

(1990) 02 SHI CK 0001
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 : 02-02-1990

Acts Referred:

Army Act, 1950 — Section 164
Army Rules, 1954 — Rule 49
Constitution of India, 1950 — Article 226, 227, 227(4), 33
Penal Code, 1860 (IPC) — Section 79

Citation : (1995) 4 ILR HP 2851

Hon'ble Judges : D.P. Sood, J

Bench : Single Bench

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

Final Decision : Allowed

Judgement

D.P. Sood, J.—Since both my learned brother Judges, Mr. Justice V.P. Bhatnagar, J. and Mr. Justice Bhawani Singh, J. have taken divergent views in this case, the same has been placed before this Court for being heard and its disposal in accordance with law. I have had the privilege of going through the Judgments prepared by both the learned judges.

2. Notably, since the prime question involved in the instant petition pertains to the scope and extent of the powers of High Court to interfere with the decisions of Courts Martial under Article 226 of the Constitution, it would be better first of all to detail the settled principles relating to the parameters of judicial review of decisions arrived at by various kinds of Courts Martial laid down by the Apex Court. Judicial review, generally speaking, is not directed against a decision, but is directed against the "decision making process". A peep into the intendment of the Legislature for treating the Armed Forces as a separate entity with respect to the application of some of the general laws is afforded by Article 33 and 227(4) of the Constitution. Army Act is a law enacted by Parliament. The Parliament has

been conferred the power to modify the fundamental rights in their application to Armed Forces by virtue of the above said provision. Article 227 confers power of superintendence over all Courts, and Tribunals, 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 prejudicial to military discipline. This is because army personnel are subject to strict discipline and no compromise can be made as far as their work and conduct is concerned. Thus, the Courts of law are ordinarily hesitant to interfere with such decisions pertaining to the Indian Armed Forces. This does not mean that Courts have no powers of judicial review under Article 226 of the Constitution. I need not dwell upon the various earlier decisions of the Apex Court, except that of *Bhuvneshwar Singh Vs. Union of India (UOI) and Others*, wherein the Apex Court, relying upon the observations made in *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, and *S.N. Mukherjee Vs. Union of India*, has laid down that:

the Supreme Court as also the High Courts under Article 226 have the power of judicial review, in respect of proceedings of court-martial as well as the proceedings subsequent thereto, even though to a limited extent, and can in appropriate cases grant relief, where there has been denial of the fundamental rights of the citizen or if the proceedings before the court-martial suffer from jurisdictional defect or any other substantive error of law apparent on the face of the record.

Thus, intervention of the Court depends 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 provision . of any law applicable to the case or reflects the 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.

3. As per the Judgment of my learned brother Justice v.P. Bhatnagar, J., the present case does not fall within the parameters laid down by the Apex Court, whereas it is otherwise, as per the divergent view taken by my learned brother Justice Bhawani Singh, J. It is universally accepted that justice must not only be done, but it must seem to be done, ought to apply even with greater force to trials by Court-Martial. Thus, in that view of the matter, with all respect, I cannot but agree with the view taken by brother Justice Bhawani Singh, J., holding that the order of conviction and sentence by the General Court-Martial (hereinafter shortly referred to as "the Court") and confirmed by the higher authorities against Petitioner Amar Singh ought to be set aside.

4. At the material time, petitioner as also the deceased belonged to 12th Battalion, J&K Rifles and their unit was then located at Darranga in Assam. The petitioner was a member of Kote" Guard Party, consisting of the petitioner,

Rifleman Sikander Lal, Rifleman Milap Chahd and Havildar Chaman Lal. According to the Kote, there was Quarter Guard, whose Commander was Naik Kharaiti Lal with Rifleman Major Singh, L/NK. Gurbachan Singh and Rifleman Ramesh Chander. On the intervening night of 9th and 10th of July, 1982, Naib Subedar Som Singh, the deceased, was the duty J. C. O. The case against the petitioner is that 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 whereafter words "Thum" "Thum" in quick succession were uttered and 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. Riflemen Milap Chand and Sikander deposited their weapons along with 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 been 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 J. K. Sinha, Assistant Director-cum-Assistant Chemical Examiner, Central Forensic Laboratory, Chandigarh, who reported that the fire cartridges were fired through Rifle Butt No. 235.

5. The petitioner claimed to be innocent by pleading not guilty to 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.

6. The petitioner was ordered to be tried by the Court, after having pleaded not guilty to the charge. Number of witnesses were examined in this case and finally,

the Court sentenced the accused to suffer imprisonment for life and dismissal from service/ This order of the Court was confirmed by the General Officer Commanding, 16 Infantry Division (Annexure PC) on April 5, 1984. The petitioner filed a petition, u/s 164 (Annexure PD) of the Army Act to the Chief of Army Staff with a prayer to set aside the order of Court dated December 21, 1983 and the confirmation order of General Officer Commanding, referred* to above. It was rejected on July 2, "1985 (Annexure PG). The accused also moved a petition dated March 22, 1986 (Annexure PJ) to his Excellency, the President of India, with a similar prayer. Finally, the accused preferred this Criminal Writ Petition under Article 226 of the Constitution of India for quashing the order of the Court, referred to above (Annexure PB) sentencing him to imprisonment for life and dismissal from service and the order dated April 5, 1984 (Annexure PC) by the third Respondent and also the order dated July 22, 1985 (Annexure PG) issued by the fourth Respondent.

7. Elaborate arguments have been advanced by Shri Anup Chitkara, learned Counsel for the petitioner Amar Singh as also Shri P. A. Sharma, learned Senior Central Government Standing Counsel. Both have given valuable assistance in understanding the factual as also legal position arising in the instant case. In the initial stage, Shri Chitkara sought to assail the validity of the charge as well as jurisdiction of the Court on the ground that the petitioner was on active service at the material time. However, this objection has not been allowed by me, simply on the ground that such an objection is too late to be accepted. In fact, the place of offence as mentioned in the particulars of the charge is field. As indicated in para 2 of the petition, the unit concerned (12th J&K Rifles) was then located at Darranga which was a field location. Hence the place of offence was described accordingly. It was not a place pleaded by the petitioner to be on active service. Neither during his trial by the Court nor in the text of his petition, petitioner put forth any objection to the validity of the charge on which he was tried by the Court when an opportunity was given to him under Army Rule 49. In the light of the aforesaid, the stage to examine the validity of the charge is long since over and is beyond the scope of this writ petition. Hence this attempt to raise objection with respect to the validity of the charge, being too late, is rejected.

8. Elaborate reasons have been given for directing the quashment of the orders passed by the Court and Respondents 3 and 4. However, for corroborating the ultimate conclusion so arrived at by my learned brother Mr. Justice Bhawani Singh, J., I am giving additional reasons. From the evidence adduced before the Court, my learned brother has rightly come to the conclusion that) in view of the varying nature of the evidence and! particularly in view of the document (Ex. Y) whichj is a statement as to the character and; particulars of service of the. accused, motive on the part of the accused to kill the deceased, stands eliminated. He has also rightly concluded from the sworn testimony of the various witnesses 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. As regards the question whether . the petitioner was justified in firing at Naib

Subedar Som Singh, I am fully in agreement with the reasonings adopted by Brother Mr. Justice Bhawani Singh, J. In addition, I would like to detail that the maps Ex. "M" and Exs. M/1 to Ex. M/4 produced and proved on record by the witnesses on behalf of the prosecution, indicate the distance between the Quarter Guard building and Kote Building as also the position of the dead body at which he was fired and the position of the petitioner-accused at the time of firing. Thus, it also reveals the distance which the deceased Naib Subedar Som Singh had covered and his position at which he was fired at by the petitioner. Perusal of the maps indicate the distance in between the two buildings to be about 60 yards. As per the statements of PWs 2 to 4 and 8, the dead body of Naib Subedar Som Singh was lying at point "B" and accused was found to have fired from point "C" and the distance between the two points was 2 to 3 yards. There is no dispute that after Rifleman Ramesh Chander was sent for calling the petitioner with his Duty Register for inspection from the Verandah of the Quarter Guard Building where he was inspecting the same, the petitioner did not come to that place. The result was that after Naib Subedar Som Singh, since deceased, conducted the inspection and signed the register of the Sentry on duty, namely, Rifleman Ramesh Chander, came down and started walking towards the Kote building. The above said documentary evidence also reveals that as certain animals had entered the Quarter Guard Building, simultaneously Rifleman Ramesh Chander had gone to send the said animals out of the premises of the Quarter Guard building. According to "his sworn testimony, he was at point "G" when he heard the gun shot having been fired by the petitioner-accused. He says that he had heard the gun shot fire after about two or three minutes. It appears that Naib Subedar. Som Singh had also covered a distance of about 55 yards within the same time. Now, viewing the explanation of the petitioner in view of the cumulative circumstances appearing from the record to the effect that it was dark and it was not possible to identify the person from even a short distance; that he was on duty and on seeing a person coming towards Kote, he uttered the words "Thum" "Thum" in quick succession and when the person did not stop, he fired the shot cannot, in any way, be said to be exceeding the limits of his duty. There is no documentary! evidence as to at what distance the person approaching the petitioner was located by him or whether the approaching person, namely, Naib Subedar Som Singh deceased had raised his hand on hearing "Thum" "Thum" or whether the petitioner was knowing that deceased was coming to the Kote for inspection or even that he had been deputed as duty JCO on the relevant date and time. This fact of the deceased having approached the Duty Guard without disclosing his identity to such a close range and not raising his hands on hearing "Thum" "Thum", coupled with other circumstances discussed by Brother Mr. Justice Bhawani Singh, J., the reasonings of which I fully adopt, entitles the accused to take benefit of his plea founded on the application of Section 79 of the Indian Penal Code. Record shows that though deceased was holding a torch but it was not possible to either of the prosecution witnesses to recognise the person fired at in the absence of extra light and some of them even could not be recognised even in the torch light. This documentary

evidence has been ignored by not only the Court but all other higher authorities rejecting the appeal and the petition of the petitioner. These submissions are of substance if one peeps through the circumstances in which the petitioner was placed before resorting to fire. I am in full agreement with the conclusions of Brother Mr. Justice Bhawani Singh, J. that it was a genuine and bonafide mistake on his part in failing to identify Naib Subedar Som Singh. This plea is further cemented from the fact that the deceased failed to respond to the pass words shouted by the accused and there is no evidence to point out that he responded to the same. There is also some evidence on record to show that the conditions in the area were not normal. Two officers were found missing from the premises of the Officers Mess in the near past and on search, their dead bodies were found on the following day at a distance varying between 20 to 30 Kms. In the instant case, the death may be un-fortunate but it cannot be attributed that the accused intentionally killed Naib Subedar Som Singh as alleged by the prosecution. Seen in the light of the evidence, it is a case which falls within the parameters of Section 79 Indian Penal Code and this aspect having not been considered by the Court or other higher authorities below, amounts to the proceedings suffering from the denial of fundamental rights to a citizen as also any other substantive error of law apparent on the face of the record.

9. The result is that there is merit in this petition and the same is allowed. The conviction and sentence passed by the Court and confirmed by the higher authorities vide Annexures PB, PC and PG, is hereby set aside and quashed. The accused is acquitted of the charge. He, being in jail, is ordered to be set free forthwith.