IN THE ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

TA/259/2009(Writ Petition (C) no.2706/96)

Connected with

TA/261/2009 (Writ Petition (C) no. 874/97)

SERGEANT B.K.MEHTA
OF 2305
IGLA, FLIGHT AIRFORCE
ATTACHED TO 230 S.U.
AIR FORCE, AMRITSAR
NOW IN THE AIR FORCE CELL
AT AMRITSAR, THROUGH HIS
WIFE SMT. RAGINI MEHTA
PRESENTLY AT NEW DELHI.

THROUGH : DR. H.B.MISHRA, ADVOCATE

...APPELLANT

VERSUS

1. **UNION OF INDIA**
   THROUGH SECRETARY
   TO THE MINISTRY OF DEFENCE
   SOUTH BLOCK
   NEW DELHI-110 011.

2. **THE CHIEF OF THE AIR STAFF**
   AIR HEADQUARTER (VAYU BHAWAN)
   NEW DELHI-110 011.

3. **THE AIR OFFICER COMMANDING-IN-CHIEF**
   WESTERN AIR COMMAND
   SUBROTTO PARK
   NEW DELHI.

4. **GROUP CAPTAIN P.M.MATHAI**
   COMMANDING OFFICER
   230 S.U.
   AIR FORCE, AMRITSAR
   PUNJAB

5. **SQUADRON LEADER M.EKKA**
   COMMANDING OFFICER
   NO.2305 IGLA
   FLIGHT, AIR FORCE
   C/O. NO.230 S.U. AIR FORCE
   AMRITSAR

6. **SERGEANT MOHAMMED S.M.**
   WEAPON FITTER-I, OF 2305,
   IGLA, FLIGHT, AIR FORCE,
   C/O. 230 S.U. AIR FORCE,
   AMRITSAR.

7. **CORPORAL SUNIL K.S.**
   EQUIPMENT ASSISTANT, OF NO.2305,
   IGLA, FLIGHT, AIR FORCE,
   C/O. 230 S.U. AIR FORCE,
   AMRITSAR.

8. **CORPORAL RAJESH K.**
   RADIO TECHNICIAN, OF 2305
   IGLA, FLIGHT, AIR FORCE,
   C/O. 230 S.U. AIR FORCE,
   AMRITSAR.

9. **FLYING OFFICER ARVIND KUMAR**
   LOGISTICS OFFICER,
   511 S.U. AIR FORCE,
   ATTACHED TO C/O. 230
   S.U. AIR FORCE,
   AMRITSAR.

10. **LIEUTENANT COLONEL A DHINGRA**
    MEDICAL SPECIALIST,
    BASE HOSPITAL,
    DELHI.

11. **DISTRICT COURT MARTIAL**

THROUGH ITS PRESIDING OFFICER,
WING COMMANDER K. KRISHNAMURTHY,
ACCOUNTS OFFICER OF 8 WING, AIR FORCE,
C/O. WESTERN AIR COMMAND,
I.A.F. SUBROTTO PARK,
NEW DELHI.

12. FLIGHT LIEUTENANT J.S. BHALLA
ADMINSTRATIVE OFFICER,
JUDGE ADVOCATE
D.C.M. WESTERN AIR COMMAND,
I.A.F. SUBROTTO PARK,
NEW DELHI.

THROUGH : MS JAGRITI SINGH, ADVOCATE
SH. AJAI BHALLA, ADVOCATE

...RESPONDENTS

CORAM :

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. S.S.DHILLON, MEMBER

J U D G M E N T
DATE : 04-06-2010

1. Both the petitions have been received from Delhi High Court and are treated to be an appeal under Section 15 of the Armed Forces Tribunal Act. Since identical questions of facts and laws are involved in both the cases and so they are taken together for disposal. The accused-appellant who was at the relevant time attached to 230 S.U. Air Force Amritsar for driving the vehicle BA No.92 AF 14615 ALWYN NISSAN, on 02.12.1994 at about 1745 hours by his rash and negligent driving caused the death of Sh.Amarnath, Son of Sh. Heera Lal aged

about 60 years, R/o.Village P.O.Dhanowali Tehsil and District Jallandhar amounting to culpable homicide punishable under Section 71 Air Force Act, 1950 R/w. Section 304A IPC, 1860 and further he had also committed civil offence by causing disappearance of the evidence of the deceased and for that he was also charged under Section 71 R/w. Section 201 IPC. Further other charges were levied pertaining to causing damage to the vehicle, not depositing the dead body of the deceased to Civil Govt. Hospital, Jalandhar and not reporting circumstances leading to the death of Amarnath to the nearest Police Station extended to the offences under Sections 60, 64 and 65 of the Air Force Act. Further he was also charged for the offences under Section 42(e) of the Air Force Act, 1950 for not complying the orders of the superior officers for keeping the speed within limits. It is said that the learned Court Martial (hereinafter referred as Court) has not properly appreciated the materials and evidence on record. Whatever the evidence was adduced by the prosecution did not prove the culpability of the accused-appellant. Merely on conjectures and surmises the guilt of the accused-appellant for the offences under section 71 R/w. Section 304A IPC and also under Section 71 R/w. Section 201 was construed. The old man (deceased) suddenly crossed the road and all necessary precautions were taken by the accused-appellant to avoid the accident. It was said to be negligence on the part of the deceased and for which to hold the accused-appellant criminally liable for rash and

negligent driving is against the well established principle in law. Further all possible efforts were made for providing treatment to the deceased. He was immediately rushed up to the Military Hospital but in the meantime he succumbed to his injuries. There is no independent witness of the incident except the Air Force personnel who were sitting in the vehicle, who are themselves criminally liable. Other superior officers who were responsible for the proper regulation of the convoy, in order to shift their responsibility wrongly fixed the accused in this case. The vehicle was not in perfect mechanical condition but petitioner was asked to drive the vehicle. The accused was driving the vehicle in a controlled manner and not at high speed. Further it is also said that the report of the incident was lodged by the senior officer after a considerable gap and even the necessary formality for the preparation of the site plan were taken after a considerable period of one and a half year. Such site plan would not lend support to the prosecution case. In as much in the claims petition brought by the dependents of the deceased under Motor Vehicle Act, specific plea after verifying true facts was taken from the side of the respondents that the vehicle was not driven rashly or negligently. Under such circumstances in the criminal case taking altogether a different plea would itself show the malafides on the part of the respondents. It is also said that the accused-appellant was not afforded fair trial. Legal assistance including that of the lawyer of his choice was not afforded.

Moreover the Court Martial deviated from the Rules by not putting the evidence against the accused-appellant to him as required under section 66 (4) of the Air Force Act.

2. It is next contended that on 06.11.1994 the convoy comprising Sqn Leader M.Ekka as Convoy Commander (respondent no.5), Sgt S.M.Mohammed (respondent no.6), Corporal K.S.Sunil (respondent no.7), Corporal K.Rajesh (respondent no.8) with four other airmen and two Air Force Vehicles i.e. one Gypsy Jeep and another one Tonner (Nissan) proceeded from Amritsar to New Delhi for attending International Trade Fair India at Pragati Maidan. Accused-appellant was detailed as MT Driver of one Tonner, under the over all command of respondent no.5 and en route under the respondent no.6 at times. The movement order for the return journey was collected on 30.11.1994 but under the instructions of the Convoy Commander the movement was to effected from 02.12.1994. Sqn Leader M.Ekka, Convoy Commander started from New Delhi to Amritsar in the morning hours on 02.12.1994 after giving necessary instructions to Sgt. S.M.Mohammad who was the senior most in the leading party. On the way there was an accident and the victim was taken to Military Hospital but he could not survive. The entire incident was reported to the Police Station on 4/5th-12-94 however,

on 23.01.1995, the claim petition was filed before MACT Jallandhar by the relatives of the deceased, where in the Written Statement categorical plea was taken with regard to the innocence of the accused in the accident. It was also averred in the Written Statement that the vehicle was not being driven rashly or negligently.

3. The prosecution in support of its case has examined Sgt. S.M.Mohammad, PW1 who was the senior most amongst the party travelling in that vehicle. Witness said that the vehicle was being driven rashly and negligently and also gave the narration of the incident and took the victim to Military Hospital. There he insisted for taking the deceased to Civil Hospital but the vehicle was diverted by the accused to different route where the dead body was dropped at an isolated place, though time and again he warned to the accused-appellant for not doing so. PW2 Cpl Sunil KS who was also sitting in that vehicle in the centre of the front cabin along with driver, stuck to the prosecution version that the vehicle was being driven at a high speed though the accused-appellant was warned time to time for not driving in high speed. He also supported the prosecution version about the rash and negligent driving and thereafter dropping the dead body on a Kutcha Path with a view to screen out the evidence. PW4 Dr. Devinder Bindra who was at the relevant time Senior

Medical Officer, Civil Dispensary Muqsudan, Jallandhar was examined. He had conducted autopsy on the dead body of the deceased and found following anti-mortem injuries:

> *Haematoma between scalp layers and skull bones. Brain matter was lacerated. Skull bones were fractured and fifth to eight ribs were fractured and right lung was lacerated. There was bleeding from nostrils and left ear.*

He proved the post mortem report and it was also opined by him that the cause of the death of the deceased was due to shock and haemorrhage as a result of the injuries described in the record. Lt Col A Dhingra, PW10 who was at the relevant time posted at the strength of the Military Hospital declared the victim to be dead and advised Flt Officer Arvind Kumar to take the body to the Civil Hospital for the purposes of post mortem.

4. Prosecution further examined Sqn Ldr Mukul Ekka (PW8) who was posted as Commanding Officer at the relevant time, who stated that on 06.11.1994 a Convoy of his Unit, consisting of two vehicles had gone to New Delhi to display IGLA missiles in International Trade Fair. For that purpose, Op Order 05/94 dated 05.11.1994 was issued by Wing Commander S.K.Sharma the then Station Commander of 230 SU, AF. It

is further stated by him that on 02.12.1994 the convoy started back from 03 Wing AF, for Amritsar at around 1000 hours. In one tonner, Sgt Mohammad who was i/c of the vehicle, Cpl Rajesh and Cpl Sunil were sitting and the vehicle was driven by accused-appellant. The Convoy reached at Ambala at 1400 hours. Since he had to go to meet AOC 09 Wing, Air Force so he left Ambala at about 1445 hours and made Sgt Mohammad to be Incharge of the Convoy. At the time Sgt Mohammad also told that they would be proceeding slowly and would join up at Jallandar Dhaba. He reached at that Dhaba at 2000 hours but did not find ALWYN vehicle. He thereafter decided to move towards Amritsar and in the way around 2115 hours saw that vehicle parked at Kutcha Road. There Sgt Mohammad informed him about the accident and damage caused to the wind screen of the vehicle. He questioned why the matter was not reported to the Police and why the dead body was thrown. After having received such information, he decided to apprise the Station Commander and also to take up the matter with Security Officer K.K.Sharma for the next course of action. The witness also stated that he went to lodge report on the next day i.e. 03.12.1994 at the Police Station Jallandhar Cantt. where he was told that unless the dead body is brought, the report could not be registered. The Civil Police also tried to locate the dead body. On that day it could not be located. On 05.12.1994 Sqn. Ldr Gurmeet Singh along with the accused-appellant went to locate the dead body and this

witness also reached at the site where the Sqn Ldr parked his vehicle near to the dead body. Other formal witnesses B.K.Sharma who produce the Xerox copy of the 'Requisition for Govt. Transport" i.e. vehicle in question. JWO S C Gupta furnished the photographs of the deceased with negatives.

5. Prosecution further examined PW9 Flying Officer Arvind Kumar who was posted on the strength of 223 Sqn, AF on 02.12.1994. He had gone to Jallandhar for wagon-loading for the Air Force stores. After completion of the wagon loading he was returning to his Unit. At about 1730 hours he saw one ALWYN vehicle with Air Force personnel being surrounded by 15-20 civilians. He rushed to that place and saw "two Air Force personnel holding an injured person.....trying to put him in the front seat of the vehicle. He also saw..... some blood on the road near the front left wheel.....He inquired from the Air Force personnel whether there is any Officer with them or not. One person stated himself to be the senior most, and he was instructed to take the victim to Military Hospital." He also saw skid marks of about 8-10 meters in length at that place. He rendered all possible assistance to them for Military Hospital where victim was declared dead. Senior most person of the Convoy party was told to take the victim to the Civil Hospital, even the road leading to

District Hospital was told to them. Other witnesses namely PW5 Sh. Mahinder Singh, who was posted as ASI in Jallandhar Cantt who registered the case under sections 279, 304A and 201 IPC was also examined by the prosecution. PW6 Const Gurdev Singh had taken the dead body for post mortem. was also examined. PW7 Sh. Ashwani Kumar is the son of the deceased stated about the filing of the claims petition and also giving the reason for not anticipating about the accident because the deceased told that he had to go to Ambala on tour and so he and his family members remained under the impression that the deceased had gone to Ambala.

6. The Court Martial on the basis of such evidence held the accused guilty for the offences under Section 71 Air Force Act, 1950 R/w. Section 304A IPC, 1860, Section 71 R/w. Section 201 IPC and offences under Section 42(e) of the Air Force Act, 1950 and dismissed him from service and R.I. for six months in Civil Jail.

7. The first and foremost argument from the side of the accused-appellant is that it was the national highway and the accused was not driving the vehicle rashly and negligently. Suddenly the deceased

crossed over the road and met with an accident. He stopped the vehicle but it was on account of contributory negligence on the part of victim, he sustained injuries. Before appreciating this point it may be mentioned that rashness and negligence are not the same things. Mere negligence cannot be construed to mean rashness. There are degrees of negligence and rashness and in order to construe criminal rashness or criminal negligence one must find that rashness has been of such a degree as to amount to taking hazard, knowing that the hazard was of such a degree that injury was most likely to be occasioned thereby. The criminality lies in running risk or doing such an act with recklessness and in-difference to the consequence. Criminal negligence is gross and culpable neglect, that is to say, failure to exercise due care and failure to take precaution which having regard to the circumstances it was the imperative duty of the individual to take.

8. There is ample evidence on record that the accused-appellant was driving the vehicle at high speed. As it is also clear from the statement of PW1 Sgt. S.M.Mohammad and PW2 Cpl Sunil KS who were sitting in that vehicle. PW1 Sgt. S.M.Mohammad time and again reminded the accused for not driving the vehicle so rashly but the accused paid no heed. It was also clarified that the accused-appellant was driving

the vehicle at the speed of 70-80 kms. This witness also stated that he could ascertain the speed by seeing the Speedometer. When the victim of the accident crossed 1/3rd of the road, he shouted at the accused to stop the vehicle but he did not apply brake. Second time he again shouted at the accused, only then brake were applied but the vehicle met with an accident. Almost identical is the statement of PW2 Cpl Sunil KS. Both were sitting in the vehicle and narrated the whole prosecution version and stated that the vehicle was driven with high speed. The testimony of both these witnesses remained unimpeached. There appears to be no reason for disbelieving them. Even otherwise when PW1 Sgt. S.M.Mohammad warned to the accused having noticed high speed. He did not respond on the first call of the witness to stop the vehicle when the victim was crossing the road. Such circumstances would show the culpable rashness on the part of the accused. When the second time PW1 Sgt. S.M.Mohammad shouted, he applied brake leaving skid marks of about 8-9 meters which was even noticed by PW9 Flying Officer Arvind Kumar. This would indicate rashness on the part of the accused (Driver). Subsequent applying of the brakes would not free him from criminality. Criminality lies in not taking precautions to prevent the happening of consequences in the hope that they may not happen. Such high speed on the part of the accused-appellant when the vehicle was passing near the

Railway Station and one side there was a Divider would lead to the inference that vehicle was driven rashlessly.

9. Further in his statement, the accused did not question the prosecution version with regard to the speed of 80 kms. at the time of accident when the vehicle was driven. It was an area near to the Railway Station and is a busy road as is evident from record. The testimony of the accused would also support the prosecution case. It shall be useful to mention that in *Gola Bag Vs.State of Orissa reported in 1983 Cr LJ (NOC) 211*, it has been held that *when the court act upon the statement of the accused and there is no other evidence available which disproves any portion of the statement, the whole of the statement and not only the part of it which may go against him should be considered*. In the instant case as regards the high speed the testimony of the accused-appellant remained consistent with the prosecution version. He has not given justified reasons for driving the vehicle with such a high speed. He cannot escape the liability of rash and negligent driving.

10. As regards the defence set up on behalf of Union of India in claim petition brought by the son of the deceased, taking the plea of not being rash and negligent by the Driver of the vehicle would not be an

estoppel. That liability (civil liability) is altogether different with the criminal liability. It is noteworthy that the standard of proof as also culpability requirements under section 304-A of the Indian Penal Code stands on an altogether different footing. But in determining whether negligence or rashness existed in the present case for the purpose of Section 304A IPC, all attending circumstances and surrounding factors have to be taken into accounts. The accused cannot say that in all the circumstances once in the Written Statement his fault was not attributed by his Commanding Officer and so that would be the sufficient circumstances to hold him not responsible for any of the offences he is charged with.

11. The criminal rashness and negligence governed by Section 304-A of the Indian Penal Code reads as under:

> *"Causing death by negligence-Whosoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

12. Essential ingredients of Section 304-A are as under:-

(i) Death of a person.

(ii) Death was caused by accused during any rash or negligence act.

(iii) Act does not amount to culpable homicide.

And to prove negligence under Criminal Law, the prosecution must prove:

(i) The existence of duty.

(ii) A breach of the duty causing death.

(iii) The breach of the duty must be characterized as gross negligence.

The question in the instant case would be whether the respondents are guilty of criminal negligence. Criminal negligence is the failure to exercise duty with reasonable and proper care and employing precautions guarding against injury to the public generally or to any individual in particular. It is, however, well settled that so far as the rashness and negligence alleged to have been caused by driving the vehicle, to constitute rashness and negligence, simple lack of care or an error of judgment is not sufficient. The rashness and negligence must be of a gross or a very high degree to amount to an offence under section 304-A IPC. The close scrutiny of the materials and evidence referred above of the witnesses, long skid marks and accused own admission in the statement under Rule 66 would lead towards irresistible conclusion that the findings of guilt of the accused-appellant is based on analytical discussion of oral and documentary evidence on record.

13. Before coming to another charge of causing disappearance of evidence it shall be useful to take note of the observations made by Apex Court in the case of *Palvinder Kaur Vs. State of Punjab, AIR 1979 S.C.1245* to the effect that in order to establish the charge under Section 201 IPC it is essential to prove that the offence has been committed, that the accused appellant knew or had reason to believe that such offence had been committed with the requisite knowledge and with the intent to screen the offender from legal punishment, cause the evidence thereof to disappear or gave false information respecting such offence knowing or having reason to disbelieve the same to be false. It was observed that the court should safeguard itself against danger of basing conclusion on suspicions however strong they may be. Identical view was also taken in the case of *Vijaya Vs.State of Maharashtra AIR 2003 SC 3787*. In this case the testimony of prosecution witnesses remained intact to prove the offence under Section 304A IPC. The accused appellant had knowledge of it with a view to screen himself could cause the evidence to disappear, though reminded by PW1 Sgt SM Mohammad not to do this act. He dropped the dead body at the isolated place. It was discovered when he along with PW6 Const Gurdev Singh as is clear from the evidence. On such evidence the findings of the Court Martial do not warrant any interference for the conviction under section 201. It has been established beyond even a shadow of doubt that the dead body was dropped by the

accused-appellant and it was discovered when the accused-appellant himself along with Sqn Ldr Gurmeet Singh went there to locate the same. The testimony of PW1 Sgt S.M.Mohammad and PW2 Corporal KS Sunil remained intact on the point of throwing of the dead body on the way and other persons sitting in that vehicle also helped the accused-appellant in doing that act. The fact remains that the dead body was thrown. Entire burden was tried to be shifted on PW9 Flying Officer Arvind Kumar that under his instructions this act was done by the accused. Though PW9 Flying Officer Arvind Kumar has categorically replied that he came at the spot to help the victim by providing medical assistance. The victim was taken to Military Hospital but was declared dead. Senior most officer was instructed to take the dead body to civil hospital. The way to the civil hospital was also explained to him. There appears to be no reason for the accused-appellant to shift his culpability.

14. Lastly the legal point was also taken that there is no compliance of the provisions of Rule 66 of Air Force Rules. The statement of the accused-appellant was taken by putting misleading questions which created confusion and was not given fair opportunity to present his case and to explain the circumstances in his defence. The questions which are to be put to the accused-appellant do not limit the nature of questioning to one or more question of general nature relating to

the case. The question so put to the accused-appellant related to the whole of the accident it was not limited to any particular part of it, though questions were formulated in the manner to explain his conduct, but those questions would not be construed to have caused prejudice to the accused-appellant. Whatever questions were framed they appears to have made with a view to enable the accused-appellant to know what he was to explain, what were the circumstances which were against him and for which the explanation was needed. The whole object of Rule 66 is to afford the accused a fair and proper opportunity to explain the circumstances which appeared against him and that the questions must be fair and must be formulated in a form which an ignorant or illiterate person will be able to understand. By putting the questions to the accused-appellant, an opportunity was given to him as part of fair trial.

15. In view of the aforesaid discussions we do not find any merit in the appeal. Appeal is dismissed.

S.S.DHILLON
(Member)

S.S.KULSHRESTHA
(Member)

PRONOUNCED IN THE OPEN COURT
TODAY ON DATE 4th JUNE, 2010