

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

**T.A NO. 623 OF 2009
(WRIT PETITION (CIVIL) NO. 5662 OF 2000)**

SATENDER PAL

...APPELLANT

V.

UNION OF INDIA AND OTHERS

...RESPONDENTS

ADVOCATES

MR. KUNWAR C.M KHAN FOR THE APPELLANT

**MR. AJAI BHALLA
WITH
LT. COL. NAVEEN SHARMA FOR THE 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
13.12.2010**

1. The petitioner filed W.P (C) No. 5662 of 2000 before the Delhi High Court challenging the Summary General Court Martial (SGCM)

proceedings, whereby he was held guilty of the offence under Section 302 of the Indian Penal Code for causing the death of Capt. Manish Tiwari (the deceased, hereinafter) and sentenced to death, which was subsequently converted by the Central Government on statutory representation to imprisonment for life and to be dismissed from service. On formation of the Armed Forces Tribunal, the writ petition was transferred to this Tribunal and is being disposed of by this judgment, treating it as an appeal under Section 15 of the Armed Forces Tribunal Act 2007.

2. Before appreciating the rival contentions of the parties, it would be appropriate to briefly state the facts. In the month of December 1996, the appellant was admitted to 402 Field Ambulance as he was suffering from fever and severe stomach pain. He was discharged from the hospital on 28.12.1996. On 10.1.1997, the appellant was charge sheeted for intentionally causing the death of Capt. Manish Tiwari, Officer Commanding of 11 JAT Regiment while he was sitting in an official vehicle and talking to Nb. Sub. Harphool Singh. The charge sheet reads:

ARMY ACT SEC. 69

**COMMITTING A CIVIL OFFENCE, THAT IS TO SLAY, MURDER,
CONTRARY TO SECTION 302 OF THE INDIAN PENAL CODE,**

in that he,

At Lakhapani, while on active service, on 10 January 97 by intentionally causing the death of IC-51188H Captain Manish Tiwari of the same unit, committed murder.

On 7.8.1997, the trial commenced before the SGCM, which gave its finding holding the appellant guilty of the alleged charge and sentencing him to be hanged by the neck until he is dead. On statutory representation, the sentence was converted into imprisonment for life, which is under challenge in this appeal.

3. Counsel for the appellant contended that the SGCM failed to appreciate that the prosecution had not succeeded in proving its case against the appellant. The SGCM simply acted on conjectures and surmises and not on the basis of materials on record. The entire evidence put forth by the prosecution contained full of inherent infirmities and discrepancies. The prosecution is not corroborated with the forensic evidence. No case is made out under Section 302 and at the most, it can

only be termed under Section 304-II of the Indian Penal Code. No motive was established by the prosecution.

4. Denying the contentions raised by learned counsel for the appellant, it was submitted by learned counsel for the respondents that the SGCM found the appellant guilty on direct evidence. The appellant was apprehended at the spot with the rifle, which was used for the commission of the offence. Empty cartridges and magazine were also recovered. Motive is established. Further, the prosecution finds corroboration from the medical report and the ballistic report.

5. In support of its case, the prosecution examined PWs 1 to 18. The prosecution case mainly revolves around the evidence of PWs 7 Nb. Sub. Harphool Singh, PW 8 Nb. Sub. Jaimal Singh, PW 9 Sub. Dariya Singh and PW 11 Dr. Ritu Raj Chaliha. **PW 1 L/Nk. Bagrawat Singh** prepared the topographical sketch of the area where the incident took place. The Adjutant showed him the place of occurrence. There appears to be no dispute with regard to the place of occurrence. **PW 2 Sep. Balwan Singh** has stated that on 10.1.1997, while 'A' Company was carrying out practice

of patrolling and ambush, wherein the appellant and PW 2 participated, the deceased asked them to advance. He then told PW 2 that he would be the “exercise casualty” and told the appellant to lift PW 2 up and join the section. The appellant replied that he had got some problem in his abdomen. Thereupon, he was asked by the deceased whether he was a Low Medical Category, to which he answered in the negative. So the deceased again asked the appellant to lift him up, to which the appellant replied that “Agar sarkari hukam hai to main utha leta hun”. Thereafter, the appellant lifted him up in fireman lift position. When he walked about two to three steps, both the appellant and PW 2 fell on the ground. At about 0900 hours, he heard a fire shot and within five to six minutes, the whole company concentrated in the MT area of the unit, where he came to know that the appellant had shot at Capt. Manish Tiwari, the deceased.

PW 3 Sep. Jagdish Kumar has stated that on 10.1.1997, he was detailed for protection duty on station wagon Jonga which was sent for the conveyance of Capt. Manish Tiwari from his residence to the unit. At about 0930 hours, Sep. Shyam Singh called him for the protection duty. He followed him towards the office area, where the station wagon Jonga was

parked. Midway, he heard the sound of fire and also heard somebody shouting “pakaro, pakaro, bhag na jaye” from a distance of about 200 yards. He saw the movement of 2-3 persons near the station wagon Jonga and he rushed towards the vehicle. On reaching there, he saw Nb. Sub. Jaimal Singh sitting in the co-driver seat of the Jonga holding the deceased. The deceased was seen lying on the floor of the vehicle between the co-driver seat and the dash board. He was profusely bleeding from his right hand and front side of his uniform was soaked in blood. At that time, Nb. Sub. Harphool Singh was holding the appellant in bearhug position near the Jonga. Sub. Dariya Singh, who was also there, asked this witness to call Sub. Nanda Ram from the training area. At the incident site, he heard the appellant saying twice “isne mujhe gali di aur maine” He clarified that he had not heard the deceased hurling abuses to the appellant. He further deposed that in his presence, the appellant confessed of having committed the offence. **PW 4 Hav. Karan Singh** reiterated the incident as told by PW 3 and further added that the appellant confessed to have committed the offence. , **PW 5 L/Nk Karambir** has only hearsay information about the appellant having shot at

the deceased. **PW 6 Hav. Bharat Singh** gave an identical version of the incident as that of other witnesses. **PW 7 Nb. Sub. Harphool Singh** gave a categorical narration of the incident and further clarified that the deceased did not abuse the appellant. On 1.1.1997, at about 0920 hours, the deceased came to the office area in the station wagon jonga – BA No. 88B-46853K. After getting down from the vehicle, the deceased went towards the Battalion Store, where the ECC clothing and weapons handing/taking over between 20 RR and 11 JAT was in progress. After about five minutes, the deceased came from Battalion Store and sat in the vehicle which was parked near the office area. He then called PW 7 and asked about the progress of repairs of the vehicle – BA 93D-94422Y. After he signed certain papers, all of a sudden, PW 7 heard the sound of rifle shot and simultaneously the cry “AAH” from the deceased. The rifle SLR 7.62 mm, from which the bullet had been fired by the appellant, was directed inside the vehicle through its door from his left side. The rifle was very close to his body on the left and he instinctively pushed it away with his left hand. He then grabbed the appellant in a bearhug position from his back side. As he grabbed him, the appellant fired the second shot from the

rifle which went into the air. While grabbing the appellant, he asked him “arre befkuph tumne yah kya kiya”, to which he replied “jo mujhe karna tha, who kar diya”. In the meantime, Sub. Dariya Singh and Nb. Sub. Jaimal Singh reached there. Sub. Dariya Singh snatched the rifle from the appellant and handed it over to Hav. Bharat Singh. **PW 8 Nb. Sub. Jaimal Singh** and **PW 9 Sub. Dariya Singh** gave an identical version as that of PW 7. Both these witnesses have supported the prosecution version. **PW 10 P.C Das**, Chief Judicial Magistrate, Tinsukia (Assam), before whom the appellant made the confession, clarified that the appellant had made the confession voluntarily. **PW 11 Dr. Ritu Raj Chaliha**, who conducted autopsy, has found four injuries on the body of the deceased, i.e. two wounds of entry and two were of exit of a bullet fired from a rifled fire arm. Further, there was injury to the lungs, liver, heart and fracture of the upper part of the right humerus. In her opinion, the cause of death was shock and hemorrhage as a result of the injuries caused by bullet fire. **PW 12 Apurba Kumar Sarma**, a ballistic expert, opined that both the fired cartridge cases 7.62 mm ammunition (Exts. B1 and B2) were fired from the rifle 7.62 mm SLR. **PW 13 Sub Inspector J. Das, PW 14 Capt. Shubhralok**

Sinha, PW 15 Maj. B.K Mohan, PW 16 Col. K.G Bhagwat, PW 17 Sub.

Dharam Pal and PW 18 Sep. Shyam Singh are formal witnesses.

6. The appellant gave an unsworn statement, Ext. "II", relevant portion of which reads thus:

"3. That on 10 Jan 97 when I was having my breakfast I was told to join the parade for training from 2nd period onwards. I went to the parade ground at 0900 hrs for attending patrolling and ambush training. After the report was given to Sub Nanda Ram, Sr. JCO 'A' Coy, the training commenced. I was detailed in No. 1 Sec. as Sec 2IC. We marched from parade ground towards bound No.1, after clearing the bound we moved towards bound No.2 and as we approached near the bound, we were fired upon (bicatstrip fire), and as I came out from bush I heard Capt Manish Tiwari calling me from about 10 yards away from me. He asked me why I was talking? I told him that I was calling my LMG Group to place them in position. He told me that Sep Balwan Singh is battle casualty and ordered me to lift him up. I told him that I was not feeling well as I was suffering from stomach pain and so I would not be able to lift him up. Capt Manish Tiwari again ordered me to lift him up, then I again requested him that I would not be able to lift him as I was suffering from stomach pain. Then Capt Manish Tiwari insisted me to carry out his order and said 'lift him'. I said "if it is Sarikari Hukum then I will lift him up". I lifted Sep Balwan Singh and as I took step forward I fell down alongwith Sep Balwan Singh and when I got up and turned towards Capt Manish Tiwari he shouted on

me “.....” (not quoted). I told Capt Manish Tiwari not to abuse me and then he told me to carry on with crawling. I started crawling with angry mood and as I advanced my anger increased and I lost my conscience. I got up and moved towards my living barrack where I took off my belt and jungle cap and in doing so one magazine which was in my pouch also got removed and I throw them on my bed. I was not aware of what I was doing as I was totally upset. I cocked my rifle and moved towards Capt Manish Tiwari who at that time was sitting in Jonga. On reaching there I fired towards Capt Manish Tiwari. Immediately after fire I was caught hold by somebody and accidentally the second round was fired in the air. I gained my conscience when I heard the voice ‘Pakro, Pakro’. I saw Nb Sub Harphool Singh was holding me and Sub Dariya Singh approached me whom I handed over my rifle and told him that I am not going to run away. After some time I was taken to the Quarterguard of 11 JAT.”

7. The first and foremost argument raised by learned counsel for the appellant is that the prosecution was not able to establish the motive for the alleged offence. The appellant suffered from fever and stomach pain and was advised to take rest. Instead of allowing the appellant to take rest, the deceased ordered the appellant to lift PW 2 being an exercise casualty in the training area. Though the appellant initially was reluctant to do it, he was forced to do it and after moving

about two to three steps, both the appellant and PW 2 fell down. When the appellant got up, the deceased abused him with filthy language. This provoked the appellant to shoot the deceased dead. Counsel for the appellant contended that the appellant acted as a spur to it and it was not a pre-meditated act. Therefore, in the absence of motive, the appellant cannot be fastened with the culpability. It is true, no doubt, that motive may be considered as a circumstance which is relevant for assessing the evidence. But the absence of motive would have no consequence if direct evidence is established. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. If the genesis of the motive of the occurrence is not proved, ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise evidence is worthy of reliance (see **Hari Shankar v. State of U.P** – 1996(9) SCC 40; **Bikau Pandey and others v. State of Bihar** – 2003(12) SCC 616; and **Abu Thakir and others v. State of Tamil Nadu** – 2010(5) SCC 91). The apex Court, while dealing with a similar issue in **State of U.P v. Kishanpal and others** (2008(16) SCC 73), held as under:

“The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eye-witnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eye-witnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eye-witnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.”

8. From the evidence of PW 2 Sep. Balwan Singh, it is clear that the deceased ordered the appellant to carry on the crawling and it provoked him to gun down the deceased. This is the motive allegedly proved by the prosecution on the part of the appellant. PW 2 further made it clear that though the deceased got annoyed by his indifferent attitude, he (the deceased) did not abuse him. Further, there is also the direct evidence of PW 7 Harphool Singh, who was an eye witness to the incident. It was he who apprehended the appellant immediately after the gun shot. PW 8 Jaimal Singh and PW 9 Dhariya Singh also came to the

scene of occurrence and snatched away the rifle from the appellant. There is no dispute with regard to their presence at the scene of occurrence. These three witnesses are independent witnesses. Merely because they were under the command of the deceased, their testimony cannot be discarded. Their statements get corroboration from the medical report and the statements of other witnesses. There is no reason for these witnesses to falsely implicate the appellant in the case. No animosity also proved against these witnesses. In this regard, the observations made by the apex Court in **Masalti and others v. State of U.P** (AIR 1965 SC 202) would be relevant. They are:

“But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses..... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.”

The above position was highlighted in **State of Punjab v. Jagir Singh** (AIR 1973 SC 2407), **Lehna v. State of Haryana** (2002(3) SCC 76), **Gangadhar Behera and others v. State of Orissa** (2002(8) SCC 381), **Babulal Bhagwan Khandare and another v. State of Maharashtra** (2005(10) SCC 404) and **Salim Saheb v. State of M.P** (2007(1) SCC 699).

9. Further, soon after the incident, the appellant confessed to have committed the crime. In this context, it would be relevant to refer to the unsworn statement made by the appellant. From these materials, it is evident that the appellant intentionally caused the death of the deceased.

10. It was next argued by counsel for the appellant that the appellant committed the crime on a sudden provocation since the deceased had hurled filthy languages at the appellant aggressively and so, the offence would fall within Exception 4 to Section 300 of the Indian Penal Code. In order to answer this point, it would be useful to consider the scope of Explanation 4 to Section 300 IPC, which deals with acts done in sudden provocation. The said explanation deals with a case of prosecution not covered by first exception. This exception is founded

upon the same principle, for, in both, there is absence of pre-meditation. But, while in the case of Exception 1, there is total deprivation of self-control, in the case of Exception 4, there is only that heat of passion, which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties put them in respect of guilt upon equal footing. As is clear from the statement of the appellant referred to above, after the exercise, he went back to the barrack where he took off his belt and jungle cap and also removed one magazine which was in his pouch. Totally upset, he moved towards the deceased and shot at him. There is noticeable gap between these two. This time gap is sufficient to disprove the plea of sudden provocation. At the time when the appellant fired the gunshot, the deceased seemed to

have not behaved provocatively. The deceased was talking to PW 7 when the appellant gunned him down.

11. Going through the evidence, we notice that PW 7 was an eye witness and PWs 8 and 9 were in the close proximity, at the time and place where the incident took place and the other circumstances also favoured the hypothesis of guilt, which included the unsworn statement of the appellant also. From such evidence, we find that the prosecution has established its case against the appellant.

12. Viewed in this light, we find no reason to interfere with the finding and sentence arrived at by the SGCM. In the result, the appeal fails and is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER