
(1993) 03 GAU CK 0015
In the Gauhati High Court
Case No : Civil Rule No. 700 of 1992

KH.R.Singh

APPELLANT

Vs

Union of India and Ors.

RESPONDENT

Date of Decision : 30-03-1993

Acts Referred:

Army Act, 1950 — Section 164(1), 164(1), 164(2), 164(2)
Constitution of India, 1950 — Article 226, 226, 227, 227

Citation : (1993) 1 GLJ 355 : (1993) 1 GLR 293

Hon'ble Judges : S.N.Phukan, J

Bench : Single Bench

Advocate : A.K.Phukan, S.K.Chand Mohammad, G.Roy, M.Bhuyan, Advocates
appearing for Parties

Judgement

1. This writ petition is directed against the finding and sentence dated 8th April 1989 (Narangi Cantonment) Guwahati of the General Court Martial in respect of No.8028642 H Pioneer K. Muhori Singh of 1816Pioneer Coy attached to 222 ABOD and order No. 7 (9)/90 (i)/(D) (AG) dated 23.8.90 issued by the Under Secretary to the Govt of India, Ministry of Defence, whereby, the findings and sentence of death by hanging awarded by the General Court Martial in respect of the accused petitioner Pioneer K, Muhori Singh was confirmed in exercise of powers conferred under section 154 of the Army Act 1950. The present petition has been filed by the elder brother of the accused.

2. In pursuant to the tentative charge sheet and the summary of evidence recorded against the accused by orders of the Officiating Cammandant 18th Assam Rifles, a certificate was issued by the Commandant 222 Advance Base Qrdanance Depot (ABOD), Narangi Cantonment, Guwahati, respondent No. 5 certifying that there exists a prima facie case against the accused on the tentative charges and therefore was of the view that the accused should be brought to trial by a General Court Martial on 3.2.b9 and order for the assembly of the General Court Martial under the Army Act was passed by the General

Officer Commanding, 101, Area, Shillong, respondent No.4 for trying the accused against 4 charges under section 69 of the Army Act read with section 302 IPC and one charge under section 69 of the Army Act read with section 307 IPC. The trial was held at Narangi Cantonment, Guwahati which commenced on 15.2.89 and concluded on 8.4.89.

2A. The prosecution story in brief was that on 9th May, 1986 the accused allegedly misbehaved with a local girl of Zobawk Village. It was alleged that the matter was amicably settled on the 11th May, 1986 when the accused along with Police party as well as some Army personnel went to the said village and resolved the matter by paying Rs. 200/- by the accused to the ^parents of the girl. On 12.5.86 one Mb Sub. Muhasis Singh who was performing the duties of JCO in charge of Det. 1816 Pioneer Company (Army) in 72 RCC Sector, came over to the Zobawk Dat and told the accused that he should move back to 1816 Pioneer Company HQ for his own safety as well for others. The accused without any protest against the said order, requested one Pioneer Dadaso Anna Masal and Pioneer DC Nath to load his personal belongings on the vehicle while he went "to the latrine to relieve himself. At about 1200 hrs on the very same day, the accused after coming back from the latrine, picked up his rifle and ammunition from the guard room and started firing indiscriminately killing the Guard Commander, L/Nk Satbir Singh, Pioneer Krishna Bahadur and LCPL Madhusudan on the spot and injuring LCPL Sidharthan and LCPL Chandran Pillai. LCPL Sidharthan later succumbed to his injuries. According to prosecution the accused absconded from the place of shooting with arms and ammunition and was later apprehended by 18 MAHAR in the evening of 13th May, 1986. During trial 19 persons were examined by the prosecution and certain materials Exts were also produced before the Court Martial. After trial the accused was found guilty and sentenced to death by the Court Martial. The accused petitioner filed preconfirmation petition under section 164 (1) of the Army Act to the confirming authority namely the Ministry of Defence, Government of India which was rejected by order dated 23.8.90 vide Annexure 2 to the writ petition. The accused also filed another petition under section 164 (2) of the Army Act, 1950 through General Officer Commanding 101, Area Shillong, respondent No.4 challenging the order of Court Martial as well as the above order of Govt of India. This petition was also rejected vide order dated 8.1.92, \\nnexure 3 to the writ petition. Hence the present petition. Petitioner has prayed for a writ of Certiorari for setting aside the sentence of death awarded by the General Court Martial on 8.4.89 and order of confirmation dated 23.8.90 (Annexure 2). The interim prayer of the writ petitioner was duly considered at the time of issuance of Rule on 8.4.92 and execution of death sentence was suspended.

3. In the writ petition it has been alleged that the prosecution only tried to establish that it was the accused person who had fired on the deceased persons. According to the writ petitioner the prosecution failed to produce the first information report which was an important piece of evidence and also did not examine the ballistic expert who examined the rifle and the empty cartridges and

also the Investigating Officer regarding inquest report. According to the accused person prosecution failed to prove the ingredient of offence beyond reasonable doubt. The accused took the plea of legal insanity (not medical insanity) which according to writ petitioner was the most probable and reasonable plea but was not properly considered. It has also been alleged that prosecution did not at all establish any motive, consciousness of guilt and element of premeditation on the part of the accused. In para 6 of the writ petition it has been alleged on behalf of the accused that since ingredients of mens rea is absent and the same not having been established at all by the prosecution, the general burden of prove resting on the prosecution was not discharged. The summing up by the Judge Advocate before the Court Martial has been annexed at Annexure 1. Various pleas have been taken to prove the second point that the Judge Advocate erred and completely failed to consider the relevant point in the case inter alia whether there was any intention or knowledge on the part of the accused in committing the offence, whether the plea of legal insanity taken by the accused was plausible and reasonable one and whether on the facts and circumstances of the case the general burden of prove resting on the prosecution was at all discharged.

4. I may extract relevant portions of the summing up by the Judge Advocate for the present purpose. At the outset Judge Advocate gave the gist of the words "proved" and "disproved" as defined in section 3 of the Indian Evidence Act. The Judge Advocate is also informed the Court Martial that the accused was charged under section 69 of the Army Act for committing the civil offence namely murder under section 302 IPC and one charge under above section 69 for attempting to commit murder. After giving the gist of the sections the Court Martial was informed that as the charges not hit by section 17 of the Army Act the Court have jurisdiction to try the accused. Thereafter gist of sections 299, 302 and 307 was explained in detail and as per law. The difference between motive and intention was also explained and the Court was informed that if there was clear evidence to bring home the charges, motive need not be proved. In this connection the ratio laid down by the Apex Court in various decisions were brought to the notice of the Court. The legal procedure for appreciating the oral evidence of witnesses including the evidence of interested witnesses and injured witnesses were also explained. The summary which was read out to the Court also contains statement regarding ambit and scope of circumstantial evidence as two charges were required to be considered in the light of such evidence. The Court Martial was also informed regarding discrepancies and contradiction and also corroboration of evidence in detail. Thereafter the prosecution case was explained in detail including, the summary of evidence of the witnesses examined by the prosecution. The defence case was also explained more particularly plea of legal insanity taken by the accused. The Judge Advocate framed the issues i.e. point for determination in respect of 5 charges in detail visavis the evidence on record. Each charge on the basis of which issues have been framed was explained with reference to the evidence on record. The evidentiary value of medical evidence was also explained.

5. The Judge Advocate explained at length the law regarding insanity visavis provision of section 84, IPC and section 5 of the Army Act including Rule 145 of the Army Rules. In this connection regarding presumption of insanity as per Halsbury's law of England (3rd Edition Vbl29) page 419 was also quoted and it is brought to the notice of the Court. The principle underlined in section 105 of the Evidence Act was brought to the notice of the Court Martial. The Judge Advocate also dealt with previous history of the accused, nature and character of the crime, behaviour and conduct of the accused prior and subsequent to the crime as urged on behalf of the prosecution as well as defence. In this case 3 experts witnesses were examined as PW6,. PW 15 and PW 26 regarding chemicals examination of blood conducted by PW6 reading section 142 of the Army Act the Court was informed that report is admissible and can be considered by the Court. There is a report of the ballastic expert marked Ext. 4 and Judge Advocate rightl informed that this report cannot be considered as Mr. Rao who conducted the test was not examined. The evidentiary value of expert evidence was also explained.

6. The Judge Advocate regarding Rule 58 of the Rules framed of the Army Act informed the Court that the statement of the accused has to be given due consideration while assessing the evidence and arriving at the finding. But most important aspect namely whether the accused has to be asked or not regarding sentence as provided under the CrPC by the Court Martial was not dealt with by the Judge Advocate. The Judge Advocate was also not dealt with the vital question regarding death sentence to be imposed in the murder case and no reference was made to the decisions of the Apex Court on this point as such decisions are binding on all Courts and Tribunals in the country in view of the constitutional mandate.

7. The first point to be determined is the extent of jurisdiction of writ Court in a trial conducted by the Court Martial under the Army Act. The power of judicial review is the basic structure of the Constitution and by invoking writ jurisdiction a person can assail any order passed by any authority, whether executive, quasi judicial or judicial body. This, in my opinion, will also include a proceeding conducted by a Court Martial. Therefore the writ Court can exercise powers of judicial review by exercising writ jurisdiction under Article 226 of the Constitution

8. By exercising powers of judicial review any administrative action or any order passed by any authority can set aside if in such order or decision of the authority there is illegality, irrationality or procedural impropriety. I may add here that normally judicial review is directed against the decision making process by an authority. In this connection I refer to the decision of the Apex Court in Ranjit Thakur, AIR 1987 SC 2386. Applying the above ratio I am of the opinion that writ Court can interfere with any decision or sentence of Court Martia even though it is within the exclusive jurisdiction of the Court Martial, if it is found that such decision or sentence of the Court Martial is an outrageous defiance of logic. I may refer to the decision of the Apex Court in Ex Naik Sardar Singh vs. Union of

India & others, (1991) 3 SCC 213. In this decision the Apex Court reiterate the above principle and found that the sentence awarded by the Court Martial was arbitrary and therefore the Apex Court interfered with the findings and sentence of the Court Martial.

9. That apart, by invoking jurisdiction under Article 227 of the Constitution High Court has got power of judicial superintendence over Court Martial. It is a settled law that this power has to be exercised most sparingly and only in appropriate cases to keep the subordinate Courts and Tribunals within the bounds of their authority and this power should not be confused with the powers of an appellate authority.

10. Before I proceed to consider the main contention urged on behalf of the writ petitioner regarding the sentence imposed by the Court Martial let me consider three other points raised on behalf of the writ petitioner.

11. According to Mr. Phukan, learned counsel for the petitioner, the two orders by which the petitions filed by the accused before the Govt. of India under section 164 (1) and 164 (2) of the Army Act was rejected by cryptic orders and it would show that there was no application of mind. Subsection 1 of section 164 inter alia provides that any person subject to the Act being aggrieved by any order passed by and Court Martial may present a petition to the officer/authority empowered to confirm any findings or sentence of such Court Martial and the confirming authority may take steps to satisfy as to the correctness, legality or propriety of such order passed or as to regularity of any proceeding to which the order relates. Subsection 2 inter alia provides that such person as mentioned above, being aggrieved by finding or sentence of any Court Martial and confirmed by the authority, may present a petition to the Central Govt. the Chief of Army staff or prescribed any officer and Central Govt. or such an officer may pass such orders thereon as it or he thinks fit.

12. The above powers conferred on the Central Govt. or any other officers authority is very wide and both these remedies are valuable right for a person convicted by a Court Martial. These powers have to be exercised by the Central Govt. or any other empowered officer carefully and the final decision has to be taken after proper application of mind to the sentence, proceeding including evidence on record tendered before the Court Martial. Unlike some European countries there is no regular Court of appeal under the Army Act. I may refer to the provisions of Court Martial (Appeals) Act 1964 of the United Kingdom and the above provisions of the Army Act correspond to that Act. In absence of any proper Court of appeal in country the above powers under the Army Act to be exercised carefully and for the interest of the person aggrieved by an order of the Court Martial. These powers are available to a person convicted by a Court Martial at two stages namely before the conviction and sentence are conferred and second one is available after such confirmation.

13. Coming to the case in hand, by the order dated 23.8.90 vide Annexure 2 the

petition under section 164 (1) was rejected by a cryptic order and the learned counsel for the accused was informed that the petition under section 164 (I) was rejected. By order dated 8.1.92 vide Annexure 3 the learned counsel for the petitioner was also informed that the petition filed on behalf of the accused under subsection (2) of section 164 was rejected. These two orders do not contain any reason and in fact these orders do not indicate whether at all the Central Govt. looked into the evidence tendered before the Court Martial and whether plea taken by the accused was duly considered or not by the Court Martial. In spite of law laid down clearly by the Apex Court regarding awarding the death sentence, the sentence imposed, on the accused was not at all considered. It is really unfortunate that Central Govt. has taken the case of the accused lightly though the extreme penalty of the death was imposed on him. These two orders are not tenable in law and is liable to be rejected, which I hereby do.

14. Mr. Phukan, learned counsel has urged that plea of insanity taken by the accused was not duly considered by the Court Martial. On the other hand Mr. Sk. Chand Mohammad, learned Central Govt. Standing Counsel has urged that writ Court being not a Court of appeal need not consider this submission. I may mention here that Air. Phukan has placed reliance extensively on the point of insanity on the book of "Introduction to Criminal Law" (10th Edition by Courts and Jones). From page 90 onwards the learned authors have dealt with the subject of insanity.

15. I have already stated that this point of insanity was dealt with by the Judge Advocate by apprising the learned members of the Court Martial. Therefore this point was duly considered as it was placed before the Court Martial. The address by the Judge Advocate cannot be faulted regarding summing up on the point of insanity. I, therefore, do not find any scope to exercise powers of this Court either under Article 226 or Article 227 of the Constitution. I therefore, reject the contention of Mr. Phukan.

16. On the question of sentence learned counsel Mr. Phukan has addressed this Court at length. According to Mr. Phukan, learned counsel, in view of the law laid down by the Apex Court and considering the facts and circumstances of the case this is not a fit case for death sentence.

17. I have already stated that judicial review is directed mainly against the decision making process. In the case in hand while addressing the learned member of the Court Martial the Judge Advocate did not apprise the Court Martial regarding the law laid down by the Apex Court for imposing death sentence. I am of the opinion that if the learned members of Court Martial would have been properly informed of the law laid down by the Apex Court, the decision might have been otherwise. I, therefore, hold that there was illegality in the decision made by the Court Martial in the case in hand.

18. In the land mark decision of the Apex Court in the case of Rajendra Prasad, (AIR 1979 SC 916). it was held that special reason necessitated for imposing

death penalty must relate not to the crime as such but to the criminal. According to their Lordship the crime may be shocking and yet the criminal may not deserve death penalty. Mr. Justice Krishna Aiyar observed that there is divinity in every man and that none is beyond redemption and death penalty is the last step in a narrow category where within a reasonable spell the murderer is not likely to be cured and tends to murder others even within the prison or immediately on release, if left alive. His Lordship further held that extreme penalty can be invoked only in extreme situation and it is illegal to award capital sentence without considering the correctional possibilities inside prison. In Bachan Singh's case, AIR 1980 SC 898, the Apex Court held that death sentence ought not to be awarded save in the rarest of rare cases and that for a person convicted of murder, life imprisonment is the rule and death sentence is an exception.

19. In Machhi Singh vs. State of Punjab. AIR 1983 SC 957 Apex, Court held that the extreme penalty of death need not be inflicted; 1 except in gravest cases of extreme culpability and that life imprisonment is the rule and death sentence is an exception. In the case in hand there is no thing to show that the accused person had previous conviction or had adverse report during his service career. Admittedly there is no motive for the crime. On perusal of the evidence on record I find that some witnesses have stated that the accused had friendly relationship with some of the deceased. Some of the victims were unknown to the accused. There is no evidence of voluntary consumption of liquor or drugs. There is no premeditation and it has come out in evidence that the accused has a good character. On going through the evidence I find that suddenly something happened and the accused could not keep his balance of mind. In view of this fact the present case cannot be taken as a rarest rare case for imposing the exceptional sentence of death. The crime may be shocking but accused does not deserve the extreme penalty of death. Nothing has been brought out by the prosecution to show that the accused cannot be cured and he may commit murder either in the prison or after his release. I, therefore, hold that the Court Martial erred in law by awarding the extreme penalty of death in the case in hand.

20. For the reasons stated above the present petition is partly allowed by converting the sentence of death to imprisonment for life awarded by the General Court Martial (Narangi Cantt.) Guwahati by its finding and sentence dated 8th April, 1989 in respect of No. 8028642 H Pioneer K. Muhori Singh of 1816 Pioneer attached to 22 ABOD. The convict shall be entitled to get set off the period of detention under army custody before conviction and sentence as laid down by this Court in Bijoy Chandra Patra vs. Commanding Officer & others reported in 1987 Gauhati High Court Cases 47 .