

**ARMED FORCES TRIBUNAL, CHANDIGARH
REGIONAL BENCH AT CHANDIMANDIR**

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OA 589 of 2010 (Appeal)

Ashok Kumar **Petitioner(s)**
Vs
Union of India and others **Respondent(s)**

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For the Petitioner (s) : Mr. Rohit Verma, Advocate
For the Respondent(s) : Mr. SK Sharma, Sr. PC.

**Coram: Justice Vinod Kumar Ahuja, Judicial Member.
Air Marshal (Retd) SC Mukul, Administrative Member.**

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**ORDER
12.12.2013**

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1. This is a petition filed by the petitioner under Section 14 of Armed Forces Tribunal Act against the order passed by General Court Martial dated 24.07.2009 vide which the petitioner was held guilty of offence under Section 69 of Army Act read with Section 302 of Indian Penal Code and was sentenced as under:-

- a) To be reduced in the ranks;
- b) To suffer imprisonment for life; and
- c) To be dismissed from service.

2. Briefly stated the facts of the case as proved by the prosecution are that on 15.07.2008 PW 11 Capt. Sunil Anand was working as Regimental Medical Officer at the Battalion Headquarters at Moltuk. At about 1215 hours he came to the Adjutant's office and there petitioner was posted as Havildar. He entered the office of Adjutant and gave all OK report about the patrol. The Adjutant enquired about the conduct of the patrol after which he told the petitioner to wait outside the office. Major Ankit Bhardwaj was performing the duties of Adjutant at that time. He called Lt. Sanchit Rathore PW 10 to his office who reported there and Ankit Bhardwaj asked Lt. Sanchit Rathore as to why he has not reported with weapon and ammunition on person. PW Sanchit Rathore replied that he was not aware of this procedure. Thereafter Ankit Bhardwaj asked Sanchit Rathore as to whether he was not briefed by Senior Non-Commissioned Officer of the patrol. He replied that he was not briefed by the Senior NCO of the patrol and thereafter Ankit Bhardwaj

called the accused to his office and asked him as to why he had not informed PW Sanchit Rathore about the reporting procedure. The accused accepted that he had not informed Sanchit Rathore about the said procedure and accepted his mistake. Thereafter Ankit Bhardwaj told the accused to go out and told PW Sanchit Rathore about the correct procedure and also told him that he should not commit such mistakes. He then called for Field Scale Marching Order (FMSO) with 5 Kgs weight in it and a rifle and asked Sanchit Rathore to carry out 200 rounds of the helipad ground.

3. It is further in evidence that thereafter PW 11 Sunil Anand and Major Ankit Bhardwaj deceased proceeded towards the Officers Mess and on way told PW Sanchit Rathore to break-up and carry out the rest of his punishment after lunch. Thereafter both of them had lunch and proceeded to the room, changed the uniform and were watching television.

4. It is further in evidence that at about 1510 hours the accused entered the room carrying AK-47 Rifle, opened fire on Major Ankit Bhardwaj and fired 4 to 5 rounds. PW 11 Sunil Anand got up from his bed, lifted the accused and pushed the accused and thereafter removed the magazine of AK-47 rifle while holding his neck from behind and pointed the weapon in a safe direction.

5. It is in evidence that PW 11 Sunil Anand shouted for Sentry and after PW 12 Naseer Ahmed War came to the room and he was asked to take weapon of the accused from his hand. Meanwhile Major Ankit Bhardwaj had fallen on the floor and then mess waiter Surinder Singh entered the room and helped PW 11 Sunil Anand in carrying Major Ankit Bhardwaj, who was then taken for treatment in a helicopter and life saving procedures were followed by Sunil Anand.

6. Post mortem examination was conducted and statements of witnesses were recorded during Court of Inquiry and on submission of the report of Court of Inquiry the Court Martial proceedings were initiated. The petitioner was tried for the offence as detailed above and was held guilty and sentenced accordingly.

7. We have heard the learned counsel for the parties and have gone through the record of the case.

8. The submissions made by learned counsel for the petitioner were that there was no occasion for PW 11 Capt. Sunil Anand, Regimental Medical Officer to be present in the room of the deceased. No such incident took place and the petitioner has been falsely implicated in the case. It was also submitted that the room which was subsequently locked was opened 2-3 times without permission and as such the articles kept in the room were tampered with. It was submitted that the conduct of the petitioner had all along good and there was no occasion for him to fire at his Major and since he has been wrongly held guilty the findings of the Court Martial are liable to be set aside.

9. On the other hand, learned counsel for the respondents had submitted that the rifle was issued to the petitioner as proved from the evidence and there is statement of an independent witness Capt. Sunil Anand corroborated by other witnesses coupled with medical evidence which proves that shots were fired by the petitioner and the medical opinion also gives the cause of death as these injuries were suffered as a result of the fires from rifle and the guilt of the petitioner was duly established beyond any reasonable doubt and, therefore, there is no merit in the application which deserves to be dismissed accordingly.

10. Upon consideration of the record of the case it is clear that the present application has to be treated as a criminal appeal and, therefore, being the first Court of appeal there has to be re-appraisal of evidence by this Court to consider as to whether the findings of the General Court Martial holding the petitioner guilty are liable to be affirmed or not.

11. Coming to the evidence, we will make a brief reference to the relevant witnesses whose statements can be said to be material and deserve to be appreciated with a caution.

12. PW 11 Capt. Sunil Anand, as mentioned above, was present with the deceased Major Ankit Bhardwaj when he chided Lt. Sanchit Rathore for entering the room without following the relevant procedure since he was required to report with weapon and ammunition on person. The deceased had then called the petitioner who was posted as Havildar and was the Senior Non-Commissioned

Officer of the patrol who was required to brief the new officer. PW 10 Sanchit Rathore informed the deceased that he was not told about the reporting procedure and accepted his mistake. Thereafter the deceased called the petitioner as to why he had not told the procedure to Lt. Sanchit Rathore and the petitioner admitted his mistake. Thereafter PW 10 Sanchit Rathore was given the punishment to carry out 200 rounds of the helipad ground and the deceased and PW 11 Capt. Sunil Anand came for lunch and thereafter to the room and were watching television. It is further in evidence that the petitioner entered the room, opened fire on Major Ankit Bhardwaj when he was present with PW 11 Sunil Anand in the room. 4-5 rounds were fired and thereafter PW 11 Sunil Anand got up, pushed the petitioner and removed the magazine of AK-47 rifle and thereafter PW Naseer Ahmed War entered the room on his shouts and he was asked to take weapon from the hands of the accused. He was still holding the weapon which was taken from him and thereafter steps were taken to shift the deceased for treatment after initial treatment had been given by PW 11 Capt. Sunil Anand, Regimental Medical Officer.

13. This statement stands further corroborated from the statement of PW 10 Sanchit Rathore who went to the Adjutant Major Ankit Bhardwaj's room and was chided for not having given the correct report with weapon who was informed that he was not advised by senior most NCO of the procedure. He further stated that Major Ankit Bhardwaj had called the petitioner to his room and asked about the reporting procedure and he informed him that he had forgotten to tell the reporting procedure to Lt. Sanchit Rathore. Thereafter the petitioner was sent out of the office of Adjutant and Lt. Sanchit Rathore admitted his mistake and was given the punishment as stated by PW 11 Sunil Anand. He has further stated that he started carrying out the punishment and Major Ankit Bhardwaj (deceased) and PW 11 Capt. Sunil Anand proceeded towards Officers Mess and the Major called him to complete the punishment after lunch.

14. At about 1520 hours he was woken up by the commotion in the lines and on enquiry came to know that Major Ankit Bhardwaj has been fired upon, who was thereafter evacuated to Military Hospital at 1650 hours. He informed about the incident to his Commanding

Officer as to what had happened earlier and the room was locked which was sealed thereafter.

15. The statement of this witness corroborates the occurrence that had taken place prior to the firing upon the deceased by the petitioner.

16. Naseer Ahmed War who had entered the room immediately after the firing has been examined as PW 12 who stated that at about 1330 hours on 15.07.2008 when he was present at the helipad post the accused came, took his food and his weapon and told him that he is going to his tent for rest. At 1510 hours he heard a sound of firing and tried to locate as to from which direction the sound of firing came. He heard some noise and went to officers living room. When he opened the door of officers living room he saw that Capt. Sunil Anand RMO was holding the accused from behind and the accused was holding a weapon in his hand. He was told by PW 11 Sunil Anand to snatch the weapon from the accused which was snatched by him forcibly and kept aside and asked him to hold him the accused so that he can attend Major Ankit Bhardwaj. Thereafter Mess Waiter Surinder Singh also came and went inside the room and started helping Sunil Anand RMO in lifting Major Ankit Bhardwaj. When he left the accused he lied on the ground and some of the persons carried away Major Ankit Bhardwaj.

17. These statements have been further corroborated by the statement of PW 15 Dr.M Bapin Kumar who had conducted the post mortem examination on the body of the deceased on 16.07.2008 and found the following injuries on the person of the deased:-

1. Entrance wound, 0.8 cm x 0.6 cm, front of chest, 12 cm left to midline in 6th intercostal space, 140 cm above heel, with red abraded collar. Exit wound, 03 cm x 02 cm, back of chest, 15 cm right to midline at T3 level, 153 cm above heel with red irregular margins. The track involved skin, muscles, bones and lungs.
2. Entrance wound, 1.5 cm x 01 cm, front of chest, 18 cm left to midline in the 3rd intercostals space, 146 cm above heel with red abraded collar. Exit wound, 03 cm x 02 cm, on the right side chest, 16 cm right to midline at the mid axillary line in 3rd intercostal space, 146 cm

above the heel with red irregular margins. The track involved skin, muscles, bones, both lungs and heart.

3. Entrance wound, 01 cm x 0.8 cm, back of right wrist with red abraded collar. Exit wound, 07 cm x 03 cm, medial aspect right hand with red collar irregular margins. The track involved skin, muscles and right 5th metacarpal bone.
4. Entrance wound, 02 cm x 01 cm, back of right forearm, 03 cm above wrist with red abraded collar. Exit wound, 03 cm x 02 cm, front of right forearm, 04 cm above wrist with red irregular margins. The track involved skin, muscles and both bones right forearm.

He produced the medical certificate of cause of death Ex.26 vide which the deceased died. In the opinion of the Medical Officer the cause of death as given in Ex.23 was due to the laceration of the vital organs resulting from fire arm injuries which were homicidal in nature. In the medical certificate Ex.26 also same was reported as the cause of death.

18. Apart from the above, there is statement of PW 5 Havildar Sita Ram who was performing the duties of Kote Non Commissioned Officer at the relevant time. His duties included issuing the weapons, magazine along with ammunition. He did 'Khali Kar' drill after the incident and found a live round in the chamber, located the magazine in the room of Major Ankit Bhardwaj, picked up the magazine, took out the rounds and counted them. He produced the weapons and register before Subedar Major Murli Lal Sharma PW 6 and stated that AK-47 rifle was issued in favour of the petitioner whose signatures are also there in the register. This clearly proves that the weapon in question was issued to the petitioner which had been used for firing the deceased.

19. On a careful perusal of the statement of PW 11 Capt. Sunil Anand it is clear that in the cross-examination no such suggestions were put to the witness that some body else had fired upon the deceased or PW 11 Capt. Sunil Anand had fired upon the deceased, which plea was sought to be taken at the time of leading of defence version. This plea cannot be sought to have been

substantiated since no questions were put up to PW 11 Capt. Sunil Anand in this regard and rather his statement on all material facts goes un-rebutted. The accused was associated by a defence counsel and, therefore, had full opportunity to cross-examine the witness and some questions were put to him by the defence counsel but there were no suggestions of any false implication and, therefore, the statement of PW 11 Capt. Sunil Anand goes un-rebutted and inspires confidence.

20. Apart from the above it was suggested to PW 11 Capt. Sunil Anand that when the accused was called in side the office of Adjutant second time, the Adjutant used the abusive language to the accused. This rather proves the motive for the crime committed by the petitioner that he was hurt by the abusive language by the deceased. In a case which is based upon direct evidence it is not necessary to prove motive. However, motive once proved can be used as corroborative evidence and though no such motive was proved from the statements of prosecution witnesses in their examination-in-chief but it was sought to be substantiated by the defence counsel that some abuses were hurled upon the petitioner. The statement of the witness has to be read as a whole and cross-examination is also a part of the statement made by a witness and, therefore, the motive has been sought to be brought on record by the petitioner himself in cross-examination of PW 11 Capt. Sunil Anand. This rather can be used as a corroborative evidence and the statement of the witness examined by the prosecution has to be read as a whole which rather goes against the petitioner.

21. From the above discussion it is very much clear that the weapon in question had been issued in favour of the petitioner who does not deny that it was in his possession. There is direct evidence of the witness with whom the deceased was sitting at the relevant time. There is no substance in the argument that PW 11 had no reason to be present in the room of the deceased at the relevant time since the earlier person staying with the deceased had left one day earlier and that as why PW 11 Sunil Anand shifted to the deceased room on that day only. The deceased may be feeling lonely or alone and in case PW 11 Capt. Sunil Anand had come to his room during day time, no formal order was required for him to sit in the room of the Major and,

therefore, no such infirmity can be found in his statement or anything wrong in his being present in the room of the deceased particularly when no such suggestions were put up of false implication or were suggested to him in his cross-examination. These statements find further corroboration from the statement of PW 12 Naseer Ahmed War who came to the spot and other witnesses as discussed above.

22. The conduct of the petitioner prior to the occurrence is not relevant and once the occurrence in question has been proved to have taken place in the manner as put up by the prosecution and the statements of the witnesses inspire confidence they have to be relied upon.

23. The statements of other witnesses are not very material and no detailed reference is necessary.

24. In regard to the plea that as to why the room was opened, the room was sealed and it was opened on the asking of PW 5 Sita Ram and PW 6 Murli Lal Sharma had entered the room to take in possession the rifle and magazine etc. and to tally it with the register and there was nothing abnormal in it. There is nothing on record to show that there was any destruction in the room and the room was opened just to take in possession the weapon etc. and there was no wrong committed during investigation of the case. There were no blood marks etc. which were destroyed by opening of the room and, therefore, no defect can be found in the investigation and the minor defects in the investigation, if any, are not fatal which have not been proved to have been committed during the investigation of the case.

25. From above detailed discussion it is very much clear that the petitioner was rightly held guilty under Section 302 IPC read with Section 69 of Army Act and once the guilt of the petitioner was proved under Section 302 IPC, there is no discretion left with the Court since the punishment prescribed is either death sentence or life imprisonment and the Court has nothing to consider for awarding lesser punishment which is not permissible under Section 302 IPC and, therefore, it is clear that the Court Martial had rightly convicted the petitioner on the basis of the evidence which was reliable and there are no contradictions and as such the findings of the Court Martial imposing the sentence of life imprisonment and dismissal from service

and to be reduced in the ranks calls for no interference by this Court. A young officer had lost his life due to the act of the petitioner which is punishable for imprisonment for life and, therefore, the guilt of the petitioner stood proved clearly under Section 69 of the Army Act read with Section 302 IPC. The statutory appeal filed by the petitioner had been rejected as per record. We find no reason to interfere in the findings of General Court Martial and as such the present application filed by the petitioner is dismissed accordingly.

(Justice Vinod Kumar Ahuja)

(Air Marshal (Retd) SC Mukul)

12.12.2013

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Whether the judgment for reference is to be put on Internet? Yes/ No