

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

O.A. 580 OF 2010

IN THE MATTER OF:

Sep. Arvind Singh

.....Applicant

Through : Mr. Rohit P. Ranjan, counsel for the applicant

Versus

The Union of India and others

.....Respondents

Through : Mr. Ajai Bhalla, counsel for the respondents

CORAM:

HON'BLE JUSTICE S. S. KULSHRESTHA, MEMBER,

HON'BLE LT GEN Z. U. SHAH, MEMBER

JUDGMENT

Date: 19.04.2011

1. The appellant had filed O.A. file 80/2010 before this Tribunal praying for setting aside of the order of General Court Martial (GCM) dt. 27 May 2010 and order of confirming authority dated 3

August 2010. The appellant has also prayed that he be reinstated into the service.

2. The appellant was convicted by GCM under Army Act Section 69 for "committing a civil offence that is to say attempt to murder, under section 307 of Indian Penal Code(IPC). The applicant was acquitted by the GCM of the charge u/s 307 of IPC and was held guilty u/s 326 IPC for voluntarily causing grievous hurt by dangerous weapon and sentenced to dismissal from service and awarded three years R.I. The confirming authority confirmed the sentence vide the order dated 3 August 2008.

3. The appellant has submitted that he was accused of firing from his INSAS Rifle at Sepoy S. K. Sahu at 0205 hrs. on 5 January 2008 inflicting bullet injuries on both thighs of Sepoy S. K. Sahu. The appellant submits that the FIR registered (Annexure A-1) was not against any particular person.

4. The appellant submits that on 4 August, 2010 he was alleged to have put his finger in the anus of Sepoy S. K. Sahu who reported the matter to his superior authorities. A Court of Inquiry was held to enquire into the incident. The appellant states that during the Court of Inquiry Army Rule 180 was violated

in that 17 witnesses gave their statements but none of them had stated that the appellant fired at the victim.

5. The appellant states that a summary of evidence was held between 5 June 2008 and 27 August 2008. Army Rule 22 was violated as the procedure for "hearing of charge" was not complied with. This deficiency which would go to the root of trial was also pointed out by him before the GCM but no heed was paid.

6. In the findings the Court found that the prosecution had failed to prove that accused had any intention to inflict injuries which may result to his death. But the intention to cause grievous hurt was well founded from the evidence on record. Since the means of such voluntary causing grievous hurt was through a rifle so the offence u/s 326 was held proved beyond reasonable doubt.

7. The findings and sentence of the GCM were confirmed on 3 August 2010 by Major General Manvinder Singh GOC Delhi Area(Annex.A-17).

8. The appellant has pointed out that there were material contradictions during the GCM on "motive" and "manner of

occurrence". The appellant also states that the place of occurrence was also contradictory in that the alleged victim was not on duty on 4 January 2008 i.e. the night of the incident and thus could not have been sleeping in the Guard Room of West Block-V as only personnel on duty were allowed to sleep in the Guard Room. The appellant has also stated that there was no recovery of incriminating article (weapon) in that PW-2 Sepoy H. N. Shandekar and PW-3 Nk. E. Perumal had taken away the rifle and removed its magazine, counted the bullets and deposited the same with HQ 68 DSC Platoon. There is contradiction in that PW-1 Insp. Subhash Malik had stated that he had found the rifle and magazine on the floor of place of incident. The appellant has also stated that his presence at the place of occurrence has not been proved. The appellant also avers that there was no blood stain on the bullet and his finger prints were not found on the weapon. It was also not proved that the blood on ME3, ME4 , ME5, ME6, ME7 and ME8 belong to the victim. In fact the blood was not matched with the victim's blood group of B.

9. In the closing address by the prosecution counsel it was brought out that both the appellant and Sp. Suresh Kumar Sahu were on night guard duty on night 4/5 January, 08. Sp. S. K. Sahu

was sleeping in the guard room at the time of incident and the appellant fired one shot at him with rifle INSAS registered no. 17191563, Butt no. 68/69. PW16 Sep. H.N. Shandekar took 3 to 4 seconds to reach the Guard Room after hearing the sound of rifle fire from the Guard Room on night 4/5 January 2008 at 020 hrs. Sep. H. N. Shandekar saw the accused standing with his rifle INSAS 5.56 mm registered no.17191563, Butt no. 68/69 in firing position with barrel of the rifle pointing towards the bed on which Sp. Suresh Kumar Sahu was lying injured. PW-17 Sp. S. K. Sahu has also stated that the accused while being led away after the firing incident came back to the victim's bed and shouted **"Saale Aaj Tu Bach Gaya Kyuonki Mere Ko Pata Nahi Chala Ki Tera Sar Kahan Hai Kyonki Tu Kambal Odhe hua Tha."**

10. It was brought out that the platoon Cdr. Sub. Ishwar Chand on arrival at the guard-room had asked the appellant as to why he had fired at Sep. Suresh Kumar Sahu and injured him. The appellant had replied "bus ho gaya sahib". This conversation was heard by Sp. H. M. Shandekar who was standing nearby.

11. The Civil Police was informed of the incident on 5 January, 2008. The Civil police referred the case to criminal court of Sh.

Sameer Bajpai at Patiala House Court which in turn transferred the case to the Army u/s 475 of Cr.P.C. 1973.

12. The rifle, fired case, bullet recovered and blood stained clothes of Sp. Suresh Kumar Sahu were sent to Forensic Sciences Laboratory, FSL, New Delhi. It was confirmed by them that the fired case recovered had been fired from INSAS rifle 5.56 registered no. 17191563.

13. In order to appreciate the rival contentions raised by learned counsel for the parties. It would be useful to reproduce the charge sheet against the appellant. It reads:

ARMY ACT SEC. 69

**COMMITTING A CIVIL OFFENCE THAT IS TO SAY,
ATTEMPT TO MURDER, CONTRARY TO SECTION
307 OF THE INDIAN PENAL CODE**

in that he,

at New Delhi on 05 Jan 2008 at 0205 hrs fired one shot from his rifle INSAS 5.56MM Registered No.17191563, Butt No.68/69 at No.10260506K Sep Suresh Kumar Sahu of the same PI with intent to murder and thereby wounded both the thighs of the same Sep Suresh Kumar Sahu.

14. In support of its case, the prosecution examined twenty witnesses. PW 1 Inspector Subash Malik, who was at the relevant

time the Sub Inspector at Police Station R.K Puram, South West Delhi, has stated about the incident which took place on 5.1.2008. According to him, at 0615h, he had received information about one Army jawan SK Sahu was admitted in Base Hospital, Delhi Cantt in an injured condition and a case was registered under Section 307 of the Indian Penal Code. PW 2 Hav (MP) MK Kumawat has stated that on 5.1.2008 at approximately 0800h, desk NCO informed him that a person was shot in West Block RK Puram. When he reached the site of incident after 30-45 minutes, he saw a charpoy with a bullet mark/hole. He was informed that a jawan was shot and admitted in the Base Hospital. Other formal witnesses were also examined by the prosecution.

15. PW 3 Nk E. Perumal, who was at the relevant time duty Guard Commander at West Block V, RK Puram, has stated that during the intervening night of 4/5.1.2008, when he was sleeping in the Guard Room, he heard a fire sound at around 0205h and saw Sep. S K Sahu was screaming and the appellant standing near his cot. The appellant was standing in a firing position with rifle pointing towards the feet of Sep. Sahu. He removed the magazine from the rifle and counted the rounds. There were 13 rounds in the magazine. When he cocked the rifle, one live round

got ejected and another fired empty cartridge was found under the cot of Sep Sahu. PW 6 Hav Balram Singh has stated that when he reached the Guard Room, he saw Sep Sahu screaming in pain. He had injuries on both the thighs and was bleeding. He put bandages on the wound and then arranged for the vehicle. PW 7 Nk KP Vijayan, who was on duty from 1200h to 1400 on 4.1.2008 and from 0001h to 0200h on 5.1.2008. He was to be relieved by the appellant at 0200h on 5.1.2008. Since the appellant did not turn up, he had to wake him up to take on duty. PW 8 Sep Sughar Singh has stated that when the appellant failed to attend to the duty and when he was moving towards Block V, he heard a gunshot. On hearing the gunshot, he reached the gate and saw Sep Shendkar holding the appellant. When asked as to what had happened, Sep Shendkar told him that the appellant had shot Sep Sahu. It was he who reported the matter to Platoon Commander. PW 10 Sep Shivtaj Yadav deposed to have seen the appellant standing in the Key Room with Sep Shendkar. PW 14 Ishwar Chand has deposed that after getting information that Sep Sahu was shot, he rushed to the scene of occurrence and saw Sep Sahu with bleeding injuries and the appellant pacing restlessly in the Key Room. When he asked the appellant why did he do it, he

was told "Bas mere se ho gaya". Similar is the statement of PW 16 Sep HN Shendkar, who reached the scene of occurrence on hearing the fire shot. He saw the appellant standing with the rifle pointing towards Sep Sahu. The appellant was standing next to the charpoy of Sep Sahu near the feet and he heard Sep Sahu shouting "Bachao....bachao". He caught hold of the barrel of the rifle the appellant was holding and pushed it upwards and caught him from the side. PW 17 Sep Suresh Kumar Sahoo, who is the victim of the incident, has made it clear in his statement that on 4.1.2008, the Platoon Commander ordered presence of all jawans to attend roll call at 1900 hours. He reached West Block V to attend the roll call at around 1850 hours. When he entered the barrack of West Block V, the witness saw the appellant and Nk GB Gangadhar eating channa. Nk Gangadhar offered him channa and while he was having it, the appellant tried to put his finger in his anus. PW 17 Sahoo pushed his hand and said "***kya mai hijda hu joh tu muze ungli kar raha hai***", to which the appellant replied "***agar hijda nahi hai toh ghar pe bula le***". After the roll call, when the witness was going from the barrack of West Block V, the appellant repeated the same act. On getting annoyed, the witness pushed the appellant and there started a scuffle. The

Platoon Commander intervened and pacified both of them. Thereafter, while PW 17 was sleeping, at approximately 0205 hours, he heard a gunshot and felt burning sensation in his thigh, due to which he woke up and saw the appellant standing near with his rifle in his hand pointing towards him. On hearing his shouting, Sep Shendkar, who was on duty at the main gate, came inside and caught hold of the barrel of the rifle the appellant was holding and pushed it upwards and caught him from the side. He then took the appellant to the key room. The bullet fired at him pierced through the right side of his thigh. He was removed to the Base Hospital, Delhi Cantt. While he was in hospital, the inquiry officers came there to record his statement. The appellant was also brought there and in their presence, he said "*mai tere pao pakadta hu, muzse galti hoh gayee, mai dus bees hazar rupayee tere baccho ke naam kar duga, muze maaf kar de*". The testimony of this witness remained unchallenged. Further, he is the injured, whose testimony was corroborated by medical evidence. His evidence cannot be disbelieved. Reliance may be placed on the decision reported in **Abdul Sayeed v. State of Madhya Pradesh** (2010(10) SCC 259). The injuries were confirmed by PW 4 Maj Ravikant Narain, who examined Sep

Sahu when he was brought to the hospital. It was stated by him that on the lateral aspect, there was an entry wound of 2 x 1 cm on the right thigh of Sep Sahu and on the medical aspect, there was an exit wound of 4 x 3 cm approximately along with profuse bleeding from the wound. On the left thigh, there was a deep lacerated wound on the anterior aspect of the thigh without any exit or entry wound.

16. It is submitted by learned counsel for the appellant that there was no eye witness to the incident and the testimony of these witnesses cannot be relied upon. Suffice it to mention that the witnesses were at the nearby place and on hearing the hue and cry, they reached the scene of occurrence within no time. Close proximity of the place and the time making the witnesses to reach the scene of occurrence lend support to the prosecution version. Their testimony cannot be brushed aside merely on the ground that they did not see the appellant fire a shot at Sep Sahu. Further, nothing could be elicited in cross examination rendering their testimony to be doubtful. It was submitted that there were inconsistencies in the statements of the witnesses. We do not find any such material contradiction as regard the incident and the presence of the appellant near the victim pointing the

weapon to him. Out of 15 rounds, 13 were recovered from the magazine. The report of the ballistic/scientific expert also supported the prosecution version. There appears to be no reason to disbelieve their testimony. Contradictions, inconsistencies, exaggerations or embellishments are common and could make no significance. To the contrary, it supported the prosecution version as the witnesses had not given parrot like statements. Reliance may be placed on the decision reported in **Ramesh and another v. State of Uttar Pradesh** (2009) 15 SCC 514.

17. It has further come out in evidence that the appellant was, at the relevant time, on duty and seen by the side of the victim. The victim was crying in pain when the witnesses reached there. Such inculpatory circumstances appearing against the appellant cannot be ignored. It enables the Court to be appraised of what the accused had to say. Answers to this question may sometime be flat denial or outright repudiation of these circumstances. But, here in this case, the appellant had not offered any explanation to the incriminating circumstances. Such incriminating circumstances lend support to the prosecution version.

18. The prosecution has also relied on the evidence with regard to the misconduct of the appellant in the past. It was stated that the appellant tried to put his finger in the anus of the victim, which resulted in some altercation. But that was not construed to be the motive behind and was not sufficient for the GCM to attribute intention or knowledge relating to the commission of attempt to murder. It may be mentioned that for constituting an offence under Section 307, there must be (i) an intention of or knowledge relating to commission of murder; and (ii) doing of an act towards it. In this case, obviously, the intention could not be established. For the purpose of Section 307, what is material is the intention or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. The section clearly contemplates an act which is done with intention of causing death but which fails to bring about the intended consequence on account of intervening circumstances. The intention or knowledge of the accused must be such as is necessary to constitute murder. In the absence of intention or knowledge, which is the necessary ingredient of Section 307, there can be no offence 'of attempt to murder'. Intent, which is a state of mind, cannot be proved by precise direct evidence, as a fact it can only be

detected or inferred from other factors. Some of the relevant considerations may be the nature of the weapon used, the place where injuries were inflicted, the nature of the injuries and the circumstances in which the incident took place. In this case, the intention could not be established, but the essential ingredients of Section 326 appear for voluntarily causing grievous hurt with a dangerous weapon. Reliance may be placed on the decision in **State of Uttar Pradesh v. Indrajeet alias Sukhatha** (2000) 7 SCC 249.

19. In view of the aforesaid discussion, we are of the view that the conviction and sentence awarded by the GCM do not require any interference. In the result, the appeal is dismissed.

Z. U. SHAH
(MEMBER)

S. S. KULSHRESTHA
(MEMBER)