IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI

T.A. No. 432 of 2010
(W.P.(C) No. 3466 of 2007)

Ex. Sep. Balinder Pandey .....Petitioner

Versus

Union of India & Ors. .....Respondents

For petitioner: Mr. S.K. Tyagi, Advocate.
For respondents: Mr. Anil Gautam, Advocate.

CORAM:
HON'BLE MR. JUSTICE A.K. MATHUR, CHAIRPERSON.
HON'BLE LT. GEN. S.S.DHILLON, MEMBER.

J U D G M E N T
16.03.2012

S.S.Dhillon, Member:

1. The Petitioner is aggrieved by the illegal award of the General Court Martial (GCM) held on 3rd June 1995 by which he was sentenced to suffer life imprisonment and to be dismissed from service for an offence under Section 302 of the Ranbir Penal Code (RPC). He is also aggrieved by the Government of India, Ministry of Defence letter of 9th September 2002 whereby his statutory complaint has been rejected in the most arbitrary manner without due application of mind.

2. The Petitioner was enrolled in the Indian Army on 18th March 1983 in the Army Service Corps (ASC). During the relevant point in time he was posted to 898 Animal Transport (AT) ASC Battalion which was at that point of time located in the hostile counter insurgency environment of Jammu & Kashmir. The incident for which he was punished occurred on 17th January

1994 at approximately 7.15 in the evening when liquor was being issued, the Petitioner's loaded rifle Butt No. 95 accidentally fired a shot killing Lance Naik Mahender Sambha Ji Kamble. The Petitioner had no intention of killing the deceased and it had been purely accidental. For such accidental fire from his rifle he was very illegally and arbitrarily charged for an offence under Section 302 of RPC and the charge sheet reads as under:

"**CHARGE SHEET**

The Accused Number 6472452X Sepoy/Animal Transport Balindra Pandey, 898 Animal Transport Battalion, Army Service Corps, is charged with:-

Army Act Sec 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 17th January 1994, by intentionally causing the death of No. 6470280P Sepoy (Lance/Naik) Driver (Animal Transport) Mahendra Sambhaji Kamble of the same unit, committed murder.

3. The Petitioner is aggrieved at the illegal manner in which the entire investigation has been conducted starting from the Court of Inquiry during which Army Rule 180, which is a mandatory provision, has not been imposed and his statement was recorded as witness No. 1. Non-compliance of Army Rule 180 vitiated the entire proceedings and the consequent follow up action by the authorities. The Petitioner was not permitted to be present during the proceedings of the Court of Inquiry and it was only later that he realised that various witnesses had made contradictory statements during the Court of

Inquiry and then subsequently during the Summary of Evidence and the GCM.

4. The primary grievance of the Petitioner was that while he should have been tried for an offence under Section 304 of the RPC, the authorities have grossly erred by charging and convicting him under Section 302 of the RPC. An FIR, No. 9 of 1994, in police station Punch was filed under Section 304 and the same had been filed by his Company Commander, Capt. Munish Sharma. The FIR further adds that after investigation the police authorities came to the conclusion that the crime comes under Section 304 of the RPC. Therefore it was due to sheer vindictiveness that he was tried under Section 302 of the RPC. The Petitioner urged that the prosecution could not produce even a single eye witness to the fact that the accused had killed the deceased let alone intentionally killed the deceased. During the proceedings it has been amply proved that the general behaviour and character of the accused was good and the relationship that the Petitioner enjoyed with the deceased was cordial and there was no complaint of any quarrel or previous enmity between the two. Therefore there was no motive whatsoever for the Petitioner to have killed the deceased. Learned counsel for the Petitioner urged that the Petitioner had been found guilty merely on circumstantial evidence and the two important ingredients of motive and mens rea are lacking. There was no criminal intention of the Petitioner in killing the deceased which is evident from the fact that only one bullet has been fired which has caused the injury resulting in death of the deceased and such shot was fired accidentally. All along during the investigation it was obvious that the charge under which the Petitioner should have been tried should have been under Section 304 of the

RPC and instead he was tried for an offence under Section 302. Learned counsel for the Petitioner indicated that this view of trial under Section 304 of the RPC instead of under Section 302 of the RPC was also held by the convening authority of the GCM itself. When the initial finding of guilty and sentence under section 302 of RPC was sent to GOC 25 Infantry Division, who was the convening and confirming authority for this GCM, he himself has sent it back for revision along with comments as extracted from the revision order of 31st May 1995 and read as below:

> "While in no way intending to interfere with the discretion of the Court in arriving at their finding, I, as the Confirming officer, am of the view that the finding of Guilty arrived at by the Court on the charge is not supported by the reasons given by the Court, as Court has specifically mentioned in their reasons that the prosecution has failed to prove that the accused had intentionally caused the death of the deceased. The Court instead has said that the case was covered under the Fourth Clause of Section 300 of RPC, which means that the accused knew that his act of firing was so imminently dangerous that it would in all probability have caused the death of the deceased. In view of the above, the finding of the Court is perverse and to that extent is required to be reconsidered in the light of my following observations.
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> In the particulars of the charge it is averred that the accused by intentionally causing death of No. 6470280P Sepoy (L/Nk) Driver AT Mahendra Sambhaji Kamble of the same unit, committed murder. To find accused 'Guilty' of this charge it was essential for the Court to have satisfied itself about

intention to cause death, on the part of the accused. If Court was not satisfied of the proof of this essential ingredient but was satisfied that the accused while firing upon the deceased knew that his act of firing was so imminently dangerous that it must in all probability, cause death, the Court should have arrived at special finding as envisaged in Army Rule 62(4) & (5) of Army Rules 1954 given as under:

Army Rule 62, for record and Averment of Finding.

(1) xxx xxx xxx xxx

to

(3) xxx xxx xxx xxx

(4) Where, the Court is of opinion as regards any charge that the facts which it finds to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in charge and that the difference is not so material as to have prejudiced the accused in his defence, it may, instead of finding the accused 'Not Guilty', record a special finding.

(5) The special finding may find the accused 'Guilty' on a charge subject to the statement of exceptions variations specified therein.

Since recourse to Army Rule 62(4) & (5) has not been opted by you, I am, as the confirming authority, of the considered view for the reasons discussed above, the findings in the charge is perverse being not supported by reasons. I, therefore, direct that the finding may be reconsidered in the light of my aforesaid observations.

If the Court after careful consideration of all the aforesaid matters and whole of the proceedings decide to revoke its earlier findings they can do so and arrive at their finding afresh, with fresh reasons for the same. It should thereafter, pass a fresh sentence as provided by law. In case the Court decides to adhere to their original finding the record should be made accordingly.

After this order is read in open Court and before the Court is closed for consideration of their finding, the accused shall be given an opportunity to address the Court. Thereafter, if it becomes necessary to clear any point raised by the accused, the Judge Advocate, will give a further Summing Up. No evidence will however be led.

The attention of the Court is drawn to the provisions of Army Act Section 160 and Army Rule 68 and Notes thereto and the specimen form of proceedings, on revision, given on page 421 of Vol. II, 1983 Edition.

After revision, the proceedings will be returned to this Headquarters through Dy. Judge Advocate General, HQ Northern Command.

Signed at Field this Thirty First day of May 1995."

5. Notwithstanding such judicious remarks by the confirming authority, when the GCM reconvened it stuck by its earlier findings and sentence of guilty under Section 302 of the RPC. Such arbitrary dismissal of the entire

evidence, including the revision order, was illegal and has led to his uncalled for detention in prison for a period much beyond what was envisaged had he been convicted under Section 304 of the RPC.

6. Learned counsel for the Petitioner also pointed out that besides the material contradictions which were there in the statements of various witnesses, the place of occurrence of the incident had been disturbed. It had come in the evidence of PW-2, PW-7 and PW-15 that Petitioner was under the influence of liquor and, therefore, in all necessity he should have been sent for medical examination which had not been done thereby causing great prejudice to the Petitioner. It was also argued that from the testimony of PW-1, PW-4 and PW-7 there is possibility of a third man other than the Petitioner and the deceased, being present in barrack during the time of the incident. In the circumstances as enumerated by the various witnesses a third person could clearly hide and would have had adequate time to run after the incident. It was also argued that the guard book which was produced as an exhibit was improperly maintained and its pages were not prepared serially and that there had been two different entries for 17th January 1994 one of which had been scored out. Learned counsel also alleged that this was a unique trial in which the DJAG, prosecutor and defence counsel were changed, which runs contrary to the Rules and Regulations for the conduct of a GCM. Thus the trial has been vitiated by the convening authority.

7. Learned counsel for the Petitioner repeatedly urged that for a deliberate offence of murder it was his conduct prior, during and after the incident which should have been taken cognizance of before arriving at a

finding of guilt under Section 302 of the RPC. In the case of the Petitioner his conduct prior to the incident was very normal in that he was sitting in his charpoy with his weapon on his lap and enjoying a drink and even consequent to the firing of a single shot the Petitioner had not indulged in any violative or aggressive act. To the contrary he had cooperated all along with the authorities and was simply in a state of shock. Had the Petitioner intentionally shot the deceased, he could also have shot the other persons who were there in the barrack or who subsequently came to disarm him. Therefore his conduct both prior to the incident, the actual firing of the weapon and his conduct after the incident had not indicated any deliberate intent on his part of committing the so-called murder.

8. We have gone through the records of the GCM during which prosecution presented 15 witnesses. Nb. Risaldar Saheb Singh of 898 AT Battalion ASC was a material witness who was the first person to enter the barrack after the firing of the shot. He saw the Petitioner sitting on a charpoy with his rifle in his lap. He has stated that the distance between the Petitioner and the deceased was approximately 8 feet. Hav. Nursing Asstt. Yogender Singh (PW-2) was the person who gave first aid to the deceased. He reached the scene approximately 15 minutes after the shot was fired and after examining the deceased, declared that he was dead. The witness also took the blood pressure and pulse of the Petitioner who appeared to be visibly shaken. During his conversation with the witness, the Petitioner has mentioned “Mujse Galti Ho Gai”. The witness has stated that although the Petitioner was smelling like alcohol, he did not consider it necessary to inform anybody since the Petitioner was talking very coherently and was behaving as

a normal human being. Captain V.K. Kalhan (PW-3) was the Medical Officer in the area and was the first doctor to arrive at the scene approximately one hour after the incident. After examining the deceased he declared him dead at approximately 2020 hours. The wound was described by the witness as "8 to 10 cm deep i.e. if you insert your hand it could go in. There was no clear cut exit or entry point of the wound. This kind of wound, in my opinion, is caused by a high velocity object. In this case some high velocity object has broken the part of the skull". Nb. Sub. Jagdish Prasad (PW-4) was the immediate superior of the Petitioner in 898 AT Battalion ASC. He had issued arms and ammunition to the entire night guard in the presence of Hav. N.C. Hazara (PW-5) and Hav. N.C. Sarkar (PW-6). Before issuing the weapons he ensured that all weapons were empty and that no ammunition was filled in the magazine. He has testified that the Petitioner was issued SLR rifle Butt No. 95 along with 10 rounds by Hav. N.C. Sarkar and Hav. N.C. Hazara in the presence of the witness. The guard book was produced and marked as exhibit-P and indicated that the Petitioner had been issued SLR rifle Butt No. 95 along with 10 rounds of ammunition and the signature of the Petitioner was appended in acknowledgment of receipt of such weapon and ammunition. On hearing the shot, he along with PW-1 Nb. Sub. Saheb Singh reached the spot and they were the first who reached the spot of the incident. He saw the Petitioner sitting on the charpoy with his weapon kept on his lap. He also saw the deceased kneeing down on the floor with his head rolled down and trying to seek support from a corner of the charpoy. He did not see anybody else in the OR living barrack. Due to fear they did not enter the barrack. This witness had lodged the FIR with the civil police and brought ASI Ram Dass (PW-12) to the site of the incident. Hav. Hazara (PW-5) was the one who

issued the weapon to the night guard including the Petitioner. He has testified that no weapon or ammunition was issued to the deceased and instead that weapon was given to Hav. N.C. Sarkar, since the deceased was not present during the time of distribution of weapon and ammunition. The witness has stated that the existing orders were that sentries will not fix the magazine on the weapon and that the ammunition will be kept in the pouch or the pocket. Hav. N.C. Sarkar (PW-6) was the Guard Commander of the night guard for 17th January 1994 i.e. on the date of the incident. He has testified to the fact that PW-5 issued arms and ammunitions to all sentries, the guard except to the deceased, who was not present and whose weapon and ammunition was kept by this witness. This witness also had an occasion to speak to the Petitioner after the incident when he was being led out of the barrack and in response to a query by the witness, the Petitioner had replied that "Mujse Galti Ho Gai". The Petitioner appeared to be visibly shaken. Nb. Sub. Sahab Singh (PW-7) was at that point of time posted with 8 JAT and was present at the post where the incident occurred. He has stated that at approximately 7.15 pm on 17th January 1994 he heard the sound of a gun shot and rushed towards the direction from where the sound had come. He supposedly reached the barrack where the shot was fired within a few minutes and on reaching there he saw somebody coming out of the barrack holding an SLR rifle in his hand. He along with Hav. Daya Chand of his battalion snatched the weapon from this person and in the process of snatching the weapon he has testified that the barrel of the weapon was hot indicating that it had been recently fired. He has testified that the person carrying the rifle was the Petitioner whom he identified. The witness also did not see anybody else present in the OR living barrack. He removed the magazine from the rifle and

handed over the rifle and the magazine to one of the Jawans belonging to the Petitioner's unit. Thereafter they apprehended the Petitioner and tied his hands behind his back and took him to the unit quarter guard. Capt. Munish Sharma (PW-8) belonged to the same unit i.e. 898 AT Battalion ASC as the Petitioner and was performing the duties of his Company Commander. He has stated that at approximately 7.30 pm on 17th January 1994 he received a call from Nb. Sub. Jagdish that Petitioner had killed Lance Naik Mahender Sambha Ji Kamble. He immediately thereafter rushed to the scene of the incident where he saw the doctor examining the deceased. The witness went to the quarter guard of 8 JAT where the Petitioner has been held in custody and spoke to him. He spoke to the Petitioner and in the course of such conversation the Petitioner had told the witness that "Muj Se Galti Ho Gai, Mujse Mera Chota Bhai Mara Gaya." The witness has clarified that this conversation that took place between him and the Petitioner was not under any threat, inducement or promise and it was absolutely voluntary and the accused was in a relaxed condition. Lance Naik B.R. Lakhande (PW-9) is also a witness to hearing the shot and his testimony is akin to that of other witnesses. Sepoy Shambu Singh (PW-10) also belonged to the same unit as the Petitioner and was on guard duty on the night of 17th January 1994. He was the person to whom Nb. Sub. Sahab Singh handed over the Petitioner's rifle and ammunition. Dr. Anil Kumar Gupta (PW-11) had conducted the post-mortem and given his opinion about the cause of death. SI Ram Dass (PW-12) was at that point of time posted at the police station Punch and has stated that at approximately 0200 hours on 18th January 1994 he received information from Capt. Munish Sharma about the incident and had lodged an FIR No. 9 of 1994 under Section 304 of the RPC. He along with the police

photographer reached the place of the incident where the dead body of the deceased was lying and carried out his investigation. He recovered the fired empty case and submitted his report which was an exhibit before the GCM. Maj. M.S. Gulia (PW-13) was the second in command of 898 AT Battalion ASC and is a formal witness. Maj. T. Anand (PW-14) was the Adjutant of 898 AT Battalion ASC and has testified to the effect that the SLR of the Petitioner along with an empty magazine, 9 live rounds of ammunition and one fired case was sent for ballistic examination. The clothes of the deceased Lance Naik Mahender Sambha Ji Kamble, which he was wearing at the time of accident, were also sent for ballistic examination and he has produced the ballistic report in respect of the SLR Butt No. 95 and also the forensic report in respect of the clothes of the deceased. Maj. G.A. Shah (PW-15) was the second in command of 8 JAT and has testified that Nb. Sub. Jagdish Prasad of 898 AT Battalion has come to him approximately 7.20 pm on 17th January 1994 and informed him about the incident. The witness went to the site of the incident and ordered the Petitioner to be kept in detention in the quarter guard. The witness had subsequently met the Petitioner in the quarter guard and during his conversation with the Petitioner he was informed by him that "Pata Nahi Kaise Ho Gaya Ye To Hamara Hi Bhai Tha" and "Mai Apni Charpoy Ke Upar Baitha Tha Aur Rifle Cock Kar Raha Tha Aur Goli Chal Gayi".

9. Learned counsel for the Respondents argued that there were no material contradictions in the testimony of the various witnesses as deposed by the learned counsel for the Petitioner. Keeping in view the prolonged period of time between the three stages of the Court of Inquiry, Summary of

Evidence and GCM, it is but natural that some minor contradictions may occur but there were no material contradictions of any consequence in the testimony of any of the witnesses. The Petitioner was given full opportunity of cross-examining the witnesses and of making his own statement during the Summary of Evidence and also at the GCM, therefore, non compliance of Army Rule 180 has not prejudiced the Petitioner in any manner. In any case the Court of Inquiry had to ascertain details of the crime and the petitioner was not an "accused" before the Court of Inquiry. It was on conclusion of the Court of Inquiry that the petitioner was held blame worthy. With regard to the fact that the Petitioner has consumed liquor, Respondents argued that while the Petitioner may have consumed liquor in the evening of 17th January 1994, all the witnesses have categorically stated that his behaviour was completely normal and there were no indications whatsoever that the Petitioner was intoxicated or was incapable of understanding what he was doing or the consequences of his actions, therefore, the authorities did not consider it necessary to send the petitioner for medical examination. It was also argued that there was some disturbances to the scene of the crime which had occurred in the course of providing medical aid to the deceased and there was no malafide intention in disturbing the scene of occurrence of the incident. Commenting on the change of the DJAG, prosecutor and the defence counsel, learned counsel for the Respondents argued that all these changes had taken place during the revision stage of the GCM and during the initial proceedings of the GCM there had been no change to any of these personnel. Since the revision order was issued nine months after the GCM had concluded there was a change in the DJAG, prosecutor and defence counsel since the original officers and the defence counsel were not available.

This in no way prejudiced the Petitioner and was in the normal course of events.

10. After having perused the record and given the best of our consideration to the arguments of learned counsel for the parties, we are satisfied that while an offence under Section 304 of the RPC stands established, one cannot say the same with regard to an offence under Section 302 of the RPC. The prosecution has failed to establish beyond all reasonable doubt that the accused had intentionally caused the death of the deceased, and did not resort to a special finding under Army Rule 62(4)(5). In fact the revision order of the confirming authority more than adequately summarises the reasons for a special finding under this Army Rule as to hold him guilty for an offence under Section 304 and not under Section 302. During the entire proceedings no motive or mens rea has been attributed to the Petitioner. To the contrary all witnesses have spoken of the amicable and good relations between the Petitioner and the deceased. The behaviour of the Petitioner pre-incident and post incident also indicated an accidental fire of the weapon rather than the commission of a pre-meditated crime. There has been no display of hostility or threat to the rest of the persons and neither was any resistance offered by the Petitioner. In all his statements, the Petitioner had categorically referred to the deceased as “Bhai or Brother” and has time and again stated that he did not know how the bullet got fired from his weapon.

11. The pre revision findings have been adequately commented upon by the convening authority in his revision order of 31 May 1995, whereby he was of the view that “to find the accused Guilty of this charge, it was essential for the court to have satisfied itself about intention to cause death, on the part of

the accused". However the court itself in its findings has recorded that "the court accepts the plea of the defence counsel that the prosecution has failed completely in proving the intentions involved in the committing of the offence by the accused". Therefore, the argument that the offence came within the fourth clause of the Section 300 of the RPC is not sustainable. The GCM has erred even in the post revision reasons for the findings of Guilty by stating "The Court is of the considered view that the accused intentionally caused the death of the deceased and therefore the case is covered under first clause of Section 300 RPC". No grounds/rationale/logic/evidence/hypothesis has been extended as to how the GCM arrived at the view that the petitioner "intentionally caused the death of the accused". The intention to cause death has not been proved anywhere in the proceedings of the GCM. Not only this, at no stage has the prosecution been above to lead evidence of motive, mens rea, enmity or any other explanation for the death, and as accepted by the prosecution there is no eye-witness to the incident and conviction is based purely on circumstantial evidence. Accordingly, while it has been established that the death of the deceased occurred by an act of the accused, they have not been able to prove beyond reasonable doubt that the petitioner intentionally caused the death of the deceased. Therefore, when two or more hypothesis are evident, the tenets of natural justice are too well known to warrant repetition.

12. Keeping in view the above facts, we set aside the findings and sentence awarded by the GCM on 3 June 1995. We hold the petitioner Guilty of Culpable Homicide not amounting to murder as provided in RPC Section 304 read with AA Section 69 and sentence him to 10 years

imprisonment. Should he have served this sentence, he should be set free, if not required in any other case. The appeal is accordingly allowed to this extent. No order as to costs.

A.K. MATHUR
(Chairperson)

S.S. DHILLON
(Member)

New Delhi
March 16, 2012
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