Avtar Singh Vs. Union of India and Others

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Court : Armed forces Tribunal AFT Principal Bench New Delhi

Decided On : Dec-08-2010

Judge : S.S. Kulshrestha, Member &Amp; the Honourable Mr. Lt. Gen. S.S. Dhillon, Member

Appeal No. : T.A No. 23 of 2009 (Writ Petition (C) No.3582 of 1991)

Appellant : Avtar Singh

Respondent : Union of India and Others

Judgement :

1. The challenge in this petition is directed against the court martial proceedings conducted from 1.11.1990 to 15.3.1991 whereby the petitioner was held guilty for the offences under Sections 60(a), 54(2), 77(2), 41(2), 48(a) and 74 of the Navy Act and sentenced to undergo rigorous imprisonment for twenty four calendar months, to be dismissed from Naval service and to pay a fine of Rs.10,000/-, with a default clause of rigorous imprisonment for six more calendar months. On judicial review, Charge No. 20 was found not to have been established against the appellant and he was exonerated of that charge and the sentence was modified to the term already undergone. The authority even remitted the fine. There remains only the sentence of dismissal from service. On formation of the Armed Forces Tribunal, the writ petition was transferred to this Bench for disposal and was treated as an appeal under Section 15 of the Armed Forces Tribunal Act 2007.

2. It is contended that the appellant was not afforded a fair opportunity during trial and there was a patent breach of the mandatory provisions under the Navy Act and the Regulations for Navy Part II. The charges drawn against the appellant had no nexus with the summary of evidence. The convening authority overlooked the fact that the material witnesses, viz. Cdr. Majumdar (Retd) and MK Bhattacharya, were not examined at the time of recording the summary of evidence. The convening authority was swayed by irrelevant considerations and acted merely on conjectures and surmises to find the appellant guilty of the charges.

3. Before appreciating the points raised by the learned counsel for the parties, it would be appropriate to state briefly the facts giving rise to this appeal. The appellant was commissioned in the Indian Navy on 1.7.1970 as Sub Lieutenant. He has had an unblemished record of over 20 years of dedicated and selfless service with the Indian Navy. In 1989, the appellant was issued a charge sheet containing 28 charges and a Board of Inquiry was convened by the then Flag Officer Commanding-in-Chief. Based on the report of the inquiring officer, the appellant was tried by a court martial. The appellant pleaded not guilty to the charges. However, the court martial held him guilty of the charges and sentenced him to undergo rigorous imprisonment for 24 months, to be dismissed from Naval service and to pay a fine of Rs.10,000/-, in default of which to undergo rigorous imprisonment of further six months.

4. The respondents have sought to support their action by contending, inter alia, that the appellant knowingly signed GRSE work completion report form purporting to show that certain repairs/modifications were carried out. But no such repairs/modifications were actually done. The modifications actually done were not in the approved list and none of the authorities, viz. WPS, Calcutta, FOC-in-C East and Naval Headquarters, acceded to his request for the same due to paucity of funds. His intention was to fraudulently siphon off the money saved from the legitimate (but not executed) modifications for unauthorised modifications. Further, in his capacity as Commanding Officer of INS Magar, he dishonestly misappropriated Rs.20,000/- from Savings Account No.C-3081 for making payment towards a flat booked by him, thereby committing the offence under Section 403 of the Indian Penal Code. That apart, a sum of Rs.13,000/-, being

sale proceeds of victualling stores, was misappropriated by him. He also failed to account for the amount in the Canteen Cash Account Book of INS Magar. On 2.5.1989, while on board, the appellant slapped Sub Lt. Baljor Singh Jakhar, thereby he committed the offence under Section 48(a) of the Navy Act and on 31.10.1989; he acted prejudicial to good order and Naval discipline by making false declaration pertaining to his family members in the application form for obtaining Garrison membership of Madras Gymkhana Club.

5. We have given our thoughtful consideration to the submissions addressed by the learned counsel for the parties and we have also had the benefit of sifting the original records, both summary of evidence and the court martial proceedings. The learned counsel for the parties have submitted their arguments charge-wise and we shall also proceed accordingly. As stated earlier, the appellant was found guilty of six of the offences under Navy Act Sections 60(a), 54(2), 77(2), 41(2), 48(a) and 74 and these are now considered sequentially.

6. Charge No. 4 under Section 60(a) of the Navy Act reads thus:

(4) Did, between 07th November 1988 and 31st December 1988, knowingly sign a false document to be used for official purposes namely, Messers Garden Reach Shipbuilders and Engineers Limited, Calcutta, Work Completion Report Form bearing serial number 0324 dated 07th November 1988, purporting to show that the modifications shown in the said Work Completion Report Form amounting to about Rupees 68,950.00 (Rupees sixty eight thousand nine hundred fifty only) were executed whereas, no such modification was carried out, thereby committed an offence punishable under Section 60(a) of the Navy Act 1957.

There is no dispute in regard to the fact that the appellant had signed the Work Completion Report form purporting to show that modifications showed therein were carried out. Counsel for the appellant pointed out that even if the appellant gave such a report, the prosecution was not able to prove the mens rea, which is an essential ingredient in a criminal case. In this regard, it is stated that after the appellant took over command of the ship INS Magar, he found that the Wardroom (Officers Mess) and the COs cabin were in a deplorable condition requiring modification. The necessity of carrying out the modification work was brought to the notice of WPS (Cal), a representative of Naval Headquarters, who supervised the repairing works on its behalf. He, however, expressed his inability to help due to paucity of funds. Therefore, the appellant approached the FOC-in-C East and the Naval HQs, who also expressed difficulty due to financial constraints. At last, the appellant approached the Chairman and Managing Director of GRSE (Cal), who suggested him to identify the minor repairs to be carried out by the ships staff instead of by the shipyard and that the budget amount, which was already made available, could be re-appropriated for the work. When this proposal was discussed with the HoD, he also agreed. The amount which was allotted for the renovation work amounted to Rs.3,01,050/-, including Rs.68,950/- against WCR No.0324 dated 07.11.1988, for which the appellant was charged. In this regard, reliance was placed on WCR Form (Exhibit P63), which was signed and counter-signed by the representative of the Shipyard, WPS (Cal), who was supervising the work, and also by the representative of the concerned HoD. The said amount was utilised for carrying out the modification work. The appellant had signed it as per the understanding given by the superior officers. It was further clarified that since on that date, the Commander (E) was on leave, he had no other option but to sign the document. Therefore, counsel for the appellant pointed out that mens rea could not be proved, as the appellant had no intention to siphon off the money. Actually it was utilised for work with the understanding of the superior officers, whom he apprised of the pathetic conditions of the Wardroom and the COs cabin. Further, a member of the Naval HQs also signed the certificate confirming that the work had been carried out. It was contended that when the certificate was signed, the appellant was under the bona fide impression that the modifications stated in the WCR form could be carried out, as discussed with the HoD.

7. From the side of the respondents, it is submitted that neither sanction had been obtained nor was it approved by the HQ ENC or Naval HQs. In fact, the work shown in the WCR was not carried out and the amount was diverted for some other purposes. It was well within the knowledge of the appellant that he was giving a false certificate with regard to the execution of the work. Therefore, the charge is substantially proved by the evidence of PW 16 Lt. Cdr. S.R. Rangarajan, PW 28 Lt. Cdr. V. Ramesh and PW 21 Raghavendra Pratap Singh. PW 16 Lt. Cdr. Rangarajan gave a clear answer to Question Nos.1181 and 1182 that the work

mentioned in Exhibit P63 was not carried out at all. That fact is not in dispute. Further, PW 28 Ramesh corroborated that the work mentioned in Ext.P63 was not carried out. Identical is the statement of PW 21 R.P. Singh. From the evidence of these witnesses, it is clear that the work shown in Ext. P63 was not carried out and the certificate given by the appellant was obviously false.

8. The material question that arises for consideration in this case is, whether the appellant had the intention to defraud while signing Exhibit P63? Since the document, Ext. P63, bore the signature of the appellant, it could be presumed that the appellant had the knowledge while signing the document that the work was not carried out. The mens rea on the part of the appellant with respect to the charge, for which he was tried, is to be gathered from the attending circumstances. We find that sufficient reasons have been assigned from the side of the appellant to show that the condition of the Wardroom and the COs cabin of the ship was bad necessitating modification. For getting approval, he approached various authorities, including WPS (Cal), who was the representative of Naval HQs, FOC-in-C East and the Naval HQs. Finally, he approached the CMD of GRSE Cal, who asked him to identify the works which could be executed by the ships personnel and utilise the budget so saved for such uncatered for modifications. In support of his contention, the appellant stated that he got the certificate counter signed by his superior officers, particularly by the representative of the Shipyard, WPS (Cal), who was supervising the work done, and also the representative of the HoD. That would be sufficient to construe that the work was carried out, as per verbal approval. On the basis of such approval, the appellant had signed the certificate. It could be termed only as a failure on the part of the appellant in performing his duties or observing financial propriety. Such error or breach of performance of duty cannot be equated with dishonest intention to establish the charge against the appellant. In this regard, it would be useful to state the principle of mens rea, as was enunciated by the apex Court in Nathulal v. State of Madhya Pradesh (AIR 1966 SC 43). It reads as under:

4. .... Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision

creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. ....

In this case, mens rea is an essential ingredient and that is not appearing on the part of the appellant. The appellant carried out the work from the budget allotment, on the basis of the undertaking and advice given by his superiors and that was the only irregularity committed by him. It has not come out in evidence that the appellant defalcated the funds. Merely by diversion of the funds, the charge is not established and would not fall within the ambit of criminal offence. This being the position, we do not find any mens rea on the part of the appellant.

9. It may also be mentioned that whatever budgetary grant was utilised for different works acting on the advice of his senior officers, whom the appellant had consulted, it would not be construed that appellant acted with the animus of guilt. In this regard, it would be relevant to note the decision of the apex Court in S.W Palanitkar and others v. State of Bihar and another (2002(1) SCC 241, wherein it was held as under:

8. Before examining respective contentions on their relative merits, we think it is appropriate to notice the legal position. Every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person wronged may seek his redress for damages in a civil court but a breach of trust with mens rea gives rise to a criminal prosecution as well.

9. The ingredients in order to constitute a criminal breach of trust are: (i) entrusting a person with property or with any dominion over property, (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own

use; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract made, touching the discharge of such trust.

Therefore, we hold that Charge No. 4 is not established and the appellant is entitled to the benefit of doubt.

10. Next we consider Charge No. 6 under NA Section 54(2). It reads:

(6) Was between 17th November 1988 and 31st may 1990 guilty of fraudulent conduct in that he with intent to defraud opened and operated Savings Bank Account No. C-3081 in the name of Commanding Officer, Indian Naval Ship Magar with State Bank of India, Fort William Branch, Calcutta, for transacting the unauthorised receipts of money in the name of Commanding Officker, Indian Naval Ship magar from Messers Garden Reach Shipbuilders and Engineers Limited, Calcutta, thereby committed an offence punishable under section 54(2) of Navy Act 1957.

As regards this charge, it is submitted by learned counsel for the appellant that the charge against the appellant does not disclose any offence. Mere opening of an account, that too in the name of the officer (the Commanding Officer), cannot be construed to be a fraudulent act. Had it been opened in the name of the appellant, the position would have been different and motive would have been attributed. But that is not the allegation against the appellant. In the context of the provisions contained in Section 3(25) of the Navy Act, which states all words and expressions used but not defined in this Act but defined in the Indian Penal Code (45 of 1860), shall have the meanings respectively assigned to them in that Code, it cannot be said that the appellant had acted fraudulently. It means that the person could be construed to have fraudulent intention only if he acted with intent to defraud. The element of fraudulent intention has not been established by the prosecution. There is nothing in evidence to prove the intention on the part of the appellant. Reliance may be made in the case of Dr. S. Dutt v. State of U.P (AIR 1966 SC 523).

11. However, from the side of the respondents, much thrust was laid that the appellant got the savings account opened with intent to divert the money and it could be construed to be an offence under NA Section 54(2). Emphasis has been laid that the appellant was not authorised to open account in the name of CO. In this respect, the statements of the prosecution witnesses were also referred to. As already stated, by mere opening of an account, that too in the name of the CO, no fraudulent act can be attributed on the part of the appellant. Therefore, this charge is also not sustainable.

12. Charge No. 7 is under NA Section 77(2), which is reproduced below:

(7) Did on 30th December 1988, in his capacity as Commanding Officer, Indian Naval Ship Magar, dishonestly misappropriate certain movable property to wit a sum of Rs.20,000.00 (Rupees Twenty thousand only) from Savings Bank Account No. C-3081 held in the name of Commanding Officer, Indian Naval Ship Magar for payment to Air Force Naval Housing Board, New Delhi towards a flat booked by him for his personal use, thereby committed an offence punishable under section 403 of Indian Penal Code read in conjunction with section 77(2) of the Navy Act 1957.

As regards this charge, it is contended that the appellant has not misappropriated any amount from Account No. C-3081. As a matter of fact, Cheque No.184159 from Account No. C-3081 was not drawn for getting the draft. In this regard, counsel for the appellant referred to the statement of the witness PW 12 Das, who had stated, in reply to Question No. 1008, that the appellant paid Rs.30,000/- by cash and Rs.20,000/- was paid by cheque from his personal account (No. C-7065) vide Cheque No. 180854 dated 30.12.1988. It is submitted by learned counsel for the appellant that he arranged Rs.50,000/- from his mother, which was reflected in the account of the appellant C-7065 (Page 1817 of the proceedings). This amount was withdrawn by him a few days earlier, on the eve of ships departure from Calcutta for shopping and the balance amount was utilised by him for taking draft and Rs.20,000/- was drawn from his personal account. It was pointed out that though there was ample evidence to prove this fact, the court martial failed to appreciate it in the correct perspective. However, from the side of the respondents, it is contended that there is sufficient evidence to prove that the appellant had misappropriated Rs.20,000/- after drawing it from Account No. C-3081. In this regard, reference to the statement of PW 12 Das (Question No. 1008) was made. It refers to Item No. 14 of Exhibit P56. He stated that the draft in favour of AFNHB was made on 30.12.1988 for Rs.50,000/- and that Rs.20,000/- was paid by Cheque No. 184159 from the account of CO, INS Magar (C-3081) and the balance was paid in cash by the appellant. In this regard, it would be advantage to extract the relevant portion of Exhibit P56, which reads as under:

14. A draft in favour of Air Force Naval Housing Board was made by us on 30.12.88 for Rs.50,000/-, Rs.20000/- was paid by cheque No. 184159 from the account of Commanding Officer, INS Magar and balance Rs.30000/- paid in cash, signed by Commander Avtar Singh INS Magar C/o Navy Office, Hastings, Calcutta (Draft No.112759, Rs.30000/- was withdrawn on 30.12.88 from A/c No.C-7635, personal account of Commander Avtar Singh).

The witness, in answer to Question No. 1008, clarified that at Item No. 14, the draft in favour of AFNHB was drawn by the bank on 30.12.1988 for Rs.50,000/- and Rs.30,000/- was paid by Cheque No. 184159 from the account of CO, INS Magar and the balance amount of Rs.20,000/- was paid in cash by the appellant. The witness retracted from that statement while giving answer to Question No. 1008 and stated that this was a mistake and the draft in favour of AFNHB was drawn on 30.12.1988 for Rs.50,000/-. Rs.20,000/- was paid by Cheque No. 180854 from Account No.C-7065 of the appellant. In this regard, the prosecution examined PW 4 Lt. Anil Kumar Ahuja. He stated, while examined in chief, that in the application for the draft, the name and the local address were in his handwriting and the signature was that of the appellant. It was also clarified by him that he went alongwith the CO to the bank on 30.12.1988 and withdrew Rs.20,000/- from the account of INS Magar by cheque. Rs.10,000/- was given in cash by the CO and the cheque for Rs.20,000/- was from the personal account of the appellant. This part of the statement corroborates the statement of the bank officials, who initially stated that Rs.20,000/- was drawn through Cheque No.184159 from the account of CO, INS Magar (Account No.C-3081). He retracted from this statement subsequently. But withdrawal of the amount for the purpose of draft is decipherable from the statement of PW 4 Lt. Ahuja. Moreover, it appears that the appellant had insufficient funds in his account to arrange Rs.30,000/-. The testimony of PW 8 Lt. Cdr. Dawara with regard to transmission of that draft to AFNHB is also established from Ext.P22 and from the Question/Answer Nos. 432, 434, 440 and 442.

13. Section 405 of the Indian Penal Code defines the offence of criminal breach of trust, the essential condition of which is that the accused being, in any manner, entrusted with property or with dominion over the property, dishonestly or fraudulently misappropriates it for his own or dishonestly uses or disposed of it in violation of any law prescribing the mode in which such trust is discharged or of any legal contract, expressed or implied, which he has made touching the discharge of his trust. The documentary evidence on record, coupled with the earlier statement of the Bank Manager, shows that Rs.20000/- was drawn for the preparation of the draft. This account was not supposed to be operated by the appellant for his personal benefit. In that backdrop, it can be presumed that the appellant has misappropriated Rs.20000/- by drawing it from the account of CO, INS Magar. The manner in which the appellant allegedly acted may or may not involve fraudulent conduct, but it covers dishonest intention to misappropriate money, that is to say, the appellant misappropriated the money which was allotted for a different purpose. The appellant has thus committed the offence under NA Section 77(2) (Charge No. 7) by misappropriating the amount of Rs.20,000/-. Therefore, we hold that the appellant is guilty of Charge No. 7.

14. Next we have to consider Charge No. 23 under Section 77(2) of the Navy Act. It reads:

(23) Did between 01st December 1988 and 31st December 1988 in his capacity as Commanding Officer, Indian Naval Ship Magar, dishonestly misappropriate certain movable property to wit a sum of Rs.13,000.00 (Rupees Thirteen thousand only) being the sale proceeds of 1691 Kilograms of victualling stores comprising of Rice, Milk Powder, Coffee, Tea leaves, Milk Tinned, Sugar and Dal, thereby committed an offence punishable under section 403 of Indian Penal Code read in conjunction with section 77(2) of Navy Act 1957.

Counsel for the appellant contended that the appellant had never sold rationed articles and the entire case was cooked up by certain disgruntled elements. The rationed articles were taken out without the knowledge of the appellant. The material witnesses were not examined to prove the so called illegal sale of rationed articles, which resulted in miscarriage of justice. It is submitted on behalf of the respondents that the illegal sale of rationed articles at the instance of the appellant has sufficiently been proved by the prosecution evidence and the GCM correctly appreciated the evidence while finding the appellant guilty of the charges levelled against him. From the statements of PW 4 Lt. AK Ahuja, PW 30 Cdr. Mathew George, PW 37 B. Singh and PW 49 Lt. Cdr. C.J Singh, it is clear that the appellant unauthorisedly sold rationed articles and misappropriated the money.

15. The material question that arises for consideration is, whether the appellant was entrusted with such ration articles in victualling stores comprising of rice, milk powder, coffee, tea etc. and whether he was to maintain the registers? The relevant pages of the register, based on which the appellant was charge sheeted, were found torn off. In its absence, it could not be determined whether there was any illegal sale of rationed articles or not and the surplus, if any, of the stores also could not be ascertained. The essential ingredients of the offence of criminal breach of trust are: (i) entrustment with the property or dominion over the property; and (ii) dishonest misappropriation thereof. Before proving the criminal breach of trust, it is essential that it must be shown that the accused has been entrusted with the property or the dominion over the property. There is nothing on record to show that the appellant was entrusted with or was having dominion over the property. Further, there is also no evidence as to the dominion which the appellant was alleged to have over the property. Mere statement regarding sale of surplus virtualling stores, in the absence of evidence for the entrustment, does not make out an offence against the appellant. In its absence, the appellant cannot be held to be responsible and, therefore, the charge is not proved.

16. Next what we have to consider is Charge No. 25, which reads thus:

(25) Did between 12th May 1989 and 15th May 1989 negligently perform the duty imposed upon him as Commanding Officer, Indian Naval Ship Magar in that, he

failed to ensure that a sum of Rs.6,490.00 (Rupees six thousand Four hundred ninety only) was accounted for in the Canteen Cash Account Book of Indian Naval Ship Magar, thereby committed an offence punishable under Section 41(c) of Navy Act 1957. T.A NO. 23 OF 2009 20

As regards this charge, it is contended that there is nothing on record to show that it was the responsibility of the appellant to maintain accounts. If the Accounts Officer failed to exercise control, the appellant cannot be held responsible for it and no culpability can be fastened on him. Thus, no offence is made out against the appellant so far as Charge No. 25 is concerned.

17. The next charge to be dealt with is Charge No. 26, which reads as under:

(26) Did at about 1340 hours on 02nd May 1989 strike then Sub-Lieutenant (now Lieutenant) Baljor Singh Jakhar (03184-K), Indian Navy of Indian Naval Ship Magar on the quarter deck when the ship was coming alongside South Quay I berth in Madras Harbour, thereby committed an offence punishable under section 48(a) of Navy Act 1957.

As regards this charge, counsel for the appellant urged that there being the relationship of trainer and trainee between the CO and the Officer, if the appellant had given a slap for the mistakes committed by trainee Officer, it cannot be termed as a criminal act and it could be treated only as part of the training. However, this aspect was controverted from the side of the respondents stating that the CO had no authority to slap the trainee officer and such act on the part of the appellant would fall within the ambit of NA Section 48. In this regard, it would be appropriate to quote Section 48, which reads as under:

48. Quarrelling, fighting and disorderly behaviour:-- Every person subject to naval law, who, --

(a) quarrels, fights with or strikes any other person, whether such person is or is not subject to naval law; or

(b) uses reproachful or provo9king speeches or gestures tending to make a quarrel or disturbance; or

(c) behaves in a disorderly manner,

shall be punished with imprisonment for a term which may extend to two years or such other punishment as is hereinafter mentioned.

The offence is said to be striking on the trainee officer, which is stated to have fallen within the ambit of Section 48(a) of the Navy Act. The provisions under Section 48(a) cannot be read in isolation attributing a literal meaning to ascertain the offence. The expressions quarrel, fight or strike are to be given a constructive interpretation. Under Section 48, quarrel, fight or beat would carry the same meaning. Here, in this case, the appellant was the CO and when the trainee officer committed mistakes, with a view to improving his working, if the appellant gave a mild slap, that would not fall within the purview of NA Section 48. Even from the statement of PW 56 Lt. Baljor Singh Jakhar, his mistake is apparent, which could lead to untoward incident. Therefore, Charge No. 26 also would not stand.

18. Finally, we have to consider Charge No. 27, which is re-produced below:

(27) Was on 31st October 1989 guilty of an act to the prejudice of good order and naval discipline in that, he made a false declaration pertaining to his family members in the application form for obtaining Garrison Membership of Madras Gymkhana Club, Madras purporting to show that Shrimati Alathoor Padma and Miss Sonu are his family members whereas in actuality his family members are Shrimati Harneet Singh (wife), Amandeep Singh (son) and Amanika Singh (daughter), thereby committed an offence punishable under Section 74 of the Navy Act 1957.

With respect to this charge, counsel for the appellant contended that there is ample evidence on record that Smt. Harneet Singh (wife), Amandeep Singh (son) and Amanika Singh (daughter) were the family members of the appellant. He obviously made a false declaration. However, it is contended that the declaration was given to a private club and the same has nothing to do with the naval discipline. There was no dishonest intention from the inception to cause wrongful loss to the institution. Ultimately the appellant married Smt.Padma and so it would not attract any offence against the appellant. Moreover, the allegation is of civil nature and what the maximum could be done was to terminate his membership by the club for wrong declaration and he cannot be made criminally liable for the same.

19. In view of the aforesaid discussion, we are of the hold that the appellant is guilty of the offence under Section 77(2) for having misappropriated an amount of Rs.20,000/-. Rest of the charges having not been proved, looking to the nature of offences proved against the appellant, the sentence of dismissal does not require any interference. In the result, the conviction under NA Section 77(2) is sustained. Accordingly, the appeal is partly allowed.