IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH NEW DELHI

T.A NO. 489 OF 2010
(WRIT PETITION (CIVIL) NO. 7877 OF 2007)

LAC. MITHILESH SHARMA .. APPELLANT

V.

UNION OF INDIA AND OTHERS .. RESPONDENTS

ADVOCATES

MR. V.S TOMAR, ADVOCATE
FOR THE APPELLANT

MR. AJAI BHALLA, ADVOCATE
FOR 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
16.09.2010

1. The petitioner filed W.P (C) No. 7877 of 2007 before the Delhi High Court challenging findings of the District Court Martial,

whereby the petitioner was held guilty of having committed an offence under Section 71 of the Air Force Act (the Act) read with Section 304-A of the Ranbir Penal Code 1989 and sentenced to be reduced to the rank, reprimanded and to undergo rigorous imprisonment for six months, which was subsequently remitted to two months by the confirming authority, in exercise of the powers under Section 161(2) of the Act. On formation of this Tribunal, the above writ petition has been transferred for disposal. Since, in this case, the petitioner (the appellant hereafter) challenged the conviction recorded by Court Martial by filing a writ petition, which has been transferred to this Tribunal, the same has been treated as an appeal under Section 15.

2. The facts giving rise to the case are: The appellant was enrolled in the Air Force on 30.3.1988 as Mechanical Transport Driver. Subsequently, he was detailed to carry luggages of airmen to Srinagar in a van - BA No.02D-148528 – Tata 6.5 ton. As the coach, which was to be followed by the appellant to Srinagar, could not accommodate all the airmen, about nine airmen were accommodated in the appellant's van. On 1.6.2004, the convoy reached Banihal. After

crossing Jawahar tunnel, the convoy stopped for tea and the appellant was directed to follow the coach. It was raining and the road was muddy. After about half an hour, the vehicle started skidding and in spite of his best effort to bring the vehicle under control by applying the brake, the vehicle turned to left and went down the hill resulting in a major accident. The accident resulted in the death of three personnel and causing grievous injuries to five others. When the appellant regained consciousness, he found himself admitted in the 92 Base Hospital at Srinagar. A court of inquiry was conducted against the appellant for rash and negligent driving. As a sequel to the court of inquiry, a summary of evidence was ordered, which concluded in March 2006. The appellant was given a charge sheet, which read:

> **FIRST CHARGE**
> **Section 71 AF Act, 1950**
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> **COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, CAUSING DEATH BY A RASH OR NEGLIGENT ACT, NOT AMOUNTING TO CULPABLE HOMICIDE PUNISHABLE UNDER SECTION 304-A OF THE RANBIR PENAL CODE, 1989.**
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> in that he,
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> on Jammu-Srinagar Highway, about 20 km after Jawahar tunnel, near Titanic view point at about 1530 h on 01 Jun

04, by rashly or negligently driving service vehicle BA No.02D-148528 Tata 6.5 Ton, caused death of 773329 Cpl lama D Clk/GD of 1 Wg, Armed Forces Tribunal, 823792 NC(E) Rajesh Kumar S/Wala of 45 WEU and 153798816 Sep SP Chauhan Sig/Man of 1 AFSR.

SECOND CHARGE
Section 71 AF Act, 1950

COMMITTING A CIVIL OFFENCE, THT IS TO SAY, CAUSING GRIEVOUS HURT BY DOING AN ACT SO RASHLY OR NEGLIGENTLY AS TO ENDANGER HUMAN LIFE OR THE PERSONAL SAFETY OF OTHERS PUNISHABLE UNDER SECTION 338 OF THE RANBIR PENAL CODE, 1989.

in that he,

on Jammu-Srinagar Highway, about 20 km after Jawahar tunnel, near Titanic view point, at about 1530 h on 01 Jun 04, by rashly or negligently driving service vehicle BA No.02D-148528 Tata 6.5 Ton, caused grievous hurt to 796461 Cpl Dogra A Clk/GD of 1 Wg, AF, 709348 Sgt Kumar S ADSO of 71 SU, AF, 785151 Cpl Paswan P AFSO of 1 Wg, AF, 724127 Cpl Dixit MTD of 1 Wg, AF and 821360 NC(E) Leeladhar Lascar of 102 S qn, AF.

THIRD CHARGE
Section 65 AF Act, 1950

AN ACT PREJUDICIAL TO GOOD ORDER AND AIR FORCE DISCIPLINE

in that he,

on Jammu-Srinagar Highway, about 20 km after Jawahar tunnel, near Titanic view point, at about 1530 h on 01 Jun 04, by rashly or negligently driving service vehicle BA No.02D-148528 Tata 6.5 Ton, caused damage to the said

service vehicle to the extent of Rs.6,65,774 (Rupees six lakhs sixty five thousand seven hundred seventy four only).

FOURTH CHARGE
Section 65 AF Act, 1950

AN ACT PREJUDICIAL TO GOOD ORDER AND AIR FORCE DISCIPLINE

in that he,

on Jammu-Srinagar Highway, about 20 km after Jawahar tunnel, near Titanic view point, at about 1530 h on 01 Jun 04, by rashly or negligently driving service vehicle BA No.02D-148528 Tata 6.5 Ton, caused damage to the arms and ammunition which were on board of the said service vehicle to the extent of Rs.18,556.40 (Rupees eighteen thousand five hundred fifty six and paise forty only).

On pleading not guilty, the appellant was tried by the DCM, which, after sifting the evidence, found the appellant guilty of all the four charges and sentenced to be reduced to ranks and severely reprimanded. But, in revision, the confirming authority remitted the matter to the DCM for reconsideration of the sentence awarded by it taking into account the gruesome accident occurred due to the rash and negligent driving of the appellant and in light of the loss caused to the Government to the tune of Rs.6,84,300.40. Pursuant to the said

order, the DCM reassembled on 5.2.2007 and enhanced the quantum of punishment by further sentencing the appellant to undergo imprisonment for six months. In the petition under Section 161(1), confirming authority, while confirming the sentence, reduced the imprisonment to two months. The appellant also moved the petition under Section 161(2) unsuccessfully. Hence this appeal.

3. Counsel for the appellant has pointed out that the DCM failed to appreciate the evidence on record while holding the appellant culpable to the offence under Section 304-A of the Ranbir Penal Code. Negligence and rashness on the part of the appellant were not proved by the prosecution evidence. The accident occurred when the appellant was following the passenger coach and there was heavy rain. Further, the road was muddy and slippery. While taking a U turn though the appellant applied the brake, it fell down. There are consistent statements of the witnesses that the luggage van, which the appellant was driving, was hardly maintaining the speed of 20-25 kms. per hour, which did not substantiate the allegation that the appellant was driving the vehicle in a rash and negligent manner. Even the witnesses, who were in the luggage van at the time of the accident,

deposed that the appellant was driving the vehicle with caution and maintained moderate speed. Therefore, the finding of the DCM is not justifiable and it is against all cannons of justice.

4. The appeal is resisted by the respondents contending, inter alia, that the DCM correctly appreciated the evidence and came to the conclusion that the appellant was guilty of all the charges. The prosecution witnesses, especially PW 2 Cpl. P. Dixit and PW 14 R Sgt. S. Kumar, gave factual aspects leading to the accident. Their testimony could not be assailed by the appellant. The rash and negligent manner in which the appellant drove the luggage van was well established and there appears to be no reason to disbelieve the testimony of the prosecution witnesses.

5. In order to appreciate the rival contentions raised by both the learned counsel, it would be appropriate to refer to the evidence adduced in the case. PW 1 PC Idiculla, who is a formal witness, has stated about the passing of the movement order of the luggage van and also the coach, which the appellant supposedly followed as per the direction of PW 1. PW 2 Cpl. Dixit, who was in the cabin of the luggage van driven by the appellant, has stated that having felt

uneasiness, he requested Sgt S. Kumar to permit him to sit in the front cabin. Sgt. S. Kumar permitted him to sit in the front cabin. According to PW 2, after crossing Jawahar tunnel, the vehicles stopped to allow the passengers to relieve themselves. After the tunnel, there was heavy rain and the visibility was very poor. Speed was normal. But, after crossing Titanic View Point, the vehicle suddenly turned left and started hitting the barriers which were on the left side of the road. The vehicle then fell down and started rolling on the ground. PW 3 Cpl A Dogra, who was also in the luggage van, has stated that the journey in the luggage van was comfortable. He has not stated anything about the rash and negligent driving of the vehicle by the appellant. PW 4 Sgt. G Patra, who travelled in the coach, has stated of having checked both the vehicles and were reported to be serviceable. PW 5 Cpl S Hariharan, who drove the coach, has given description of the movement of the vehicles as per orders and also stated that after crossing Jawahar tunnel, the road was wet and slippery and it was drizzling lightly. The vehicle could slip if brake was applied. He has also stated that having found the fuel gauge of the coach defective, WO Idiculla (PW 1) asked him to drive the coach in front of the luggage

van. After about 5 km. there was a downhill U turn and when they reached there, he noticed some smoke and something falling about 100 m. ahead. He stopped the coach and found that it was the luggage van which had fallen down. According to him, when the accident took place, the road was slightly slippery and he himself was driving the vehicle very slowly by taking precaution keeping the headlights and the wipers on. PW 6 Cpl Dushyant, who was in the coach, has stated about the luggage van falling down and that his coach was being driven at a moderate speed. Identical is the statement of PW 7 Sgt SK Sharma that the appellant drove the luggage van negligently. PW 8 JWO M. Singh is a formal witness who inspected the vehicle after the accident. PW 9 Sgt MK Agrawal is also a formal witness who inspected the vehicle which was damaged in the accident. PW 10 Flt. Lt. Rakesh Kumar, a formal witness, has stated that the condition of the road was okay and it was drizzling. PW 11 WO RS Majhi lodged report of the incident to the police. PW 12 Cpl Paswan, who was at the rear seat of the luggage van at the time of the accident, has stated of having seen mud on the road and that the vehicle was driven by the appellant at a moderate speed of 20-25 kms. per hour. PW 13 Cpl SH Mehdi, who

was in the coach, gave an identical statement as that of PW 12. PW 14 Sgt S. Kumar, as already pointed out somewhere herein above, has stated that after the tunnel, the rain was heavy and the side glasses were closed and the lights and wipers were on. The speed of the luggage van was between 20-25 kms. per hour. PW 15 NC(E) Leeladhar has stated of the luggage van having throughout been jumping and further it hitting against the barriers on the left side of the road. PW 16 Wg Cdr D Malik, who conducted autopsy on the dead bodies of Cpl. D Lama, NC (E) Rajesh Kumar and Nk SP Chauhan and examined the persons who sustained injuries, has produced the post-mortem examination reports and the injury reports of those who died and sustained injuries in the accident. According to him, the death was due to damage of brain stem and cardio respiratory arrest. PW 17 Wg Cdr Sudhir Nair, who recovered the luggage van from the place of accident, has produced photographs of the vehicle.

5. In defence, DW 1 Cpl (Actg. Sgt) M Sharma, who was in the luggage van at the time of the accident, has stated that the appellant drove the vehicle at a comfortable speed and the vehicle

skidded since road was muddy. Identical is the statement of DW 2 Sgt. SK Sharma as that of DW 1.

6. Learned counsel for the appellant has pointed out that even if the entire evidence is taken into account, there is not even an iota of evidence to prove that the appellant was rash and negligent while driving the luggage van. The accident occurred since the road was muddy and slippery. To prove how far the offence under Section 304-A is made out against the appellant, it would be appropriate to refer to the observations regarding "rash and negligent", which read:

> "What constitutes negligence has been analysed in Halsbury's Laws of England (4th Edition) Vol. 34 Paragraph 1 as follows:
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> > "Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist of omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence, where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding

circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two.

In tort, (at common law), this is decided by considering whether or not a reasonable man in the same circumstances would have realised the prospect of harm and would have stopped or changed his course so as to avoid it. If a reasonable man would not, then there is no liability and the harm must lie where it falls. But if the reasonable man would have avoided the harm then there is liability and the perpetrator of the harm is said to be guilty of negligence. The word 'negligence' denotes, and should be used only to denote, such blameworthy inadvertence, and the man who through his negligence has brought harm upon another is under a legal obligation to make reparation for it to the victim of the injury who may sue him in tort for damages. But it should now be recognised that at common law there is no criminal liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two

> states of mind which constitute mens rea and they are intention and recklessness. The difference between recklessness and negligence is the difference between advertence and inadvertence they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence. The common habit of lawyers to qualify the word 'negligence' with some moral epithet such as 'wicked', 'gross' or 'culpable' has been most unfortunate since it has inevitably led to great confusion of thought and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression in order to explain itself."

Here, in this case, PW 2 Dixit, who was in the luggage van and sustained injuries in the accident, has made it clear in his statement that after crossing Titanic View Point, the vehicle suddenly turned left and hit against the barriers and further that the vehicle fell over the hill. In cross examination, he, however, has made it clear that when the vehicle hit against the barriers, the appellant was trying to keep the vehicle on the right side, but unfortunately the vehicle fell down. Identical statement was the statement given by PW 14. The testimony of both these witnesses could not be assailed by the appellant and from their statements, it is established that there was heavy rain and the road was wide and no vehicle was overtaking. The luggage van was

coming in front but his vehicle went to the extreme left and hit against the barrier and ultimately it fell down. These factors clearly show that the appellant was driving the vehicle in a rash and negligent manner and he should have been aware that by such reckless driving, untoward incidents were likely. The act of the appellant is wanton that it must be presumed to be negligence on his part. It was not merely negligence, but gross culpable negligence amounting to criminal negligence. Such criminal negligence can also be attributed when PW 5 Cpl Hariharan gave description of the circumstances under which the vehicle was driven by the appellant. He did not notice any foreign object like mud on the road and he further clarified that only in the event of using of the brake, there was possibility of the vehicle being slipped away. It would infer that the appellant had driven the vehicle in a rash and negligent manner and had he been taken sufficient care, the accident would not have occurred. From the experience of a professional driver, it should have normally been expected that he would pedal the accelerator with care and caution that he could not afford to have a moment of laxity or inalertness when his leg was on the pedal of the vehicle in motion. He could not have taken a chance

to bring the wheel of the vehicle on the wrong path when there was no vehicle coming in front or overtaking his vehicle.

7. The apex Court in **Rathnashalvan** v. **State of Karnataka** (2007(3) SCC 474) has observed thus:

> "7. ..... Negligence and rashness are essential elements under Section 304-A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factors. A question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient considering all the circumstances of the case. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused.
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> 8. As noted above, 'rashness' consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences.

> Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted."

Further, in **Naresh Giri** v. **State of M.P** (2008(1) SCC 791), the apex Court, after considering the entire law on the subject, held as follows:

> "13. According to the dictionary meaning, 'reckless' means, 'careless', 'regardless' or heedless of the possible harmful consequences of one's acts. It pre-supposes that if thought was given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences; but, granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognizing the existence of the risk and nevertheless deciding to ignore it."

From the evidence, in particular that of PW2, PW 5 and PW 14, it is clear that the road was wide enough and it was not slippery and if the vehicle was driven with care and caution, as was done by PW 5, the accident would not have been occurred. By taking the wheel on to the

left, the vehicle hit against the barriers which itself proved that the appellant was rash and negligent while driving the luggage van. Such rashness cannot be negated merely on the basis of the speed of 25-30 km. per hour.

8. In view of the aforesaid discussion, we do not find any merit in the appeal. It is consequently dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER