

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on : 27th April, 2011
Judgment Pronounced on : 12th May, 2011

+ WP(C) 564/2007

COMDT. ATUL KUMAR SINGH ...Petitioner
Through: Mr.Rajiv Khosla and Mr.Surender
Chauhan, Advocates

versus

UOI & ANR. ...Respondents
Through: Ms.Jyoti Singh, Sr.Advocate with
Mr.Amandeep Joshi, Advocate and
Mr.Bhupinder Sharma, Deputy
Commandant, BSF

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. Petitioner Atul Kumar Singh was enrolled as an Assistant Commandant with Border Security Force (herein after referred to as the "BSF") and was promoted to the post of Commandant in the year 2002. In the year 2005 he was attached with the 18th Bn. BSF which was deployed at Paniasagar sector, which we are informed is in the State of Tripura.

2. In the year 2006 allegations were leveled against the petitioner that he had misappropriated the properties belonging to

the government and regiment institution. In view of the seriousness of the allegations leveled against the petitioner, the Offence Report was taken cognizance of and Record of Evidence was directed to be prepared and considering the same a Security Force Court was convened and an indictment was laid. It was so done under cover of a charge sheet dated 07.09.2006 in which two charges were laid against the petitioner as under:-

"First Charge
BSF Act
Sec 30(b)

DISHONESTLY MISAPPROPRIATING
PROPERTY BELONGING TO THE GOVT

In that he,
at Bn HQ Paniasagar between Dec 2004 to Mar 2005, being Comdt of 18 Bn BSF misappropriated following spare parts of unit MT, the property of the Govt and got them fitted in Maruti Gypsy registered No.TR-01-664 purchased in the name of his son Shri Narendra Pratap Singh from public auction.

- 1) Carburetor Assembly -01.
 - 2) Wiring loom complete -01
 - 3) Horn Jalwa -01,
 - 4) Relay Horn -01,
 - 5) Wiper Blade – 01,
- Total amount Rs.15,726/-**

Second Charge
BSF Act
Sec 30(b)

DISHONESTLY MISAPPROPRIATING
PROPERTY BELONGING TO REGIMENTAL
INSTITUTION

In that he,
at Bn HQ Paniasagar, on 02.02.2005, being Comdt of 18 Bn BSF having got purchased 112.5 Qtls of Atta for Rs.97,913/- @ Rs.864.11 per Qtl from M/s Danaram Gwalpara Flour Mills, Guwahati (Assam) from unit ration fund and subsequently got prepared fake bills of said qty of Atta @ Rs.977/- per Qtl from M/s GP Kanoo of Dharmanagar (Tripura) and dishonestly misappropriated Rs.12,000/- (Twelve

Thousand) only, the property belonging to regiment institution.”

3. The petitioner pleaded not guilty and hence the matter proceeded to trial.

4. Twenty-eight witnesses were examined by the prosecution to prove the charges and in defence the petitioner examined 2 witnesses. Since the petitioner has been acquitted of the second charge, we need not note the evidence led at the trial pertaining to the said charge and thus would concentrate on the evidence relatable to the first charge for which the petitioner has been indicted.

5. G.Panmei PW-1, DC/MT of SHQ BSF Teliamura deposed that on 17.11.2004 one Narender Pratap Singh, the son of the petitioner purchased one condemned Maruti Gypsy bearing registration No.TR-01-664 at an auction of condemned vehicles of Teliamura sector and its units. The bidders were not allowed to carry out the minute technical/mechanical of the vehicles before the start of the auction.

6. HC Ram Parvesh Rai PW-3 and HC Suresh Kumar VM PW-13, deposed that on 30.11.2004 the gypsy bought by the son of the petitioner was brought from Telimura sector to Paniasagar sector in a civil truck in their presence.

7. SI/MT G.P.Tewari PW-3, deposed that on 21/22.11.2004 the petitioner called him at his residence and told him that he has purchased a gypsy at an auction and that he needs some spare parts for the said vehicle; namely, one carburetor assembly, one wiring loom complete, one horn, one relay horn and one wiper blade set. He apprised the petitioner that the said spare parts were not available in the unit MT store, petitioner told him to arrange the same from somewhere. Thereafter he told the petitioner that the

said spare parts are quite costly and thus cannot be arranged, upon which the petitioner insisted that he should do something to arrange the same. After about two-three days the petitioner called him and enquired about the spare parts demanded by him. The petitioner again told him to do something to arrange the said spare parts immediately. After about two-three days he proceeded on casual leave for fifteen days. Before proceeding on leave he had a discussion with other officers working with unit MT store; namely, HC M.M.Pillai and HC/MT Amarnath regarding the procurement of the spare parts demanded by the petitioner but they could not come up with a solution to the said problem. He directed the said officers to make arrangements for procuring the said spare parts in his absence. HC/Driver Ram Babu took one wiper blade and one jalwa horn from unit MT store on 04.02.2005 and 20.03.2005 respectively. When he returned after availing his leave HC M.M.Pillai told him that one carburetor assembly and one wiring loom were purchased in his absence and that the same were taken by HC/Driver Ram Babu from unit MT store for being fitted in the vehicle purchased by the petitioner. On being questioned about the date of issuance of the spare parts demanded by the petitioner he stated that wiper blade and jalwa horn were shown issued from unit MT store on 04.02.2005 and 20.03.2005 respectively and that carburetor assembly, wiring loom and wiper blade set were shown as issued in respect of gypsy bearing registration No.HR-26E-9884 and Jalwa Horn and horn relay were shown as issued to gypsy bearing registration No.JK-01D-6345.

8. HC M.M.Pillai PW-4, deposed that in June/July 2004 he was working as HC/MT of unit store in Paniasagar sector in the absence of Ram Pal Shukla who was on leave. In November 2004 one day before proceeding on leave SI/MT G.P.Tewari called him and HC Amarnath in MT office and informed them that the petitioner has

purchased one condemned gypsy at an auction in Teliamura sector and has demanded five spare parts from unit MT store; namely, carburetor assembly, wiring loom complete, wiper blade, horn and relay horn. When he and HC/MT Amarnath told Mr.Tewari that it is difficult to procure the said spare parts as the same are expensive he told them that they have no option but to comply with the orders of the petitioner. Mr.Tewari further told them that the said spare parts can be adjusted against one vehicle of 131 Bn BSF which is quite old and due for major repairs. On 06.12.2004 HC/MT R.P. Shukla returned from leave and he and HC Amarnath apprised him with the said facts who then told them to comply with the order of the senior. On 09.12.2004 an approval form was put up before the petitioner for purchase of one carburetor assembly and one wiring loom set in respect of gypsy bearing registration No.HR-26E-9884 for a sum of Rs.15,000/-, which was approved by the petitioner. HC/Driver Ram Babu purchased the said two spare parts from Guwhati. After completion of the formalities, said two spare parts were shown as issued in respect of gypsy bearing registration No.HR-26E-9884 which was in charge of Constable/Driver Mahipal Singh but the same were handed over to HC/Driver Ram Babu on 18.12.2004. On 04.02.2005 one wiper blade was handed to HC/Driver Ram Babu. On 20.03.2005 one horn and horn relay were handed over to HC/Driver Ram Babu but entries regarding the same were made in the necessary registers on 23.03.2005 as he had to leave for Agartala on 20.03.2005 and returned to his unit only on 23.03.2005.

9. HC/MT Amarnath PW-8, SI Raj Pal Shukla PW-9 and Dharam Pal Singh PW-14, deposed in harmony with the testimony of SI/MT G.P. Tewari and HC M.M. Pillai P-W-4. Be it noted here that on being questioned about the Maruti Gypsy bearing registration No.HR-26E-

9884 SI Raj Pal Shukla stated that (Quote):- *'Denting, painting work in Maruti Gypsy HR-26E-9884 was done.'*

10. Const./Driver Mahipal Singh PW-5, deposed that on 09.12.2004 he brought the gypsy bearing registration No.HR-26E-9884 from BOP Ranibari to Paniasagar sector. On 17.12.2004 HC M.M. Pillai got his signatures on the MT Job Register against issuance of one carburetor assembly and wiring loom in respect of aforesaid gypsy but the said spare parts were neither handed over to him nor were fitted in the said gypsy. During the period the said gypsy remained in his custody i.e. from 09.12.2004 to 13.02.2004 new carburetor assembly, wiring loom and wiper blade were not fitted in the same. On being questioned about the condition of the said gypsy the witness stated that (Quote):- *'From BOP Ranibari to Bn HQR, vehicle was run for 65 kms. While driving the said vehicle from border to Bn HQ, I did not observe any kind of technical problem in the vehicle.'* On being questioned about the repairing work carried out on the said vehicle the witness stated that (Quote):- *'After 17.12.2004 miscellaneous works like brake repair, repair of HT lead, denting and painting of the vehicle and body work etc were carried out on this vehicle.'*

11. Brij Mohan Purohit PW-6, deposed that he carried out annual inspection of 18 Bn BSF MT between 23.02.2005 to 25.05.2005. On 15.06.2005 he carried out special audit of MT contingency bills and found several irregularities in the records. On being questioned about the gypsy bearing registration No.HR-26E-9884 the witness stated that (Quote):- *'Carburetor assembly was got opened. Scratch marks of MT tools like, De spanner and Ring spanner, were noticed on the carburetor assembly. Similarly, wiring loom complete was found old seeing its life period of rubber material. Those parts appeared to be 2-3 years old.....Witness further indicates another*

entry dated 4-3-2005 at page 19 wherein welding, denting and painting work costing Rs.5275/- is shown against the vehicle. Entry, as shown b the witness, is marked 'X-2' and signed by the Presiding Officer. Witness further states that this welding, denting and painting work was not found done on the vehicle.

12. Raj Sekhar Bhattacharya PW-7, deposed that he is the owner of Raj Automobiles situated in Dharmanagar. On 03.12.2004 one Narender Pratap Singh accompanied by two-three other persons brought gypsy bearing registration No.TR-01-6664 to his service centre for repair of its engine. On or around 13.01.2005 the said gypsy was taken out of his service centre for test drive and the same did not return to the service centre after the test drive. After about three-four days he received a telephonic call informing him that the balance amount of the bill raised in respect of said vehicle will be paid after some time. The final bill was raised for a sum of ₹9,065/- out of which ₹5,000/- was paid as advance money at the time when the vehicle was brought to his service centre. On 31.03.2006 one unknown person visited his service centre and made the payment of the balance amount of ₹4,065/-. On being questioned about the carburetor and wiring loom of the gypsy of the petitioner the witness stated that (Quote):- *'To the best of my knowledge, old carburetor of the vehicle was not changed, however, I had seen one new carburetor assembly which was brought by an individual in my service centre. To the best of my knowledge, old carburetor was not changed, however, I had seen one carburetor assembly which was brought by an individual in my service centre. One carburetor assembly was brought by an individual who was related/connected to that Maruti Gypsy and this carburetor assembly was seen kept in the vehicle. However, that carburetor was not changed in that vehicle. I do not remember correctly*

whether that carburetor was changed or otherwise. Witness further clarifies that he is not a mechanic and these parts are changed by mechanics. However, he enquired about from his mechanics but they did not remember even about the said vehicle....As already stated, wiring loom was also brought by that person with the carburetor assembly and kept in the said Gypsy. However, I did not see it being changed. Service charges for change of wiring loom do not find mention in the cash memo....I am not absolutely sure that new carburetor assembly and wiring loom were not changed in that Maruti Gypsy.....After the vehicle was taken out from service centre, in the name of test trial and when said vehicle was did not return I did not make a call to the telephone number given to enquire about the said vehicle. Even on non-release of balance payment I did not telephone to concerned person specially as I had been given advance amount of ₹5,000/-. Two-three persons used to visit the service centre to see the progress of repairs of said Maruti Gypsy...One of them who had brought carburetor assembly and wiring loom had shown to me and had kept those items in that Maruti Gypsy. I do not remember the purpose of bringing that carburetor assembly and wiring loom.'

13. HC/Driver Sahib Singh PW-10, deposed that on 02.03.2005 he along with HC/Driver Ram Babu went to Silchar to bring the gypsy bought by the petitioner at an auction. On being questioned about the headlights of the gypsy of the said vehicle he stated that (Quote):- *'It is correct that we stayed at Badarpur while returning as headlights of the white colored Maruti Gypsy were not functioning properly.'*

14. Const./Driver M.Elavarasan PW-11, deposed that on 07.12.2004 HC/MT R.P.Shukla pressurized him to sign in the defect

register regarding requirement of carburetor assembly, wiring loom and wiper blade for the gypsy bearing No.HR-26E-9884. He did not replace aforementioned spare parts in the said gypsy.

15. Const./Driver Ajay Kumar PW-12, deposed that on 22.03.2005 he and the petitioner went to Guwhati in the gypsy of the petitioner. On their way to Guwhati the wiper of the gypsy was not functioning properly. On reaching Guwhati the son of the petitioner met them and HC/Driver Ram Babu and he left the gypsy of the petitioner in the custody of HC/Driver Ram Babu.

16. Const./Driver Paran Chand Koch PW-15, deposed that he was entrusted with the charge of the gypsy bearing registration No.JK-01D-3645. On 23.03.2005 one horn jalwa, horn relay and insulation tape were shown as issued in respect of the said gypsy in the records but the said spare parts were neither handed over to him nor were fitted in the said gypsy.

17. HC/Driver Ram Babu PW-16, deposed that on one occasion the petitioner had instructed him to daily visit the service centre where his gypsy was being repaired and to bring some spare parts for the said vehicle from Guwhati. On 16.12.2004 he purchased one carburetor assembly and wiring loom from Guwhati for the purposes of fitting the same in the gypsy of the petitioner. On one occasion he told the owner of Raj Automobiles that he want to take the gypsy in question for test drive which was not allowed by him whereupon he apprised the said facts to SI Tewari. After sometime the owner of Raj Automobiles allowed him to take the said gypsy for test drive. Having driven the gypsy for three-four kilometers he brought back the same to Raj Automobiles but the owner thereof did not allow him to park the gypsy there whereupon he apprised the said facts to the petitioner. After sometime the petitioner came there and

instructed him to park the gypsy in NBCC complex at Dharmanagar. Upon the instructions of the petitioner on 04.02.2005 he took one wiper blade set from unit MT store and got them fitted in the gypsy of the petitioner at Raj Automobiles. On 02.03.2005 he went to Silchar in the gypsy of the petitioner and the headlights of the said gypsy were not functioning properly during the said journey. On 20.03.2005 he got fitted the horn and horn relay in the gypsy of the petitioner at Raj Automobiles. On 23.03.2005 he, the petitioner and Const.Driver Ajay Kumar went to Guwhati in the gypsy of the petitioner where he handed over the said gypsy to the son of the petitioner.

18. After recording the statements of the prosecution witnesses the statement of the petitioner was recorded wherein he denied the charges leveled against him. He however admitted that on 17.11.2004 his son Narender Pratap Singh who is employed in Guwhati purchased the gypsy bearing registration No.TR-01-664 at an auction of condemned vehicles of Telimura sector and that the repairing work of the said vehicle was carried out in Raj Motors in Dharmanagar. Relevant would it be to note that the petitioner stated that his son Narender Pratap Singh entrusted the responsibility of his gypsy to HC/Driver Ram Babu before leaving for his employment in Guwhati and also gave ₹5,000/- to him to cover the future expenses incurred by him on the gypsy.

19. The Security Force Court returned a finding of 'Guilty' of the first charge and 'Not Guilty' of the second charge. The Court sentenced the petitioner to undergo rigorous imprisonment for six months and dismissed him from service. On 03.11.2006 Director General, Border Security Force confirmed the finding and sentence

of the Security Force Court in terms of the provisions of Section 107 of Border Security Force Act, 1968.

20. Aggrieved by the finding and sentence awarded by the Security Force Court which stood confirmed by the Director General, the petitioner preferred a petition under Section 117(2) of Border Security Force Act, 1969 to the Directorate General Border Security Force, Ministry of Home Affairs, Government of India, which petition was rejected vide order dated 26.03.2007.

21. Aggrieved by the finding and sentence awarded by the Security Force Court and the order dated 26.03.2007 passed by the Directorate General, Border Security Force, the petitioner has filed the present petition under Articles 226 and 227 of Constitution of India.

22. During the hearing of the present petition, it was argued by the learned counsel for the petitioner that there are material discrepancies in the evidence of the prosecution which have not been noted by the authorities below and when said discrepancies are taken into account no prudent person would ever reach the conclusion that the petitioner is guilty of the first charge framed against him. The discrepancies pointed out by the learned counsel can be enumerated as under:-

(i) Whereas the case set up by the prosecution against the petitioner was that the carburetor assembly and wiring loom purchased from the funds of unit MT store were fitted in the gypsy of the petitioner Raj Sekhar PW-7, the owner of the service centre where the said gypsy was repaired has denied fitting of new carburetor and wiring loom in the said gypsy.

(ii) Whereas the case set up by the prosecution against the petitioner was that on 04.02.2005 and 20.03.2005 the wiper blade and horn jalwa and horn relay respectively were fitted in the gypsy of the petitioner at Raj Automobiles Raj Sekhar PW-7, the owner of Raj Automobiles, has deposed that gypsy of the petitioner left his service centre on or around 13.01.2005 and did not return there after the said date.

(iii) Whereas the case set up by the prosecution against the petitioner was that the wiper blade purchased from the funds of unit MT store was fitted in the gypsy of the petitioner on 04.02.2005 Const. Driver Ajay Kumar PW-12, has deposed that the wiper of the said gypsy was not functioning properly on 22.03.2005.

(iv) Whereas the case set up by the prosecution against the petitioner was that the wiring loom purchased from the funds of unit MT store was fitted in the gypsy of the petitioner on 18.12.2004 HC/Driver Sahib Singh PW-10 and HC/Driver Ram Babu PW-16, have deposed that the headlights of the said gypsy were not functioning properly on 02.03.2005.

(v) Whereas HC/Driver Ram Babu PW-16, had deposed before the Security Force Court that he had purchased the spare parts allegedly fitted in the gypsy of the petitioner on various days he stated in his statement recorded at the time of Record of Evidence that the said spare parts were purchased by him on a single day.

(vi) Whereas SI/MT G.P. Tewari PW-3, had deposed that the petitioner had demanded carburetor assembly, wiring loom, horn relay, horn jalwa and wiper blade from him SI Dharam Pal Singh PW-14, had deposed that SI/MT G.P. Tewari had told him that the petitioner has demanded carburetor assembly and wiring loom from him.

(vii) Whereas SI/MT G.P. Tewari PW-3, had deposed that he had a discussion with M.M. Pillai PW-4 and Amarnath PW-8, regarding the procurement of the spare parts demanded by the petitioner but they could not come up with any solution in the said discussion M.M. Pillai PW-4 and Amarnath PW-8, had deposed that during their discussion with SI G.P. Tewari he told them to procure the spare parts demanded by the petitioner against gypsy bearing registration No.HR-26E-9884.

(viii) Whereas the case set up by the prosecution against the petitioner was that horn jalwa and horn relay allegedly fitted in the gypsy of the petitioner was issued on 20.03.2005 the entries contained in the relevant registers shows that the same was issued on 23.03.2005.

(ix) Whereas Const./Driver Mahipal Singh PW-5 and SI Raj Pal Shukla PW-9, deposed that painting and denting work was carried out on the gypsy bearing registration No.HR-26E-9884 Brij Mohan Purohit PW-6, had deposed that the painting and denting work was not found done on the said vehicle.

(x) There are various discrepancies in the records pertaining to the purchase and issuance of spare parts allegedly misappropriated by the petitioner which shows the connivance on the part of the prosecution witnesses to falsely implicate the petitioner.

23. While exercising power of judicial review under Article 226 of the Constitution the High Court does not act as an Appellate Authority. Its jurisdiction is circumscribed and confined to correct errors of law or procedural law, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. Judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority. The standard

of proof which is required in the departmental proceedings is preponderance of probabilities and not proof beyond reasonable doubt.

24. Keeping the afore-mentioned legal principles in mind, we proceed to examine the case set up by the prosecution against the petitioner, keeping in view the arguments advanced and as noted herein above.

25. On 17.11.2004 the son of the petitioner purchases the gypsy bearing registration No.TR-01-664 at an auction of condemned vehicles held in Telimura sector, a fact admitted by the petitioner. As deposed to by SI/MT G.P.Tewari four-five days thereafter i.e. on 21/22.11.2004 the petitioner demands five spare parts namely carburetor assembly, wiring loom, wiper blade, horn relay and horn jalwa, which spare parts are most integral to a vehicle, from SI/MT G.P. Tewari. As deposed to by HC Ram Parvesh Rai and HC Suresh Kumar on 30.11.2004 the gypsy in question is brought from Telimura sector to Paniasagar sector where the battalion of the petitioner is deployed instead of taking the same to Guwhati where the son of the petitioner who has purchased the said gypsy is employed. On 09.12.2004 an old gypsy bearing registration No.HR-26E-9884 is brought from BOP Ranibari to Paniasagar sector by Const./Driver Mahipal Singh PW-5. Even though no technical problem is observed by Const./Driver Mahipal Singh in gypsy bearing registration No.HR-26E-9884 a carburetor assembly and wiring loom are purchased from the funds of unit MT store in respect of the said vehicle. On 17.12.2004 the aforesaid carburetor assembly and wiring loom are shown as issued in respect of gypsy bearing registration No.HR-26E-9884 in the necessary registers but neither the said the same are handed over to Const./Driver Mahipal

Singh nor fitted in the said gypsy. On 18.12.2004 the said carburetor assembly and wiring loom are handed over to HC/Driver Babu Ram, who is a confident aid of the petitioner evident from the fact that his son had entrusted the responsibility of his gypsy to HC/Driver Ram Babu before leaving for his employment in Guwhati. The aforesaid circumstances, when cumulatively seen, are sufficient to raise a presumption that the aforesaid carburetor assembly and wiring loom were fitted in the gypsy of the son of the petitioner. The aforesaid presumption further gets stronger from the fact that Raj Sekhar PW-7, the owner of the service centre where the gypsy of the son of the petitioner was being repaired, saw one person connected with the said gypsy bringing one carburetor assembly and wiring loom in his service centre and keeping the same in the said gypsy. Thereafter on 04.02.2005 one wiper blade was shown as issued in respect of gypsy bearing registration No.HR-26E-9884 but yet again instead of fitting the same in the said gypsy the same was handed over to HC/Driver Ram Babu. Similarly on 20.03.2005 one horn relay and horn jalwa were shown as issued in respect of gypsy bearing registration No. JK-01D-6345 but yet again instead of fitting the same in the said gypsy the same are handed over to HC/Driver Ram Babu. When all the five spare parts demanded by the petitioner from SI/MT G.P. Tewari were issued from unit MT store and handed over to HC/Driver Ram Babu immediately thereafter on 23.03.2005 the gypsy of the son of the petitioner was taken to Guwhati where the son of the petitioner was employed and left there. This completes the chain of the circumstances raising strong presumption against the petitioner that the aforesaid five spare parts were fitted in the gypsy of the son of the petitioner.

26. Now the question is that whether the petitioner has been able to dispel the aforesaid strong presumption appearing against him.

27. From the afore-noted submissions advanced by the learned counsel for the petitioner, it is manifestly clear that the petitioner has heavily relied upon the testimony of Raj Sekhar PW-7, to dispel the strong presumption appearing against him, in particular upon his depositions that the carburetor assembly and wiring loom of the gypsy of the son of the petitioner were not changed and that the said gypsy did not return to his service centre after it was taken out for test drive on or around 13.01.2005.

28. At the first instance Raj Sekhar PW-7, deposed that the carburetor assembly and wiring loom of the gypsy of the son of the petitioner were not changed. However in the same breath he deposed that he saw one person connected with the gypsy of the petitioner bringing one carburetor assembly and wiring loom in his service centre and keeping the same in the said gypsy and that he is not sure that the carburetor and wiring loom of the said vehicle was not changed. The petitioner was working on the post of Commandant in BSF in a terrorist infected area. Raj Sekhar was scared of the petitioner evident from the fact that he did not make any noise when the full payment in respect of the bill raised for repairing work done on the gypsy of the son of the petitioner was not made to him. The possibility that Raj Sekhar was not truthfully disclosing all facts in his knowledge due to the fear of the petitioner cannot be ruled out.

29. Regarding the deposition of Raj Sekhar PW-7, that the gypsy of the son of the petitioner did not return to his service centre after it was taken out for test drive on or around 13.01.2005 it is important to note the testimony of HC/Driver Ram Babu PW-16, on the said point. HC/Driver Ram Babu deposed that he took the gypsy of the son of the petitioner from the service centre of Raj Sekhar on

13.01.2005 and thereafter parked the same in NBCC complex. Thereafter on 04.02.2005 and 20.03.2005 wiper blade and horn relay and horn jalwa respectively were fitted in the said gypsy at the service centre of Raj Sekhar. There is a hiatus in the evidence of HC/Driver Ram Babu regarding the point of time when the said gypsy was taken out from service centre for test drive on 13.01.2005 and the point of time when wiper blade was fitted in the said gypsy on 04.02.2005. The whole operation was planned in secrecy and carried out in a clandestine manner. It was impossible for the prosecution to bring out in open all facets of the said operation. Though it has remain unexplained as to what exactly transpired on the dates 13.01.2005 and 04.02.2005 happened between period from 13.01.2005 to 04.02.2005 the same has not made the case set up by the prosecution against the petitioner unexplainable in view of the strong presumption appearing against him.

30. Nothing much turns on the so-called discrepancies pointed out by the learned counsel predicated upon the fact that the wiper and headlights of the gypsy of the petitioner were found to be malfunctioning subsequent to the dates on which the new wiper blade and wiring loom were fitted in the said gypsy. In the instant case, only the wiper blade of the gypsy of the petitioner was changed. The wiper of the gypsy of the petitioner could have malfunctioned due to number of reasons such as malfunction of the motor of the wiper etc. In any case, the gypsy of the petitioner was an old vehicle and not in a good working condition evident from the fact that it was categorized as a condemned vehicle in Telimura sector. It is a known fact that generally a defect recur in the old machines soon after fixing of the said defect by the mechanic.

31. As regards the discrepancies pointed out by the counsel between the evidence of SI/MT G.P. Tewari PW-3, M.M. Pillai PW-4, Amarnath PW-8 and SI Dharam Pal Singh PW-14, suffice would it be to state that a witness cannot be expected to possess a photographic memory and correctly recall all the details of an incident. It is not as if a video tape is replayed on the mental screen. When a witness is examined at length there are bound to be discrepancies in his evidence. Too serious a view adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of same witness) is an unrealistic approach for judicial scrutiny.

32. As regards the discrepancy pointed out by the counsel between the evidence of the prosecution witnesses and the relevant records on the aspect of the date of issuance of horn relay and horn jalwa relevant would it be to note that HC M.M.Pillai PW-4, deposed that he could not make entries in the relevant registers regarding the issuance of horn relay and horn jalwa on 20.03.2005 as he had to leave for Agartala on the said day that he returned in his unit only on 23.03.2005.

33. As regards the discrepancy pointed out by the counsel between the testimony of Const./Driver Mahipal Singh PW-5 and SI Raj Pal Shukla PW-9, on one hand and Brij Mohan Purohit PW-6, on the other on the aspect of carrying out of painting and denting work on the gypsy bearing registration No.HR-26E-9884 the possibility that Const./Driver Mahipal Singh PW-5 and SI Raj Pal Shukla PW-9 lied to save their own skin is writ large. In any case, whether the painting and denting work was carried out or not on the gypsy bearing registration No.HR-26E-9884 has no relevance whatsoever to the controversy involved in the present case.

34. Having dealt with all the discrepancies pointed out by the learned counsel for the petitioner in the evidence of the prosecution, we hold that the petitioner has not been able to dispel the strong presumption appearing against him that he had misappropriated the spare parts belonging to unit MT store by getting them fitted in the gypsy of his son. As a necessary corollary to the aforesaid, we find no merits in the present petition. The same is hereby dismissed.

35. Noting that on being granted bail by this Court pending hearing of the writ petition and by then the petitioner had already served a sentence of nearly 5 out of 6 months to which he was sentenced to undergo imprisonment, we dispose of the writ petition maintaining the conviction of the petitioner but modify the sentence and restrict the same to the period already undergone by the petitioner. Dismissal of the petitioner from service is upheld.

36. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

May 12, 2011
dk