

(1990) 12 SHI CK 0032
In the High Court Of Himachal Pradesh
Case No : Criminal W.P. No. 10 of 1986

Amar Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-12-1990

Acts Referred:

Army Act, 1950 — Section 130(1), 137, 164
Constitution of India, 1950 — Article 14, 226, 227, 227(4), 33
Criminal Procedure Code, 1973 (CrPC) — Section 374(2)
Penal Code, 1860 (IPC) — Section 302, 79

Citation : (1995) 4 ILR HP 2822

Hon'ble Judges : V.P. Bhatnagar, J; Bhawani Singh, J

Bench : Division Bench

Advocate : M.G. Chitkara, for the Appellant; P.A. Sharma, Central Government Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Bhawani Singh, J.—Accused Amar Singh of 12th Battalion Jammu and Kashmir Rifles, was charged u/s 302 of the Indian Penal Code for committing the murder of J.C-112655, Naib Subedar Som Singh of his Unit on the night of 9/10th July, 1982. He was ordered to be tried by General Court Martial after having pleaded not guilty to the charge.

2. Number of witnesses were examined in this case and. finally by order dated 21.12.1983 (Annexure P-B), the Court sentenced the accused to suffer imprisonment for life and to be dismissed from service. This order of General Court Martial was confirmed by the General Officer Commanding, 16 Infantry Division (Annexure P-C) on 5th April, 1984. The accused moved a petition u/s 164 (Annexure P-D) of the Army Act to the Chief of Army Staff with a prayer to set aside the order of General Court Martial dated 21st December, 1983 and the confirmation order of General Officer Commanding, 16 Infantry Division dated 5th April, 1984. It was rejected on 2nd July, 1985 (Annexure P-G). The accused also moved a petition dated 22nd March, 1986 (Annexure P-J) to his Excellency,

the President of India, with a similar prayer. Finally, the accused has preferred this criminal writ petition under Article 226 of the Constitution of India for quashing the order of sentence dated 21st December, 1983 (Annexure P-B) passed by the General Court Martial sentencing him to imprisonment for life and dismissal from service and the order dated 5th April, 1984 (Annexure P-C) by the third Respondent, the General Officer Commanding, 16 Infantry Division and order dated 22nd July, 1985 (Annexure P-G) issued by the 4th Respondent, Adjutant General, Army Headquarters, thereby rejecting the petition made by the petitioner against the order dated 21st December, 1983.

3. The petitioner was serving in the Army and was attached to 12 Jammu and Kashmir Rifles. The Unit was located at Darrang, Assam, during the period from April to July, 1982. On the intervening night of 9-10 July, 1982, Naib Subedar Som Singh was the duty J.C.O. and the accused was a member of Kote-guard party consisting of the accused, Rifleman Sikander Lal, Rifleman Milap Chand and Havildar Chaman Lal. Adjoining to the Kote, there was Quarter Guard whose Commander was Naik Kharaiti Ram with Rifleman Major Singh, L/NK Gurbachan Singh and Rifleman Ramesh Chander. Rifleman Ramesh Chander was on duty from 10.00 PM onwards. At 11.30 hours of the night of 9-10 July, 1982, duty J.C.O. Som Singh went to check the Quarter Guard and was challenged by the Quarter Guard Sentry Rifleman Ramesh Chander. After exchange of passing words, the J.C.O. duty sat on a Bench and directed Rifleman Ramesh Chander to call the Kote Sentry with the duty register. The Kote sentry, it is alleged, refused to come to the Quarter Guard. The duty J.C.O. after signing the register went towards the Kote where after words "Thum" "Thum" in quick succession fire shots were heard. On hearing it, the Kote Guard Commander Havildar Chaman Lal woke up and asked the accused as to how he had fired and the accused told him that the person approaching did not stop when challenged. So, he fired at him. J.C.O. Subedar Yudhbir Singh and Major B.S. Katoch were informed and they reached the spot and on being questioned, the accused told them that when the approaching person did not stop after being challenged, he fired at him. The Guard Commander and other Riflemen were directed to deposit their weapons in the Kote and new guard was appointed to take over Kote guard duty Rifleman Milap Chand and Sikander Lal deposited their weapons alongwith the Rifle of Guard Commander Chaman Lal in Kote and during the process of depositing the same, a second shot was heard. On checking and verification, it was found that the fire was shot from rifle bearing Butt No. 235 which had been issued in favour of Guard Commander Chaman Lal. It was this rifle which was allegedly used by the accused to fire the first shot. The accused was seen changing his rifle Butt No. 274 with Rifle Butt No. 235. Naib Subedar Som Singh expired at the spot and this fact was reported to the local Police which reached the spot and found that the wrist watch which was with the accused at the relevant time was 20 minutes faster than the actual time and that there was no clock in Kote Guard. It was Rifleman Milap Chand's watch and was being used by the Guards in rotation. In the early morning, an empty cartridge was recovered from the Kote area. Rifles

with Butt No. 235 and 274 and the Scabbord No. 224 and 233, 8 live cartridges, one magazine and 2 fired cartridges were sent for examination to Sh. J.K. Sinha, Assistant Director-cum-Assistant Chemical Examiner, Central Forensic Laboratory, Chandigarh, who reported that the fired cartridges were fired through Rifle Butt No. 235.

4. The case of the accused is that he is innocent and he had not committed the crime. His explanation is that he was on duty and when the deceased did not stop after he was challenged and when he felt that something was thrown at him, he fired without knowing that the approaching person was none other than duty J.C.O. Naib Subedar Som Singh of his Unit.

5. The learned Counsel for the parties made elaborate submissions and referred to the evidence recorded during the Court Martial proceedings quite exhaustively. While Sh. M.G. Chitkara, counsel for the accused assailed the Court Martial proceedings, findings and the sentence, Sh. P.A. Sharma, learned Central Govt. Standing Counsel, made efforts to defend the same.

6. Shri P.A. Sharma urged that the matter relates to indiscipline by a soldier, therefore, it should be left to the domain and discretion of the Army Authorities to deal with such a matter and this Court has very limited jurisdiction to examine the sentence awarded to the accused. It is true that the petitioner is a soldier, but the indiscipline involved in the present case is the commission of an offence u/s 302 of the Indian Penal Code, which could otherwise be tried by a Code of Criminal Procedure in accordance with the procedure prescribed by the Code of Criminal Procedure. It may be that in view of Army Act, 1950, the rules and regulations framed thereunder, the provisions of the Code of Criminal Procedure, 1973 may not apply, but as a matter of substance, the manner and method of trial by the sets of courts - one under the Army Act, 1950 and the other under the Code of Criminal Procedure, 1973 - are similar to a greater extent. The provisions of Evidence Act, unless they or some of them are specifically excepted, apply to trials conducted by the General Court Martial as they apply to the trials by the Criminal Courts under the Code of Criminal Procedure. The accused has the benefit of examining his case in accordance with the well-settled legal principles during his appeals and revisions before the next higher courts and the court concerned have to give not only their conclusions, but also reasons for the same, while deciding the matter. But under the Army Act, 1950, there is no provision for giving a speaking judgment. The only provision available thereunder is that the court Martial proceedings are to be confirmed by the higher authorities and then there is a provision for statutory appeal, but they are also not bound by any statutory provision to pass a speaking order. In such a situation to say that this Court has very limited jurisdiction to interfere with the Court Martial proceedings cannot be said to be correct. In case, court finds that there is no evidence to connect the accused with the commission of the offence or that legal principles have not been correctly applied while convicting the accused, court can very well look into the matter. Now, the scope of this

examination has been settled by the apex court in 1987 SC 2386 *Ranjit Thakur v. Union of India*, wherein M.N. Venkatachaliah, J., speaking for the court said in para-9 that:

Re: contention (d): Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process." The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence fit an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In *Council of Civil Service Unions v. Minister for the Civil Service* (1984) 3 WLR 1174 (HL) Lord Diplock said:

Judicial Review has I think, developed to a stage today, when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads of the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community...

7. In *Bhagat Ram Vs. State of Himachal Pradesh and Others*, this Court held:

It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution.

The point to note and emphasise is that all powers have legal limits.

In the present case the punishment is so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review.

8. For the reasons being discussed hereinafter, the present case falls within the parameters laid down in this judgment.

9. Another point argued related to the motive part of the case. Shri M.G. Chitkara, learned Counsel for the accused contended that proof of motive, in this case, is essential because, but for it, there was no reason for the accused to have killed the deceased and that in case motive is eliminated, the defence of the accused that he was not only legally justified in firing at the person, but also

by mistake of fact the accused believed the person to be someone other than the deceased. The counsel submits that the Army Court did not at all examine the application of this defence which could altogether exempt the petitioner from any liability. In the facts and circumstances of this case, this is a clear case of illegality besides leading to complete miscarriage of justice. The genuine defences of the accused were not taken into consideration and the Army authorities were influenced by the consideration that the deceased turned out Naib Subedar, Som Singh otherwise the firing would have been justified and the accused awarded for the same. There is substance in what the counsel submits. Certain incidents, like, the complaint by the accused, once made, that he was asked to come into a dummy helicopter for better observation during a night ambush of which the accused was a party and that the deceased had checked the accused once for keeping long hair and side-burns and reporting of the matter to the Subedar Major who in turn had ticked-off the accused and that the deceased had forwarded the name of the accused for posting to 18 J&K Rifles and did not want him to be retained in his RP Party, are quite insignificant to point out that the accused had motive to kill the deceased. It appears from the statement of Havildar Chaman Lal (P.W-7) that the first incident was enquired into and found baseless. There is no evidence of the second incident nor can the same be considered to be of such magnitude which could infuriate the accused to such an extent that he would entertain the motive to kill the deceased. The third incident also appears to be baseless since the accused was never posted in the new Unit. Havildar Chaman Lal (P.W-7) also states that the accused had never complained against the deceased although he had served with him on several occasions. Similarly, Onkar Singh (P.W-9) states that he had never received any report from any person of the platoon that the accused had the intention to harm or kill Naib Subedar Som Singh. The accused was normal as any other Jawan throughout his stay in his platoon. Ever since the day of his arrival "to the day of the incident, he had never disobeyed any orders. Documents (Ex.Y) is a statement as to the character and particulars of service of the accused. Against entry No. 1, his general character has been shown "Exemplary" while against entry No. 7, no previous conviction and court martial has been noticed. In view of this kind of evidence, motive on the part of the accused to kill the deceased stands eliminated.

10. The next point deals with the question whether the accused knew the identity of Naib Subedar Som Singh before he was fired at. This is a crucial question in the case. The statements of witnesses on this aspect are grossly vague, incoherent, divergent and lack exactness.

11. Milap Chand (P.W-3) says that it was dark in the Kote premises with no electric bulbs on. The night was dark due to clouds. He further states that he lit the torch for reading the Butt number of the rifle held by the accused. Major B.S. Katoch (P.W-1) states that he saw the dead body of Naib Subedar with the help of light from the torch still on in the hands of the deceased. Further, he states that when he reached the site of incident, the sky was cloudy in patches and

after a while it started drizzling. One could make out in the existing conditions before it started drizzling that a person in uniform was coming from about ten yards but could not recognise or identify as to who he was. He also states that when he reached the Kote premises, there was no light in the verandah of the Kote or in the Kote compound. He had not seen any sentry post in the Kote area. As it was raining, the Kote Sentry may stand in the Verandah of the Kote. Again, he states that he himself identified the body by means of a torch but could not say whether the torch belonged to Subedar Yudhvir Singh or not. Ramesh Chand (P.W-2) states that there was no light in the Kote premises and the night was dark due to clouds. Again, he states that he recognised the duty JCO only by his voice and not otherwise, when he was about 20 yards away from him. Milap Chand (P.W-3) states that Rifleman Sikandar Lal told him that a person in uniform was lying with a lit torch in his hand and also that he could not recognise him. He also states that it was dark in the Kote premises as no electric bulb was on. The night was dark due to clouds. Sikandar Lal (P.W-4) also states that he told Rifleman Milap Chand that a person in Uniform was lying and he could not recognise him and it was from the lit torch of the lying person that he could make out that he was wearing uniform. He also states that there was no light in the Kote premises. Kharaiti Lal (P.W-6) also states that he could not identify the man lying on the ground and he used torch. Chaman Lal (P.W.7) also stated that there was no light in the Kote premises. The Kote area was dark with patches of clouds and it rained in the morning. Yudhbir Singh (P.W-8) gives the same version.

12. From this kind of evidence, it is quite clear that there was no light in the Kote premises and it was dark. Identifying a person in such a situation, as a matter of fact, was not possible.

13. The next question is whether the petitioner was justified in firing at Naib Subedar Som Singh. The answer is in the affirmative for the reason that the accused did not know that the deceased was on duty during that night and that it was he who was approaching the accused at that particular time. The contention that the accused knew about the duty of Naib Subedar Som Singh since he was called alongwith the duty register is hardly believable as it is never done. He was on guard duty at a fixed point and a soldier on guard duty never leaves the place of duty to attend to any other work nor could he be called upon to do so even by his superiors. The fact that he was called alongwith the register to the place where JCO Som Singh was sitting has, it appears, been introduced simply to indicate that he knew that Naib Subedar Som Singh was on duty that night, therefore, the accused could have understood that the man approaching him was none other than Subedar Som Singh. On the question whether the accused could have known it while the duty JCO had gone to the adjoining premises to check the Guard, it can be said that the same was not! possible because of factors like darkness, distance between the two points and the hedges that had been raised in between these two premises.

14. Shri P.A. Sharma, learned Standing Counsel for the Central Government, referred to Standing Orders for Kote Guards and submits that the accused should have followed the same strictly. He also refers to the evidence touching this point and urges that the accused uttered "Thum" "Thum" without appreciable gap and resorted to firing without giving chance to Naib Subedar Som Singh to follow his instructions. Evidence on this aspect is not quite clear. Some witnesses say that the accused uttered "Thum" "Thum" twice while some others say that he uttered the same thrice - Again some talk of gap between these utterances while others deny it. However, the perusal of the evidence discloses that the accused when approached by the deceased, definitely uttered "Thum" "Thum" twice if not thrice as stated by some of the witnesses. There was reasonable gap between the utterances, not only because the witnesses say so but also because these expressions are such, which, as a matter of fact, call for automatic gap before repetition. Even otherwise, calling of "Thum" even once was enough and the deceased should have stopped there and then without allowing the accused to repeat the same, since after the first utterance, the person has to stop whereupon the soldier has to issue him certain other directions in order to identify him correctly. The deceased did not stop even when he was directed to stop twice and the accused also felt as if something had been thrown at him. It was a dark in that area. Although there is no over-whelming evidence to show that it was a disturbed area, however, there is some evidence to point out that entire Assam was not peaceful and this was one of the parts of the State and the troops had been directed to be vigilant as to duty, ammunition and movement. The prosecution witnesses also state that it was not possible to recognise a person in the absence of light and some of them could not be recognised even in torch light.

15. From these circumstances, it is clear that the accused, who was on sentry duty, was justified in firing at the approaching person, who, later happened to be his duty J.C.O. Since the duty of the sentry is absolutely important and crucial to the army management, any slackness or sluggishness can cause immense damage to the whole army.

16. In order to strengthen his plea founded on the application of Section 79 of the Indian Penal Code, learned Counsel for the accused placed reliance on number of cases like AIR 1947 Lah 249 Dhara Singh v. Emperor AIR 1926 Lah 554 Bonda Kui Vs. Emperor, Bonda Kui v. Emperor, AIR 1952 Nag 282 Chirangi v. State AIR 1952 Nag 268 State Govt. of H.P. v. Rangaswami, and 1978 CLJ 1305 State of Orissa v. Khora Ghasi. These submissions are of substance if one looks to the circumstances in which the accused was placed before resorting to firing. It was a genuine and bonafide mistake on his part in failing to identify Naib Subedar Som Singh. This plea gains strength from the fact that the deceased failed to respond to the directions of the accused and there is no evidence to point out that he responded to the same. It was night time and the area was dark since there were no lights. The conditions in the area were not quite normal. The death may be unfortunate, but it cannot be said that the accused

killed him as alleged by the prosecution. Seen in the light of the evidence that has come on the record of this case, it is a case clearly covered by the principles of Section 79 of the Indian Penal Code and the conviction of the accused cannot be legally sustained.

17. In view of the aforesaid conclusion, other submissions of Shri M.G. Chitkara, namely, failure of the prosecution to examine all other rifles to eliminate altogether the use of any other rifle, except with Butt No. 274, non-examination of Dr. Sunil Dhar (P.W-10) by resorting to provisions of Section 137, Army Act, 1950 to prove the post-mortem report and the injuries and connecting the injury with the bullet fired through rifle with Butt No. 235, need not be examined.

18. The result is, there is merit in this petition and the same is allowed. The conviction and sentence passed by the General Court Martial and confirmed by the higher authorities are set aside. The accused is acquitted of the charge. He is stated to be in jail. He be set free forthwith.

Per V.P. Bhatnagar, J.

19. I have had the benefit of going through the judgment prepared by Brother Bhawani Singh, J. to be delivered in this case. With all respect, I cannot but differ with the view taken by him that the order of conviction and sentence passed by the General Court-Martial and confirmed by the higher authorities against petitioner Amar Singh ought to be set aside.

20. First, the scope and extent of the powers of High Court to interfere with the decisions of Courts-Martial under Article 226 of the Constitution may be examined. A peep into the intendment of the Legislature for treating the Armed Forces as a separate entity with respect to application of some of the general laws is afforded by Article 33 and Article 227(4) of the Constitution. Thus, the Parliament has been conferred the power to modify the fundamental rights in their application to Armed Forces by virtue of the provisions contained in Article 33. Article 227 confers power of superintendence over all Courts and Tribunal on the High Court but any Court or Tribunal constituted by or under any law relating to the Armed Forces has been taken out of its jurisdiction. The rationale is that nothing should be done prejudicial to military discipline. The parameters of judicial review of decisions arrived at by various kinds of Court-Martial have been laid down from time to time. The courts of law are ordinarily hesitant, and rightly so, to interfere with such decisions pertaining to the Indian Armed Forces. This is because Army personnel are subject to strict discipline and no compromise can be made as far as their work and conduct are concerned. However, it is not to say that courts have no powers of judicial review under Article 226. In fact, it is well-settled that all powers have legal limits. Intervention by the courts will depend upon the nature of illegality, irrationality or procedural impropriety shown to have been committed during the Court-Martial. If the decision is based on no evidence whatsoever or is against the express provisions of any law applicable to the case or reflects violation of principles of natural justice, courts may give

remedial relief. These grounds are not exhaustive but are certainly indicative of the fact that the courts of law cannot sit in appeal against the decisions of the Court-Martial by way of invoking the extra-ordinary powers under Article 226 and thereby embark on a process which otherwise stands debarred under law. An extraordinary power must only be used in extraordinary circumstances.

21. In *Ranjit Thakur Vs. Union of India (UOI) and Others*, the facts were that signal-man Ranjit Thakur was ordered by his superior officer to eat his food but he did not obey. This offence was tried as a Summary Court-Martial but the statutory mandate of Section 130(1) of the Indian Army Act, 1950 was not complied with inasmuch as the Court-Martial did not afford to him an opportunity to challenge its constitution as required by that section. Ranjit Thakur pleaded guilty. He was then sentenced to rigorous imprisonment for one year and sent to civil prison. He was also dismissed from service and declared unfit for any future civil employment. The confirming authority u/s 164 of the Army Act rejected his representation. It was on the above facts that the Supreme Court observed that "the sentence has to suit the offence and the offender" and further that "it should not be vindictive or unduly harsh". the ratio of that case in no way detracts from the proposition of law enunciated in para 2 above.

22. In *Trilochan Joshi and Ors. v. Union of India* 1983(1) CRI 1025 , a learned single Judge of Delhi High Court, following *Sawarn Singh and Another Vs. State of Punjab and Others*, quoted his observations in an earlier case decided by him (*Captain Jagdish Chander v. Union of India Cr. W. Nos. 53 and 74 of 1979*):

Clause (4) of Article 227 of the Constitution provides that the High Court has no power of superintendence over any Court or Tribunal constituted by or under any law relating to the armed forces. It is said that such courts and tribunals are courts of honour. Their business is to find the truth. They are instrumentalities through which the President maintains discipline in the armed forces. They are called courts but are administrative in character. They are created ad hoc. They are short and swift. They only make recommendations. They are efficient. But being exclusive they are liable to abuse and since they form part of our criminal justice system, the law does not leave the members of the armed forces entirely to the mercy of their compeers. They are not exposed to public glare but have, therefore, been subjected to limited judicial review. In *Ram Murti Wadhwa v. Union of India* I.L.R.(1976) 2 Del 691 this Court held that under Article 226, a writ of certiorari can be issued against a court martial if it is not duly constituted or it had no jurisdiction over the person or the subject matter of the charge or there is an error of law apparent on the face of the record or the principles of natural justice were violated so as to result in miscarriage of justice. The court can also intervene where any fundamental right of the petitioner has been violated, vide *Capt. Harish Uppal Vs. Union of India (UOI) and Others*, But the findings of fact reached by it as a result of the appreciation of evidence cannot be reopened or questioned nor can they be challenged on the ground that the evidence before it was insufficient or inadequate to sustain the impugned finding.

However, a writ of certiorari can be issued if it is shown that in arriving at the said finding, it has erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding or if a finding of fact is based upon no evidence because all this would be regarded as an error of law. Such error should be self evident and not dependent upon elaborate examination of the record. It is a working test but not an unfailing one. Experience shows that it is not usually difficult to decide whether the impugned error of law is apparent on the face of the- record or not, vide *Shri Ambica Mills Co. Ltd. Vs. S.B. Bhatt and Another*, and *Syed Yakoob Vs. K.S. Radhakrishnan and Others*,

With respect, I find myself in agreement with the limits and extent of jurisdiction under Article 226 as delineated above.

23. Shri M.G. Chitkara, learned Counsel for petitioner Amar Singh , has, however, argued this case before (s)sic as if we are hearing an appeal against a judgment of conviction u/s 374(2) of the Code of Criminal Procedure. He has invited us to enter into re-appraisal of the entire evidence adduced before the Court-Martial and hold the accused not guilty in the totality of the facts and circumstances of this case. Evidently, this is the function of an appellate court and I am of the firm view that adoption of such a course is not legally admissible.

24. All the same, since elaborate arguments have been addressed to us from both sides on the lines indicated above, I have no hesitation in saying that there is nothing wrong, otherwise too, with the verdict of the Court-Martial holding Amar Singh guilty of the offence. My reasons for this conclusion are given below.

25. Relevant facts of the case have already been stated by Brother Bhawani Singh, J. and, for brevity sake, these need not be repeated. Suffice to say, that it cannot be disputed that Naib Subedar Som Sing, who was the duty J.C.O. during the night intervening 9th & 10th of July, 1982, and had gone to check first the Quarter Guard sentry and then the Kote sentry at about 11.30 P.M., was shot dead by petitioner Amar Singh who at the time of incident was performing the duty of Kote sentry. Petitioner as also the deceased belonged to 12th Battalion, J & K Rifles and their Unit was then located at Darrange in Assam. The testimony of Maj. B.S. Katoch (PW.1), Rifleman Ramesh Chander (PW.2), Rifleman Milap Chand (PW.3), Rifleman Sikandar Lal (PW.4), Naik Kharati Ram (PW.6), Havildar Chaman Lal (PW.7), Subedar Major Yudhvair Singh (PW.8), Subedar Onkar Singh (PW.9) and Subedar Rattan Singh (PW.11), when read as a whole, establishes beyond any iota of doubt that the fatal shot had been fired by none other than petitioner Amar Singh. In fact, this was admitted by Amar Singh in the presence of Maj. B.S. Katoch (PW.1) Rifleman Sikandar Lal (PW.4), Havildar Chaman Lal (PW.7) Subedar Major Yudhvair Singh (PW.8) and Subedar Onkar Singh (PW.9). There is not a single good reason to disbelieve the testimony of the above witnesses on this point. However, Amar Singh is stated to have taken a plea then and there that he had called out "Thum Thum" on finding a person approaching him but that he did not stop". His further defence is that he felt as if something

had been thrown on him on which he fired. By and large, this is the substance of the statement made by him immediately after the incident to a number of persons with insignificant variations here and there. Based on it, his learned Counsel Shri Chitkara has strenuously tried to build an argument that Amar Singh had shot dead the duty J.C.O. under mistake of fact in good faith while performing duty and that he was entitled to the benefit of Section 79 of the Indian Penal Code. I cannot accept this defence which, in my opinion, totally militates against the facts and circumstances of this case.

26. It is in evidence that the duty J.C.O. Som Singh first went to the Quarter Guard compound for inspection purposes. Rifleman Ramesh Chander (PW.2) was on duty there as a sentry. All sentries on night duty, in an eventuality of some person approaching them, are required to conduct themselves in accordance with the Standing Orders for Kote Guards at S. No. 28 and 29 at Ex.N. These orders read as follows:

28. Rat Ke Samay kisi bhi admi ke ane par "Tham" pukare ga Pass Word Puchhe ga aur agar Pass Word Nahin batata hai ya galat batata hai ya sak parne par gd ko hoshiaar karega.

29. Agar us par achanak hamla ho ya hone ka andesa ho jo apni jan salamati aur sarkari sampatti ke bachane ke lie fire kholega aur iska byora gd cdr ko dega.

Ramesh Chander (PW.2) performed the above drill and his statement on the point and what happened immediately thereafter may be reproduced verbatim:

By about 23.30 hours the duty JCO came to check the guard." At about 25 yards, I shouted, "Thum" and said "Haath Upper". He raised his hands and I said "Pahchan ke liye auge bad". "Thum" aaj ka nishan ? He said "Jugnu". I told "Kanti" Sub teek tak, aage bad dost".

The witness at this stage shouts in the same tone and pitch as he had done on 09/10 Jul 82.

Then the duty JCO sat on the bench in the verandah of the Quarterguard and started checking the "Key In and Out" Register. The name of the duty JCO was Naib Subedar Som Singh. While signing the register he told me, "Kote sentry ko bulao Copy ke saath". The duty roster is in possession of the duty guards. I went upto the cord and called out "Sentry kote sentry, duty JCO Sahib bula raha hai". I could make out a person standing as kote sentry even though I could not identify him. Looking towards that direction only I called out. The kote sentry did not reply. He came little forward upto the main road in front of the kote. Then he stood there for a while and then turned back. While turning back he was muttering something, which I could not make out. When the kote sentry came upto the main road of the kote I could not identify him still. I went back and stood at the sentry seat. Then duty JCO went from the verandah towards the kote.

The witness states "Yu hee duty JCO neeche uthre hue, woh apni torch jagaya.

While he was signing the Quarter-guard register he was wearing spectacles. I had observed him that he was folding the spectacles. As the duty JCO stepped out of the Verandah I went to the left of the Quarterguard to drive away 2-3 animals grazing inside the Quarterguard. After driving the cattle away I turned back and heard two shouts of "Thum" "Thum", followed by a rifle shot. There was no appreciable gap between the two occasions. I heard "Thum" immediately after the second "Thum" then the shot was fired. I heard "Thum" twice in rapid succession. I heard the fire shot immediately after second. There was hardly any time-gap between the second "Thum" and fire shot.

According to the statement of Ramesh Chander, duty JCO Som Singh lighted his torch when he left him for the kote guard. Som Singh's dead body, was found with a torch still lighted. It could, therefore, be reasonably said that Som Singh was approaching the kote sentry (Amar Singh) with a lighted torch in his hand. This could hardly be an act of an enemy or an intruder so as to warrant firing a shot at him.

27. Much emphasis has been laid on that part of the evidence which shows that there was darkness at that time and that petitioner Amar Singh could not have possibly identified the duty JCO but what has been lost sight of is that there had to be complete silence at that hour of the night. The distances between the Quarterguard and the kote guard, two buildings which adjoin, can be gathered from the sketches Ex.M to M-4. It is simply not possible to believe that Amar Singh did not hear the exchange of the words which took place between Ramesh Chander and the duty JCO. Also, Ramesh Chander instantaneously identified the duty JCO from his voice. They belonged to the same Unit and so was Amar Singh. Not only that, Ramesh Chander was asked by the duty JCO to go and call kote sentry. Ramesh Chander then proceeded towards the kote sentry and called out "Sentry Kote sentry, duty JCO Sahib bula raha hai". The kote sentry did not reply but came little forward up to the main road in front of the kote, stood there for a while and then turned back muttering something. This could not but put the kote sentry on his guard about the impending visit of duty JCO. It is abundantly clear that the accused had by then come to know that it was now his turn to be visited by duty JCO, darkness notwithstanding.

28. Otherwise too, petitioner Amar Singh could have known that it was Naib Subedar Som Singh who was the duty JCO on the night of the incident. Rifleman Milap Chand (PW.3) has stated that a list containing the names of the duty JC Os used to be displayed on the Board of the Quarterguard. Naik Kharati Ram (PW.6) who was the quarterguard Commander has stated that the name of the duty JC Os used to be written in bold letters and displayed on the Quarterguard Board and further that he had told Rifleman Ramesh Chander who the duty JCO was. Havildar Chaman Lal (PW.7) who was the kote commander has deposed that he had known on the evening of July 8, 1982, during roll call that Naib Subedar Som Singh would be the duty JCO for the night intervenning 9th and 10th July 1982. Thus, petitioner Amar Singh also can be expected to have known this fact.

29. Another reason why the shooting down of the duty JCO cannot be attributed to a mistake of fact is that there is ample evidence adduced before the General Court-Martial that Darranga where the Unit was posted at that time was not a disturbed area. It has been stated by Major B.S. Katoch in unequivocal terms that there was no hostile activity in the area. In this connection the statements of Havildar Chaman Lal (PW.7), Subedar Major Yudhvir Singh (PW.8) and Capt. A.K. Chandok (PW.12) may also be referred to. Cumulatively the only inference which flows from the evidence is that the conditions at Darranga were peaceful and there was no reason for Amar Singh to be unduly alarmed or apprehend an attack. It is also not believable that duty JCO Som Singh would not identify himself or would not stop according to the prescribed drill in the manner he had earlier done when challenged by Rifleman Ramesh Chander on Quarterguard duty. And then, the instructions are quite clear that the first duty of the sentry is to raise an alarm and caution the other guards in case he apprehended any danger. There was no obstacle in his way in retreating to the kote guard room where his other companions including the commander were sleeping at that time instead of firing at the so-called intruder. He fired at the duty JCO from a distance of 3 to 4 yards. He had been issued a magazine containing ten bullets which he had to take out from his pouch and load it in the rifle and then cock it. It is obvious that this much preparation Amar Singh had already done before firing the shot. He permitted the duty JCO Som Singh to come quite close to him in the first instance and then shouted "Thum" "Thum" in quick succession and, aiming at a vital part of his body, fired so that his victim would not escape. Captain Dr. Sunil Dhar (PW.10) who examined the dead-body on July 10, 1982 had described the injury. He found "a wound on the right cheek region, about 2 centimeters on above the angle of the mouth. It was circular in shape with inverted edge. The wound was about one centimetre in diameter. On the posterior aspect of the head, there was a big wound, lateral to the right ear, with averted edges". When questioned by the Court, he opined that the injury could be caused by a bullet or missile.

30. The prosecutor in the General Court-Martial, by way of his final address tried to focus the attention of that Court on the following points which, according to him, needed careful evaluation:

(a) The deceased was out to check the unit night guards. He did not move by stealth or cunning. PW-2 Rifleman Ramesh Chander had spotted him (deceased) even before he came on the road. The JCO came to Quarterguard straight. He was challenged by PW-2 and the response of the deceased was correct. PW-2 shouted "Thum" in a voice loud enough to be heard at very long distance in night (He demonstrated it in front of you). The accused would have come on duty only 5-10 minutes back and fully awake. Therefore, complete challenge and reply of the deceased would have been fully heard by him. The Quarterguard sentry summoned him saying "Sentry", Kote Sentry, duty JCO Sahib bula rahe hain. Copy lekar; The Accused came to the gate (though not identified then but later events suggest that it was accused only) and went back muttering something.

The muttering might have been a resolution/challenge expressed by itself or expression of sheer indignation.

(b) The deceased on knowing that the kote sentry was not coming, got up from bench in Quarterguard, lighted his torch and went towards kote through the beaten track normally used for passage between Quarterguard and kote. The message of the duty JCO for getting the kote guard copy and with lit torch would be sufficient warning even to the dullest of all duds, of the arrival of the kote JCO and hence no question of accused being taken by surprise. In fact it can be clearly discerned that accused was lying in full wait for him. Having ascertained the presence and identity of the deceased, the accused went away, cocked the rifle and took position near the hedge thus making sure that his presence was not even detected by the visitor.

(c) Accused saying "Thum, Thum" in quick succession followed by shot gave him 2 benefits, first the deceased had no time to react that is even to escape from the close range at which the accused had him, secondly the accused could advance his line of defence of shouting "Thum, Thum" and also not missing his victim.

(d) Naib Subedar Som Singh was shot at such a close range that accused made sure that the shot did not miss him. This shows, intention, premeditation and resolve of the accused to gun down his victim to death.

(e) The accused had taken his firing position at such a place that he could shoot at Naib Subedar Som Singh on both the tracks (Explained with the help of sketch).

(f) The place where the fired case had been recovered will show clearly that that place of firing would be closer than even 2 yards as told by the accused (PW.7 and 11).

(g) If the intention of the accused was not to cause death of the JCO then how did he let him come so near. He could have challenged the deceased at much longer range.

(h) Had the accused not prepared himself for the Crime ? "Thum, "Thum" in quick succession was followed by instant fire (PW-2 and 3). If the accused was not well prepared then even though challenged person did not stop, he had to take the magazine out of pouch, cock the rifle (which will make lot of noise when done in hurry and under puzzle and adopt some fire position. Normally such firing will be from hip position or from shoulder). The weapon had been fired from kneeling position (PW 8 and 11). The path of bullet (low to higher tangent shows that the person firing was kneeling or lying (Explained). Most of these reasons have already been discussed by me and I find considerable force therein. The intention of petitioner Amar Singh to commit murder is writ large on the facts and circumstances of this case. Merely because the evidence pertaining to the motive is weak constitutes no reason to reject the prosecution case, specially

when there is incontrovertable evidence of Amar Singh having committed the murder.

ORDER

31. As a result of the above discussion, I find no merit whatsoever in this criminal writ petition which is dismissed.

32. Since both of us have taken different views in this case it be now placed before Hon"ble the Chief Justice for being heard by a third Judge.