQ 9 Corps in this case. We have perused all these documents and they have been inspected by the learned counsel for the appellant as well. The advice of the DJAG 9 Corps (HQ 9 Corps letter No. 8544/1/27/JAG/2006 dated 30.9.2006 addressed to Commander, 26 Artillery Brigade, PIN – 926926, C/O 56 APO with copies endorsed to CO of 80 Field Regiment and HQ Western Command). It would have been noted by the concerned Brigade Commander and General Officer Commanding (GOC) before he countersigned and confirmed the subject SCM proceedings.

28. We have examined all the documents and available records, affidavits in this case and heard both the counsel in detail. Our observation with regards to the manner in which the SCM was conducted are in subsequent paragraphs. We, however, find it necessary to quote few paragraphs of the ibid DJAG report dated 30.09.2006 herein below:-

*"4. The accused when afforded opportunity at the trial to make statement in reference to the charge or in mitigation of punishment, stated, "I did not point the weapon". At the Summary of Evidence, he had stated that on 05 Aug 2006, there was Sainik Sammelan at 80 Field Regiment. He was No. – 1 of his section. As per Regiment's drill, he was to give report to the Commanding Officer about his section and equipment holding. He had not drawn his weapon that day. He therefore, took the weapon of his section junior Gnr/Svy Dinu G. He had taken over the weapon 5.56 mm INSAS with magazine fitted on it from Gnr/Svy Dinu G. After the Sainik Sammelan, Lt. Col. S K Jaini, Second in command checked him about his hair cut and asked him as to why he had not taken proper hair cut. The accused replied that he had taken the hair cut. Lt. Col. S K Jaini told the accused that he had checked him earlier also for the hair cut. He called the Battery Commander of the accused and told him to take appropriate action against him for the disobedience of orders. After some time, LNK/BBR Subhash Thakur told the accused that Lt. Col. S K Jaini had called him. The accused went to Lt. Col. S K Jaini with his weapon. His weapon was slinged on his back. Lt. Col. S K Jaini again asked him as to why he had not taken proper hair cut. The accused was agitated, as Lt. Col. S K Jaini was after him for a long time. The accused asked him, 'Aap mere piche kyon pade ho'. On being told that why should he be after him, the accused asked him as to why was he checking him only when there are many others who had not even taken hair cut. At that time Sub Murugesan R, JA and Capt Sandeep Nagpal, Adjutant entered the office. Lt. Col. S K Jaini asked Sub Murugesan R to take the weapon of the accused. Sub Murugesan R accordingly asked the accused to*



hand over his weapon. The accused however, refused to hand over the weapon telling that it was his personal weapon. Lt. Col. S K Jaini again told the accused to hand over the weapon. The accused handed over the his weapon to Sub Murugesan R. Capt. Sandeep Nagpal and Sub Murugesan R went out of the office, and Lt. Col. S K Jaini also followed them. After few minutes, Lt. Col. S K Jaini called the accused and took him to the Commanding Officer along with Capt Sandeep Nagpal, Sub Maj Phillip Samuel and Sub Murugesan R. He told the Commanding Officer that the accused had pointed the weapon at him and had threatened him. The accused has stated that at that stage he came to know that the weapon was loaded with a round in chamber and its safety catch was on 'R' position which he had not done. He did not know as to how his weapon got cocked. The statement of the accused at the Summary of Evidence read with his statement at the trial thus negates the plea of 'Guilty' offered by him.

It may be pointed out that, in terms of AR 116(4), if from the statement of accused, or from the Summary of Evidence, or otherwise, it appears to the Court that the accused did not understand the effect of his plea of 'Guilty', the Court is required to alter the record and enter a plea of 'Not Guilty', and proceed with the trial accordingly. The officer holding the trial, in the instant case, lost sight of the aforesaid provisions of AR 116(4) and omitted to alter the record by entering the plea of 'Not Guilty'. The aforesaid omission on the part of the officer holding the trial is fatal. Such a legal infirmity ordinarily, lead to the setting aside of the SCM proceedings."

"..... 8. Points for future guidance of the offr holding the trial:-

(a) IAFD – 907 (SCM Proceedings)

- (i) The accused being a NCO, the word "brought" at page 'A' should have been scored out and initialed by the officer holding the trial.
- (ii) At page 'B' of the proceedings, plea of the accused should have been recorded as 'guilty' and not 'I plead guilty of the said charge'.
- (iii) Question asked to the accused and his answer thereto throughout the proceedings should have been consecutively numbered.
- (iv) The exhibits at Court Martial are now marked as 1,2,3 .... and so on and not as K.L.M etc. (refer AO 28/2002/JAG). Accordingly, the Summary of Evidence being the first exhibit, should have been marked as 'Exhibit 1' instead of Exhibit 'K' at page 'C'.



- (v) *The scored out portions throughout the proceedings should have been initialed by the officer holding the trial.*
- (vi) *The sentence of reduction and dismissal should have been formally worded as, "to be reduced to the ranks" and "to be dismissed from the service". In this regard specimen given at page 428 of MML Vol.-II may be referred.*
- (vii) *The signature of the accused should have been obtained on page 'J' below the sentence. HQ Western Command letter No. 033/1/DV-1 dated 22 Sep 92 refers.*
- (viii) *On page 'J', the promulgation minute should have been signed by the offr in his capacity as "offr in charge documents" and not as Adjt.*
- (ix) *Docket sheet has been left blank. The particulars of the accused should have been recorded in the docket sheet. "*

*"9. Before parting with the case ,it may be mentioned that the evidence contained in the Summary of Evidence reveals that on 05 Aug 2006, after the Sainik Sammelan, Lt. Col. S K Jaini, second in command of the Regt. Had checked the accused regarding his hair cut. He had asked him as to why he had defied the orders and the accused had replied in an unmilitary like and insolent manner that he had taken correct hair cut. Lt. Col S K Jaini thereafter called the Battery Commander of the accused and told him to take suitable action against him for the disobedience of order. Subsequently thereafter, at about 0945 h on 05 Aug 2006, Lt. Col. SK Jaini again called the accused in his office to counsel him for his misbehavior, when the incident in question took place (statement of Lt. Col. S K Jaini (PW-1) may be referred). Lt. Col. S K Jaini having instructed the Battery Commander to take suitable action against the accused, should not have called the accused again on the same issue. It may be appreciated that in the instant case, the incident might have led to more unfortunate consequences. In my considered view, Lt. Col. S K Jaini should have been more circumspect and could have acted in a matured manner. Notwithstanding the man-management certificate dated 29 Aug 2006 rendered by the Commanding Officer, you may consider advising Lt. Col. S K Jaini suitably to be more careful in future. "*

29. From the sequence of events of timings as brought out by the learned counsel of the appellant we are also of the view that more time and deliberations could have been given in conduct of the summary of evidence and the SCM. Notwithstanding that, the non-deposition of two essential witnesses from summary of evidence , the Sub Major Phillip Samuel of the Unit and the Battery Commander, who is the immediate superior officer of the appellant, does not appear to be very



convincing. It is quite evident from the deposition of PW-1 and PW-3 that Sub Maj Phillip Samuel was as much an eye witness in the alleged commission of offence, as PW-2 and PW-3 were. Sub Maj (SM) is a very important and responsible functionary in a Unit with regard to discipline and administration of troops. In this case he was an eye witness. Similarly, the Battery Commander (a Major Rank official) who was the immediate superior officer of the appellant and was present when the appellant was admonished for hair cut. Absence of both these vital witnesses raises suspicion on the fairness of the S of E and the trial. This being an offence under Army Act Section 40A, it needs to be absolutely convincing not only through corroboration by evidence deposed by reliable witnesses, but also by other exhibits of material evidence, if available. In this case we find that the INSAS rifle which was alleged to have been loaded and pointed at Lt. Col. Jaini in order to threaten him was not produced as material evidence nor identified by any one. It was through this weapon, that a charge of 'assault to superior officer' was construed. It has not been produced at any stage of the trial. This should have been ceased and accused should have been arrested immediately on commission of such an offence. Such gross errors vitiate the entire proceedings of trial.

30. Instead of such important action we find that the accused was sent for psychiatric check up without being arrested. The weapon involved in the incident has been totally lost sight of during the process of recording of evidence and also during trial of SCM. Thus the vital exhibit was missing though all prosecution witnesses deposed before the summary of evidence that such a weapon was used.

31. The non-corroboration of the incidence as stated in the statement of PW-1 by PW-5 is a matter that drew our attention as a serious latch bringing the very incidence into doubt. As per the statement of PW-1, he directed PW-5 to call the Sub Maj Philip Samuel and Sub Murugesan and Adjutant Capt. Sandeep Nagpal. This aspect of having received such order and compliance thereof should have been corroborated in the statement of PW-5, which has not happened. It makes us to a belief that the summary of evidence proceedings were conducted against a dead line of time under great hurry in a haphazard manner. Therefore the statement of the appellant that the summary of evidence was completed within one hour is not totally unbelievable.

32. The points brought out by the learned counsel for the applicant with regards to the pleading of guilty by the accused in the SCM proceedings is of very great importance. We find that in terms of Army Rule 116(4), which is quoted below:



*"..... 116(4) – If from the statement of the accused, or from the summary of evidence, or otherwise, it appears to the court that the accused did not understand the effect of his plea of 'guilty', the court shall alter the record and enter a plea of 'not guilty' and proceed with the trial accordingly...."*

the officer holding trial i.e. the Commanding Officer in this case perhaps ignored the provisions of Army Rule 116(4) and omitted to alter the record by entering the plea of 'not guilty' instead of 'guilty'. Such omission is a very serious breach in holding of trial in any court. This being a SCM, the commanding officer should rise above his proximity to the accused being of the same unit and applied the rule of law in a very just and appropriate manner. At no stage the commanding officer should obtain any statement or signature from the accused if he doubted that his intention was different. In this case the statement of the accused at the summary of evidence read with the statement on trial therefore negates the plea of guilty offered by him. After the alleged plea of guilty, when the accused was given an opportunity at the trial to make a statement in reference to the charge or in mitigation of the punishment he stated "I did not point the weapon". All these indicate that the accused had no intention to plead guilty at the trial. This departure of conduct of the present SCM trial above would be enough to set aside the SCM.

33. The observation was also noticed by Dy JAG of HQ 9 Corps as evident from his report at para 28 above. Unfortunately, the higher authorities chose to ignore such serious lapse even when pointed out.

34. Besides the above, other minor errors in the SCM proceedings as brought out by the learned counsel for the appellant and also noticed by the Dy. JAG report as quoted earlier have been taken note of by us and we are of the view that the presiding officer of this SCM was very careless in conduct of this SCM. He should not have even ignored a small issue like not obtaining the signature of the accused below the sentence, or ensuring that the certificate (extract of Army Rule 115(2A) in Pg 'B' of the SCM proceeding appearing before the question 1 of arraignment could commence. It clearly shows the mechanical nature and lack of basic knowledge of presiding officer during SCM. Another small issue which reflects the carelessness of the presiding officer is that a NCO should have been "called" and not "brought" before the Court. All these lapses, though minor, have been reflected in the DJAG advice dated 30.9.2006 quoted earlier.



35. It is clearly evident that the charge under Section 40A is a very serious charge and would attract more severe punishment, perhaps through a GCM. In the manner it was dealt with in this particular case appears that the decision of the authorities to convene a SCM for such a serious charge was not entirely justifiable. Moreover the punishment awarded was mere dismissal for a serious offence like pointing a loaded weapon to a superior officer of the rank of Lt. Col., which should have rightly deserved a trial by a GCM. This point was also brought out by the learned counsel for the appellant and not contested by the respondents.

36. Besides the points that have been discussed above, it will also be pertinent to highlight three important issues, that we would like to discuss before concluding which make the entire prosecution storey doubtful. These are:-

(a) **The probability of the incidence of alleged assault:** The manner in which the accused was not put under arrest and instead sent to the hospital for psychiatric check up, with the incidence of such an assault as a background, that has not even been entered by the medical officer (exhibit to summary of evidence). It throws doubt over the happening of such an incidence. The Unit Sub Major who is a kingpin in the routine administration of unit (80 Field Regiment in this case) was not examined while recording the summary of evidence. Similarly the immediate superior officer of the appellant, who is the Battery Commander of HQ Battery to which the accused belonged, was also not examined. Both these officials are vital officer witnesses who could have not only thrown light on the details of the incidence but on other issues relating to the behavior and general conduct of the appellant in the regiment. It is not very convincing to ignore their absence both as witnesses during S of E and also during trial. Similarly adequate corroboration of the statements made by the PW-1 by others specially PW-5 throws doubt in credibility of such an incidence under Section 40A of the Army Act i.e. assaulting a superior officer.

(b) **Non-production of material evidence:** The INSAS rifle, in this case, which was alleged to have been used to threaten or assault the superior officer with a bullet filled magazine and a bullet in the chamber as well has not been identified by the PWs. It is very strange that the rifle that was used for assaulting the superior officer could not be produced during the summary of evidence nor during trial. In fact it would have been appropriate under the law for the eye witnesses to



recognize that weapon and the bullet that was seen in the chamber by them on the spot of incidence as deposed by them. This material evidence was not produced for identification. This also gives rise a tremendous doubt in our mind with regard to the veracity of the incidence itself. Deliberate non-production of such vital material evidence vitiates the entire proceedings of the SCM.

- (c) **Plea of "Guilty" in the SCM:** The appellant contested the allegations and the charge under Army Act Section 40(a) during Summary of Evidence, clearly stating that he was not guilty of the charge. During trial of the SCM, it has also been stated by him that he did not point the weapon to Lt. Col. S K Jaini. Yet, the Court proceeded to record his plea as 'guilty of charge' and treated him as an accused having pleaded 'guilty'. We find the accused (appellant) had no intention of pleading 'guilty'. The court (i.e. the SCM) appears to have forced upon him the guilty plea and proceeded with the trial in total violation of Army Rules 116(4). This would be enough to set aside the SCM.

37. In view of the discussions made above, the appeal is allowed with contest but without cost with the following directions:-

- (a) The SCM proceeding conducted against Havildar R Nasik Raja is set aside and consequently the impugned order of 14.07.2007 is quashed.
- (b) The appellant R Nasik Raja be reinstated in service with restoration of seniority and rank forthwith. The period between dismissal on 29 August 2006 till he rejoins service should be regularized as 'in service'.
- (c) The appellant shall, however, receive pay and allowances and back wages for the period since his dismissal restricted to three years from the date (5.4.2011) that he appealed before this Tribunal. His arrears shall thus be limited from 1<sup>st</sup> April, 2008 onwards till he joins duty.
- (d) Considering the sensitivity of the Army service and organizational aspects, Respondent No. 2 (COAS) is at liberty to reinstate him in any Arm or Service or Unit of the Indian Army but in a grade and pay scale NOT lower than what he was holding. He need not necessarily be reverted to 80 Field Regiment.



38. The back wages and other monetary benefits shall be paid within three months of receipt of this order. The SCM proceedings and other documents received in original be returned to the respondents by Registry under proper acknowledgement.

39. Plain copy of the order be given to all parties.

(LT GEN KPD SAMANTA)  
MEMBER (ADMINISTRATIVE)

(JUSTICE H N SARMA)  
MEMBER (JUDICIAL)