

(2006) 04 DEL CK 0132
In the Delhi High Court
Case No : WP (C) No. 3709 of 2003

Prosenjit Kundu

APPELLANT

Vs

The Presiding Officer, General Security Force Court and
Others

RESPONDENT

Date of Decision : 25-04-2006

Acts Referred:

Border Security Force Act, 1968 — Section 117(2), 130
Constitution of India, 1950 — Article 21, 226, 227, 32
Evidence Act, 1872 — Section 32

Citation : (2006) 88 DRJ 856

Hon'ble Judges : Reva Khetrapal, J; Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : Ranjan Mukherji and S.G. Ghosh, for the Appellant; Manisha Singh and Amit Bansal, for the Respondent

Final Decision : Dismissed

Judgement

Reva Khetrapal, J.—The petitioner in this writ petition has, inter alia, prayed for issuance of an appropriate writ, order or direction for quashing the proceedings of the General Security Force Court, Baramula (Annexure P.2 and P.3), and the confirmation order dated 27th February, 2002 passed by the Inspector General, BSF, Baramula Frontier (Annexure P.4), and the order of the Director General, BSF rejecting the statutory petition filed by the petitioner u/s 117(2) of the Border Security Force Act, and a writ, order or direction in the nature of mandamus to reinstate the petitioner with all consequential benefits for the intervening period.

2. The petitioner on or about 16.10.2000 was serving as a constable in the 70th battalion under the Border Security Force at Tangdhar in Jammu & Kashmir when after an altercation concerning the working condition of a radio handset he is alleged to have committed the offence of inflicting fatal injury with a wooden danda on the forehead of one Nisar Ahmed Koka, another constable of the same

battalion, as a result of which the injured subsequently died on 27.10.2000 in the Northern Command Hospital at Udhampur. On 17.10.2000, i.e., on the day following the occurrence, a First Information Report was lodged being FIR No. 36/2000 at Police Station Karnah, Tangdhar on the basis of which the investigating officer took up the investigation of the case and recorded the statements of the witnesses and submitted a challan in the local court. The military authorities, however, by purported exercise of the power vested in them under the Act, took over the investigation and trial of the case. The petitioner was heard by the commandant on 19.10.2000. A record of evidence was prepared under the BSF Act and Rules. On completion of the record of evidence, sufficient evidence was found against the petitioner and accordingly he was ordered to be tried by the General Security Force Court on the following charge framed u/s 46 BSF Act, 1968 read with Section 302 of the Indian Penal Code.

The accused No. 96122002 Constable Prosenjit Kundu of 70 Battalion, Border Security Force is charged with:-

BSF ACT 1968

SECTION -46

COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, MURDER, PUNISHABLE u/s 302 OF INDIAN PENAL CODE.

In that he, at Tangdhar, on 16 October, 2000, by inflicting fatal injury on the forehead of No. 93254278 Constable Nisar Ahmed Koka of the same Battalion by a wooden rod, caused the death of the said Constable Nisar Ahmed Koka on 27 October 2000 and thereby committed murder.

3. The petitioner having pleaded "Not guilty" to the aforesaid charge, the trial was ordered to commence. Before the trial commenced, the petitioner was informed about his trial by the General Security Force Court and directed to nominate a defense counsel of his choice. It is not in dispute that Sh. A.K. Singh, Commandant, 20th Battalion, BSF, who was legally qualified, was nominated by the petitioner as his defense officer/counsel. The petitioner also procured the services of Sh. Nisar Hussain Shah, advocate, as his defense counsel. In between the trial, one more civil counsel, namely, Sh. Mohd. Ashraf Sheikh appeared in the Court to defend the petitioner Along with Sh. A.K. Singh, Commandant, 20th Battalion, BSF and Sh. Nisar Hussain Shah, advocate. The evidence of the witnesses was recorded in the presence of the petitioner and the petitioner was given opportunity to produce witnesses in his defense and to make a statement in his defense, which was declined by the petitioner.

4. On appraisal of the record of evidence, the evidence recorded in the course of the trial and the arguments made by the defense, the General Security Force Court found the petitioner "Not guilty" of the charge of murder but held him "Guilty" of culpable homicide not amounting to murder punishable u/s 304 Part-II of the I.P.C. and sentenced him to suffer rigorous imprisonment for seven

years and to be dismissed from service. The aforesaid findings were confirmed by the Inspector General (BSF) on 27th February 2002 and the petitioner was directed to undergo the sentence of rigorous imprisonment by confinement in a civil prison at Singhpura, BCA, Jammu & Kashmir. On 17th February, 2003 the statutory b2 petition filed by the petitioner against his conviction by the General Security Force Court and the confirmation thereof was dismissed. The petitioner accordingly filed the present writ petition challenging the verdict of the General Security Force Court and its confirmation as also the rejection of his statutory petition by the competent authority.

5. During the pendency of the writ petition the petitioner moved an application for suspension of his sentence on the ground that u/s 130 of the Border Security Force Act, sentence can be suspended by the Director General or any other empowered officer and the petitioner having already served sentence of six years and two months out of a sentence of seven years was entitled to the suspension of the remaining portion of his sentence. A Division Bench of this Court, thereupon, directed that the present writ petition would be treated as a request to the Director General u/s 130 of the Act and decision shall be rendered by the Director General within three weeks thereon which shall be communicated to this Court. Pursuant to the orders of this Court, the Director General in exercise of his powers u/s 130 of the Border Security Force Act passed an order on 26th September, 2005 by which the sentence of the petitioner was suspended for a period of six months pending the hearing of the present petition.

6. In the course of the hearing of this writ petition, learned Counsel for the petitioner submitted that the petitioner had already served six long years of imprisonment which cannot be brought back, but what can be restored to the petitioner is the few years of service that are left before he superannuated from service. He contended that in the course of the Court Martial Proceedings, though the department in support of its case had examined as many as 10 witnesses, the two star witnesses of the prosecution, namely, PW-3 Ct.Virender Pathak and PW-5 LNK Chand Bir Singh, who had immediately reached the place of occurrence after the alleged incident, did not support the prosecution case; and hence the prosecution case which rested largely upon the testimonies of the aforesaid eye witnesses to the alleged occurrence was completely demolished. It was also contended that the Department's case was thus based upon circumstantial evidence, and in a case based upon circumstantial evidence, the settled principle of law is that the chain of events leading to the commission of the offence must be so complete as to unerringly point the finger of guilt towards the accused. It was submitted that the chain of events in the case of the prosecution having broken down, the conviction of the petitioner could not be sustained. Then again, it was submitted that the weapon of offence viz., the danda ought to have been sent for Chemical examination, which unfortunately was not done, and thereby a dent had been created in the case of the prosecution. It was also contended that the General Security Force Court had rendered no reasons, much less any cogent reasons, for the imposition of the

aforesaid sentence upon the petitioner, thereby infringing the petitioner's fundamental rights guaranteed under Article 21 of the Constitution of India. Finally, it was submitted that on the basis of the evidence on record, as it is, without any reappreciation of the same, no conviction could be fastened upon the petitioner as this is a case of "NO EVIDENCE".

7. Per contra, it was submitted by learned Counsel for the respondents that the limited scope of review under Article 226 of the Constitution of India is to see if the prescribed rules/ procedures have been duly followed and there was no violation of the principles of natural justice. The power of judicial review under Article 226 of the Constitution of India, it was submitted, can not be a power of an appellate authority, permitting this Court to reappreciate the evidence and enabling it to come to a conclusion that the evidence is insufficient for the findings arrived at by the competent authorities in Court Martial proceedings. Lastly, it was contended, relying upon the judgment of the Hon'ble Supreme Court reported in Union of India and Others Vs. R.K. Sharma, that once this Court is convinced of the guilt of the petitioner, it should not interfere with the sentence awarded to him as punishment merely on compassionate grounds. It was submitted that considering the gravity of the offence committed by the petitioner, the sentence awarded to him could not be said to be disproportionate and hence the writ petition deserved to be dismissed.

8. We have considered the submissions made by the parties and scrutinised the records as well as the relevant provisions of the BSF Act and the Rules framed there under pertaining to Court Martial proceedings. At the outset, it may be noted that the petitioner has nowhere contended that any prescribed rule or procedure was flouted in the conduct of the Court Martial proceedings by the General Security Force Court or that there was any violation of the principles of natural justice. The case of the petitioner, on the other hand, is that there is a complete paucity of evidence to uphold the conviction and that no reasons, much less any cogent reasons, have been given by the General Security Force Court for the imposition of the sentence.

9. Dealing first with the contention of the petitioner that no reasons have been given to form the basis of the conviction and the sentence imposed upon him, the aforesaid contention can not be accepted in view of the various decisions of this Court and the decision of the Supreme Court in the case of S.N. Mukherjee Vs. Union of India, wherein it has been held by a Constitution Bench 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 for mercy if the Court Martial makes such a recommendation. In this case there is no question of any such recommendation as the petitioner, though charged with an offence punishable u/s 302 of IPC, was convicted of a charge u/s 304 Part-II of the IPC. Further, it has also been held in S.N. Mukherji's case (supra) that reasons are not even required to be recorded for an order passed by the Confirming Authority confirming the findings and sentence

recorded by the Court Martial as well as for the order passed by the Central Government dismissing the post confirmation petition.

10. The aforesaid decision of the Supreme Court was followed by a Division Bench of this Court in the case of *Spe Inder Pal Singh and Another Vs. Union of India (UOI)*, wherein the Division Bench relying upon *S.N. Mukherji's* case (supra), rejected the contention of the petitioner therein, who had been awarded the death sentence for the killing of his Commanding Officer, that there had been violation of the principles of natural justice as no reasons had been recorded while pronouncing sentence and rejecting the petitions filed u/s 164(1) and 164(2) of the Act. The Division Bench accordingly refused to interfere with the death sentence awarded by the General Court Martial to the petitioner and dismissed the writ petition. In paragraph 5 of its judgment, it was observed as follows:-

We have no difficulty in accepting the general proposition urged by Mr. S.K. Bagga, learned Counsel for the petitioners, that the rules of natural justice should be followed in a Court Martial. The further contention that the violation of principles of natural justice is writ large because no reasons have been given in the order dated 10th December, 1988 and in the letters rejecting pre and post confirmation petition cannot be accepted in view of decision of Supreme Court in the case of *S.N. Mukherjee Vs. Union of India*, . It has been held in this decision 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 for mercy if the Court Martial makes such a recommendation. In this case there was no question of any such recommendation as maximum sentence had been awarded by the Court Martial. It has also been held in *Mukherjee's* case that reasons are not required to be recorded for an order passed by the confirming authority confirming the findings and sentence recorded by the Court Martial as well as for the order passed by the Central Government dismissing the post confirmation petition.

11. Adverting next to the contention of learned Counsel for the petitioner that this was a case of "NO EVIDENCE", a scrutiny of the Court Martial records shows that as many as ten witnesses were examined by the prosecution. There may not be an eye witness to the murder, but the deceased himself before he succumbed to his injuries had implicated the petitioner before the Company Commandant, who was examined as PW-1. PW-1 Sh. M.V. S. Mughunthan, the Company Commandant of the 70th Battalion, BSF, at the time of the recording of his evidence and also subsequently during trial deposed that the deceased had named the petitioner as the one who had hit him with the danda. He stated as under:-

At Water Point post I saw Ct Nisar Ahmed Koka who had injury above his left eye brow. Ct. Nisar Ahmed had been bandaged. I also saw blood stains above his left eye brow on the bandage. I inquired from Ct. Nisar Ahmed Koka as to what had happened. He replied that "CONSTABLE PRASENJIT KUNDU NE MUJHE DANDA

MARA HAI.

12. Then again PW.1 stated:-

"Ct. Nisar Ahmed Koka voluntarily and clearly told me that he had been hit with a wooden danda by the accused on his head.

13. The evidence of PW-1 Sh. M.V. S. Mughunthan that the deceased had made a dying declaration implicating the accused is further fortified by the evidence of PW-3 Const. Virender Pathak and PW-5 LNK Chandbir Singh, both of whom admitted that the deceased was alive and conscious at the time PW-1 arrived at the spot and took the deceased in the gypsy to the Battalion Head Quarters. According to PW-3 he (the deceased) walked on his own up to the gypsy at the post while being evacuated to the Battalion Head Quarters and the Company Commandant had also taken Constable Prosenjit Kundu (the accused) to the Battalion Head Quarters. PW-5 also stated that the Company Commandant had taken the injured Constable Nisar Ahmed Koka and the accused to the Battalion Head Quarters, and at that time the injured said that his head was paining and he should immediately be taken to the Battalion Head Quarters, meaning thereby that he was fully conscious.

14. Learned counsel for the petitioner vehemently urged that such type of statement made by the deceased should not be treated to be a dying declaration as the same was not admissible under the provisions of Section 32 of the Indian Evidence Act. We are unable to agree, the law in this regard being well settled. In a recent decision, the Apex Court in the case of Kulwant Singh and Others Vs. State of Punjab, has categorically held that it is not essential that a dying declaration should be made only before a Magistrate or in other words, any statement which has not been recorded before the Magistrate can not be treated to be a dying declaration.

15. Reference was also made by the Supreme Court in the said case to an earlier decision rendered by it in the case of Ramawati Devi Vs. State of Bihar, wherein it has been held as follows:-

In our opinion neither of these two decisions relied on by the appellant is of any assistance in the facts and circumstances of this case. These decisions do not lay down, as they cannot possibly lay down, that a dying declaration which is not made before a Magistrate, cannot be used in evidence. A statement, written or oral, made of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, becomes admissible u/s 32 of the Evidence Act. Such statement made by the deceased is commonly termed as dying declaration. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case....

16. Adverting to the facts and circumstances of the present case, the dying declaration of the deceased Constable Nasir Ahmed Koka made to the Company Commandant that Constable Prosenjit Kundu had hit him with a danda is corroborated by the deposition of PW-9 Vishwajit Singh Slaria, Assistant Commandant of 70th Bn. BSF, who saw the accused and the injured being taken away after the injured had sustained injury, and heard about the guilt of the accused from the accused himself. According to PW-9, on inquiry, he came to know that Ct. Nisar Ahmed Koka had been hit with a wooden danda on his head by Ct. Prosenjit Kundu at Water Point Post on the same day, that is, on 16.10.2000. Further, according to him, he (PW-9) had enquired about the incident from the accused, who stated "Sahab mere se galti ho gaya, Nisar Ahmed ne mujhe gali diya aur maine use gusse mein mar diya."

17. A perusal of the Court Martial record further reveals that, as a matter of fact, the petitioner himself voluntarily gave a signed statement u/s 48(3) of the Act that there was a scuffle between him and the deceased during which they both took up dandas for hitting each other. This statement is also referred to in the deposition of PW 10 Shri Raj Singh Rathor, Second in Command of 70th Battalion BSF, as having been recorded by him at the time of the preparation of record of evidence; and as already stated is signed by the accused. Thus, we are left with no manner of doubt that there was a scuffle between the accused and the deceased and that the accused in the course of the same had used a danda.

18. We are also unable to agree with the submission of learned Counsel for the petitioner that PW-3 and PW-5, during the course of trial before the General Security Force Court, having proved hostile to the prosecution, this by itself was sufficient to demolish the substratum of the case of the prosecution. In our view a close reading of the statements of PW-3 Ct. Virender Pathak and PW-5 LNK Chand Bir Singh, the so-called "hostile" witnesses, makes it abundantly clear that the deceased was "last seen" alone with the accused (petitioner) by the said witnesses, both of whom had heard the petitioner and the deceased arguing with each other over the functioning of a radio handset and had pacified them and thereafter gone to their respective barracks. According to PW-3 Ct. Virender Pathak, when he was removing his bullet proof jacket, he heard the scream of Ct. Nisar Ahmed Koka and immediately came out of the barrack and saw Ct. Nisar Ahmed Koka lying on the ground with his left hand on his left eye-brow. He removed his hand from the eye brow and saw that it was bleeding. He (PW-3) thereupon called LNK Chandbir Singh who reached on the spot immediately. In the course of his cross-examination by the Prosecutor, PW-3 states:-

When I came out of the barrack and saw Ct. Nisar Ahmed Koka lying on the ground, Ct. Prosenjit Kundu was standing near the bench about three feet from him. Yesterday I forgot to depose this.

19. In cross-examination by the defense counsel, he states:-

When I came out of the barrack the weapon was about four feet away from Ct.

Prosenjit Kundu.

20. PW-5, LNK Chandbir Singh in his deposition states:-

...I saw and heard Ct. Nisar Ahmed Koka and the accused arguing about functioning of radio set. The argument was of normal nature. After pacifying them I went to my room.

After about 2-3 minutes, Ct. Virender Kumar Pathak called me by shouting "Ustad Jaldi Aao. Ct. Nisar Ahmed ke chot lagi hai aur khoon baha raha hai." I immediately went on the spot.

21. In cross-examination by the Prosecutor, PW-5 states:-

The police party seized a danda from the post and I signed the seizure-memo but I do not know why it was seized. The danda was handed over to police authorities by Ct. Virender Kumar Pathak between the verandah and bathroom of our post.

I am now shown a wooden danda/plank (already marked exhibit-II). I recognise it as the same which was handed over by Ct. Virender Kumar Pathak to police authorities.

22. No doubt, PW-3 and PW-5 had deposed before the police that they had been told by the deceased constable that the petitioner had hit him with a wooden plank (danda) lying nearby, and after reiterating their said statements before PW-10, the recording officer who prepared the record of evidence, they partially resiled from the same, but it cannot be lost sight of that their demeanor has been noted by the General Security Force Court to be prevaricatory. In any case, as set above, the law in this regard is well settled. The entire evidence of a hostile witness is not effaced by the declaration that he is hostile. In other words, so much of the evidence of a hostile witness which furthers the case of the prosecution may be taken into account for the purpose of bringing home the guilt of the accused. Reference may be made in this regard to the decision of the Supreme Court reported in 2001 CrI. L.J. 487 Gura Singh v. State of Rajasthan, paragraph 11 of which reads as under:-

11. There appears to be misconception regarding the effect of the testimony of a witness declared hostile. It is misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in Bhagwan Singh Vs. The State of Haryana, , held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. In Shri Rabindra Kumar Dey Vs. State of Orissa, , it was observed that by giving permission to cross-examine nothing adverse in the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony can not be excluded from consideration. In a

criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the Court can rely upon the part of testimony of such witness if that part of the deposition is found to be credit worthy.

23. Similar view was taken by the Hon'ble Supreme Court in some earlier judgments also, one of which is Koli Lakhmanbhai Chanabhai Vs. State of Gujarat, . Para 5 of the same reads as follows:-

5. From the aforesaid evidence on record, in our view, it cannot be said that the High Court erred in relying upon some portion of the evidence of a hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence Bhagwan Singh Vs. The State of Haryana, and Sat Paul Vs. Delhi Administration, . In the present case, apart from the evidence of PW-7, the prosecution version that he saw that the appellant was having a knife in his hand and was quarrelling with the deceased gets corroboration from the evidence of PWs 11 and 12 to whom he disclosed the incident immediately. On the basis of the said information, within one hour, FIR was lodged disclosing the name of the appellant as the person who had inflicted the knife-blow. A number of incised wounds are found as per the post-mortem report. The prosecution version gets further corroboration from discovery of Muddamal knife containing human blood Group "A". Further the bush shirt and banian which were put on by the accused at the time of incident were having extensive bloodstains which were also found containing human blood Group "A". Learned counsel for the appellant, however, contended that the accused is also having Blood Group "A" and that he was having injury on the thigh as per the evidence of the doctor. In our view, there is no substance in his contention because as per the medical evidence, the injuries caused to the accused were minor and that because of such injuries, there would not be extensive bloodstains on the bush shirt and banian put on by the accused. In his Section 313 statement also, the accused has not explained how he got bloodstains on his bush shirt and banian. He has also not denied the recovery of the said bush shirt and banian from his person at the time of his arrest.

24. To the same effect is the view taken by the Apex Court in Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh,

25. In another decision reported in AIR 1971 SC Raj Singh v. The State of Haryana the Hon'ble Supreme Court had observed that:

.. It is now well settled that in each case the Court has to appraise the evidence

to see to what extent it is worthy of acceptance and merely because in one respect the court considers it unsafe to rely on the testimony of a witness it does not necessarily follow as a matter of law that it must be discarded in all other respects as well.... The court has to sift the evidence with care in each case and on full consideration of all the relevant material circumstances to come to a decision which part of the testimony of the witness to accept and which to reject.

26. In the judgment of Gujarat High Court reported in 1997 (III) CCR 277 State of Gujarat v. Ghanshyamsinh (supra) also it was held :-

... We are quite conscious of the fact that PW-1 is a decoy witness who has been declared hostile, but at the same time mere label of "hostility" should not and can not be permitted to prevent and prejudice any court from examining the over all content of his evidence in its total perspective. A prosecution witness can be hostile in part or wholly. That is to say, there can be a decree of hostility to the prosecution. In other words, to the extent prosecution witness does not support prosecution case that much part of his evidence can, rather must, be kept out of the consideration, but at the same time to the extent it supports the prosecution case, which in turn is not rendered improbable or false in cross-examination by defense Advocate, the same can to that extent certainly and must be accepted.

27. Learned counsel for the respondents on the strength of the above decisions of the Apex Court contends that the evidence of PW-3 and PW-5 (the so-called hostile witnesses) ought not to be wholly discarded. Without prejudice to his said contention he, however, submits that even if the same is disregarded in its entirety, there is enough proof to establish the guilt of the petitioner by way of circumstantial and other link evidence. This is sought to be rebutted by counsel for the petitioner by contending that the injury sustained by the deceased could well have been sustained by a fall and that in order to rope in and falsely implicate the accused, firewood lying near to the place of occurrence has been used by the prosecution so as to link the petitioner with the alleged offence. This link evidence, counsel for the petitioner has contended, was not sent for Chemical analysis as there was no blood on it and hence cannot be used against the petitioner.

28. In our considered view, this argument is of no avail to the petitioner in the face of the post mortem report of the deceased and the opinion of the expert witnesses, namely, PW-2 Dr. Nasser Ahmed Awan, Block Medical Officer and PW-4 Lt.Col. P.K. Murthy, Surgeon, Base Hospital. that the kind of injury suffered by the deceased could have been sustained only by a blow of a danda, and not by falling down as suggested by the petitioner, and that when a danda is hit on the scalp, the danda will not be stained with blood, because scalp is very thick tissue of the body and blood will take some time to come on the surface. Thus, according to the medical evidence on record, the deceased died because of the huge collection of blood in the scalp and pressing of the brain by the collected blood. The danda (Exhibit-17) was shown to the expert witnesses who categorically opined that the injuries sustained by the deceased could have been

caused by hit of the said danda. It has also come in evidence against the petitioner that the surface of the place where the scuffle took place was cemented, so the kind of injury sustained by the deceased could not have been sustained by falling down as sought to be made out by the petitioner.

29. Keeping in view the entire conspectus of evidence recorded by the General Security Force Court, in our considered opinion, the contention of learned Counsel for the petitioner that the present case is a case of "NO EVIDENCE" against the petitioner is not tenable. The record shows that the General Security Force Court meticulously examined the evidence of the prosecution witnesses, took the advice of the Judge Advocate General through the recording of evidence and gave full opportunity to the petitioner to defend his case. Even otherwise, it is trite that the Army Act is a self-contained comprehensive Code and governs the working of a disciplined force. The provisions of Section 5 of the Code of Criminal Procedure render the provisions of the Code inapplicable in respect of matters covered by such special laws. Thus, ordinarily there is a finality to the findings arrived at by the competent authority in the court martial proceedings. While exercising powers of judicial review under Article 226 of the Constitution, it is well settled, this Court cannot either sit in appeal or re-appreciate the evidence.

30. Judicial Review is a basic feature of the Constitution of India which, it is settled law, can in no situation be altered or taken away. In *L. Chandra Kumar Vs. Union of India and others*, , it has been held that the Parliament cannot insert a provision on the Constitution, which would take away the right of judicial review of the High Court under Article 226 of the Constitution of India. All statutes must, thus, be construed in such a manner so that right of judicial review of citizen may be effectively safeguarded.

31. In *B.C. Chaturvedi Vs. Union of India and others*, , the Supreme Court observed that "judicial review is not an appeal from a decision but a review of the manner in which the decision is made and the power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of law.

32. In *Major Anil Behl No. 3141 is (Ex.) v. Union of India and Ors.* 1999 I AD (DELHI) 447, one of us (Dr.M.K. Sharma, J.) has held as under:-

10. This court exercising jurisdiction only under Article 226 cannot re-appreciate the evidence adduced before the Court Martial like an ordinary criminal court and scrutinise each part thereof to see whether the charges leveled against the petitioner are proved or not. Even if it is found that there is some evidence on record which implicates the petitioner with the offence alleged in the charges, this Court will have no jurisdiction to sit in appeal upon the verdict and sentence of the Court Martial. In a writ petition filed against the proceedings of the General Court Martial the court cannot act like an ordinary criminal court and sit

in appeal against the findings recorded by the trial court. Since the counsel for the petitioner as also the counsel appearing for the respondent referred to some of the records of the Court Martial proceedings. I have looked into the said proceedings to satisfy myself with regard to validity and merit of the submissions of the petitioner that there is no evidence at all on record to implicate the petitioner with the offence alleged in the charges except for the retracted confession. The statements of the witnesses made before the General Court Martial which was also considered by the General Court Martial while giving its verdict do prove and establish that it cannot be said that there is no other evidence at all except the retracted confession to fasten liability on the petitioner with regard to the offence alleged against him. In my considered opinion, Therefore, there is no merit in this submission of the learned Counsel for the petitioner, which stands rejected.

33. A learned single Judge of this Court in *Trilochan Joshi and Ors. v. UOI* 24 (1983) DLT 13 SN has held as under:-

That as observed by this Court in *Cr. W. Nos. 53 and 74 of 1979* decided on 7.4.1981, "Clause (4) of Article 227 of the Constitution provides that the High Court has no power of superintendence over any court or tribunal constituted by or under any law relating to the armed forces. It is said that such courts and tribunals are courts of honour. Their business is to find the truth. They are instrumentalities through which the President maintains discipline in the armed forces. They are called courts but are administrative in character. They are created ad hoc. They are short and swift. They only make recommendations. They are efficient. But being exclusive they are liable to abuse and since they form part of our criminal justice system, the law does not leave the members of the armed forces entirely to the mercy of their compeers. They are not exposed to public glare but have, Therefore, been subjected to limited judicial review. In *Ram Murthi Wadhwa v. Union of India*, (1976)2 Del 691, this Court held that under Article 226, a writ of certiorari can be issued against a court martial if it is not duly constituted or it had no jurisdiction over the person or the subject matter of the charge or there is an error of law apparent on the face of the record or the principles of natural justice were violated so as to result in miscarriage of justice. The court can also intervene where any fundamental right of the petitioner has been violated, vide *Capt. Harish Uppal v. Union of India and Ors.* AIR1983 SC 258 . But the findings of fact reached by it as a result of the appreciation of evidence cannot be reopened or questioned nor can they be challenged on the ground that the evidence before it was insufficient or inadequate to sustain the impugned finding. However, a writ of certiorari can be issued if it is shown that in arriving at the said finding, it has erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding or if a finding of fact is based upon no evidence because all this would be regarded as an error of law. Such error should be self-evident and not dependent upon elaborate examination of the record. It is a working test but not an unfailing one.

Experience shows that it is not usually difficult to decide whether the impugned error of law is apparent on the face of the record or not, vide *Shri Ambica Mills Co. Ltd. Vs. S.B. Bhatt and Another*, , and *Syed Yakoob Vs. K.S. Radhakrishnan and Others*, .

34. In *Union of India and Another Vs. Charanjit S. Gill and Others*, , the Supreme Court held as under:-

At the outset, we must make it clear that the plenitude of power available to this Court under Article 226 of the Constitution is not the same as that available to a Court hearing an appeal against conviction. It is axiomatic that judicial review is not an appeal from a decision but a review of the manner in which the decision is made and the power of judicial review is meant to ensure that the judicial or quasi-judicial Tribunals exercising quasi-judicial power do not exceed their statutory jurisdiction and correctly administer the law laid down by the statute under which they act. The judicial review is not deigned to ensure that the conclusion on which such Tribunal reached is necessarily correct in the eye of the Court. *B.C. Chaturvedi Vs. Union of India and others*, In *S.N. Mukherjee Vs. Union of India*, , it was held that the proceedings in respect of Court-Martial can be quashed in exercise of power of judicial review if they suffer from a jurisdictional error or any error of law apparent on the face of the record. [See also *Ex. Major R.S. Budhwar Vs. Union of India (UOI) and Others*, .

35. In *Union of India and Anr. v. Captain S.S. Mehta*. 2001 V AD (Delhi) 661, a Division Bench of this Court has held as under:-

3. Assailing validity of the impugned judgment, the learned Counsel for the appellant has strenuously urged that the learned single Judge has committed a patent illegality by setting aside the respondent's conviction and sentence on re-appraisal of the evidence adduced by the prosecution before the General Court Martial. We find considerable force in the said submission of the learned Counsel. It is well settled that the proceedings in respect of court martial can be quashed in exercise of power of judicial review if they suffer from a jurisdictional error or any error of law apparent on the face of the record. *S.N. Mukherjee Vs. Union of India*, ; *Ex-Major R . S. Budhwar v. UOI and Anrs.* 58 (1995) DOT 339 D.B. and *Balwan Singh v. UOI and Ors.* 87 2000 DLT 229

4. ...

5. In the instant case the learned Single Judge meticulously juxtaposed the evidence of the prosecution witnesses on the disputed points and held that the evidence adduced by the prosecution does not inspire confidence and on the ground alone he has set aside the respondent's conviction and sentence. It is equally well settled that plenitude of power available to this Court hearing an appeal against conviction. It is axiomatic that judicial review is not an appeal from a decision but a review of the manner in which the decision is made and the power of judicial review is meant to ensure that the judicial or quasi judicial Tribunals exercising quasi judicial powers do not exceed their statutory

jurisdiction and correctly administered the law laid down by the statute under which they act B.C. Chaturvedi Vs. Union of India and others, As noticed earlier, the learned Single Judge has re-appreciated the evidence adduced by the prosecution as if he was hearing an appeal against a conviction in a criminal case. Consequently, we are constrained to observe that the learned single Judge has exceeded his jurisdiction by re-appreciating the evidence and holding that the prosecution evidence is insufficient to sustain the respondent's conviction. In our opinion, the evidence of complainant Bhoop Singh alone is sufficient to sustain the conviction of the respondent for the offence complained of. That being so, the impugned judgment of the learned Single Judge cannot be sustained in law.

36. In S.N. Mukherjee's case (supra), the Constitution Bench while dealing with a case wherein the appellant had challenged the validity of the findings and the sentence recorded by the General Court Martial held that the Supreme Court under Article 32 and the High Court under Article 226 have the power of judicial review in respect of proceedings of court martial and the proceedings subsequent thereto and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record.

37. In the case of General Court Martial and Others Vs. Col. Aniltej Singh Dhaliwal, , the Supreme Court after referring to its earlier decisions in Bhagat Ram's case (supra), in B.C. Chaturvedi's case (supra) and S.N. Mukherjee's case (supra) held that the High Court had erroneously set aside the findings of the court martial on some of the charges and upheld the same.

38. In Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), , the Apex Court has held that some minor deficiencies in the trial may not be considered for the purpose of exercising the power of judicial review. It went on to state that it was not necessary for the High Court to minutely examine the record of the General Court Martial as if it was sitting in an appeal. In paragraph 23 of its judgment, the scope of judicial review in court martial proceedings was delineated as follows:-

23. 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 the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law. It has been rightly said that court-martial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is

preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, defense Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. 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 the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment.

24. After ourselves examining the record of the court-martial, we find that the High Court completely misdirected itself in coming to the conclusion that the respondent was denied reasonable opportunity to defend himself. He was given copies of all the relevant papers and also given opportunity to inspect whatever record he wanted; allowed services of a civilian counsel; special advance was given to engage the services of civil counsel as requested by the respondent; there was no rule to give further advance to engage yet another civil counsel when the first one withdrew; the respondent was not hampered by paucity of funds as made out by him; no fault could be found with the convening officer if the respondent himself did not avail of the services of a defending officer when provided; cross-examination of important witnesses was deferred at the request of the respondent; and he had participated in the recording of Summary of Evidence without raising any objection. The General Court-Martial took into consideration all the evidence and other materials produced before it; found the respondent guilty of the charge and sentenced him to be dismissed from service. Pre-confirmation petition submitted by the respondent was rejected by the Chief of the Army Staff and findings and sentence of the General Court-Martial were confirmed by him. Thus, examining the case of the respondent from all angles which led the High Court to set aside his conviction and sentence, we are satisfied that there was no irregularity or illegality and the respondent was provided with reasonable opportunity to defend himself and the proceedings were fair. We, Therefore, set aside the impugned judgment of the High Court and dismiss the writ petition filed by the respondent.

39. In another decision rendered by the Supreme Court in the case of Union of India and Others Vs. Himmat Singh Chahar, and in a subsequent decision of

Supreme Court relying upon its earlier decision in Major A. Hussain's case (supra) etc. while considering the scope and ambit of the High Court's power of judicial review of court martial proceedings and defining the parameters thereof held as follows:-

3. In view of the rival submissions at the Bar the short question that arises for consideration is what would be the extent of the jurisdiction in exercising power under Article 226 of the Constitution over the findings of the authority in court-martial proceedings? The defense personnel serving in the Army, Navy or Air Force when commit any offence are dealt with by the special provisions contained in the Army Act, 1950 or the Navy Act, 1957 or the Air Force Act, 1950 and not by the normal Procedure Code. The said Navy Act is a complete code by itself and prescribes the procedure to be followed in case it is decided that an officer should be tried by a court-martial. The Act also provides sufficient safeguard by way of further appeal to the Chief of the Staff and then ultimately to the Union Government.

4. Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of the Naval Staff and then by the Union Government then ordinarily there should be a finality to the findings arrived at by the competent authority in the court-martial proceedings. It is of course true that notwithstanding the finality attached to the orders of the competent authority in the court-martial proceedings the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceedings or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a power of an appellate authority permitting the High Court to reappreciate the evidence and in coming to a conclusion that the evidence is insufficient for the conclusion arrived at by the competent authorities in court-martial proceedings. At any rate it cannot be higher than the jurisdiction of the High Court exercised under Article 227 against an order of an inferior tribunal. This being the parameter for exercise of power of judicial review against the findings of a competent authority in in court-martial proceedings, and applying the same to the impugned judgment of the High Court we have no hesitation to come to the conclusion that the High Court overstepped its jurisdiction in trying to reappreciate the evidence of Mrs. Nirmala Sharma and in coming to the conclusion that her evidence is not credible enough to give a finding of guilt against the respondent of a charge u/s 354. We have also perused the statement of Mrs. Nirmala Sharma and the conclusion becomes inescapable on the basis of the said statement of Mrs. Nirmala Sharma that the respondent has been rightly found to have committed offence u/s 354 by the authorities in the court-martial proceedings.

40. In another decision *Union of India and Others Vs. R.K. Sharma*, , the Supreme Court succinctly stated the law relating to the exercise of power of judicial review under Article 226 of the Constitution. It was held by the Supreme Court that the High Court under Article 226 or 227 and the Supreme Court under Article 32 should not interfere with the punishment imposed in Court Martial Proceedings merely on compassionate grounds such as it being disproportionately harsh. It was further held by the Supreme Court that the law on the subject had been aptly set out in the case of *Major A. Hussain* (supra) wherein it had been held that the High Court should not allow the challenge to the validity of conviction and sentence of the accused if it is manifestly clear that the procedure prescribed by the Army Act, the Army Rules, defense Service Regulations and other administrative instructions of the Army have been followed.

41. Applying the ratio of the above decisions of the Supreme Court to the facts of the instant case and on examining the records we are satisfied that the proceedings of the court martial have been conducted in accordance with the rules and every possible opportunity has been afforded to the petitioner to defend his case. We are also of the considered opinion that the evidence adduced by the prosecution is sufficient to sustain the conviction of the petitioner for the offence punishable u/s 304 Part II of the IPC, though as noticed above it is not within the purview of this Court to examine the sufficiency of evidence adduced. We hold that there is no procedural error or any lapse in the conduct of the court martial so as to warrant interference of this Court in exercise of its powers of judicial review under Article 226 of the Constitution. We, Therefore, hold that the challenge in this writ petition to the proceedings of the court martial and its findings call for no interference by this Court. The writ petition is dismissed. However, in the facts and circumstances, there will be no order as to costs.