

(1990) 07 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Criminal Writ Petition No. 41 of 1988

Lalit Kumar

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 12-07-1990

Acts Referred:

Army Act, 1950 — Section 69
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 304A

Citation : (1990) 2 ShimLC 233

Hon'ble Judges : D.P. Sood, J; Bhawani Singh, J

Bench : Division Bench

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

Final Decision : Allowed

Judgement

Bhawani Singh, J.—This. Criminal Writ Petition under Article 226 off the Constitution of India assails the District Court Martial proceedings dated 6-9-1989 (Annexure-A) and other orders like (Annexure-C), (Annexure-1 D) and (Annexure-R) available on the record of this petition. J

2. The Petitioner, Lalit Kumar is a driver of PH and HP Area, Signal Regiment Simla. He was tried by the District Court Martial, Simla for commission of offence u/s 304A of the Indian Penal Code, read with Section 69 of the Army Act. The trial ended in the conviction of the Petitioner and he was sentenced to suffer rigorous imprisonment for three months.

3. The case against the Petitioner is that on 14-10-1987, while driving I-Ton vehicle, he met with an accident near Boileauganj resulting in the death of six persons. The allegation appears to be that while driving through the slope, the vehicle was in third gear and the speed of the vehicle was excessive with the result that the Petitioner could not control the vehicle and result was that it struck the parapet and then rolled down. Number of witnesses were examined by

the prosecution to sustain the charge against the Petitioner. The Petitioner claims that on the basis of evidence that has been recorded during these Court Martial proceedings, no case has been made out against him and the Court Martial proceedings against him cannot, in these circumstances, be sustained. It has also been submitted that the decision on his petitions moved against the Court Martial order, are liable to be set aside being non-speaking and show absence of application of mind which is a sine qua non of a fair and just procedure.

4. The learned Counsel for the parties read the evidence recorded by the Court Martial quite extensively in order to place their respective contentions. Shri O.P. Sharma, learned Counsel for the Petitioner submitted that it has not been established by the prosecution through its witnesses that the Petitioner was either rash or negligent in driving the vehicle in question. Reference to the statements of witnesses was also made to substantiate the plea. Devinder Kumar (PW 3) was one of the occupants of the vehicle. He states that the vehicle was moving at a normal speed when he felt the first jolt followed by the second jolt after a short-while. Almost to the same fact is the statement of Karnail Singh (PW 4). L.S. Bhandari (PW 5) checked the vehicle before it was handed over to the Petitioner. He examined the vehicle after the accident also and found that the front right wheel was broken from the Knuckle Flange Collar and the front wheel was missing and the same was ultimately found lying on the road forth where the vehicle had fallen down. He noticed drag marks also on the road. He also states that the Petitioner is a good driver and used to maintain his vehicle quite well. He also states that the defect noticed in this vehicle was also found in other two vehicles in the past. On being questioned by the Court, he states that this vehicle had not hit against any object prior to the breaking of Knuckle Flange Collar and the drag marks on the road Boileauganj-Simla gave an appearance as if it had been caused by the right wheel disc. A.A. Desh Pandey (PW 8) also states that he had observed that the vehicle rested on the parapet and the front right wheel was missing and he was told that the missing wheel was lying on Boileauganj Simla road where it was ultimately found by him. He asked the accused about the details of the accident and he was told that while moving, the front wheel came out and the vehicle went off balance. It came down the slope and since the brakes were not functioning, he tried to cut the vehicle to the left so as to drag it along the wall, but it could not be controlled and it fell down. He also states that he knew the Petitioner for the last fourteen months and that he was a good driver and a disciplined soldier. When questioned by the Court, he states that the wheel of the I-Ton vehicle was lying about ten feet away from the broken parapet towards Boileauganj.

5. Captain A.K. Khajuria (PW 12) has been examined as an expert witness in the case. He also found the front right wheel missing. He admits that in the defect-report, he had mentioned that the defect appeared to be manufacturing defect and designed inadequacy and that the wheel had got sheered off because the knuckle spindle was broken at the joint of the Knuckle Flange and the Spindle. Similar defect of the Knuckle Spindle breaking at the joint of knuckle and Spindle

was found in another vehicle of 980 TPT Coy (ASC) attached to Station Headquarter, Simla during the first week of December, 1987. He also states that there are chances of a vehicle to toppling at the place where the front wheel is sheered off.

6. Major S.S. Achari (PW 13) has also been examined as an expert. According to him, the vehicle may have been driven at the same speed even while negotiating the curve at the place with a result that the driver may have lost control over it and the defect may have developed by the crashing of the vehicle against the parapet. However, the learned Counsel for the Petitioner has pointed out certain improvements in the statement of this witness which were not there when summary of evidence was recorded.

7. Rifle-man Lila Parshotam (PW 15) saw this vehicle coming down Boileauganj-Simla Road, when he himself was driving a Jeep. He states that when he reached near Agriculture Department Gate, he saw the front right wheel of the I-Ton vehicle wobbling. On seeing this, he gave a signal to the Petitioner to slow down his vehicle and stop. He stopped his vehicle in order to tell the accused about this defect, but by the time he turned back after stopping his vehicle, he saw that the front right wheel of the I-Ton vehicle of the Petitioner had sheered off. He then saw the I-Ton vehicle going to the left, hitting the retaining wall and thereafter turning to the right, hitting a parapet and rolling down from the road. The vehicle was moving at the speed of 15-20 Km. ph. These are some of the important features of the prosecution evidence in this case.

8. In order to constitute an offence u/s 304A of the Indian Penal Code, the death must have been caused by the Petitioner while doing any act in a rash or negligent "manner, so there must be positive proof that the rash or negligent act of the Petitioner was the approximate cause which resulted in the death of the deceased. There must be direct nexus between the death of a person and rash and negligent act of the accused. See *Suleman Rehiman Mulani and Another Vs. State of Maharashtra*, a. The implications of the words "rashness" and "negligent" in Section 304A have been explained in *Bharosi Vs. State*,

rashness means doing an act with the consciousness of a risk that evil consequence's will follow but with the hope that they will not. And negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are the determining factors. According to *Russet on Crime* (1950 Ed.), p. 641, there must be mens rea in the criminal negligence also. The learned author has said that Judges have used many epithets to describe negligence, such as "culpable", "criminal," "gross", "wicked" or "complete negligence" But whatever epithet be used...in order to establish criminal liability the facts must be such that the negligence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime.

9. Now the question is whether the prosecution has been able to establish the

case against the Petitioner. The answer is in the negative. It has not been established clearly and conclusively that the Petitioner was driving the vehicle rashly or negligently. Rather, the evidence points out that the vehicle was being maintained properly and before handing over the vehicle to the Petitioner, it was thoroughly checked. The speed of the vehicle has not been established. The evidence on this aspect is varying, but looking to the slope and the evidence that points out that the Petitioner was a good driver with a clean record, it is reasonable to conclude that he was driving the vehicle at a low speed. Further, no tangible evidence has been produced suggesting clearly that the wheel sheered off after the impact and" not before that. As a matter of fact, this was a crucial point which should have been established to show that the Petitioner was either rash in driving the vehicle or negligent in not taking care to see that it did not strike the sides. In such a situation, it is worthwhile to depend on the evidence which points out that not only brake, system had failed, but also the wheel had sheered off, whereafter the vehicle had moved to the left then to the right before falling down the road after hitting the parapet.

10. Therefore, looking to the evidence in the light of the legal principles involved in this case, it is difficult to uphold the conviction of the Petitioner by the District Court Martial. The Petitioner cannot be convicted on the basis of vague and contradictory versions of the prosecution witnesses, though it is unfortunate that a number of lives have been lost. The Confirming Authority as well as the Appellate Authority have not given any reasons for rejecting the petitions. These orders are non-speaking and do not give any reasons for rejecting the case of the Petitioner. Although, giving of reasons and speaking order may not be a statutory requirement, yet there is no prohibition for giving a speaking order supported by reasons. The statutory omission can be made good by application of the principles of natural justice. Before a person is prejudicially effected, the procedure for doing so must be fair and just. (See Management of M.S. Nally Bharat Engineering Co. Ltd. Vs. State of Bihar and Others, , Management of M.S. Nolly Bharat Engineering Co. Ltd. v. State of Bihar and Ors. Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, ; Mohinder Singh Gill v. Chief Election Commissioner Swadeshi Cotton Mills Vs. Union of India (UOI), Swadeshi Cotton Mills v. Union of India and JT(1989) 4 582 Charan Lal Sahu v. Union of India.

11. The result of the aforesaid discussion is that the writ plea of the Petitioner is allowed. The District Court Martial's proceedings (Annexure-A) as well as (Annexure-C), (Annexure-D) and (Annexure-R) are quashed. However, the parties are left to bear their own costs.