

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI.

T.A.No.147 of 2009

[Arising out of WP(C)No. 18682 of 2004 of Delhi High Court]

Mulk Raj Singh

...Petitioner

Versus

Union of India and Anr.

...Respondents

For the Petitioner :

Mr. VD Sharma, Advocate

For the Respondents:

Capt. Alifa Akbar, Advocate.

C O R A M:

HON'BLE MR. JUSTICE A.K.MATHUR, CHAIRPERSON

HON'BLE LT.GEN. M.L.NAIDU, ADMINISTRATIVE MEMBER

JUDGMENT

1. The petitioner by filing this Writ Petition in Delhi High Court challenged the Summary General Court Martial proceedings

dated 29th April, 2003, whereby the petitioner was sentenced for life imprisonment and dismissed from service. On formation of this Armed Forces Tribunal this case has been transferred to this Tribunal for disposal.

2. Under Section 15 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as 'Act, 2007') appeal lies against any order, decision, finding or sentence passed by a Court Martial or any matter connected therewith or incidental thereto.
3. Sub Section 2 of Section 15 of Act, 2007 further provides that any person aggrieved by an order, decision, finding or sentence passed by a court-martial may prefer an appeal in such form, manner and within such time as may be prescribed.
4. Sub Section 3 of Section 15 of Act, 2007 further contemplates that the Tribunal shall have full power to grant bail to any person, with or without condition.

5. Sub Section 4 of Section 15 of Act, 2007 says that Tribunal shall allow on appeal against the order of conviction passed by the Court Martial can set aside that finding which is not sustainable for reasons recorded, the finding involves a wrong decision on a question of law or there is material irregularity in the course of the trial resulting in miscarriage of justice.
6. Sub Section 5 of Section 15 of Act, 2007 further says that the Tribunal may allow an appeal against conviction and pass appropriate order.
7. Sub Section 6 of Section 15 of Act, 2007 also says that notwithstanding anything contained in foregoing provisions the Tribunal have power to substitute findings of the court-martial, finding of guilty for any other offence for which the offender could have been lawfully found guilty by the court-martial and pass a sentence afresh for the offence specified or involved in such findings under the provisions of the Army Act, 1950 or the Navy Act, 1957 or the Air Force Act, 1950.

8. It further says that sentence can also be reduced, if it is found to be excessive, illegal or unjust. The Tribunal shall have the power to remit the whole or any part of sentence, with or without condition. Mitigate the punishment awarded, commutes such sentence to lesser punishment. It has also power to enhance the sentence awarded by court-martial. But shall be done only with an opportunity of being heard to the petitioner. It can release the appellant, if sentence of imprisonment on parole, with or without condition. It can suspend a sentence of imprisonment or pass any order as it may think appropriate.
9. Sub Section further says that notwithstanding anything contained in this Act, the Tribunal shall be deemed to be a criminal court for the purposes of Sections 175, 178, 179, 180, 193, 195, 196 or 228 of the Indian Penal Code and Chapter XXVI of the Code of Criminal Procedure, 1973.

10. Therefore, by virtue of Section 15 the Tribunal has full appellate power against the order of the court-martial, like a court of appeal.
11. Since in this case the petitioner challenged the conviction by the court-martial by filing a Writ Petition, which has been remitted to this Tribunal, on its formation. This Tribunal has converted this Writ Petition into an appeal under Section 15 of the Act, 2007.
12. We have heard learned counsel for the parties and perused the record.
13. Brief facts which are necessary for disposal of this appeal are that the petitioner/appellant was charged for committing a murder of Havildar/Uphol Gulzar Singh of 7015 Electronics Electronics and Mechanical Engineers Battalion (150 Field Workshop Electronics and Mechanical Engineers). It is alleged that the accused Mulkraj Singh, who belong to Unit 7015 Electronics and Mechanical Engineers Battalion (150 Field

Workshop Electronics and Mechanical Engineers) was on guard duty.

14. It is alleged that on 4th March, 2002 at about 1800 hrs. Sepoy/Driver (Mechanical Transport) AK Verma (PW 2) of 7015 Electronics and Mechanical Engineers Battalion (150 Field Workshop Electronics and Mechanical Engineers) went to collect food from the cook house and came back at 1930 hrs. Thereafter, he and Sepoy/Driver(Mechanical Transport) Jamshed Ali had food. After having dinner PW 2 went to the Main Post for guard duty along with Sepoy/Driver Jamshed Ali around 2000 hrs. He was detailed for the second shift guard duty. At about 2155 hours he went to wake-up Sepoy/Driver (Mechanical Transport) Mulkraj Singh (accused) and Cfn AK Singh as they were next to stand on the guard duty. It is alleged that he told the accused that it is his turn for guard duty and also woke up Cfn AK Singh, though, Cfn AK Singh did not respond, but, the accused Mulkraj Singh told him that they will come shortly. For some time nobody turned-up, then, again he asked

Sepoy/Driver (Mechanical Transport Jamshed Ali to find out why both of them are not coming to Main Post. Before Jamshed Ali could go to Guard Room, he saw that accused and Cfn AK Singh walking towards the Main Post. Accused, on reaching the Main Post, told both to leave, they reached guard room and both accused and Cfn AK Singh took over the charge.

15. It is further alleged that at about 2230 hrs. rifle shots were heard, therefore, PW 2 immediately got up from his guard room , took bullet proof jacket, Patka and his rifle and rushed to the Main Post, along with Jamshed Ali. Soon thereafter somebody came from behind and wanted to know how and from where this firing has taken place. But, someone from main post answered that Guard Commander has been hit. Thereafter, he rushed to that place where a person lying on the ground. Some officer also reached on the Post and it was Lieutenant Sugandha. Lieutenant Sugandha ordered: '*pick-up the Guard Commander*' and he identified that it was Guard Commander, Havildar/Uphol

Gulzar Singh. They picked-up the body of the Guard Commander, thereafter, it was told to leave Cfn AK Singh from the Main Post. He also alleged that a 100 watt bulb was glowing on Main Post on the fateful day.

16. On the basis of this incident a FIR was also lodged, thereafter, a request was made to the Magistrate to transfer this case to the Army for court-martial proceedings. Accordingly the court-martial proceedings were initiated against accused Mulkraj Singh.
17. The prosecution in support of this case has examined as many as 19 witnesses and given full opportunity to the accused to defend himself.
18. In this case there is one eye witness of the incident. The admitted facts which emerge that on the fateful day the accused and one Cfn AK Singh were on guard duty and at about 2230

hrs. shots were fired and hit the Guard Commander and he died on the spot.

19. Prosecution has relied on the testimony of **PW-16** (Cfn/Turner AK Singh of 7015 Electronics and Mechanical Engineers Battalion) main witness and **PW-2** (Sepoy/Driver AK Verma) of 7015 Electronics and Mechanical Engineers Battalion), and other witnesses who had came on the scene subsequently like Major DR Senwal and others.

20. The plea of the accused was that deceased approached wearing coat with hood covering his head. Accused gave a caution '**Tham**' and identify with pass word three times, but he did not respond. Therefore, he had no option but to shoot. Thereafter, it is found that he was none other than Guard Commander.

21. The lone witness at the relevant time was PW-16 (Cfn/Turner AK Singh of 7015 Electronics and Mechanical Engineers Battalion), who was also on duty along with the

accused. He has also admitted that at the relevant time he and accused was relieved by PW-2 (Sepoy/Driver AK Verma) and PW-3 (Sepoy/Driver Jamshed Ali). He has deposed that after they were asked to takeover the post from AK Verma (PW 2) and Jamshed Ali (PW 3) they took over the post on guard duty. The accused Mulkraj Singh proceeded two minutes before him to the post. At the Main Post the accused went and stood at the position of Sentry No. 1 and he went and stood at Sentry No. 2. The butt number of his SLR was 74 and the accused had SLR bearing butt number 81. He deposed that he saw the accused hanging his rifle on the Sling which was already hanging from the roof of the Main Post at the position of Sentry No. 1. He also put his rifle on the Sling that was already hanging at the position of Sentry No. 2. After about twenty minutes he told the accused that he wanted to interchange his position as he was feeling cold and the accused was standing close to the Bhukari. Both of them changed their position. They did not carry their rifles. After about 5 to 7 minutes accused called out **“Tham”** (Halt). On this

caution of the accused, he presumed that one of Unit Officers or the Duty Officer might have come to check the guard personnel on duty. The accused again called out **“Tham”** for the second time. He then asked the accused as to who was coming and from which direction. The accused told him **“Picchae Sae Koi Aa Raha Hai”** (someone is coming from the rear). On hearing this he looked towards his front and back but did not see anyone. The accused then took out rifle which had butt No. 74 from the Sling. The accused told **“Password Bata De, Ya to Ruk Ja Bhai”** (Tell the password or stop brother). When the accused called out “Tham” twice it was loud enough for the other posts to hear it, but, when he heard other words telling someone to stop, his voice was normal. The accused, thereafter, cocked the rifle and fired a single round.

As soon as the accused had fired the round, he jumped out of the Main Post and ran out towards the electric pole. After about 2 to 3 seconds the accused fired two more rounds. Since the firing was coming from the Main Post he immediately took

out his rifle bearing butt number 81 and came out and took the position between the Main Post and the adjoining wall. After about 6 to 7 seconds, the accused fired two more rounds from his rifle. Both these rounds were fired towards the entrance of the Main Post. Thereafter accused told him ***“Dekh Kon Geera Hai; Koi Harkat to Nai Kar Raha”*** (See who is fallen; is he doing any activity). On hearing this he stood up. The accused again told him ***“Kahan Dekh Raha Hai, Woh Deewar Kai Picchae Side Mai Geera Hai”*** (Where are you looking; he has fallen on the backside of the wall). Then he deposed that he went down from the Main Post and after getting down he saw a body lying on the ground. He then went closer to the body and saw that head of the body was covered with the hood of the coat. He lifted the head of the body and removed the hood of the coat in order to see the face of the person and he saw that the person lying there was his Guard Commander-Havildar/Uphol Gulzar Singh. Then he shouted ***“Yaar Yeh Kya Kar Diya; Yeh to Hamara Guard Commander Hai”*** (Friend what have you done;

He is our Guard Commander). The accused replied that ***“Hamne Tham Pukara, Password Puccha, Yeh Nahi Bataya, Hamhe Shuk Hua, Maine Usko Shoot Kiya”*** (I called out Halt; asked the password; he did not tell; I got suspicious; I shot him). This statement given by the PW-16 (Cfn/Turner AK Singh), who was on the spot and the lone eye witness had supported the version of the accused in toto.

22. More or less, this version given by PW-16 was repeated by the accused before PW-12 (NM/VM [MV] Ramesh Kumar of 7015 Electronics and Mechanical Engineers Battalion), who was on the fateful night on the third shift duty at Single Sentry Post and he corroborated. He also corroborated that he heard the caution ***“Tham Kon Aata Hai”*** [Halt who comes there] . Thereafter he heard the firing of shot. Same version was given by the accused to the other officers who came on the site. From other witnesses, who were subsequently examined, by and large, supported this story. Doctor who conducted post mortem has deposed that death has taken place by fire arm injury.

- 23.** We need not to multiply the statement of various witnesses but suffice it to say that defence put up by the accused that he called out to identify the intruder but the intruder did not respond nor did he disclosed his name nor did he gave out password. Since he was on sentry duty and had no choice but to shoot. This fact has been fully corroborated by his another colleague on the post i.e. PW-16 (Cfn/Turner AK Singh). This also supported by another witness PW-12 (NM/VM [MV] Ramesh Kumar), who was also on guard duty at some distance. He heard sound from Sentry Post calling the intruder to disclose his identity and there was no response. Therefore, in this background, the question arises that what offence is made out. In normal course, a case could have been made out for murder, but, in the background of the Army and the place like Army School in Srinagar, where the insurgency is on its height, we have to appreciate the testimony of the witnesses in that background. One has to be very vigilant and cautious on sentry duty in the night. A small slip can prove

fatal. Therefore, persons on guard duty, especially when they are guarding Army School, Srinagar, cannot take any chance.

24. In this connection, learned counsel for the appellant has submitted that petitioner cannot be held guilty under Section 302 and strongly submitted that the case is covered by Section 79 of the Indian Penal Code, which reads as under:

79. Act done by a person justified, or by mistake of fact believing himself justified by law. – Nothing is an offence, which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.”

The illustration under Section 79 is an example, which reads as under:

“A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment, exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self defence.”

- 25.** Learned counsel for the appellant submitted that given in the background of the Srinagar and the petitioner doing a guard duty in the night, he bonafidely acted that when a person who is coming to the premises of the protected area and guard calls out him that he should stop and disclose the password, but, if he doesn't do it he has no choice except to resort to offensive so as to protect and guard the post. Therefore, the accused is fully justified in his action.
- 26.** In order to appreciate that what are the necessary conditions for invoking Section 79 are:
- a) The state of things believed to exist would, if true, have justified the act done;
 - b) the mistake must be reasonable; and
 - c) the mistake must relate to fact and not to law.

The classic case which is available on the subject is **Levet's Case (1 Hale P.C. 42)**. Levet was indicted for the death of Frances Freeman, the case was that William Levet being in bed

and asleep in the night. His servant hired Frances Freeman to help her to do her work. At 12.00 of the clock in the night, the servant Frances thought she heard thieves breaking open the door. She immediately rushed to her master and informed him that she thought thieves were breaking open the door. The master rising suddenly and taking a rapier ran down suddenly. In the meanwhile Frances hid herself in the buttry lest she should be discovered. Meanwhile Jevet's wife also cried out to her husband. Levet runs into the buttry in the dark, not knowing Frances but thinking her to be a thief and hit her with rapier. Frances died instantly. It was resolved that neither it is murder nor manslaughter nor felony.

- 27.** The ratio is that the offender shall be deemed to have acted under that state of facts which he believed in good faith and on a reasonable ground belief such act cannot be treated to be a murder under Section 302 of IPC.
- 28.** Similarly, sentinel strikes, or shoots other person, taking him to be an enemy his ignorance of the person is excuseth his offence.

The examples can be multiplied that where a man thinks that burglar is hiding and kills him, but, in fact, it happens to be member of his family. It has been held that no such offence was committed.

29. Hon'ble Supreme Court in the case of ***State of Orissa v. Bhagaban Barik*** [AIR 1987 SC 1265] observed that under Section 79 of the Indian Penal Code the onus to establish the facts to sustain the plea of mistake of facts lay on the accused and he had to establish his plea of reasonable probability or, in other words, on preponderance of probability either by adducing evidence or by cross-examining the prosecution witnesses, if it is established, then, in given facts and circumstances the benefit of Section 79 of the Indian Penal Code can be extended to the accused. That is acted under mistake of fact i.e. ***“an honest and reasonable belief in the existence of circumstances”*** which, if proved, would make the act for which the accused is indicted an innocent act.

Their Lordships' also held that good faith requires not logical infallibility but due care and attention. The question of good faith is always a question of fact to be determined in accordance with the proved facts and circumstances of each case.

Their Lordships' quoted from '*Ratanlal and Dhirajlal's Law of Crimes*', 23rd Edn. P. 199 observed that “ ***'Mistake' is not mere forgetfulness. It is a slip 'made, not by design, but by mischance'.***”

Their Lordships' further quoted from '*Russel on Crime*' Vol. 1, P. 76 that *the concept of mistake of fact is tersely stated thus:*

“When a person is ignorant of the existence of relevant facts or mistaken as to them, his conduct may produce harmful results which he neither intended nor foresaw.”

The law has been stated by the Russel on Crime is:
“Mistake can be admitted as a defence provided (1) that the state of things believed to exist would, if true, have justified the

act done, and (2) the mistake must be reasonable, and (3) that the mistake relates to fact and not to law.”

30. Therefore, in this background of the state of legal position it transpires that, in fact, the petitioner under the bonafide mistake of law believed that the intruder is person *non grata*. He called out to identify, but, he did not do so, later realizing that he happened to be his Guard Commander. Therefore, his bonafide plea, on his part that he is under duty to caution from the post, it was not with any malice. It was a bonafide exercise in good faith for the benefit of security which was entrusted to him. This was bonafide mistake of fact and petitioner cannot be hauled-up or charged for murder of his Guard Commander.
31. As mentioned above, from the background that incident took place in Army School at Srinagar, where, the conditions are hostile and in such hostile condition no one can take chance. It was observed in the order of the court-martial that there was a light and he could have identified the deceased. He fired five shots and he did not show any repentance. These are all factors

which had been taken into consideration by coming to the conclusion that the accused is guilty. It is that there was light of bulb, but, it was not sufficient light to identify the deceased at distance. Secondly, the incumbent had covered his head by the hood of the coat. Therefore, it was not possible for the accused to identify him. Since it was a very sensitive area, the petitioner could not have taken any chance. When he gave a caution and asked the intruder to identify by his password, but, still there was no response. No witness has been produced by the prosecution to show that at the relevant time when caution was given by the accused from the post there was response from the Guard Commander or Havildar/Uphol Gulzar Singh (deceased). Had there been some evidence to show that at the relevant time when the caution was given by the accused the deceased responded. Had he responded things would have been different. But no evidence had been led by the prosecution to show that after the caution given by the accused any response was made by the deceased. There is ample evidence to

establish that the accused did in good faith. What is expected by him to give caution to the intruder by twice calling 'Tham' and third time asking the intruder to disclose his password. He had taken care but despite this there was no response. Therefore, the action of the accused was fully justified and covered by the general exception under Section 79 of the Indian Penal Code.

32. In ***Raj Kapoor v. Laxman*** [AIR 1980 SC 605] Hon'ble Supreme Court observed as under:

“jurisprudentially viewed, an act may be an offence, definitionally speaking but a forbidden act may not spell inevitable guilt if the law itself declares that in certain special circumstances it is not to be regarded as an offence. The chapter on General Exceptions operates in this province. Section 79 of Penal Code makes an offence a non-offence. When? Only when the offending act is actually justified by law or is bona fide believed by mistake of fact to be so justified.”

33. In the case of ***'Bhawoo Jiva Ji v. Mulji Dayal*** [ILR 1888 (Vol. 12) Bombay page 377) it was observed that a police constable

was on duty near the Arthur Crawford Market. He saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went upto the complainant and questioned him. Complainant stated that the cloth was made in England. The accused, noticing that each piece bore Gujarathi marks and not knowing that such marks are placed on English made goods, concluded that this statement was false and had been stolen. He took hold of one of the pieces of the cloth in order to examine closely. There was a scuffle between them for the possession of the cloth. The accused arrested the complainant and took him to a European Inspector. He arrested the complainant because he had assaulted him. The complainant lodged a complaint before the Presidency Magistrate, charging the accused with wrongful confinement, offences punishable under sections 341 and 342 of the Indian Penal Code. The defence was that the complainant had assaulted the accused, therefore, he arrested and kept in confinement. Magistrate found no justification and convicted the

accused. High Court held that the conviction is wrong and observed that there was honest suspicion that the cloth in the possession of the complainant was stolen property, was justified in putting questions to the complainant the answers were not, in his opinion, to be satisfactory. Therefore, he acted bonafidely in justifying in detaining the accused.

34. In ***Waryam Singh v. Emperor*** [AIR 1926 Lahore Page NO. 554] the accused assaulted a man believing him to be a ghost and the assault proved fatal. Their Lordships held that it is neither guilty under Section 302 nor Section 304 nor Section 304A and gave them a benefit of mistake of fact.
35. In ***Bonda Kui v. Emperor*** [AIR (30) 1943 Patna 64] High Court held that accused at time of assault believing in good faith that person assaulted was ghost and not living human being. Fatal injuries caused resulting in death. Their Lordships extended the benefit of Section 79.
36. In ***State of Orissa v. Khora Ghasi*** [1978 CrL. L. J 1305] Orissa High Court observed that death caused by shooting arrow under

bona fide belief that object aimed at was animal, whereas, it was a man. Their Lordships extended the benefit of Section 79 of IPC to the accused and acquitted him from all offences.

37. In ***Chirangi v. State*** [AIR 1952 Nagpur 282] it was observed that the accused in delusion killed his own son believing him to be tiger. It was held that he is entitled to benefit of Section 79 of the IPC.
38. Therefore, in this background of the position of law, the matter is crystal clear that incumbent fired on fateful night while discharging his duties as manning the post and acted bonafidely in state of facts. He has taken sufficient care and caution to warn the victim, still victim did not respond, therefore, the accused was fully justified in firing, which proved fatal. Hence, he cannot be convicted under Section 302 or Section 304. He is neither guilty of murder nor acted in rash and negligent manner. In the place like Army School at Srinagar, in height of insurgency, if proper care and caution is not taken, it could cause havoc. It is unfortunate that victim happens to be his colleague

Guard Commander. Therefore, the accused cannot be held under Section 302 and accordingly we allow this petition/appeal and set aside the conviction of the accused and acquitted him of all the charges.

- 39.** The accused may be released forthwith, if not required in any other case. The Writ Petition/Appeal allowed.

[Justice A.K. Mathur]
Chairperson

[Lt. Genl. ML Naidu]
Member (A)

New Delhi
19th November, 2009