

(1996) 09 DEL CK 0017

In the Delhi High Court

Case No : Civil Writ Appeal No. 700 of 1995

Balwinder Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-09-1996

Acts Referred:

Army Act, 1950 — Section 69
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 354(3)
Penal Code, 1860 (IPC) — Section 302, 304A

Citation : (1996) 5 AD 257 : (1996) 64 DLT 385 : (1996) 39 DRJ 96

Hon'ble Judges : Devinder Gupta, J; Dalveer Bhandari, J

Bench : Division Bench

Advocate : Arun Jaitley, Anup Sachthey, C.D. Singh and A.K. Wali, for the Appellant;

Judgement

Devinder Gupta, J.

(1) The petitioner while posted as a Sepoy Driver Mt at Central Ammunition Depot (for short "CAD"), Pulgaon was charged for offence u/s 69 of the Army Act in having committed Civil Offence, namely, murder contrary to Section 302 of Indian Penal Code on 10.1.1990 by causing death of L/Nk Driver P.K. Chaudhary and that of Sepoy Driver Siva Prasad and attempt to murder, contrary to Section 307 Indian Penal Code, at Pulgaon Camp on 10.1.1990 by running over squad of unit persons by driving one Ton Army vehicle with intent to murder them resulting in injury to fourteen individual Sepoy Drivers.

(2) On a trial by General Court Martial the petitioner was convicted on 4.10.1990 and was sentenced to suffer death by being hanged by neck until dead. The findings of "guilty" and sentence "to suffer death by being hanged by the neck until he be dead" was duly confirmed on 24.4.1992 by the Central Government. The petitioner's statutory petition u/s 164(2) of the Army Act was also dismissed by the Central Government on 7.9.1994. Feeling aggrieved this petition under

Article 226 of the Constitution of India was preferred on 12.12.1994 seeking writ, order or direction, including a writ in the nature of certiorari for quashing the order of conviction and sentence passed by the General Court Martial on 4.10.1990, the order of confirmation passed on 24.4.1992 by the Central Government and the order dated 7.9.1994 rejecting petitioner's representation u/s 164(2) of the Army Act.

(3) The facts in brief are that while posted at Cad, Pulgaon Camp, the petitioner on completing his duties of driving the School Bus on 10.1.1990 returned to Mt Park around 3.30 P.M. and at 3.40 P.M. he was detailed to go to Officers' Mess to take Capt. V.P. Bharati to Iso Office. After carrying out his duty and leaving Captain B.P. Bharati at Iso Office the petitioner returned to Mt Park at about 4.20 P.M. As a matter of routine, Mt Drivers of It Section, Cad, Pulgaon Camp, used to fall in, in a squad, at about 4.30 P.M. on working days for briefing by the Jco, Mt Park. The place for fall in was an earmarked one being open in front of Uro Garages in It Section. On 10.1.1990, after the whistle was blown for call in, the drivers formed themselves into a squad at the earmarked place at about 4.30 P.M. Briefing had not yet commenced. The drivers in the squad were standing casually and their attention and the sight were in different directions. Before the fall in, the petitioner had returned to It Section, after leaving Capt. V.B. Bharati at Iso Office. On arrival he reported to It Gate Jco Nb.Sub.B.S. Rana at 4.20 P.M. As per the instructions and the practice, the petitioner should have parked the vehicle in the garage by taking it through the specified route and after depositing the Car Diary with the detailing Nco he should have joined the other drivers in the squad for briefing. It was alleged that he had ample time to join the squad but did not join the squad. The petitioner brought the vehicle near Mt Store Building. Waited for the drivers to form into a proper squad. He slowly drove the vehicle on the road leading from Mt Park Building to Uro Garages by getting nearer to the squad. Briefing of the squad by Mt Park Jco had not yet commenced. The attention of drivers was still divided. No one suspected the accused because at times vehicles from this direction and route also could be taken on "out" route. The petitioner drove the vehicle slowly till he was only about 8-10 metres away from the squad. All of a sudden in a surprise move the petitioner turned the vehicle in the direction of the squad, gave full throttle to the vehicle, ran over the drivers in the squad. No effort was made by the petitioner to give a warning by sounding the horn. No effort was made to save the squad by steering the vehicle towards the open space or by applying the brakes. The squad was run over. Some of the drivers were dragged along with the vehicle and some were thrown at a considerable distance. The vehicle thereafter was slowed down approximate at a distance of about 25 metres. The petitioner got down from the moving vehicle and looked back at the casualties with a smiling face and then cross over to the other side of the fence. The vehicle came to halt of its own after hitting a water tank.

(4) Casualties were immediately attended to and taken to the hospital. L/Nk P.K. Chaudhary was found dead when brought to hospital. Sepoy Siva Prasad

succumbed to his injuries. He was also declared dead at 5.10 P.M. the same day. Other fourteen injured were given treatment for various injuries.

(5) After about 10 minutes of this incident, the petitioner who had crossed over the fence entered through the main gate of the headquarter section. He was found walking briskly and having minor bruises on his hand with blood coming there from. After few minutes he was apprehended at the Check-Post and was put under close guard. On completion of investigation and other formalities. General Court Martial was convened. The petitioner was duly charged. First charge was laid u/s 69 of the Army Act, namely, committing civil offence, that is to say murder contrary to Section 302 Indian Penal Code by causing death on 10.1.1992 at Pulgaon Camp "of L/Nk. Driver P.K. Chaudhary; the second under the same provision for the same Civil Offence of murder by causing death on 10.1.1992 at Pulgaon Camp of Sepoy Driver M.T. Siva Prasad; and third also u/s 69 of Army Act, i.e., committing a Civil Offence being an attempt to murder contrary to Section 307 Indian Penal Code by running over a squad of unit persons by driving vehicle with intent to murder them resulting injury to 14 individuals named therein.

(6) During the trial before the General Court Martial, 13 eye-witnesses and 15 other formal witnesses were examined. The petitioner also gave his statement in writing (Ext. S), subsequent to the closing addresses by the Prosecutor to the General Court Martial and the Defending Officer for the accused-petitioner. After the summing up by the Judge-Advocate General the General Court Martial on 4.10.1990 recorded its finding "Guilty of all charges", which was announced as being subject to confirmation. General Court Martial thereafter proceeded to complete the formality of pronouncing the sentence. The accused-petitioner handed over his statement in writing (Ext."X"). Sentence to suffer death by being hanged by neck until he be dead" was announced by the concurrence of all the four members of the General Court Martial on 4.10.1990, as being subject to confirmation.

(7) As noticed above. Central Government, on 24.4.1992 after examining the pre-confirmation petition submitted on 30.4.1991 on behalf of the petitioner u/s 164(1) of the Act and the proceedings of the General Court Martial, confirmed the findings of "Guilty" and the sentence "to suffer death by being hanged by neck until he be dead". Against this order of confirmation dated 24.4.1992 the statutory petition dated 5.9.1992 submitted on petitioner's behalf u/s 164(2) of the Act was also rejected- by the Central Government on 7.9.1994.

(8) The challenge on behalf of the petitioner to the order of conviction and sentence, the order of its confirmation and rejection of his statutory petition has been on numerous grounds: (a) In the facts of the case, the charge for murder provided u/s 302 Indian Penal Code could not have been made. The petitioner should have been charged u/s 304-A of IPC: (b) Death sentence is totally disproportionate to the offence committed and is contrary to the settled position in law that it is awarded in a rarest of rare cases, the rule normally being life

sentence and death sentence being an exception; (c) Even as per the prosecution witnesses no intention or motive was proved or established on the part of the petitioner while committing the act. Onus not being discharged, the intention or motive could not have been attributed otherwise to the petitioner; (d) Section 354(3) of the Code of Criminal Procedure specifically provides that when conviction is for an offence which is punishable by death, special reasons for such sentence must be stated in the judgment and since in the instant case no special reasons are stated by the General Court Martial for passing the death sentence, in the absence of giving special reasons, the order of General Court Martial is vitiated; (e) Mere accidental deaths cannot invite the sentence of death. Evidence on record suggests that the petitioner had cordial relations with his colleagues. He was a reserved person. He had no enmity or strained relations with the members of the squad of It Section and none of the witnesses ever saw the petitioner fighting with anybody. This evidence is sufficient to infer that the incident was neither intentional, nor deliberate, rather it was a mere accident with no intention or motive involved therein. Motive was neither proved, nor established by prosecution before the General Court Martial and in these circumstances death penalty is highly disproportionate.

(9) On 14.12.1994 when the petition came up for admission show cause notice was issued confined only on the question of sentence. The execution of the sentence was stayed till further orders. On 4.4.1995 a request on behalf of 100 the petitioner was made that the petitioner be got examined by a psychiatric/medical mental doctor for ascertaining the petitioner's state of mental health. Learned counsel for the respondents stated that in relation to this application, moved by the petitioner, certain instructions had been issued to the concerned jail authorities, Nagpur where the petitioner was lodged and prayed for postponing of an order being passed. On 23.5.1995 in the facts and circumstances of the case, an order was passed for petitioner's examination by a psychiatrist preferably from a medical college. Further directions were made in that behalf on 25.7.1995 also. On 18.1.1996 it was noticed that the medical report which had been received stated that the petitioner was suffering from certain psychiatric problems. Learned counsel for the respondents was asked to take instructions as to why the petitioner be not admitted to some military hospital where he be treated. On 19.3.1996 a detailed order was passed, after noticing that the Superintendent/Nagpur Central Jail, in his letter dated 1.9.1995 had apprised the Registrar that the petitioner was suffering from psychotic depression and needs psychiatrist treatment. The Superintendent, Nagpur Central Jail was asked to have the petitioner examined by a Board of three Superintendents of Mental Hospitals, Maharashtra State, in pursuance to these directions the petitioner was examined on 21.6.1996 at Central Prison, Nagpur by the Medical Board comprising Medical Superintendents of Regional Mental Hospital Nagpur, Thane and Pune, who in their joint report opined that the petitioner has no psychiatric problem. Consequently we proceeded to finally hear the petition on 22.8.1996, 26.8.1996 and 27.8.1996.

(10) Mr. Arun Jaitley, appearing for the petitioner, confined his submissions mainly on two grounds: the necessity of recording reasons by the General Court Martial for the award of death penalty as a mandatory compliance of the provisions of sub-section (3) of Section 354 of the Code of Criminal Procedure and in the alternative, in case provisions of sub- section (3) of Section 354 of Criminal Procedure Code . would not apply to a trial by a General Court Martial; in view of Article 21 of the Constitution of India as a fair, just and reasonable procedure it would be necessary to record reasons in a case where General Court Martial considers it appropriate to award the exceptional and extreme penalty of death instead of the normal penalty of life imprisonment for offence" u/s 302 of Indian Penal Code It was contended that Code of Criminal Procedure would not apply to that extent only to which procedure has been prescribed in the Army Act or the Army Rules for trial by Court Martial but there is no provision in the Army Act or the Rules laying down the parameters or circumstances under which to award sentence of death or life imprisonment on conviction for an offence u/s 302 Indian Penal Code, as such the provisions of subsection (3) of Section 354 Criminal Procedure Code . would apply and the General Court Martial would be obliged to record special reasons in case it decides to award, in place of the normal sentence of life imprisonment, the extreme penalty of death. Otherwise also in case it is held that sub-section (3) of Section 354 of the Code of Criminal Procedure would not apply to the trial before General Court Martial and General Court Martial is not statutorily obliged to record special reasons, since life of an individual is involved, as a part of fair and reasonable procedure under Article 21 of the Constitution, as per the legislative mandate spelled out while enacting Section 354(3) of Criminal Procedure Code . recording of special reasons is to be considered as a reasonable and fair procedure to be adopted, more so in a case where the order of the General Court Martial confirmed by the Central Government would be subject to judicial review. Recording of reasons is essential in order to find the link between the material on record and the final conclusions, namely, the manner in which the power is exercised by the authority concerned, in order to enable the court, while exercising its power of judicial review to satisfy itself that how and in what manner the material on record was used to reach the final conclusion.

(11) The other point urged vehemently by Mr. Jaitley on behalf of the petitioner was that incident took place on 10.1.1990. General Court Martial pronounced its decision on 4.10.1990, which was confirmed by the Central Government on 24.4.1992. The Central Government thereafter took almost two years in taking its decision on the petition u/s 164(2) of the Army Act. The petition was submitted on 5.9.1992 and the same was decided after a period of two years on 7.9.1994. Undue and prolonged delay at the instance of the Central Government in dealing with the petition is a material consideration for commuting the death penalty. Petitioner is entitled to the commutation of sentence in the light of the ratio of two decisions of Supreme Court in Sher Singh and Others Vs. State of Punjab, ; and Triveniben Vs. State of Gujarat, . In support of his submission that

all mitigating circumstances, which are present in the instant case are required to be taken into consideration and it is not a case in which the Court will permit the extreme sentence to be carried out but would convert the same into life imprisonment, learned counsel for the petitioner placed reliance on the decision in Major R.S. Budhwar Vs. Union of India and others, .

(12) Mr. A.K. Wali appearing on behalf of the respondents, placing reliance upon the decision in S.N. Mukherjee Vs. Union of India, , contended that no reasons are required to be assigned or stated at the stage of recording the findings and sentence by the General Court Martial or at the stage of confirmation of the findings and sentence of Court Martial by the Central Government or at the stage of consideration of the post confirmation petition u/s 164(2) of the Act. The Army Act constitutes a special law. Sub-section (3) of Section 354 of the Code of Criminal Procedure or any other part of the Code would not apply to a trial by Court Martial and as such it is not the requirement of law to record special reasons by the General Court Martial, while imposing death penalty which is one of the penalties, which can be imposed by General Court Martial on conviction, for the offence alleged. It was submitted that the ratio of the decision in Major R.S. Budhwar's case (supra) cannot be made applicable to the instant case. In Budhwar's case the total delay taken was of more than three years and seven months, which was stated to be the period during which the appellants therein were being haunted by the shadow of death over their heads and in that background the Supreme Court observed that the appellants can legitimately claim consideration of the mitigating factors in their favor for commuting the sentence to life imprisonment. According to Mr. Wali, the actual delay in Major Budhwar's case was not of 3 years and 7 months. It was only about one year and six months being the time taken to dispose of the statutory petition u/s 164(2) of the Act. Order of sentence and conviction passed by General Court Martial became effective only when it was confirmed by the Central Government, as such it was tinder some mistake that the period to an order of General Court Martial till date of confirmation was also added. 13. Mr. Wali further submitted that there are aggravating circumstances in the instant case, which makes the facts of the instant case quite distinguishable from the circumstances, which were taken note of in the case of Major R.S. Budhwar's case (supra). In the instant case the petitioner was under no command or influence of anybody. He acted of his own; showed no repentance or remorse. There was no abetment of anyone. Petitioner did not immediately surrender at the spot but ran away. Circumstances are such that the petitioner can be said to be having in his mind some hidden hatred for the victims. Nature of crime being heinous and a dishonest effort on the part of the petitioner to hide the real motive by seeking fictitious motive to come on record as the real motive. Taking all these circumstances into consideration, the nature of offence, diverse circumstances attendant upon it, impact of the offence on morals of the armed force personnel and the likelihood of such an offence being repeated are such circumstances, which are sufficient not to commute death sentence. We have also been taken

through the entire record of the General Court Martial proceedings.

(13) Pw 2 Naib Subedar B.S. Rana, Security Jco, in his statement narrated the incident which version is fully supported by the other thirteen eye witnesses examined before General Court Martial. The evidence is that the petitioner had earlier taken his vehicle out of It Gate twice during the day for school and ITOs duty. He was found to be in normal state when reported back at about 4.20 P.M. He was performing the driver's duty in Truck One Ton NSN. Instead of taking the vehicle through the usual route he brought it towards the Uro garage side at a slow speed. The vehicle when it was about 8-10 metres short of the squad, the petitioner suddenly accelerated and brought it to a high speed and in no time drove it over the squad. Before accelerating the speed the petitioner aligned the vehicle in line with the squad. This incident was so fast and sudden that no reaction time was available to any one amongst the squad so as to take any life saving action. It was an abrupt and spontaneous action. Nobody could realise what was happening. Persons present could only hear the sound of the vehicle being accelerated to a high speed. Some of the individuals were thrown away and some got entangled and were dragged along with the vehicle to a considerable distance. The vehicle was slowed down by the petitioner who got down from it while it was still moving. It came to a halt thereafter of its own after hitting a water tank. The petitioner's reaction to the incident as stated was that when he got down from the vehicle was that he looked back and gave a smile and left the place by crossing over the fence: The other witnesses examined in the case described about the petitioner's movement. After crossing over the fence, within 10-12 minutes the petitioner entered through the main gate. He was found walking briskly and having minor bruises in his hand and blood was coming out. When questioned by Nb. Sub. V.R.S. Nair, Public Witness 21 as to what had happened to him and why he was panting, the petitioner stated that he had fallen down from the vehicle. Public Witness 21 allowed the petitioner to go to D.R. dispatch Rider. After few minutes when Capt. V. B. Bharati on receiving information came to the spot, he asked Public Witness -21 who informed that the petitioner had gone towards D.R. dispatch Rider. The petitioner was apprehended within 20 minutes of the incident.

(14) Nothing abnormal in his behavior was noticed before the incident during the tenure of duty. Without an exception the witnesses testified that the petitioner had no enmity or strained relations with any of the men of It Section. Rather the petitioner had cordial relations with all the personnel of It Section including the deceased. The evidence says that the petitioner was a reserved type of driver and efficient in performance of his duty. There has been no complaint against him from any quarter. He was found to be normal within 10 minutes when after the incident he re- entered from the main gate. It would imply that no effort was made by the petitioners to run away.

(15) The petitioner in his statement, Ext. S, which he gave in writing stated that on 10.1.1990 after completing the school bus duty he returned to Mt Park around

3.30 P.M. At about 3.40 P.M. he was detailed to go to officers mess to take Capt. V.P. Bharati at Iso office. After performing his duty he returned to Mt Park at 4.20 P.M. At the It Gate he got registered the vehicle and he also got the kilometres reading noted down by Dsc sentry. According to the statement Ext. S, M.T. Nco Ramphal who was in L/Nk. P.M.S. Rao's office enquired as to what he was doing when the fall-in had already taken place. Petitioner was abused by Nco Ramphal. In the meanwhile Subedar M. Shariff also shouted at the petitioner as to why he was standing there when fall-in had already taken place and instructed Havildar Ramphal to ask the petitioner to move fast to join the squad. The statement further says that the petitioner could not appreciate, nor understand why both Subedar M. Shariff or Hav. Ramphal abused him was a filthy and derogatory manner, without any provocation for such an outburst from his side. Petitioner's version thereafter is that he did not remember that what overcame him or what happened thereafter since "I must have lost my mental equilibrium. The next think that I remember is that I was brought to the Quarter Guard by Nb. Sub. whose name I do not know. In the intervening period all my actions must have been guided by my semi-conscious mind and my reflexes."

(16) That part of the petitioner's statement that the two officers abused him immediately before the incident deserves to be ignored in view of the clear denial by Sub.M. Shariff and Hav. Ramphal that they shouted at the petitioner or used derogatory remarks against the petitioner. There is no other evidence on record to support or substantiate this part of petitioner's version. The evidence on record is that there was nothing abnormal when the petitioner after completing his duty at about 4.20 P.M. entered through It Gate and got his vehicle registered and kilometre reading noted. Before the vehicle could be parked, in a spur of the moment, without any provocation, without any pre-meditation or planning the unfortunate incident took place.

(17) In so far as the motive is concerned, learned counsel for the respondents has frankly and rightly so conceded that there is nothing in the prosecution evidence that the petitioner with any motive committed the offence. According to his submission the offence was committed with some hidden motive which has not come on record. In the absence of any motive also it has to be taken as a sudden and spontaneous action on the part of the petitioner. Reasons which motivated the petitioner in committing the act are not known. Incident took place at the heat of the moment of running over of a squad, by the vehicle being driven by the petitioner, without any animosity on the part of the petitioner or ill-will towards the members of the squad with whom the petitioner had cordial and friendly relations. Petitioner is not having any past criminal record. It was an impulsive action for which there is no Explanation forthcoming from either side.

(18) After the close of the evidence the General Court Martial heard the prosecution and defense and proceeded to record findings of guilty on all count. It may be observed that during course of arguments no effort was made to challenge the findings on conviction and rightly so in view of the overwhelming

evidence on that point. We also see no reason to interfere with those findings. The only question is of the sentence.

(19) In so far as the submission of Mr. Jaitley on behalf of the petitioner of the necessity to record reasons for the extreme penalty of death is concerned, we need not go in detail into that question, more particularly in view of the decision of the Constitution Bench in S.N. Mukerjee's case (*supra*). The questions for consideration before the Constitution Bench were: (i) Is there any general principle of law which requires an administrative authority to record the reasons for its decision and (ii) if so, does the said principle apply to an order confirming the findings and sentence of a Court Martial and post-confirmation proceedings under the Army Act.

(20) On the first part of the question it was held that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision. While examining the second part of the question, the Constitution Bench proposed to consider the aspect in a broader perspective to include the findings and sentence of the General Court Martial also and examine; whether reasons are required to be recorded at the stage of (i) recording of findings and sentence by the Court Martial; (ii) confirmation of the findings and sentence of the Court Martial; and (iii) consideration of post-confirmation petition. Examining this question the apex Court held that at the stage of recording of findings and sentence the Court Martial is not required to record its reasons and at that stage reasons are only required for the recommendation to mercy, if the Court Martial makes such a recommendation. It was observed that Section 162 of the Army Act negatives a requirement to give reasons on the part of the confirming authority, while confirming the findings and sentence of the Court Martial, accordingly it was held that the confirming authority is not required to record reasons while confirming the findings and sentence of Court Martial and similarly reasons are not required to be recorded for an order passed by the Central Government while dismissing the post-confirmation petition. In para 48 of the report the Court observed:-

"BUT that was not the end of the matter because even though there is no requirement to record reasons by the confirming authority while passing the order confirming the findings and sentence of the Court Martial or by the Central Government while passing its order on the post-confirmation petition, it is open to the person aggrieved by such an order to challenge the validity of the same before the Court under Article 32 of the Constitution or before the High Court under Article 226 of the Constitution and he can obtain appropriate reliefs in those proceedings."

(21) In the light of the decision in S.N. Mukerjee's case as observed above, we need not go into the question as to the requirement of the General Court Martial recording any reasons what to say the special reasons, as envisaged in Section 354(4) of the Criminal Procedure Code, while imposing sentence of death, since

it will be open for the High Court, when matter is brought before it under Article 226 of the Constitution of India for a judicial review to examine the question of penalty of death that whether in the facts and circumstances of the case it ought to have been imposed or that whether there are any mitigating circumstances available on record due to which death sentence need not be executed.

(22) Major R.S. Budhwar's appeal along with two Special Leave Petitions preferred by Mahavir Singh and Inder Pal Singh were decided by a common judgment reported as Major R.S. Budhwar Vs. Union of India and others, . Major Budhwar was serving in Indian Army. Along with the other two officers he was tried by General Court Martial in December, 1988 for the act of committing civil offence of abetment of an offence specified u/s 302 Ipc and in consequence of which abetment the offence of Section 302 was committed contrary to Section 109 read with Section 34 of Indian Penal Code. The charge was that Major Budhwar abetted Inder Pal Singh and Mahavir Singh to commit murder of Commanding Officer Col. S.S. Sahota and Second-in-Command Major Jaspal Singh, which was committed in consequence of such abetment by said Inderpal Singh and Sepoy Mahavir Singh. General Court Martial found Major R.S. Budhwar the other two officers guilty of the above charge. Major Budhwar was awarded the sentence of imprisonment of life, while the other two were awarded death penalty. After confirmation of the findings and sentence and rejection of his petition. Major Budhwar had approached this Court with a petition under Article 226 of the Constitution of India, which was also dismissed. In the writ petition filed by the other two officers in this Court, they confined their challenge to the sentence imposed upon them by the General Court Martial that the General Court Martial did not take into consideration the mitigating circumstances. The writ petitions were dismissed. They filed S.L.Ps. in which leave was granted confined to the question of sentence.

(23) Major Budhwar's appeal was dismissed. While considering the other two appeals it was observed that there had been a delay of more than 1 year and six months in disposal of the .petition by the Central Government under sub-section (2) of Section 164. The Court also noticed that for more than 3 years 7 months the appellants had been haunting of shadow of death over their heads and no Explanation was forthcoming for the undue delay. In view of this delay the Court held that the appellants can legitimately claim consideration of the mitigating factors, namely, commutation of their sentence. Court proceeded to take into consideration the mitigating circumstances as to why the appellants therein did not deserve the extreme penalty of death notwithstanding the fact that the two murders, namely, that of a Commanding Officer and of Second-in- Command were diabolically planned and committed in cold blood. Court also observed that none of the mitigating circumstances, as noticed in the said judgment, were taken into consideration by the High Court and that it was obliged to consider both the aggravating and mitigating circumstances and, Therefore, by ignoring consideration of the mitigating circumstances, the High Court apparently fell in error.

(24) In the instant case, the petitioner submitted his statement, Ext. "X" after the findings of conviction was recorded stating that he was the sole bread earner of the family having a wife, two children aged 3 years and 4 years respectively and aged parents who were in their eighties .He had more than 10 years" exemplary service to his credit. In the statement as to the character and particulars of service of the petitioner, Ext. "W" it is stated that his general character was good during 10 years, 5 months and 18 days of service. He was of the age of 29 years 6 months. In the rank he was to serve for 15 years.

(25) In the absence of any reasons assigned by the Court Martial, it cannot be said that whether the mitigating circumstances were or were not taken into consideration but we may proceed on the assumption that the same were taken into consideration. In Bachan Singh Vs. State of Punjab, , while holding that provision of death penalty as an alternative punishment for the murder in Section 302 Indian Penal Code is not unreasonable and is in the public interest and the same does not violate the letter or the ethos of Article 19 and 21 of the Constitution; it was held that discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing of aggravating and mitigating circumstances of the crime. It was further held that the discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well recognised principles is in the final analysis, the safest possible safeguard for the accused and in this view of the matter the Court held that it will be impossible to say that there would be at all any discrimination.

(26) In Machhi Singh and Others Vs. State of Punjab, , propositions emerging from Bachan Singh's case were culled out and it was held that the same will have to be applied to the facts of each individual case where question of imposing death sentence arises, after answering the following questions: (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence? (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favor of the offender? If upon taking an overall view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the question posed hereinabove the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so.

(27) The propositions which were culled out in Machhi Singh's case from the decision in Bachan Singh's case (supra) are stated in para 33 of the report as follows:

"(I)The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability; (ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime". (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only

when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances; (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

(28) In addition to applying the guidelines of Bachan Singh's case (supra) and answering the two questions referred to Machhi Singh's case and drawing the balance sheet of aggravating and mitigating circumstances, as noticed above another circumstance which deserves to be taken note of by us in the instant case would be the question of delay. A period of more than two years was taken by the Central Government in the disposal of the post-confirmation petition filed under sub-section (2) of Section 164 of the Army Act.

(29) In Triveniben's case (supra) the conflicting decisions in T.V. Vatheeswaran Vs. State of Tamil Nadu, , Sher Singh v. State of Punjab, Air 1982 Sc 465, and Javed Ahmed Abdul Hamid Pawala Vs. State of Maharashtra, , were considered on the question as to whether the prolonged delay in execution of death sentence entitles the accused to the lesser sentence of life imprisonment. The Court gave its opinion that "If there is inordinate delay in execution, the condemned prisoner is entitled to come to the Court requesting the Court to examine whether, it is just and fair to allow the sentence of death to be executed." No fixed period of delay was fixed which would make the sentence of death unexecutable and to this extent the decision in T.V. Vatheeswaran Vs. State of Tamil Nadu, , was held as not laying down the correct law and, Therefore, to that extent the same was over-ruled. The period of undue long delay in execution of sentence was taken note of in Major R.S. Budhwar's case (supra), wherein the Court applied the ratio of the decision in Sher Singh's case (supra). In Sher Singh's case, on the vacation of death sentence that whether it should be vacated for the reason that its execution is delayed, it was observed:

"THE nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and pattern of the crime are such as are likely to lead to its repetition, if the death sentence is vacated, are matters which must enter into the verdict as to whether the sentence should be vacated for the reason that its execution is delayed."

(30) Applying the ratio of the decision in Triveniben's case (supra) in the light of the observations made in Sher Singh's case (supra) and the guiding factor noticed in Machhi Singh's case (supra) and taking clue from the decision in Major R.S. Budhwar's case (supra), the facts and circumstances of this case are such, which warrant vacation of the death sentence and substitution of the same by the imprisonment for life.

(31) It is a case where a person found to be absolutely normal till about 4.20 P.M., having meticulously and efficiently performed his assigned job on a school vehicle and thereafter took the officer to his destined place, returned and reported his arrival to the concerned officer and proceeded to park the vehicle, when all of a sudden, at the spur of the moment something extraordinary happened and under that impulsive action accelerated the vehicle, drove through the squad, slowed down the vehicle, got down there from, when it was still moving and walked across the fence and then re-entered the main gate and at that time also he was found to be normal. He had no enmity with anybody. All were cordial and friendly towards him. He was also cordial and friendly towards them. He made no effort to abscond. He offered no resistance when he was taken in custody. He remained calm and cordial throughout the trial and even as per the opinion of the Medical Board there is nothing exceptional in his behaviour. He is in the prime of youth and is a normal man having two young children and a wife with aged parents to be looked after. There was no motive. There was no planning, no pre- meditation, no hatred or ill-will. Comparing this case with that of Major R.S. Budhwar's case, which was a case of diabolically planned murder committed in cold blood of that of Commanding Officer and Second in Command; this case on an overall balancing of mitigating and aggravating circumstances leaves no manner of doubt that death penalty deserves to be commuted into imprisonment for life.

(32) For the a foregoing discussion, we allow this petition to the limited extent of commuting the sentence of death imposed upon the petitioner to that of imprisonment for life for the conviction recorded against him.

(33) The petition stands disposed of.