
(2011) 03 DEL CK 0490
In the Delhi High Court
Case No : Writ Petition (C) 6709 of 2008

Ex. CT. Mahadev	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 03-03-2011

Acts Referred:

Border Security Force Act, 1968 — Section 48
Penal Code, 1860 (IPC) — Section 300, 302

Citation : (2011) 03 DEL CK 0490

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Abdul Sattar, for the Appellant; Ashwani Bhardwaj and Bhupender Sharma, Assistant Commandant, BSF, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—The Petitioner, Ct. Mahadev, at the relevant time attached to the 131st Bn. BSF was charged as under:

The accused No. 89131037 Const. Mahadev, of 131 Bn. BSF is charged with: BSF Act Committing A Civil Offence, That Is To Say Section 48 Murder, Punishable u/s 302 IPC In that he, In a rubber garden located between BP No. 2007/S-3 and BP No. 2008/MP in AOR of BOP Bamutia, on 05/06/1004 at about 08:15 hrs by firing shots from his INSAS Rifle bearing Butt No. 503, Body No. 16397/159 caused the death of a civilian namely Nandan Deb S/o Sh. Atinder Dev R/o Village-Rangotia, PS-Sidhal, Distt.-West Tripura and thereby committed murder.

2. The Petitioner has been held guilty and he has been sentenced to suffer imprisonment for life and has been dismissed from service.

3. Let us begin by noting the statement by way of defense of the Petitioner after the prosecution led evidence, for the reason much stands admitted by the Petitioner i.e. he admits being armed with a rifle as per the charge; he admits being on duty at the place as per the charge; he admits having fired at Nandan

Deb; he admits that Nandan Deb died as a result of firearm injuries received by Nandan Deb and occasioned by the rifle with which the Petitioner was armed. He stated as under:

I joined BSF in 1989 and was further posted I 131 Bn. BSF after completion of my basic Trg and since then I am performing the General Duties in the same Unit. In Sept? 2003, "F" Coy was deployed in the area of BOP Bamutia and Bn HQ was at Fatikchera. I do not remember the month and date of my coming at Bamutia BOP, as prior to that I was performing the duties at Bn HQ. After coming at BOP Bamutia I went on 15 days leave in the last week of Feb? 2004.

On 05.06.2004 I along with CT H Vijay Kumar was detailed for OP duty at OP No. 3 from 0600 hrs to 1200 hrs. Accordingly we left BOP Bamutia and took the straight route which ends at border fencing opposite to BP No. 2008/M. On reaching OP No. 3, we went further ahead on the other flank of area of responsibility. After patrolling in that area we again returned to OP point. At about 0810 hrs, while were patrolling in our area of responsibility, I observed 03 persons who had come near fencing gate from Bangladesh side. This fencing gate is opposite to BP No. 2007/9S. On seeing the three intruders reaching near the fencing gate, we challenged them. On being challenged they ran towards Bangladesh. Two of them ran on right side and the third one ran on left side. I opened the fencing gate and ran after the two intruders, whereas, CT H Vijay Kumar ran after the other intruder. I chased the intruders up to IB, but, the intruders fled away to Bangladesh. The ground near IP is in depression and undulating. When I returned 25-30 yards from IB, I observed 6-7 people in BD side near the IB. They were shouting at us, meanwhile, CT H Vijay Kumar came closer to me and we walked briskly towards fencing gate. These 6-7 persons started to come towards us in such a manner as if they wanted to "gherao" us. They were carrying "Bhala", "Dah" and "Lathi". Seeing this, I started to retreat and when they came close to me i.e. about 10 yards from me, so as to attack at me, then I fired 02 rounds in air. However, they did not stop and kept on advancing towards me. When one of them had come too close to me at a distance of about 3-4 yards away from me and tried to attack me at by raising his "Dah", I apprehended threat to my life and seeing no other opinion left, I fired at him, as a result of which, he fell down on the ground. Later on, when I saw the change lever of my weapon I found it to be at "B" position (position in which burst of 2-3 rounds are fired at a time). As soon as the miscreant fell on the ground, the other miscreants fled away to Bangladesh. Thereafter we remained at the spot only and after about 5 minutes other OP party, who were at OP No. 2, came at us hearing the sound of fire. While we were at the spot we did not search for the EFC. After arrival of OP party No. 2, CT Jaipal informed the BOP about the firing incident as he was having wireless set with him. Thereafter we took position in order to guard the dead body. After about 10-15 minutes, the Offg.-Coy Comdr along with few others arrived at the spot in Coy Vehicle. The Offg Comdr Inspr (now Retd) D N Parihar took over the situation and after that I remained in the area till about 1300 hrs.

4. The findings returned at the trial are as under:

"That death of Nandan Deb S/o Atinder Deb, R/o Vill-Rangotia, PS-Sidhai, Distt. West Tripura took place in rubber garden located between BP No. 2007/3S and 2008/MP in AOR of BOP Bamutia on 05.06.2004 at about 0815 hrs.

The fact that Nandan Deb was found dead in rubber garden located between BP No. 2007/3S and 2008/MP in AOR of BOP Bamutia, has been stated by almost all the prosecution witnesses and the Court has believed their statement as regards this issue. SI Shanti Bhushan Bhuiya (PW-13) deposed that on 05.06.04, on receiving information regarding firing incident in AOR of BOP Bamutia, he reached at the spot at about 1045 hrs. He saw Nandan Deb S/o Atinder Deb R/o Rangotia, Distt. West Tripura, lying dead on the ground facing upwards. He prepared the Inquest Report and took the dead body to the hospital for post-mortem. Dr. Ranjit Kumar Das (PW-10) carried out post-mortem on the dead body of Nandan Deb S/o Atinder Deb on the same day afternoon. Hence, the court take this issue as proved and take the next issue of the charge. That accused on 05.06.2004 caused the death of Nandan Deb by firing shots at him

As regards this issue the Court has not believed the version of CT H Vijay Kumar, PW-1, as it was observed that he stated certain facts which were not consistent with the facts and circumstances of the case as stated by other Prosecution Witnesses and the accused. The presence of civilians in the area around the place of incident has been denied by PW-1, but in the given circumstances it cannot be true, as whole of the area where incident took place, is surrounded by Rubber plantation in which, as per daily routine, the owners and laborers were working in their respective Rubber gardens, collecting latex from Rubber trees. As per the procedure, stated by few P Ws, collection of Rubber latex were generally done during the morning hours. As per version of PW-1, he and accused saw 03 intruders when they had come close to the fencing gate. PW-1 also deposed that 2 rounds were fired first in the air by the accused and after 05-10 seconds accused again fired 02 rounds at the miscreants, which meant that firing was done twice. However, this fact has not been corroborated by any of the civilian P Ws i.e. PW-2 Sapan Das, PW-3 Sapan Das, PW-4 Tapas Das and PW-5 Sunil Das. PW-1 also gave different account about attack on the accused by the miscreants. He did not mention anything about specific attack on accused by one of the miscreants by "Dah", whereas the accused stated that he fired at the miscreant who had tried to attack him with "Dah" and the other miscreants were slightly behind at that time. Moreover, if PW-1 was so close and watched whole of the incident taking place, then it is very unusual and unnatural on part of PW-1 for not reacting in soldierly manner, keeping in view the circumstances of the case. The Court also watched the demeanor of PW-1 which created reasonable doubt about the veracity of his statement. Hence, the Court did not believe the statement of PW-1 and discarded his statement, supporting the plea of right of private defense. As per the version of PW-2, 4 & 5, the deceased and accused were seen together just prior to the taking place of the incident. PW-4 &

5 had seen the deceased and accused going in the rubber garden across the fencing and they sat in the rubber garden of Arun Das. Within 05 minutes of their going in that direction, two rounds of firing sound was heard by PW-2, 4 & 5. Immediately after firing PW-4 & 5 saw the accused standing at the place of incident with his rifle in his hand and shouted at them to go away. Subsequently the laborers and owners working the rubber garden on BD side of fence were sent on own side of fence by BSF personnel. They were not allowed to go near the spot by the BSF person till arrival of police party. Immediately after the incident, the Officiating Coy Comdr along with the BOP personnel reached at the place of incident in Coy Gypsy. The Court believed the statements of PW-11, Smt. Shukla Deb, PW-14, Rata Deb, and PW-12, Utpal Das that deceased and the accused were known to each other as they were seen together on number of occasions. PW-10, Dr. Ranjit Kumar Das who conducted post-mortem on the dead body of Nandan Deb opined that cause of death was shock and hemorrhage due to multiple injuries caused by firearm weapon. The Court therefore believed that Nandan Deb was present in the area within India, prior to the incident and was subsequently taken to BD side of border fence by the accused. Hence, the Court takes this issue as proved and takes the third issue of the charge. That the act of the accused was done with requisite intention/knowledge as envisage in Section 300 IPC.

Intention and knowledge are mental attitude which are not capable of positive proof. However, it can be inferred from the facts and circumstances of the case. In this case it can be taken from the manner in which the dead body was found lying i.e. with the legs folded and chappal (slipper) being in the feet of the deceased, the manner in which BD currency was found kept inside the shirt on chest of the deceased with the shirt having no pocket, the distance of "Dah" from the deceased, the part of body where bullets had hit, the track of bullets entering in the body which was from front, backward and downwards existing from lower part of left back side, are certain facts indicating that the act of the accused was intentional amounting to murder and not in exercise of right of private defense. Thus, the Court takes this issue as well as the charge as proved."

5. It is apparent that our job is limited. No procedural infirmities being alleged at the trial, the only limited issue which has to be decided by us is whether it is a case of no evidence or whether there is a material irregularity in the appreciation of evidence causing injustice i.e. to have a look at the evidence within the confines of our power under writ jurisdiction. Surely, we are not expected to sit as a Court of Appeal.

6. Of the 17 witnesses examined at the trial, suffice would it be to state that HCN. Jaichandra PW-9, HC Vyas Dev PW-15, Const. Kewal Krishan PW-16 and SI Suresh Kumar Dagar PW-17 have proved, what has been admitted by the Petitioner, i.e. the Petitioner being on duty at the place as per the charge and issued arms and ammunition as per the charge as also that an incident involving the Petitioner and the deceased took place at the time, place and the date as per

the charge. We need not note the testimony of Ratiranjana Dass PW-6, Apurva Deb PW-7 and Sanjeev Deb PW-8 as the three, as per their testimony, were not present at the spot and claim to have reached the spot when news spread in the village that Nandan had been killed by a BSF jawan.

7. SI Shanti Bhushan Bhuiya PW-13 of Tripura Police has deposed a relevant fact, which we note; being that when at 9:45 hrs on 5.6.2004 he received telephonic information at PS Sidhai, making GD Entry No. 156 he reached the place of incident and; to quote: "I reached at the spot at about 10:45 hrs where I saw a dead body ahead of fencing, lying on the ground facing upward, with both legs in folded position. I saw two bullet entry wounds on right side of the chest and two bullet exit wounds on back downwards near waist line and there was pool of blood on the ground near his back." Relevant would it be to note that the witness was not cross-examined on the point of his deposition of having seen the deceased in the affronted position.

8. Smt. Shukla Deb PW-11, wife of the deceased and Rattan Deb PW-14, the brother of the deceased have deposed that Nandan Deb was familiar with the BSF personnel in the camp as he used to go to the camp to supply milk, vegetables and coconuts and that the Petitioner knew Nandan Deb not only for affronted reason but additionally for the reason Petitioner used to visit the house of Nandan Deb to purchase milk, vegetables and coconut. A villager Utpal Dass PW-12 has also deposed that the accused knew the deceased. Relevant would it be to note that with respect to said testimony of Petitioner knowing the deceased, the same has not been challenged in cross-examination.

9. We are then left with the testimony of PW-1 to PW-5. No doubt, Ct.H. Vijay Kumar PW-1, as discussed in the findings by the Court, has deposed favorably to the Petitioner, but we find that, as discussed in the findings by the Court, Sapan Das PW-2, another witness named Sapan Das PW-3, Tapan Das PW-4 and Sunil Das PW-5 have deposed contrary to the testimony of PW-1 and their testimony establishes the Petitioner having summoned the deceased and having shot him twice.

10. Before noting the testimony of Dr. Ranjit Kumar Das PW-10, who conducted the post-mortem on the body of the deceased, we would simply highlight that the testimony of Sapan Das PW-2 does establish that the villagers used to indulge in smuggling activities and even the deceased used to do so and that in the past the deceased was apprehended for indulging in smuggling activities. It may also be noted that not only does the testimony of PW-1 but even that of other witnesses establishes that Bangladesh Taka's 24700 were recovered from the spot and a "Dah was recovered from the spot.

11. The testimony of Dr. Ranjit Kumar Das PW-10 and the post-mortem report of the deceased establish that the deceased died due to firearm injuries. 2 bullets pierced his body. The internal injuries were as under:

"a) A firearm entry wound circular in shape measuring 0.75 cm in radius with

abrasion collar measuring 2-4mm, present on the upper part of right anterior chest wall. The skin margin was inverted and there was no burning, blackening or tattooing of the skin around the wound. The wound was situated 125 cm above from the right heel and 7.5 cm away from the midline. A bullet track was established which was directed from front of backward, downwards and towards left through third intercostals space, pleura (covering of lung), middle lobe of right lung, peritoneal cavity (covering of abdomen) and ultimately making an exit wound which was 103 cm above from the left heel and 16 cm away from the midline on the left side of back of the lower part of abdomen, measuring 1.5 cm x 1cm with evasion of skin margin.

b) A firearm entry wound circular in shape measuring 0.7 cm in radius with 2-4 mm abrasion collar around and inverted skin margin was found present at the upper part of right anterior chest wall, which was 124 cm above from right heel and 3 cm away from midline. There was no burning, blackening or tattooing in the skin around wound. A bullet track was established which was directed from front to backwards, downwards and slightly towards left to second intercostals space, pleura, upper and middle lobe of right lung, peritoneal cavity then produced fracture of 9th rib near vertebral column and ultimately made an exit, measuring 2.5 cm x 1.5 cm with evasion of skin margin on the back of lower chest wall right side, which was 111 cm above right heel and 1 cm away from midline."

12. Who says that dead bodies do not speak? They do. And when they do, they speak with clarity.

13. The dead body of the deceased has spoken with reference to the 2 injuries caused on the body of the deceased. The post-mortem report shows that the deceased had a height of 167 cm. The path of the 2 bullets inside the body and the sites of the injuries tells us that the 1st bullet pierced the deceased 123 cm above the right heel at a point 7.5 cm from the midline. The trajectory was backward and downward. Cutting through the right lung and the peritoneal cavity the bullet an exit at the point 16 cm to the left of the midline and 103 cm from the left heel. It is apparent that the bullet travelled at an acute angle of 45 degrees. The second bullet has likewise travelled at an acute angle of about 30 degrees. Thus, it is apparent that the trajectory of the bullets being 30 degrees in one case and 45 in the other means that the shot was fired taking a downward angle and now when we bring in the testimony of SI Shashi Bhushan Bhuiya PW-13 who has deposed that when he saw the dead body, both legs were in folded position, we can understand with precision as to what happened. The Petitioner has obviously made the deceased to be in a crouching position and has thereafter fired two shots. His version that he saw an intruder armed with a chopper and hence he fired is to be rejected for the reason if this was so, the trajectory of the bullets would not have been as seen.

14. The post-mortem report of the deceased is in complete harmony with the ocular version deposed to by PW-2 to PW-5 and completely contradicts the

testimony of PW-1.

15. It is true that considerable foreign exchange i.e. Bangladesh currency was recovered from the spot and it is true that there is evidence that the deceased was indulging in smuggling activities, but that would not justify a cold blooded murder. As regards a chopper being found at the spot, suffice would it be to state that as per the testimony of PW-1 to PW-5 it stands established that the deceased was having a rubber plantation in the area and thus a chopper being found would not mean that the deceased was armed with a deadly weapon to kill somebody. Chopper is a farm implement used to cut wood and is extensively used in rubber plantations to inflict cuts on the trunk of rubber plants so that latex bleeds from the plants and is gathered in a container. We would highlight, as noted hereinabove that the testimony of PW-11, PW-14 and that of PW-2 establishes conclusively that the deceased knew the Petitioner and that when the deceased was brutally murdered, it was at the asking of the Petitioner who said "Nandan idhar aana" that the deceased went towards the Petitioner.

16. The plea of learned Counsel for the Petitioner that why would Petitioner kill the deceased is neither here nor there for the reason it is very difficult to establish motive for a crime in each and every case.

17. We may only state, on the issue of a motive, that the evidence establishes the deceased indulging in smuggling activities and sitting on the division where writ petitions pertaining to para-military forces are being listed before this Bench that a large number of them pertain to disciplinary action taken against BSF personnel found to be indulging in abetting smuggling activities in border areas. Is it not possible that the Petitioner had an issue of unpaid illegal gratification? Well, it may be a possible motive. But we determine none as we are not required to do so. Law does not require that for every crime a motive must be proved.

18. Before concluding we may state that our job is not to re-appreciate evidence as Court of Appeal. Thus, the contention of learned Counsel for the Petitioner that the testimony of PW-1 should be preferred over that of PW-2 to PW-5 is rejected for the reason we find that the Court has categorically noted that it had the benefit of observing PW-1 and had watched his demeanor. We further note, a view with which we accord concurrence, that the testimony of PW-1 mitigates against the natural conduct of a co-jawan.

19. Highlighting the evidentiary value of the post-mortem report of the deceased, which we have discussed hereinabove, and which is a further circumstance, in addition to the ones listed by the Court, we accord our concurrence to the findings returned and the penalty imposed upon the Petitioner.

20. The writ petition is dismissed.

21. No costs.