
(2000) 01 AHC CK 0190
In the Allahabad High Court
Case No : C.M.W.P. No. 35206 of 1991

Devendra Nath Rai

APPELLANT

Vs

Union of India(UOI) and Others

RESPONDENT

Date of Decision : 06-01-2000

Acts Referred:

Army Act, 1950 — Section 125, 164(2), 69, 70
Army Rules, 1954 — Rule 180, 197A
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 354, 475
Penal Code, 1860 (IPC) — Section 302, 307

Citation : (2000) 1 ACR 325 : (2000) 4 RCR(Criminal) 136

Hon'ble Judges : B. Dikshit, J;A. Chakraborty, J

Bench : Division Bench

Advocate : G.D. Mukherji and N.L. Pandey, for the Appellant; Umesh Narain Sharma, Sambhunath Srivastava and Satish Kumar Rai and S.C., for the Respondent

Judgement

B. Dikshit, J.—This writ petition has been filed by a Sepoy (Lance Naik), who has been sentenced to death at trial by general Court-martial u/s 302 of the Indian Penal Code for committing murder of No. 12204403 CHM B.S. Rathore and that of No. 15359746 Y Signalman K. Parthasarathi, and for attempting to murder No. 14238239 M Naik P. Subhash Bagla and No. 14279745M Hav. Tuki Ram passed by Commanding Officer 1, Corps., Artillery Brigade, Signal Company, C/O 56 A.P.O. on 12.9.1991, which has been confirmed by Chief of the Army Staff, Army Headquarters, South Block, New Delhi (in short "Chief of the Army Staff") by order dated 13.9.1992. The Petitioner has filed this writ petition challenging his conviction and sentence.

2. The prosecution case, detailed in counter-affidavit, is that on 15.6.1991, while Petitioner was on quarter guard duty, the following persons went to quarter guard at about 20.20 hours for entering "lights out OK Report" in the register held in the guard room:

1. 14279745M Havildar Tuki Ram.
2. 14238239M Naik Parle Subhash Bagla.
3. 15359746Y Signalman K. Parthasarathi.

The Petitioner did not allow them to enter the "lights out OK report" in the register blaming them that they were in civil dress and without identity cards. Upon report from No. 14234181H Lance Naik Yogendra Prasad, B. S. Rathore, who was the duty Non-commissioned Officer of the day, arrived immediately in the quarter guard and enquired from Petitioner about the happening and as to why he was harassing the three persons. On this the Petitioner told that they were in civil dress and not in possession of identity cards. CHM B. S. Rathore then questioned the Petitioner if everything was well with him? On this, the Petitioner aimed his rifle at CHM B. S. Rathore and fired. The Petitioner then turned towards three persons mentioned earlier, who were sitting on the bench and fired at them and immediately switched off the lights of quarter guard. The prosecution case further is that No. 14241830 L Lance Naik G. S. Pandey of the quarter guard, who was wearing pouches inside the guard room, who witnessed the incident shouted at sentry to run away. The duty clerk No. 14255747Y Lance Naik S. S. Pathania, who heard the sound of fire from the quarter guard, rang up the Officer Commanding Signal Company and Subedar Major immediately. After receiving the message, Officer Commanding Signal Company and Subedar Major rushed to the site of incident at once. Officer Commanding Lieutenant Colonel H. S. Teotia, along with Subedar Major and other ranks of the Company reached near the quarter guard at about 20.40 hours, who took shelter behind the three ton vehicle parked near the quarter guard and asked Petitioner to surrender. The Commanding Officer repeated it three or four times after which Petitioner came out of quarter guard with his hands up and surrendered himself at about 20.45 hours. The four victims were immediately sent to the military hospital where CHM B. S. Rathore and Signalman K. Parthasarathi were declared dead and Havildar Tuki Ram and Naik Parab Subhash Bagla, who were admitted in hospital, survived.

3. At general Court-martial, the Petitioner was found guilty for the murder of CHM B. S. Rathore and Signalman K. Parthasarathi and found guilty for attempt to murder Havildar Tuki Ram and Naik Parab Subhash Bagla and by order dated 12.9.1999 passed death sentence with the concurrence of six out of seven members of the Court, the sentence being subject to confirmation by Chief of the Army Staff. The Petitioner preferred an appeal u/s 164(2) of the Army Act before Chief of the Army Staff. Before the appeal and reference for confirmation of death sentence could be heard and disposed of, the Petitioner filed this writ petition praying for quashing of proceedings and sentence awarded, besides certain other general reliefs. The Petitioner's appeal has been rejected during the pendency of this writ petition and the sentence of death awarded has been confirmed by Chief of the Army Staff on 13.9.1992. The Petitioner, feeling aggrieved, has challenged by this petition the general Court-martial proceedings,

his conviction and sentences awarded by Chief of the Army Staff.

4. The learned Counsel for Petitioner argued that the trial by general Court-martial is vitiated as the offences in question are civil offences for which decision u/s 125 of the Army Act to try by general court-martial was taken by Commanding Officer, 1 Corps Artillery Brigade, Signal Company. According to Petitioner, the said Commanding Officer was not competent to take the decision. He further contended that the Petitioner was not allowed to be present during Court of inquiry proceedings though it was essential under law as Petitioner's character and military reputation was to be affected and has been affected on conviction. He contended that under law, every accused, whose character and military reputation was likely to be affected in case of conviction is entitled to be present during proceedings. It has also been contended that appellate order passed by Chief of Army Staff is bad in law for want of reasons. Lastly, he contended that it is not a rarest of rare case for awarding death sentence u/s 302, I.P.C.

5. The senior standing counsel, appearing for opposite parties contended that as Petitioner and victims were subject to Army Act at the time of commission of offence in question, therefore, the Petitioner has been rightly tried by general court-martial in view of Section 69 of the Army Act and irrespective of fact whether decision to try by general Court-martial was taken by a competent authority or not, no interference is called for in discretionary jurisdiction of this Court. In alternative, he contended that even if such a determination was necessary then the decision, to try Petitioner by Court-martial, was taken by General Officer Commanding, who was competent to determine that Petitioner be tried by general Court-martial. The Senior Standing Counsel also contended that recording of reason was not necessary while dismissing appeal. Lastly, he contended that considering the circumstances of the case and in absence of mitigating circumstances, the death sentence has been rightly awarded.

6. As Petitioner has questioned the validity of trial on the ground that the decision to try him by general Court-martial was not taken by a competent authority while Respondents' case is that though no such decision was necessary as the Petitioner could be tried u/s 69 of the Army Act only by general Court-martial, the Respondents have also claimed, in alternate, that the Petitioner was directed to be tried by general Court-martial by an authority competent to take decision. This gives rise to two questions, which are to be answered for determining the argument raised. The two questions are as to whether the decision by a competent authority u/s 125 of Army Act as to whether Petitioner is to be tried by general Court-martial was necessary and if the answer is yes, then another question which is to be answered is as to whether decision to try Petitioner by general Court-martial was taken by an authority competent to take such decision?

7. The learned Counsel for parties have referred to Sections 3(ii), 69, 70 and 125 of Army Act, which are as under:

3. Definitions.--In this Act, unless the context otherwise requires,--

(ii) "Civil offence" means an offence which is triable by a criminal court;

69. Civil offences.--Subject to the provisions of Section 70, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a Court-martial and, on conviction, be punishable as follows, that is to say,--

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned ; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned."

70. Civil offences not triable by Court-martial.--A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Court-martial, unless he commits any of the said offences--

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf."

125. Choice between criminal court and Court-martial.--When a criminal court and a Court-martial have each jurisdiction in respect of an offence it shall be in the discretion of the Officer Commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which Court the proceedings shall be instituted, and if that officer decides that they should be instituted before a Court-martial, to direct that the accused person shall be detained in military custody.

8. The learned Counsel for Petitioner has contended that the Petitioner was to be tried for a civil offence u/s 70 of the Act. We do not find any substance in the argument. Section 70 of Army Act permits trial by criminal court where accused is a person to whom Army Act applies while the victim is not subject to military, naval or air force law. There are some exceptions also u/s 70 where even an offence of murder against a person, not subject to military, naval or air force law cannot be tried by criminal court. The exceptions are not relevant as it is an admitted case of parties that Petitioner as well as victims were subject to military

law at relevant time. The learned senior standing counsel appearing for Respondents has relied on Section 69 in support of his contention that as charge against Petitioner was of murder and accused as well as victims were subject to military law, the counsel for Petitioner is not right in contending that Petitioner could not be tried by criminal court. There is much force in the argument of senior standing counsel. The application of Section 70 of Army Act stands excluded for trial by criminal court where accused and victims are subject to military law. The only other provision for trial is Section 69, which requires trial to be by general Court-martial in cases for which trial cannot be held u/s 70 before criminal court. As the case of Petitioner in respect of offence for which he has been charged cannot be tried by criminal court, he has been rightly tried by general Court-martial.

9. There appears another reason for trial by general Court-martial. The Petitioner has been prosecuted and convicted for murder u/s 302 of Indian Penal Code, which is a civil offence within the meaning of Section 3(ii) of Army Act by Section 69 of Army Act by legal fiction makes it an offence under Army Act. An offence to which Section 69 is attracted is to be tried by general Court-martial alone. Although, learned Counsel for Petitioner has argued that Army Act does not take away power of criminal court and relied upon the case of Major E.G. Barsay Vs. The State of Bombay, , in support of his argument but even in that case the Apex Court upheld a civil offence to be an offence under Army Act while considering the legal fiction created by Section 69. There is no overlapping of jurisdiction of criminal courts and general Court-martial in respect of murder trials. There is clear demarcation under law as to what murder trials are to be heard by criminal court and what before general court-martial. As the jurisdiction in respect of murder trials has been clearly demarcated under Sections 69 and 70, no occasion arose for Commanding Officer to determine u/s 125 of Army Act if Petitioner is to be tried by criminal court or general Court-martial.

10. It is relevant to mention here that according to Respondents, the decision was also taken to try Petitioner by general Court-martial, although it was not necessary, and, therefore, also the argument is liable to be rejected. u/s 125 of Army Act choice has been left with the Officer Commanding the Army, Army Corps, division or independent brigade in which accused is serving or such other officer as may be prescribed, to decide, before which Court the proceedings shall be instituted. It has been at the discretion of said Commanding Officer to determine if the accused person is to be tried by general Court-martial. For determination of Court to try the case under exercise of power conferred u/s 125, the Central Government exercising power u/s 475(1) of Code of Criminal Procedure has framed criminal courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1978 regarding adjustment of jurisdiction of Civil and Military Courts over military personnel accused of civil offences. Rule 2 (c) of Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules defines "Competent Military Authority" while Rule 197A of Army Rule speaks about who will be prescribed officer for the purpose of Section 125 of the Act, except in cases

falling u/s 69 of the Act in which death has resulted the Officer Commanding brigade or station in which accused persons are living has to decide if accused is to be tried by general court-martial. The Petitioner's case is that no decision at all was taken by the authority which is prescribed under rules. The Respondents have denied the plea in para 19 of the counter-affidavit filed by Lieutenant Colonel H. S. Teotia. The Respondents claim that the decision to try Petitioner by general Court-martial was also taken which was by General Officer Commanding Headquarters 1 Corps. The status of said officer as competent military authority to take decision has not been specifically denied in rejoinder-affidavit. The only objection in rejoinder-affidavit is that the Respondent No. 5, the Commanding Officer 1 Corps, Artillery Brigade Signal Company made up his mind even though the General Officer Commanding, 1 Corps has issued letter on 19.6.1991. The said averments made in rejoinder-affidavit do not improve the case of Petitioner in any way. As the decision was taken by General Officer Commanding Headquarters 1 Corps, for trial by Court-martial, whose competence is not under challenge, the decision by him fulfils the requirement of Section 125 of Army Act and, therefore, the argument of learned Counsel for Petitioner that no decision was taken by prescribed authority also fails.

11. Another ground on which learned Counsel for Petitioner has tried to assail the conviction and sentence of Petitioner is that Petitioner was handed over to civil police soon after incident and, therefore, he was to be tried by criminal court and not by Court-martial. He cited case of *E. G. Barsoy v. State of Bombay*, (supra) and contended that Army Act did not take away power of criminal court to try any person who was governed by Army Act. The fact about handing over of Petitioner to civil police has been disputed by Respondents in counter-affidavit. The Respondents asserted that Petitioner was never handed over to civil police and remained in custody of army authorities throughout. During arguments Petitioner could not point out any material on record in support of his contention that Petitioner was handed over to civil police except an assertion in para 22 of writ petition, which stands denied in counter-affidavit. Besides what has been said above, the argument also fails for the reason that it involves determination of a disputed question of fact, which this Court cannot determine in exercise of writ jurisdiction. However, as held earlier, we are of the view that the trial of Petitioner could be held by general Court-martial only in view of Section 69 of Army Act. There is neither any dispute in respect of proposition of law laid down in *E. G. Barsoy's* case, that Army Act did not take away power of criminal court to try civil offences but in the circumstances of case, the Petitioner could be tried by general Court-martial and not by civil court, the conviction and sentence by general Court-martial has to be upheld. Thus, the argument is devoid of any merit and it fails.

12. This takes us to next contention of learned Counsel for Petitioner that as Petitioner was not afforded opportunity to be present at Court of inquiry and Rule 180 of Army Rules stand violated all subsequent proceedings including trial is vitiated. The contention is that Petitioner was in custody with army and as at

Court of inquiry his character and military reputation was likely to be affected, it was for army authorities to see that he was taken to Court of inquiry and afforded opportunity to be present. He has relied upon the case of Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, , that he was not afforded opportunity to participate in the proceedings of Court of inquiry, which was obligatory. We have examined the case and in our opinion non-compliance of Section 180 does not vitiate the trial. The Supreme Court of India in para 40 of that case held that it is not necessary to set up a court of inquiry when an offence is committed and a trial by general Court-martial is to be held. This gives rise to questions whether the nature of inquiry was such that the trial stands vitiated for want of opportunity of participating to Petitioner at the court of inquiry.

13. The Respondents have not disputed holding of a Court of inquiry before sending Petitioner to face trial but according to them, as averred in counter-affidavit, it was ordered "to find out the facts of the case which involved more than one person and to recommend further course of action". An inquiry to find out facts and for recommending course of action can be ordered under Rule 180 (c) of Army Rules by an officer, who is in command of any body of troops, but where such an inquiry is ordered to determine what course of action be adopted in a particular matter, any recommendation with such an object neither affects character nor military reputation of the person concerned. As the order constituting court of inquiry in this case was in the nature of seeking advice as to what action be taken in the matter, we are of the opinion that the advice sought was not going to affect nor affected character or military reputation of Petitioner and, therefore, there has been no illegality in not affording opportunity to Petitioner to be present at inquiry held. Here, it is necessary to refer to the case of Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), , wherein the Supreme Court of India considering the power of High Court to interfere with the decision of general Court-martial has held that:

Though Court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the Court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a Court-martial has been properly convened and there is no challenge to its composition and proceedings are in accordance with the procedure prescribed, the High Court or for that matter any Court must stay its hand."

It further held:

"When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the Court-martial unless it is shown that accused has been prejudiced or a mandatory provision is violated. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, Court-martial had jurisdiction over subject-matter and has

followed the prescribed procedure and is within its power to award punishment.

14. Examining the argument in the light of above proposition of law laid down by the Apex Court, we find that the Court of inquiry in question was nothing more than a pre-trial investigation for determining what action be taken in the matter. It is not the case of Petitioner that prescribed procedure was not followed at trial nor he has disputed existence of evidence on which conviction has been recorded nor he has claimed causing of any prejudice at trial by general Court-martial. His plea in respect of want of jurisdiction in respect of trial by general Court-martial has already negated by us earlier. Holding of trial by general Court-martial has nothing to do whether any court of inquiry was held or not. The trial by general Court-martial is an entirely independent proceeding and want of opportunity to Petitioner at court of inquiry, even if it is assumed that it was not provided, will not invalidate the general Court-martial.

15. The argument of learned Counsel for Petitioner on merit that the appellate order is bad in law for want of reasons is devoid of any substance. We have examined the record of appellate authority wherein we find that reasons have been assigned while affirming the findings recorded by general Court-martial.

16. The last aspect for our consideration is justification of imposing death sentence instead of life imprisonment. The Respondents have produced the relevant file wherein this aspect has been considered holding the crime perpetrated by the Petitioner into the category of rarest of the rare cases, deserving the extreme punishment.

17. While considering above aspect, reference was made to the prosecution case and the defence in brief as also other facts including some act and utterances of the Petitioner after the incident and existence of a grudge of the Petitioner against the CHM, B. S. Rathor for some earlier incident. No records have been shown nor statements are available in the counter-affidavit justifying consideration of such materials.

18. Law in this regard was decided by a five-member Bench in the case of *Bachan Singh Vs. State of Punjab*, which noted the change in law by amendment of Section 354 of the Code of Criminal Procedure indicating the legislative policy. In the said judgment, the aggravating and mitigating circumstances have been indicated for a Court to take decision depending on facts and circumstances of the particular case for the purpose of deciding the penalty of death sentence or life imprisonment. It was observed by the Bench in the said judgment that "nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the Courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty."

19. The said aspect was again considered by a three-member Bench in the case of *Machhi Singh and Others Vs. State of Punjab*, taking into consideration various factors for the purpose of deciding the penalty to be imposed. The

relevant observation therein is contained in paragraphs 38 of the judgment which is reproduced below:

In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case:

(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 have 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.

20. With regard to scope of judicial review on the ground of unreasonableness of sentence imposed by the Court-martial, the law has been considered in the case of Ranjit Thakur Vs. Union of India (UOI) and Others, , holding that "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 is an outrageous defiance of logic, then the sentence would not be immune from correction."

21. Law as decided in various cases including the cases mentioned above, clearly indicates that presently it is the discretion of the Courts as regards imposition of death sentence or life imprisonment depending on various factors involved in the case concerned. Various circumstances as aggravating or mitigating have been noticed by the Courts of law. Aspect like cold-blooded murder, absence of provocation, helplessness of victims and many other circumstances have been given due weight for deciding the penalty. Consistently it has been held that in imposing death penalty, circumstances justifying the same are to be recorded. In the impugned order while holding the crime to be a rarest of rare one, the requirement of aforesaid law has not been satisfied. The above is the general law applicable in criminal cases and when army authorities held General Court Martial and considered the crime as rarest of the rare case, the above test ought to have

been satisfied. In deciding the penalty, some aspects have been considered, as stated herein above, which ought not to have been considered. We also do not find any material showing any finding as regards grudge of the Petitioner against the victims other than CHM B. S. Rathor although such grudge has been noted in imposing capital punishment. Moreover, facts involved also do not show existence of any special reason for imposing death penalty. It should have been imprisonment for life.

22. For the aforesaid reasons, sentence in the present facts as contained in Annexure-2 to the writ petition is quashed and writ petition is allowed to the limited extent and the Respondents are directed to pass fresh order as regards sentence in the light of the observations made above.