

**IN THE ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**TA/228/2009
IN W.P.C. No. 4018/2006**

**EX SEPOY RAJ BAHADUR SINGH
R/O. VILLAGE & PO KIARA
DISTT. BAREILLY (U.P.)**

**THROUGH : SH.S.M.DALAL, ADVOCATE
SH. C.P.SINGH, ADVOCATE**

...PETITIONER

VERSUS

**1. THE UNION OF INDIA
THROUGH THE SECRETARY
MINISTRY OF DEFENCE
SOUTH BLOCK, DHQ P.O.
NEW DELHI-110 011.**

**2. THE CHIEF OF ARMY STAFF
ARMY HEADQUARTER
SOUTH BLOCK, DHQ P.O.
NEW DELHI-110 011.**

**THROUGH : SH. ANKUR CHHIBER, ADVOCATE
LT COL NAVEEN SHARMA**

...RESPONDENTS

CORAM :

**HON'BLE SH. S.S.KULSHRESTHA, MEMBER
HON'BLE SH. S.S.DHILLON, MEMBER**

J U D G M E N T
DATE : 27.01.2010

1. This petition was brought by convict Raj Bahadur Singh for quashing the GCM proceedings and also the order dated 11.07.2004 passed by respondent no.2 whereby holding him guilty for the offence under Army Act Section 69 R/w. 302 IPC and also dismissing him from service. Simultaneous prayer has also been made for his reinstatement in service with all consequential benefits. **This petition has been received on transfer from Delhi High Court by this Tribunal and is treated to be Appeal u/s.15 of Armed Forces Tribunal Act, 2007.**

2. It is contended that the petitioner has falsely been roped in this case. As a matter of fact on 25.11.1999 he was sent on temporary duty to 'A' Coy of 5004 ASC Bn (MT) to perform guard duties. This Unit was located at Tezpur (Assam). The petitioner along with Sepoy G. Prusti was detailed to perform Sentry duty at main gate of 'A' Coy from 2000 hrs. to 2200 hrs. with one rifle and and 20 rounds of ammunition. On 24.12.1999, at about 2245 hours Sepoy G.Prusti had gone to patrol the area away from main gate. The petitioner was all alone at the main gate and he suddenly saw a man coming towards the main gate with one hand

in his pocket, which in those circumstances could be suspected to be having a hand grenade. As per procedure, he cautioned him for not advancing to that gate but the individual did not stop. The petitioner assuming him to be a militant had no option but to open fire, however, he aimed at lower portion of the body. He died at the spot. The petitioner got scared, fearing retribution and left for his hometown Bareilly with the rifle and ammunition. The petitioner reached Bareilly and surrendered to U.P. area Provost Unit (Military Police). During the SGCM this version of the petitioner was not taken into consideration, and merely on conjectures and surmises, the guilt was established. The SGCM did not make any attempt to ascertain the presence of witnesses namely Ms.Moom Kalita (PW10) niece and Sh. Dilip Das (PW11) servant of the deceased, but proceeded to place reliance on their testimony without any basis. Even from the other witnesses, namely Sepoy G. Prusti (PW1), it is ascertainable that the petitioner gave caution to the alleged intruder to stop and not to approach to that site. There was no intention on the part of the petitioner to cause death of the deceased. It was in the official discharge of the duties, he had to open fire, more so suspecting him to be intruder having hand grenade.

3. This petition was resisted on behalf of the UOI and it is contended that there was ample evidence to fasten the culpability of the petitioner in the aforesaid crime. There were instructions to the sentry not to open fire unless it is inescapable. The factual aspects of this case would show that the deceased was called at the gate and some altercations had taken place and accused/petitioner fired two shots causing fatal injuries to the deceased. Such repeated firing would also be construed to cause the death of the deceased. It is also said that there is admission of the accused that he opened fire. It would also lend support to the prosecution case and there is also no reason to discard the testimonies of the witnesses and particularly of Moom Kalita (PW10) and Dilip Dass (PW11).

4. In order to appreciate the points raised by the Learned Counsel for the parties, it shall be necessary to make brief narration of facts as is decipherable from the records of the proceedings. On 24.12.1999, at about 2245 hours Sub Inspector P.K.Bora Officer, Officer Incharge out post Baweja received information from one Sh. Guna Kalita that his relative Sh.Gokul Kalita was shot dead by someone from Army near the main gate of 'A'Coy. A note of this information was taken by him in the daily diary and he reached at the site of incident along with other Police personnel. He prepared inquest report after examining the

body of the deceased and could ascertain that he died because of bullet injuries. One empty and the other live cartridge was recovered by him from that place outside the main gate “A”. The deceased was identified as Sh.Gokul Kalita of Village Depota Tejpur located near “A” Coy. The dead body of the deceased was sent for post mortem on 25.12.1999. During the course of investigation on 25.12.1999, he got a separate written complaint from Guna Kant Saikia and forwarded the same to P.S.Sadar, Tezpur for necessary action. The original complaint along with English Version of that complaint which was received from Guna Kalita vide Exh.Q has also been filed by him. He also sent the Rifle 7.62 mm SLR Butt Noll2, Registration no.A-42576 along with two magazines, Empty case, which was handed over to him by Maj Ravinder Officer Commanding, to Ballistic Expert. Expert’s Ballistic report was also received confirming the use of that weapon. The autopsy of the deceased was also conducted by Dr. Ranjan Kumar Das of Kanaklata Civil Hospital, Tezpur on 25.12.1999 at 1000 hrs. and he noticed the following prominent features and anti mortem injuries.

During physical examination, he declared the body as ‘brought in dead’.

During external examination, he observed as under :

(a) A stout male aged about 38 years.

(b) Eyes open

- (c) Rigor mortis present.*
- (d) Entry wound on right side 10 cm above the waist.*
- (e) Exit wound on left side four cm in dia above the waist.*
- (f) On left hand a bullet injury was found at seven cm from the elbow zone (towards the wrist)*
- (g) Bullet injury to the right side of abdomen (entry point) has ruptured the left kidney and came out from left side of abdomen.*
- (h) The bullet injury also ruptured the peritoneum in the abdomen.*

It was also opined by him that the cause of death was due to Haemorrhage and shock as a result of bullet injuries sustained by him. He also noticed rigor mortis present on the dead body.

5. The prosecution examined Sepoy G. Prusti as PW1 who was also detailed on 24.12.1999 to perform Night Guard Duty at main gate of 'A' Coy of 5004 ASC Bn (MT). In addition Sepoy Sunil Patil, Sep G.S.Popat, Sep R.B.Singh, Sp Kunwar Pal, Sep S.S.Bag with Nk Jeevan Saikia, the Guard Commander were also detailed for night guard duty at the main gate. Sentries used to be perform duties in pairs and the accused/ petitioner was detailed to perform night guard duty with Sepoy G. Prusti. The sentries were also required to patrol the area from main gate inside the Unit located at 25-30 mtrs. at distance. At about 2145 hours or so,

when he had gone towards the pump house (MES) located on the main road, he heard the voice of Sep Raj Bahadur Singh (accused) asking someone that “Kaun Hai” or words to that effect. At that time there was sufficient light. He also noticed after 2-3 minutes that the accused/petitioner was cocking his rifle and fired shots at someone who was standing under the shade of the tree and was not visible nor identifiable. He immediately rushed to the place of incident along with Guard Commander. After some time he also noticed a Vehicle approaching the main gate and in the head light of vehicle the dead body could be seen. The accused/petitioner was not traceable and had left that place. PW2 Lt Jatinder Kaur who prepared the topographical sketch vide Exh. M to M5 was also examined by the prosecution. Other witnesses namely G.S.Popat, PW3 who was detailed for Sentry duty on that date and was to be relieved by Sep. G. Prusti and Sepoy Raj Bahadur (accused) was also examined by the prosecution who made clear that before sending Sentry to duty some instructions are also given to them in particular, firstly, sentry who notices such unknown/suspicious person would challenge that person as per procedure. In case satisfactory reply/password is not received by the sentry, then that person will be asked to raise his hands and turn about. The sentry on duty then will raise the alarm to call the other sentries including guard commander. Only on the orders of guard commander the sentry may open fire. Sentry may open

fire seeing the imminent danger to his life or in self defence. PW4 Sepoy Sunil Patil who was also detailed for night on main gate duty w.e.f.1800 hours to 2000 hours was also examined by the prosecution. He also made clear that the after 20 minutes Police came at the place of occurrence.

6. Other army personnel namely PW5 Sep Kunwar Pal who was detailed at the main gate guard duty on 24.12.1999 about 2200 hours to 0001 hours was also examined. PW6 Hav/MT Kausar Khan who is the formal witness was examined and confirmed that on 24.12.1999 at about 1730 hours he issued weapon/ammunition to accused i.e. Rifle SLR 7.62mm, Butt no.12, registration no.A-42576, two magazines and 20 rounds of 7.62mm BDR having lot no.88. Other witnesses namely Nk/MT Jeevan Saikia who was detailed as Guard Commander on 24.12.1999 stated that all the Sentries were briefed about challenging procedure etc. Only in the case of threat to life on the orders of the guard Commander Magazine will be put on weapon. PW8 Sub/MT Name Dutt stated only of the hearing of the sound of two shots. PW9 Maj Jatinder Singh who after hearing the fire shots reached at the place of occurrence and saw few civilians including young girl of 15 years was standing and crying on road. He also noticed one empty cartridge lying on the other gate.

7. Prosecution further examined Ms.Moom Kalilta who is the niece of the deceased who is said to be eye witness of the incident. She stated that on 24.12.1999 at about 2200 hours, she along with her Uncle (Gokul Kalita now deceased) and servant Dilip Das were sitting near piggery farm. One army personnel in combat dress came to the piggery farm and told her Uncle (deceased) the he was required at Sentry gate 'A' Coy of 5004 ASC Bn (MT). His uncle pursuant to that call proceeded to see that Sentry and told the witness and servant to stay on but she along with servant followed the deceased. When he was hardly 15-20 yards from the main gate he asked the sentry that why he was called, on that some arguments took place. Even the deceased was also abused by him and he shot fire at the deceased. She started crying, attracting her parents and other persons also came at the place of occurrence. PW11 Dilip Das who was the servant of the deceased also made identical statement. Smt. Mrinali Kalita, mother of PW10 was also examined by the prosecution. She also stated about the narration of the incident by Ms. Moom Kalita who came back crying after having seen the incident. PW13 Sh.Guna Kalita who is father of PW10 Kumari Moom Kalita and is also the first informant of this case made it clear that he saw the dead body near to the main gate of 'A' Coy and lodged the report. He no where mentioned in his statement that his daughter disclosed about the incident to him. Further FIR is also silent on that point. Other formal witnesses namely Maj

C.B.Singh PW14, Maj N.K.Yadav PW17, Hav/ASH P.N.Jha PW18, Hav S.N.Nandi PW19, Sub D.B.Malla PW20 and Sub SPS Deshwal PW21 were also examined by the prosecution. The Learned GCM on the basis of the evidence adduced by the prosecution with regard to the detailing of the accused/appellant on the Sentry duty at the main gate of “A” Coy coupled with the statement of other witnesses stating that he cautioned the outsider to stop and then two fire shots were made by him. The testimony of eye witnesses namely Moom Kalita (PW10) and Dilip Das (PW11) was also given credence.

8. It is submitted by the Learned Counsel for the petitioner that it was the dark night of December, 1999 and was the lonely place where the accused and PW1 Sepoy G. Prusti were detailed for sentry duty. From the site plan it would also appear to be at some distance from the village. There is nothing on record to point out that even from Village or from the house of the informant that gate of “A” Company which was manned by the appellant could be seen. On that late night in winter it was not expected from the witnesses in particular PW10 and PW11 to have followed the deceased when he was going at that gate pursuant to the message received by him. It is also said even from the statement of PW10 it is also clear that she was asked by the deceased to stay on at the house.

There is nothing on record to show that she was apprehending some danger and for that reason she preferred to follow the deceased along with the servant. Further from the statement of parents of PW10, it is also clear that they were in the house when PW10 Kumari Moom Kalita went back after the incident crying about the killing of her Uncle. There appears to be no reason as to why the minor girl could follow the deceased and not apprising to her parents the purpose and even parents did not follow him when he was called at main gate of 'A' coy. Under such circumstances, presence of PW10 and PW11 at the place of incident is said to be unbelievable. Moreover these witnesses are related to the deceased and it would not be safe to rely on their testimony. In regard to the reliability of the witnesses for furthering the prosecution version, relationship is not the factor to affect the credibility of the witnesses. It is more often that the relation would not relieve the actual culprit and make allegations against innocent persons. The court has to adopt a careful approach and analysis evidence to find out whether it is cogent and credible. Reliance may also be placed in the case of *Kalegura Padma Rao Vs. State of Andhara Pradesh 2007 AIR scc 1447*, *Dalip Singh Vs. State of Punjab SC Pg 364*, *Gulichand Vs. State of Rajasthan 1974 SC 267*. In *Masalti & Ors. Vs.State of U.P. 1965 SC Pg.202* the Apex Court has observed as under :

There is no doubt that when a Criminal Court has to appreciate evidence given by witnesses who are

parties or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account.”

9. Thus the relationship is not the fact to affect the credibility of the witnesses. But there testimony is to be looked with caution. At the outset we must make it clear that we are not inclined to believe the evidence of PW10 and PW11 the alleged eye witnesses to the occurrence as in the FIR lodged by the father of PW10 does not find reference about the presence of these eye witnesses. Even on the next date a separate complaint which was lodged by Gunakant (father of PW10) wherein for the first time he nominated these two witnesses namely PW10 Moom Kalita and PW10 Dilip Singh. There appears no justified explanation as to why these witnesses were omitted to have been mentioned in the FIR which only refers about the death of Sh. Gokul Kalita to have been shot dead by someone near the main gate of “A” Coy. Had there been any truth about the presence of these witnesses as was subsequently reported on next date and when as per the mother of PW10 she came crying back, it ought to have been mentioned in the FIR itself. Further the presence of PW10 and PW11 at the place of occurrence was also appearing doubtful. They were not natural witnesses as the other elderly members of the

family were there in the house and they did not prefer to follow the deceased. There could be no reason for the minor girl to have followed the deceased along with the servant. PW15 Sub Inspector P.K.Bora has also made it clear in his statement that only killing of Gokul Kalita was reported by Sh. Guna Kalita and he identified the deceased to be Gokul Kalita of Village Depota Tejpur located near “A” Coy. From his statement it was also not appearing that his daughter came crying at the house and informed about the opening of fire. There is obviously a gap between the time when the deceased was first located by the informant (Sh.Guna Kalita) and when the report was made by him nominating two persons namely Moom Kalita (PW10) and Dilip Das (PW11) to be witnesses of the incident. There is no explanation from the side of the prosecution as to when the first information report was lodged on 24.12.1999 why the presence of the witnesses was omitted when the informant himself happens to be close relation Kumari Moom Kalita. Introduction of the witnesses appears to be after thought. In the given circumstances it would be difficult to positively establish the presence of these witnesses at the time of the incident. In the absence of other positive evidence to conclude that accused was seen by these witnesses namely Moom Kalita and Dilip Das it would be hazardous to rely on the testimony of these witnesses.

10. It is needless to emphasis that the court had to appreciate in reaching the conclusion about the guilt of the accused, evidence placed before it, by the yardsticks of the probabilities, values animus of the witnesses. Circumstantial evidence is also to be looked into. There is ample evidence on record to show that the accused was posted at the main gate of “A” Coy of Sentry duty. He was also issued Rifle SLR 7.62mm, Butt no.12, registration no.A-42576, two magazines and 20 rounds of 7.62mm BDR having lot no.88. The other sentry who was patrolling near the water tank and other witnesses heard the shouts made by him challenging the outsider to stop. Thereafter two fires were made by him. Two cartridges were also recovered from the spot. The weapon possessed by him was sent to Ballistic Expert to confirm about its use. The accused/appellant also ran away from that place. From such incriminating facts and circumstances the act and omission on the part of the appellant is well established.

11. Moreover the accused has nowhere denied this fact with regard to his opening of the fire but made it clear that he however suspected the outsider to be militant and was advancing towards the main gate keeping one hand in his trousers. From such hand in trouser he could anyhow gather an impression that he might throw hand grenade as in the

past sentries were also killed in that insurgency area. Such statement of the appellant would lead to the admission. The question would arise whether burden of proof was to be discharged by the prosecution or not, would depend on the circumstances of the case. Here in this case, facts are admitted even otherwise sufficient materials have been brought on record so as to show that fires were shot by the accused. It is ideal to contend on the part of the Learned Counsel for the petitioner that total burden rested upon the prosecution. The admission made as well as known, is admissible in evidence (*proprio vigore*).

12. It has next been contended by the Learned Counsel for the accused that even if the prosecution version and the evidence is accepted to be true on its face value the offence would at the most fall under Exception 3 of Section 300 IPC and it would not be construed to be murder u/s.302 IPC. It is also said that the appellant being the military personnel was on official duty and in good faith believing to be part of his duty opened fire. Even if he accelerates his act it was in good faith and there was no ill will on his part for opening fire against the deceased. He was the outsider and temporarily posted at the company. There could be no intention to kill him. Suffice is to mention that Exception 3 of Section 200 IPC makes it clear that a culpable homicide is not murder. Being the

public servant acting for the advancement of public exceeds the powers given to him by law and causes death by doing an act which is in good faith without any ill will and believing it to be lawful and necessary duty, it would be culpable homicide not amounting to murder. Here the expression 'official duty' implies that the act or omission must have been done by the public servant in the course of his service and that it was in the discharge of his duty. Here from the facts of this case that he first gave caution to the deceased not to advance towards the gate, it is established that the act or omission for the accused had reasonable connection with the discharge of his duty. Merely saying that before to his deployment instructions were given as to under what circumstances, fire could be opened by him. Those instructions also include that in the eminent danger or in self defence he could open fire. The protection given under Exception 3 to the public servant is reasonably communicated to the discharge of his official duty.

13. In the end it may be mentioned that the prosecution has nowhere alleged that the accused had grudge against the deceased and he virtually called the deceased from his house. There was no motive to the accused for committing crime. To the contrary, it is established that the gate of 'A' Company was guarded by the appellant and the deceased had

no right to reach to that site despite when he was accosted. Moreover, if there was no right of the deceased to go at that gate in the night hour and there was apprehension in the mind of the accused that he (deceased) might throw hand grenade, indisputably he could exercise right of defence. However, since the appellant was not able to justify the opening of two fires causing fatal injury, he exceeded his right of private defence. *Hence, appellant is guilty under Army Act Section 69 read with Section 304 Part-I IPC and not under section 302 and sentenced to 10 years RI and a fine of Rs.5,000/- with the default stipulation of further undergoing three months RI. Appeal is decided accordingly.*

S.S.DHILLON
(Member)

S.S.KULSHRESHTA
(Member)

PRONOUNCED IN OPEN COURT
ON 27th JANUARY, 2010