

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI.

T.A.No. 239 of 2010

[arising out of WP(C) NO. 9077 of 2006 of Delhi High Court]

NK S.S. Patharia

...Petitioner

Versus

Union of India & Ors.

...Respondents

For the Petitioner : Sh. IV Raghav, Advocate with Sh. SB
Raghav, Advocate

For the Respondents: Sh. Ankur Chiber, Advocate with Maj.
Ajeen Kumar

C O R A M:

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

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

JUDGMENT

1. Petitioner by this Writ Petition has challenged the finding
of the Court Martial dated 9th April, 2005 and the

sentence awarded vide order dated 8th August, 2005, likewise, the order dated 15th September, 2005 confirming finding of the Court Martial.

2. Brief facts which are necessary for disposal of this petition are that the petitioner was enrolled on 30th November, 1988 in the Indian Army as a Sepoy. On 15th May, 2004 a FIR was lodged against him under Sections 301/302 IPC at Police Station Lucknow Cantt. and he was handed over by the Army Authorities to civil police for murder of two jawans and seriously injuring CHM Munna Lal (PW-11).

3. Prosecution examined large number of witnesses and after conducting the trial by the Court Martial found the petitioner guilty and convicted him and awarded life sentence, dismissal from service and reduction in the rank by the order dated 8th August, 2005, which was confirmed

by the competent authority on 15th September, 2005.

Hence, the present writ petition was filed challenging the aforesaid conviction and sentence before Hon'ble Delhi High Court and the same has been transferred to this Tribunal on its formation.

4. We have heard learned counsel for the parties and perused the record. The whole case is unfolded by the main prosecution witness **CHM Munna Lal (PW-11)**, who was seriously injured by the petitioner.

5. **CHM Munna Lal (PW-11)** has deposed that he was performing the duties of CHM with effect from 15th February, 2003. On fateful day i.e. 15th May, 2004 on the order of Senior JCO Subedar Labh Chand he detailed six persons including accused for rifle cleaning with CQMH Pratap Singh. These persons came back from the rifle cleaning at about 1030 Hrs. and went to their respective

sections for their duties. However, he did not get any information from the accused. Havildar BP Singh, who was the orderly NCO, after putting the duty slip on the notice board went to the RR Vehicle. L/Nk G Ponniyaram and L/Nk Ram Singh were detailed for RP duty with effect from 1300 Hrs to 1830 Hrs on 15th May, 2004. Havildar AK Shah and Havildar Lekh Ram came before him and after taking permission went to SBI Bank in Sadar Cantt for the purposing of taking ATM card. After some time Havildar SB Yadav, who was performing the duties of MT Section NCO came to Subedar Labh Chand and told him that L/NK Ram Singh, who was detailed on RP duty had gone for repair of Rover Vehicle and thus cannot come for the duty. Subedar Labh Chand asked him to change the duty of L/Nk Ram Singh and also told that L/Nk Ponniyaram was to go to the exercise area with the generator and he was also

detailed for duty. Then, Subedar Labh Chand asked him to call the orderly NCO and check with him for changing the duty of the above two persons. He then went to call Havildar BP Singh. Both of them checked register and came to Senior JCO, who, on checking the register found that only six persons were available for detailment on RP duty. Out of these six persons, four were detailed for night duty. Therefore, Senior JCO told him to put the accused and L/Nk Shatrughan Singh on duty in place of L/Nk Ram Singh and L/Nk Ponniyaram. He conveyed the message to L/Nk Shatrughan Singh about his duty but could not find the accused in the company area. Later on he was informed that accused had gone out. A message was passed to Nk MD Vadi who was doing the RP duty at the main gate to tell the accused about his detailment on duty as soon as he comes back. Havildar Lekh Ram and Havildar

AK Sah told him that they had met the accused in the bank. When accused reached the main gate at about 1245 Hrs. he was told by Nk MD Vadi about his RP duty but the accused refused to give the duty. Accused said that he had earlier also given duty in place of L/Nk G Ponniyaram.

PW-11 further deposed that he explained to the accused that there was shortage of manpower due to detailment of persons on officers mess picket and for the Brigade exercise, but, the accused refused to give duty and went to his section barrack. He told the version to Subedar Labh Chand and he asked me to call the accused. After some time the accused came to his office and he told the accused to speak to Senior JCO. Senior JCO asked the accused to go for duty, but, he refused and said that he would not give the duty and told Senior JCO to detail whoever he wants. At the relevant time Havildar AK Sah

and Havildar Lekh Ram were also present. Subedar Labh Chand told him to ask the section NCO to persuade the accused to go on RP duty and if he still refuses to go then send his absent report. Thereafter, Havildar AK Sah and Havildar Lekh Ram went to the Section Barrack and Havildar AK Sah came back and told that the accused had agreed to go for the RP duty. He also saw the accused going towards the main gate at about 1340 Hrs. from where he went to the store for drawing his weapon and ammunition. After drawing his arm and ammunition the accused came out of the store. Havildar AK Sah who could see the accused from the verandah of his office told him that the accused was coming at a fast pace. He told him that let him come. The accused cocked the rifle in a battle crouch position when he was at some distance from his table and shouted "*Bol duty kon dega*". He got up from

his chair but the accused opened fire on him and he was hit on the right side of his neck and, thereafter, the accused turned right and opened fire on senior JCO saying "*Bol duty kon dega*". He heard and saw two round of rifle shot fire hitting the JCO sahibs, then, he became unconscious. He regained his consciousness after some time. The accused also shouted that "*Aur lagao duty jo maine karna tha kar diya. Abhi aap logon ki kismat*". He again became unconscious and has been hospitalised. He is the main star eye witness of the incident.

6. Thereafter, the brigade commander, deputy commander and other persons arrived at the scene of firing and found the bodies of Subedar Labh Chand, Nb Subedar Unni Krishnan and CHM Munna Lal (PW-11) and taken to hospital.
7. An FIR was filed by Captain Pradweap RV (PW-17). Then, investigation was undertaken by Inspector Hemant Kumar

Tyagi (PW-16). Rifle was seized along with empties from there and they were sent to the forensic laboratory and a report was sent by the forensic laboratory that gun was in serviceable condition, shots were fired from the gun. Lt Col PS Kholia (PW-15) also deposed that the PW-11 has received gunshot injury and he also deposed that both the deceased died on gunshot injuries. After closure of the investigation a challan was filed by the police and the case was transferred to the Court Martial on the request made by the military authorities.

8. Prosecution examined about 17 witnesses and out of them the PW-11 is the star witness, who is a victim of the accused, as he received a gunshot injury on his neck and lucky to survive. The accused made confession before PW-4 and the another eye witness PW-3 corroborated the version of PW-11.

9. According to the statement of PW-11, as mentioned above, he has given his version of the incident that on account of annoyance of the accused for detailing him for duty, he resorted to this foolhardy action. PW-1 has corroborated the testimony of PW-11 and he has deposed that he was asked by the PW-11 to communicate to the accused that he has been detailed for duty. Similarly, PW-3 also corroborated that the accused was asked to go on duty and the testimony of PW-1 and PW-3 support the version given by PW-11. PW-1 has also deposed that when he was going for having food he met the accused and on his request issued him INSAS Rifle 5.56 having Butt No. 30 alongwith two magazines and 10 live rounds of ammunition. PW-1 has produced the relevant pages (Exhibits 11 and 12) of the Daily Arms Issue Register and Daily Ammunition Issue Register to show that the rifle in question was

issued to the accused. PW-1 has also deposed that after closing the store when he was about to move out, he heard sound of a gun shot being fired from the direction where CHM Munna Lal (PW-11) was sitting. After some time he again heard sound of 4 to 5 rounds gun shot being fired. PW-3 also supported the version of PW-1 that he also went to the accused to persuade him to go and discharge the duty as detailed by PW-11. Though, initially accused insisted not to go for duty, but, after persuasion went and collected rifle and ammunition. PW-3 further deposed that he saw the accused coming with rifle from the direction of the company office at a fast pace towards CHM's office. He told CHM Munna Lal that the accused is coming at a fast pace. He said let him come. The accused crossed him near the cooler which is placed outside the OC's office. He had hardly taken two to three steps when

he heard a clicking sound. He clarified that by clicking he means to say sound of palm striking the butt of the rifle. He turned back and heard the accused loudly saying "*Bol duty kon dega*" to PW-11 and he was in a battle crouch position and he shouted at accused "*Are Pathariya ye kya kar raha hai galat kam mat karo*" and he saw the PW-11 fell down on the ground and started bleeding. Thereafter, in order to save his own life he went inside the company office along with Havildar Devi Singh and L/Nk A Guha. At the same time he heard the sound of 4 to 5 rounds of rifle shot being fired. He came out of the company office only after hearing the sound of vehicles moving outside and on hearing people talking outside. On coming out he saw Subedar Labh Chand, Nb Subedar Unnikrishnan and CHM Munna Lal in injured condition. They were lifted and taken to the hospital. Subedar Labh Chand, Nb Subedar

Unnikrishnan died and CHM Munna Lal was injured and put on treatment.

10. **Naib Subedar Najar Singh (PW-4)** has also supported the version of the other witnesses. **Havildar SB Singh (PW-5)** has deposed that when Major Shantha Kumaran asked the accused to come near and asked the accused who has done this, then, accused said "*Maine in teeno ko mara hai*".

11. **CHM RS Sheoran (PW-7)** has deposed that at about 1340 Hrs. he heard sound of 5-6 rounds of rifle shot being fired from the direction of the company. He immediately ran towards the company and on reaching the door of the charging shop he saw the accused coming from CHM and Senior JCO's office side with a rifle in battle crouch position and moving towards the main gate. He stopped at

the main gate for few seconds and putting his rifle in sling arm position, returned along the same route and again came to verandah of CHM and Senior JCO's office. PW-7 further deposed that he went towards the CHM and Senior JCO's office and saw CHM Munna Lal's body soaked in blood. On shaking Munna Lal's body he opened his eyes, tried to speak to him but he could not speak. PW-7 also saw the motionless body of Subedar Labh Chand soaked in blood lying on the floor near his table, similarly, body of Nb Subedar Unnikrishnan also.

12. **Lt. Col. Shantha Kumaran (PW-8)** of Headquarters 167 Infantry Brigade has deposed that he got a telephone call from PW-7 (CHM RS Sheoran) informing him that the accused had shot dead Subedar Labh Chand, Nb Subedar Unni Krishnan K and CHM Munna Lal. He rushed to Brigade Commander, Brigadier Samarjeet Singh and informed him

about the same. Immediately both of them rushed to the company location and there he saw the bodies lying in a pool of blood. Nobody was present on the site, then, he shouted for the company personnel to come out and take the casualties to the hospital. When he asked for who is done it somebody told that it is done by the accused and he was shown to him standing in the verandah with his rifle. On his calling, the accused started coming towards him with his rifle. However, on being told by him the accused left his rifle in the barrack nearby and came. He asked the accused who has done it and the accused said "*Yeh Maine kiya hai*". He again asked the accused why he has done it and the accused said "*Senior JCO aur CHM ne milkar gandh macha rakha hai*".

13. Thereafter, FIR was filed and police conducted the investigation and the accused was sent for Court Martial.

14. We have examined the testimony of all these witnesses and without going in further it is suffice it to say that the testimony PW-11 is a clinching evidence, which is being supported and corroborated by other witnesses that the accused who resorted to this firing in which he received injuries and Subedar Labh Chand and Nk Subedar Unnikrishnan ultimately fell to the firing. We see no reason to disbelieve the testimony of PW-11, who has been sufficiently supported by other witnesses and there is no reason why PW-11, who is a victim of accused, will wrongly implicate him or rope in the accused falsely. Therefore, from the perusal of the statements of the witnesses there is no manner of doubting that the accused is responsible for resorting to this firing, which ultimately resulted in

serious injuries to CHM Munna Lal and death of Subedar Labh Chand and Nb Sub. Unnikrishnan.

15. Learned counsel for the petitioner argued that PW-17, who filed the FIR, did not know the name of the accused and learned counsel for the petitioner tried to shake the testimony of the witnesses that all the witnesses were malafidely motivated towards him. We regret it, we cannot accede to the submission of the learned counsel for the petitioner for simple reason that the PW-11 was a victim and he will not unnecessarily frame the accused when he saw him coming there, which is corroborated by the testimony of PW-3 (Havildar AK Sah) and Naib Subedar Najar Singh (PW-4) that they informed the victim (PW-11) that the accused is coming with a fast pace along with a rifle. Therefore, there is no reason to

disbelieve the testimony of PW-11 and the possibility of wrongly rope in the accused is ruled out.

16. Learned counsel next submitted that the report of the incident reached the Magistrate late, whereas, it should have been immediately sent to him in time that creates a suspicion about the incident. We reject the submission that in view of the categorical testimony of eye witnesses, belated sending of FIR to the Magistrate is not fatal to this case.

17. Learned counsel next submitted that the Magistrate has early rejected the request for handing over the case to the Army and the petition was filed under Section 482 Cr.P.C. before Hon'ble High Court and that was pending, then, again request was made by the army for transferring

of this case to the Army authorities for Court Martial and the Magistrate without adverting to the earlier order acceded to the request of the Army authorities for transfer of this case to the Army authorities for initiating Court Martial proceedings. Nothing turns on petition pending under Section 482 Cr.P.C. before the High Court. Earlier rejection of Army request was as challan was not filed. But, after challan was filed, case was transferred by Magistrate on request of Army authorities. The authorities were within their power to seek the permission to take up the case and that was acceded by the Magistrate. Therefore, this transfer of the case, does not, in any way, prove fatal to the prosecution case.

18. As a result of above discussion, we are of the opinion that the conviction awarded by the learned Court Martial

authorities is fully in consonance with law and guilt of the accused is established beyond the doubt. Hence, there is no merit in this petition and the same is dismissed. No order as to costs.

[Justice A.K. Mathur]
Chairperson

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

New Delhi
20th May, 2010