

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

**T.A NO. 264 OF 2010  
(WRIT PETITION (CIVIL) NO. 15736 OF 2006)**

**EX HAV SUBASH PANDEY**

**..APPELLANT**

**V.**

**UNION OF INDIA AND OTHERS**

**...RESPONDENTS**

**ADVOCATES**

**MR. ASHOK KUMAR FOR THE APPELLANT  
MR. AJAI BHALLA FOR THE RESPONDENTS**

**CORAM**

**HON'BLE MR. JUSTICE S.S KULSHRESTHA, MEMBER  
HON'BLE LT. GEN. Z.U SHAH, MEMBER**

**J U D G M E N T**

**13.05.2011**

1. The challenge in this writ petition – W.P (C) No. 15736 of 2006 is directed against the Summary General Court Martial (SGCM) proceedings, whereby the petitioner was held guilty of having committed the offence under Army Act Section 69 read with Section 302 of the Ranbir Penal Code and sentenced (a) to suffer imprisonment

for life; and (b) to be dismissed from service. The writ petition was transferred to this Tribunal on its formation and is treated as an appeal under Section 15 of the Armed Forces Tribunal Act 2007.

2. The background facts in a nutshell are as under: On 6.11.2003, an altercation took place between the appellant and Nk BG Dongre, in that Nk Dongre and L/Nk JR Rao manhandled the appellant. Next day morning, i.e. on 7.11.2003, the appellant, while going to the bathroom, noticed Nk Dongre and Cfn (VM) Rashikant were talking with each other and the moment they saw the appellant, they stopped talking. The appellant understood that they were talking about the incident which had taken place on 6.11.2003. Thereafter during morning parade also, there were talks between Nk Dongre and Hav BN Baral about the incident. Around 1445h, the appellant saw Nk Dongre, Nk Rattan Singh, L/Nk Jitendran and Cfn Rao were playing cards and Hav Baral was sunbathing behind Nk Rattan Singh. While coming back, he also saw L/Nk Dherminder watching others playing cards. When he came back to the room, he heard Nk Dongre saying "Saale pandit ko raat mein maine peeta tha". Hearing this, all loudly laughed. In a fit of rage, the appellant came out of the room with a rifle and fired shots at

them. Nk Dongre and Hav Baral died and Nk Rattan Singh got injured in the incident. After 10-15 minutes, the appellant allegedly told Lt Col SS Mehta that “Mere se galti ho gayi, main kisi pe goli nahi chalaunga”. Thereafter, the appellant handed over the weapon with magazine fitted on it. He was arrested. A first information report was lodged before Mendhar (J & K) Police Station. A Court of Inquiry was also ordered. The appellant was issued a charge sheet, which reads:

**FIRST CHARGE**

**Army Act Section 69**

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

in that he,

at field, on 07 November 2003, by intentionally causing the death of Number 6924778Y Havildar (Store Hand Technical) Biranchi Narayan Baral of the same unit committed murder.

**SECOND CHARGE**

**Army Act Section 69**

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

in that he,

at field, on 07 November 2003, by intentionally causing the death of Number 14583641F Naik (Turner) Babu Rao Gulab Rao Dongre of the same unit committed murder.

**THIRD CHARGE**  
**Army Act Section 69**

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

in that he,

at field, on 07 November 2003, did an act, to wit, fired a shot from rifle INSAS 5.56 mm Registered No 15472985, Butt No 64, at Number 14594052L Naik (Welder) Rattan Singh of the same unit with such intention and under such circumstances, that if, by that act he had caused the death of said Naik (Welder) Rattan Singh, he would have been guilty of murder.

The appellant was tried by the SGCM. The SGCM found the appellant guilty of the offence and sentenced him to undergo imprisonment for life and to be dismissed from service. His appeal to the COAS also ended in rejection. Hence this appeal.

3. Counsel for the appellant has pointed out that the entire court martial proceedings are vitiated by non-compliance of the mandatory provisions under Army Act, in that the appellant was not afforded an opportunity to defend him. Further, the appellant has not

been provided with the records, thereby Army Rule 22(1) was violated.

The proceedings of the court martial were vitiated by bias.

4. On the other hand, learned counsel for the respondents has denied the contentions of the appellant stating, inter alia, that all procedural formalities under Army Rule 22 were complied with, in that the charge against the appellant was heard in his presence and he was given full liberty to cross examine the witnesses against him and to call such witnesses and make such statement as may be necessary for his defence.

5. We have heard counsels on both sides.

6. In support of its case, the prosecution has examined PWs 1 to 17. Craftsman Jithendran who narrated the incident that took place on 7.11.2003 and supported the prosecution version. It was he who prepared the topographical sketch of the area of 132 Field Workshop Company at Mendhar, where the incident had taken place. PW 2 Nk Rattan Singh too has vividly described what took place on 7.11.2003 and how he got injured. According to him, when they were playing cards after lunch, the appellant came out of the room holding an INSAS 5.56 mm rifle and stating **“Marne ke liye taiyaar ho jao or Jitendran bhaag jao”**, he pointed the rifle towards them and fired. One bullet hit

him and he fell down. He suffered a bullet injury on his right upper arm and an injury on the forehead. He also heard four to five more shots and saw Nk Dongre collapsing forward front with his face touching the ground still in sitting position. PW 3 Capt Jafar Hussain had examined the bodies of Nk Dongre, Hav Baral (deceased) and Nk Rattan Singh and recorded the injuries in the case sheet. PW 4 L/Nk Dharminder Singh has deposed of having heard the sound of small arms fire in the direction of Station Mandir. PW 5 Maj JS Dhawan has stated to have been told by Nb Sub Karjee that the appellant had opened fire which resulted in the death of two persons and injuring another. When he reached the scene of occurrence, PW 3 Capt Jafar Hussain informed him about the death of Nk Dongre and Hav Baral. On inspecting the place of occurrence, he found some empty cartridges lying there, which were handed over to the police. Further, he was told that Nk Dongre and Craftsman Rao had a fight with the appellant on 6.11.2003 and that the same was settled in the presence of Nb Sub BS Rai. PW 6 Maj Ajay Bisht examined Nk Rattan Singh when he was brought to the hospital and noted the following injuries:

- (a) A lacerated wound on the forehead.

(b) A lacerated wound on the left side of the nose with the loss of Ala of nose.

(c) A lacerated wound on the right shoulder.

It was further noted by him that multiple fragments of copper jacket of a bullet embedded in the body of the injured and x-ray revealed another bullet lodged in his right shoulder. PW 7 Hav Maj LP Shukla has stated about having heard 7 – 8 rounds of small arms fire in the direction of his living line and further having been told by L/Nk Reddy that the appellant had killed two-three persons of the unit. When he reached the scene of occurrence, he saw the deceased lying there. PW 8 Craftsman JR Rao has stated about the fight having taken place the fight on 6.11.2003 between himself and deceased Dongre on one side and the appellant on the other side. PW 9 Craftsman M. Selva Kumar has also reiterated the incidents which took place on 6.11.2003 and 7.11.2003. PW 10 Hav BN Thakur also stated about having heard rifle shots in quick succession and seen L/Nk Jitendran running from one end of the barrack to the other loudly shouting “**Bhago pagal ho gaya hai**”. PW 11 L/Nk MP Pandey has deposed to have heard the fire shots. PW 12 Nb Sub BS Rai has also stated about the incidents that took place on 6.11.2003 and 7.11.2003. PW 13 Hav KS Rao has also supported the

prosecution version by stating that on 7.11.2003, at about 1500h, the appellant came out of his room holding a rifle 5.56 mm INSAS and stating “**Jeetu tum bhag jao**”, he cocked his rifle and fired at Nk Dongre. The bullet hit him on the backside of his head. He also confirmed to have heard the sound of 4 – 5 more shots. PW 14 Khadam Hussain, Assistant Sub Inspector, Police Station Rajouri (J & K) was the investigating officer. He prepared the seizure memo and collected 8 empty cartridges of lot No KF-97 of 5.56 mm calibre. PW 15 Dr. Rakesh Anand had conducted autopsy on the bodies of Hav Baral and Nk Dongre. He found the following injuries on the body of Hav Baral:

- (a) Gun shot wound 2.5 x 2.5 mm in diameter rounded in shape which was the wound of entry, present about 7 centimetres superior laterally from the umbilicus on the left side. The wound had redness, blackening, charring, margins were inverted clotted blood was present. No exit wound was found.
- (b) Gun shot wound about 2.5 x 2.5 mm in diameter rounded in shape wound of entry present at left shoulder lateral to midline. The wound showed redness, charring, blackening and margins were inverted, clotted blood and frank blood was also present. No exit wound was found.
- (c) One gun shot wound 2.5 x 2.5 mm in diameter present on left heel near tendeno-achelis tendon which



was the wound of entry. The wound showed bleeding plus margins were inverted, charring and blackening was present. Exit wound was at left heel through calcaneus about 2 centimetres in diameter wound showed bleeding plus bone fractured, margins were everted.

On opening the body, the following internal injuries were also found by him:

- (a) Pleural membranes of the left lung along with parenchyma and blood vessels were ruptured. Bleeding and hemothorax of the left lung.
- (b) Pericardium and left ventricle and auricle of the heart were ruptured with bullet. Profuse bleeding seen.
- (c) Abdominal wall was ruptured, injuries to small gut, large gut and liver. Abdominal cavity was full of blood.

In his opinion, the cause of death was “gun shot injuries leading to massive haemorrhage leading to haemorrhagic shock leading to cardio respiratory arrest”. On the body of Nk Dongre, the following injuries were noted by him:

- (a) One gun shot wound about 2x2 mm in diameter in the centre of occipital bone at the back which was the wound of entry. The wound showed charring, bleeding, blackening and margins were inverted.
- (b) Lacerated wound about 2x2 centimetres in size at the left zygomatic arch (below the temple) anterior to the left ear which was the wound of exit. The wound was

showing bleeding, muscles ruptured, bone fractured and margins were everted.

On detailed examination of the head, the following injuries were noted by him:

- (a) Scalp bone occipital fractured, brain dura ruptured, brain matter shattered and bleeding.

In his opinion, the cause of death was “gun shot injury to vital organ brain leading to cardio respiratory arrest”. PW 16 Bukhari, Scientific Officer (Ballistics), Forensic Science Laboratory, Jammu has identified the 5.56mm INSAS rifle as the same weapon by which the appellant fired shots at the deceased and Nk Rattan Singh. PW 17 Sub SM Sontakke is the officer who has recorded the summary of evidence.

7. Counsel for the appellant has pointed out that the charge against the appellant would not stand and at the most, the offence would fall only under Explanation (iv) to Section 300 of the Indian Penal Code. On 7.11.2003, while the appellant was going to the bathroom, he saw Dogre, Ratan Singh, Jitender and Roy playing cards and Hav Baral sleeping behind Nk Ratan Singh. While passing through, Dogra made some comments. On hearing this comment, all started laughing at him.

In a grave and sudden provocation, the appellant took out the rifle and fired. This is clear from the synopsis showing the dates and events produced along with the appeal. Therefore, the question that needs to be considered is, whether the offensive remarks made by Dogra against the appellant warranted benefit under Explanation (iv) to Section 300 of the Indian Penal Code? PW 1 Jithendran, during cross examination, denied having made such derogatory comments by Dogra. This fact is substantiated from the statement of PW 2 Nk Rattan Singh, who got injured in the incident, that certain remarks were made by Dogra on the previous date i.e. on 6.11.2003. PW 2 contradicted from his earlier statement given at the time of court of inquiry. Counsel for the appellant vehemently contended that PW 2 was the injured and his statement as regards the comments made by Dogra should be accepted and there was no pre-meditation as the appellant only acted in a grave and sudden provocation. It happened on the spur of the moment. The substantive plea of sudden provocation relates to the applicability of Explanation (iv) of Section 300 of the Indian Penal Code. To bring out its application, it has to be established that the act was committed without pre-meditation in a sudden fight in the heat of anger. In this respect, it would be appropriate to refer to the principle enunciated by the apex

Court on the subject in **Buddu Khan v. State of Uttarakhand** (AIR 2009

SC 1387). It reads:

“7. The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in 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 puts them in respect of guilt upon equal footing. A ‘sudden fight’ implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of

Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acting in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. These aspects have been highlighted in *Dhirajbhai Gorakhbhai Nayak v. State of Gujarat* (2003(5) Supreme 223); *Parkash Chand v. State of H.P* (2004(11) SCC 381) and *Byvarapu Raju v. State of A.P and anr.* (2007(11) SCC 218)."

The aftermath of the incident that took place on 6.11.2003 cannot be construed to be sudden provocation. When the appellant opened fire, the deceased persons and the injured were unarmed. He had taken

undue advantage of his possessing a weapon and acted in a cruel and unusual manner and there was no retaliation from the side of the victims. Further, it has come out in evidence from the statement of PW 2 Nk Rattan Singh that on 7.11.2003, when they (PW 2, deceased Dongre, Craftsman Jitendran, Craftsman Rao) were playing cards, the appellant came out of his room holding an INSAS rifle and pointing it towards them said “Marne ke liye tayar ho jao” and saying so, he fired seven to eight rounds on them. At that time, deceased Baran was sprawling behind him watching the game. PW 2 also sustained injuries, which is evident from the statement of PW 6 Maj Ajay Bisht. Had PW 2 Rattan Singh not been there at the scene of occurrence, he would not have suffered injuries. PW 2 gave a categorical narration of the incident and we do not find any reason to belie his testimony. The apex Court has, while considering whether weight is to be attached to the evidence of a witness who was injured in the course of the occurrence, held that the testimony of such a witness is generally considered to be very reliable as he is a witness who comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness (see **Ramlagan Singh v. State**

of Bihar - 1973(3) SCC 881; **Malkhan Singh v. State of U.P** – 1975(3) SCC 311; **Machhi Singh v. State of Punjab** – 1983(3) SCC 470; **Appabhai v. State of Gujarat** – 1988 Supp SCC 241; **Bonkya v. State of Maharashtra** – 1995(6) SCC 447); **Dinesh Kumar v. State of Rajasthan** – 2008(8) SCC 270; **Vishnu v. State of Rajasthan** – 2009(10) SCC 477; **Annareddy Sambasiva Reddy v. State of A.P** – 2009(12) SCC 546; **Balraje v. State of Maharashtra** – 2010(6) SCC 673) and **Abdul Sayeed v. State of Madhya Pradesh** – 2010(10) SCC 259). Therefore, the testimony of the injured witness (PW 2 Rattan Singh) cannot be brushed aside lightly. He had given full details of the incident as he was present at the time when the appellant shot dead the deceased. In **Shivalingappa Kallayanappa v. State of Karnataka** (1994 Supp (3) SCC 235), the Apex Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies. We find no discrepancies or contradictions in the evidence of any of the prosecution witnesses. Further, in **State of U.P v. Kishan Chand** (2004(7) SCC 629), it was held by the Apex Court that the fact that the witness sustained injuries at the time and place of occurrence lends support to his testimony that he was

present during the occurrence. Therefore, we are of the opinion that the evidence of PW 2 Rattan Singh was rightly relied upon by the SGCM.

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

**(Z.U SHAH)**  
**MEMBER**

**(S.S KULSHRESTHA)**  
**MEMBER**