

(1992) 08 MP CK 0012

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1774 of 1990

Purshottum Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-08-1992

Acts Referred:

Army Act, 1950 — Section 153, 41
Army Rules, 1954 — Rule 69, 70, 72
Constitution of India, 1950 — Article 226, 72
Penal Code, 1860 (IPC) — Section 300, 302, 304, 79

Citation : (1993) 38 MPLJ 71 : (1993) MPLJ 71

Hon'ble Judges : T.N. Singh, J; Shacheendra Dwivedi, J

Bench : Division Bench

Advocate : Madhukar Rao, for the Appellant; N.P. Mittal, for the Respondent

Judgement

T.N. Singh, J.

In this Writ Petition, the life sentence passed on 11-7-1988 by the General Court Martial which assembled at Gwalior on 24-5-1986 is challenged by the convict who was tried for committing the civil offence of murder contrary to Section 302, Indian Penal Code. He is also dismissed from service. After pronouncing the sentence, "recommendation to mercy" was pari passu made -- "the accused may not be made to undergo the full term of the sentence". The confirmation of sentence by G.O.C., 36 Infantry Division (Respondent No. 3) is also challenged.

A chequered career this petition has had in this Court and about that, few words we must say. Hearing was piecemeal, on different dates, on and from 7-1-1992. It concluded on 21-2-1992 when Order was reserved. In the course of preparation of the Judgment, we faced some difficulty in dealing with the main contention based on Section 79, Indian Penal Code. We found materials available to us insufficient to deal with the plea because from the "Summary of Evidence" recorded u/s 23 of the Army Rules we found new vistas of arguments opened to press the plea on the basis also of Rules 24, 28 and 36 of the Army Rules. We

accordingly ordered re-hearing and when we heard the matter again on 25-4-1992, we told Shri Mittal, Central Government Standing Counsel, to make available to us the proceedings of the "Court of Inquiry" relating to the incident. After records came, we heard counsel on 10-8-1992, and today also, we heard them before disposing of finally today this petition. We are distressed that despite our categorical direction, the proceedings of the "Court of Inquiry" are not made available to us. In this connection, it is necessary to point out the right of the accused petitioner in that regard contemplated under Rule 184 which respondents have violated by withholding the relevant records of the "Court of Inquiry".

Petitioner's enrolment No. is 4462568-M. He was a Sepoy of 13 Sikh Light Infantry Regiment and on the date of occurrence he was on duty at Rahon Post at the Indo-Pak border in Kargil sector. During the course of Court Martial, as many as 13 witnesses of prosecution were examined and the Key-witness is P.W.7, Ajmer Singh; Sep. Gurbax Singh, also a platoon personnel, was examined as a Court witness. P.Ws.7, 9 and 10 deposed as eye-witnesses. What is undisputed is that on the date of occurrence, 18-8-1985, two Armymen lost their lives at the same place, Rahon post, while on duty. They are L. Hav. Siri Singh and Sep. Avatar Singh. On the night of 18-3-1985, around 21.30 Hrs. the ghastly tragedy took place at the Border Post in the Platoon comprising of nine persons, headed by Naib Sub. Sadha Singh." It is undisputed that deceased L. Hav. Siri Singh as also Sep. Avatar Singh were subject to his immediate command and the Platoon was guarding the border at a height of 12,000 ft. At those dizzy heights, in the cold night, some of the members of the Platoon appear to have succumbed to the temptation of Baccus and there was a spree of drinking bouts. It is not necessary to deal with the evidence which has come in detail in respect to the ceric incident which took the lives of two persons except stating that there was a single "Court of Inquiry" for that incident. That is clear from the record but what is unclear is another thing to which we will revert in due course.

First, few words about the prosecution case, projected in the opening address of the Prosecution Counsel, Annexure P/5. Deceased Avatar Singh and some other persons of the Platoon, it is stated, had consumed liquor on the date of occurrence, in excess of their free quota. Deceased quarrelled with petitioner and P.W.7 Ajmer Singh and the latter reported the matter to Naib Sub. Sadha Singh. Some of his colleagues in the Platoon gave the deceased a good beating. Besides P.W.7, Sep. Chhinderpal Singh (P.W.9) and Sep. Jaspal Singh (P.W.10) were also involved in the fracas. Petitioner had shot the deceased out of revenge because he had picked up quarrel with him demanding more meat to be taken by him with the liquor. It is surprising that the address blacked out completely the killing in the course of the same incident L/Hav. Siri Singh though it spoke of the conduct and character of L/Hav. Bikkar Singh, charged and tried separately for Siri Singh's murder. He is stated to be a sodomist corrupting young Sepoys ; he was otherwise too unruly and mischievous contributing to "mismanagement" at the Post where "vices and vengeance "were rampant.

What is undisputed is that there was arraignment separately of petitioner who was tried singly for the murder of Sep. Avatar Singh; Naib Sub. Sadha Singh and Hav. Bikkar Singh were jointly tried for the murder of L. Hav. Siri Singh. Court Martial was convened separately and trial was held separately of the two sets of accused. What is undisputed and clear is also that at the stage of "Court of Inquiry" evidence of witnesses in regard to the incident involving three accused was recorded with respect to both killings and there is no separate "Summary of Evidence" for two separate arraignments. What is unclear unfortunately even today, from records submitted, is how and when the Commanding Officer took decision under Rule 24(2) to apply for convening not one, but two Court Martials. On receipt of telephone call from Hav. Bikkar Singh, P.W.2, Maj. Madhukar Sharma, reached the spot immediately as he was told of the post being fired upon by Pakistani troops. He has deposed that he informed the Commanding Officer, Lt. Col. R.S. Sethi (P.W.11) that it was not the case of firing of Pakistan troops but of internal fight of troops of Ration post as he found out on inquiry. Dead bodies of deceased Siri Singh and Avatar Singh were discovered on 20-3-1985 after the "Court of Inquiry" headed by Maj. V.K. Talwar (P.W.13) started investigation at site on 19-3-1985. He deposed that he did not find Naib Sub. Sadha Singh drunk and that he found the petitioner in "normal mood".

From the evidence of the Commanding Officer (P.W.11), it is disclosed that on 12-4-1985, he had read over the charge to the accused petitioner when his statement also was recorded, proved as Ex. O in the course of trial. Petitioner has stated : "I was ordered by No. 4446472-F, Nb. Sub. Sadha Singh to shoot No. 4457067-K Sep. Avatar Singh, which I did. It was also on the orders of Nb. Sub. Sadha Singh that the body of No. L/Hav. Siri Singh and No. 4457167-K Sep. Avatar Singh were thrown into enemy territory. However, the material we wanted, we could not get from the records perused as the proceedings of the "Court of Inquiry" are not produced. It would then have been possible for us to view affirmatively from the Constitutional angle the act of the Commanding Officer deciding to hold two separate Court Martials with Courts constituted by separate members to try two sets of accused with respect to the same incident. In his evidence in Court, P.W.11 did not disclose anything in that regard. Maj. Talwar (P.W.13) was second-in-command of the Unit and he is also silent on this aspect and surprisingly, Maj. Rakesh Mohan is not examined though it is he who had recorded on 16-4-1985 another statement of the petitioner. That is proved by P.W.12 Darshan Singh who was the attesting witness. That statement is before us as Annexure P/16 wherein petitioner stated categorically, inter alia : "....I was given the order to shoot Sep. Avatar Singh by Nb. Sub. Sadha Singh. I did not shoot Sep. Avatar Singh of my own. I shot Sep. Avatar Singh because I was given an order by Nb. Sub. Sadha Singh". It is a different matter that later during trial, he disowned the statement and asserted that it was not voluntarily made.

That a "Court of Inquiry", contemplated under Army Rule 177 was ordered by him is admitted by P.W.11 in his evidence, but he has not deposed anything

about its scope and what report, if any, he had received of the enquiry. In Prosecution's opening address, the fact mentioned, however, is that "the complainant on the report of investigation and opinion of the Court of Inquiry by his order dated 28-3-1986, charge-sheeted the accused u/s 69 of the Army Act". That order is, however, not produced. Indeed, no materials are produced as would have enabled this Court to screen the decision-making process which resulted in Nb. Sub. Sadha Singh's involvement in the incident concerning Sep. Avatar Singh's murder being totally wiped out. In Ex. O, which is copy of "Record of proceedings before Commanding Officer under Army Rule 22" and is dated 12-4-1985, it is stated that "the charges against the accused have been read out and explained to the accused " and signatures are obtained on that of all the three persons, (1) Nb. Sub. Sadha Singh, (2) L/Hav. Bikkar Singh and (3) Sep. Purshottum Kumar (petitioner). At what stage, in what manner and for what reasons decision was taken to hold two separate trials has not explained and is not disclosed in the records submitted.

Evidently in this case, the Commanding Officer P.W.11, acted under Clause (c) of Army Rule 22(3) and "Summary of Evidence" was recorded as contemplated under Rule 23. Thereafter, acting under Rule 24(1)(a), on consideration of the statement of the petitioner and other evidence recorded under Rule 23, he decided to remand the accused "for trial by Court Martial". Although Sub-rule (2) of Rule 24 authorised him to "apply to the proper military authority to convene a Court-Martial", he was bound to keep in view the requirements of Rule 28. He is evidently not authorised to act arbitrarily for the important reason that Rules 22 to 24 are mandatory in so far as they concern an accused who is not an "Officer", as held in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, He had to decide how to apply in a particular case, whether for convening one or more Court Martials and that decision has to be taken with due application of mind to the statutory provisions and the facts and circumstances of the case as that was bound to have an important bearing on the fairness of the trial. His duty to take an intelligent and reasonable decision in mat regard is mandated also by Section 121 of the Act prohibiting a re-trial in case of a person governed by the Acts and it flows also from Rules 28 and 35. While Rule 28(1) speaks of the requirement of the charge-sheet to deal with "whole issue or issues to be tried by Court Martial at one time", Rule 35(2) expressly contemplates "any number of accused persons, although not charged jointly, may be tried together for an offence averred to have been committed by one or more of them or have been abetted by the other or others". What is clearly reflected in Ex. O is that P.W.11, while joining the three accused in the "Hearing of charge" under Rule 22, he may have found materials in the "Court of Inquiry" to proceed in that manner otherwise there is no explanation for his acting in that manner.

The inter-relation and inter-play between Rules 24, 28 and 35 is to be kept in view in a case like this. If that is not done, the decision which is to taken by Commanding Officer under Rule 24(2) may affect fairness of trial of an accused who is governed by the Act and who is not an "Officer". For this view, reference

may be made to the holding in *Ranjit Thakur Vs. Union of India (UOI) and Others*, that "the procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary jurisdiction of the Court Martial and the severity of the consequences that visit the person subject to their jurisdiction". In the instant case, the grievance of the petitioner is substantial of his being deprived of the reasonable opportunity of proving that his case was governed by General Exception of Chapter IV of Indian Penal Code, contemplated in Section 79 to claim acquittal by shifting the blame on Nb. Sub. Sadha Singh. The abettor has neither been charged for his involvement in the murder of Sep. Avatar Singh, nor he is tried jointly along with the petitioner by same Court Martial. Unfortunately, as stated above, nothing is disclosed from records and no explanation also is forthcoming for the decision taken to apply for Separate Court Martials to hold separate trial. In *S.N. Mukherjee Vs. Union of India*, also a case under the Army Act, the amenability of any decision-making process under the Act and the Rules to judicial review is stressed by the Constitution Bench, observing that recording of reasons is necessary to impart the process a degree of fairness and exclude chances of arbitrariness.

However, we would not like to base our decision in this case on the propositions enunciated above because in categorical terms in the Writ Petition the point is not agitated and it has to rest on the tenuous ground of respondents default in compliance with our direction to produce the relevant records. Although we entertain grave doubts about fairness of the trial in this case because of the Commanding Officer's lapse in neither charging the abettor Nb. Sub. Sadha Singh nor holding his joint trial with petitioner with respect to the charge of murder of Sep. Avatar Singh and in that regard, violating the norms of Rules 24, 28 and 35 of the Army Rules, we do not propose to declare the trial void. We are still of the view, for reasons to follow, the Court Martial, trying the petitioner, acted without jurisdiction in convicting and sentencing him for the offence of murder u/s 302, Indian Penal Code because he could only be convicted and sentenced u/s 304, Part II, Indian Penal Code. We have to follow *Ranjit Thakur* (supra) to scan the Court Martial's decision-making process in regard to the sentence passed as that falls within the ken of our Constitutional competence inhered by the Writ jurisdiction. Indeed, as observed in *Ranjit Thakur*, it is directed not against the decision of the Court Martial, but against its decision-making process which is to be examined to see if it suffers the taint of irrationality or perversity. In the instant case, petitioner was charged u/s 302, Indian Penal Code and the finding recorded by the Court Martial is of his being guilty there under. On that basis life sentence is imposed on him, holding the charge proved. In reaching its conclusion, the ingredients of Section 300, Indian Penal Code, being overlooked and the case of the accused not being considered in terms of clause "Fourthly", a legal finding obviously has not been recorded; not a legal sentence has been passed. The finding and sentence are both without jurisdiction and are liable to be reviewed by us in the exercise of this Court's

certiorari jurisdiction. It is well-settled that any order passed by any statutory authority which suffers from an error of law apparent on the face of record, is liable to be reviewed and corrected by a Writ of Certiorari.

"Culpable homicide" is defined in Section 299, Indian Penal Code; when it amounts to the offence of murder and when not is to be read in Section 300. If the act by which the death is caused is done with the intention to cause the death, but if the act is committed by a person who has an "excuse for incurring the risk of causing the death" (as per clause "fourthly"), he cannot be held guilty u/s 302, Indian Penal Code as his act would not amount to murder u/s 300. It would, of course, depend on the facts and circumstances of each case as to how and when a valid "excuse" contemplated u/s 300, Indian Penal Code can be claimed and found established. However, in the instant case, Exception 3 of Section 300 plays an important role by providing the necessary guidelines to test the validity of the "excuse" established in evidence. Although the petitioner cannot claim that he was "acting for the advancement of the public justice", it cannot be denied that he was a public servant and he was aiding a public servant in the maintenance of law and order at Rahon Post for which the platoon Commander, Nb. Sub. Sadha Singh was responsible. In our view, on evidence, it cannot be denied that he was acting in "good faith" and he believed his act of obeying the "Command" of the Naib Subedar to be "lawful and necessary for the due discharge of his duty as such public servant and without ill-will" against deceased Avtar Singh whose death he caused. We have already referred to the materials which have come on record in that regard in the shape of his two statements made on 12-4-1985 and 16-4-1985, the evidence of P.Ws.7 and 9 and the case which the prosecution had itself set up against him, stated in the opening address of the Prosecution Counsel.

Two statements of the petitioner, we have already reproduced and we have expressed the view that his subsequent conduct of retracting those statements has no bearing on the question mooted. To certain significant aspects of the testimony of the two eye-witnesses, we may refer briefly. It is the evidence of P.W.7 that immediately before he was shot dead, deceased Sep. Avatar Singh was drunk and he was moving from one bunker to another armed with his rifle threatening to kill anyone coming in his way. He had even been firing shots which did not, however, hit anybody. He was somehow overpowered and brought to Nb. Sub. Sadha Singh who abused him and "asked the accused to shoot at him, as otherwise he would have killed all seven of us". P.W.9 deposed that he was helped by P.W.7 in carrying deceased Avatar Singh in drunken state to Nb. Sub. Sadha Singh's bunker where the latter slapped him and ordered the accused "shoot him; he would have killed all of us today". From the records it appears that the petitioner has read upto 9th Class only. He was enrolled on 20-6-1982 and had put in hardly three years' service. He was aged about 23 years when the occurrence took place. Besides the testimony of the witnesses and his own statements, these circumstances are also to be taken into consideration to test the validity of his "excuse". His religious adherence to "military discipline" and

dutifully carrying out the command of Nb. Sub. Sadha Singh obviously sounded his death knell. He lacked maturity and sagacity due to his young age and meagre education and had his own perception of his duty and of the possible consequences of his disobeying the command which would have exposed him the risk of suffering punishment u/s 41 of the Act. His act was not tainted by malice and it was done in good faith without any premeditation with the singular object of carrying out the command of Nb. Sub. Sadha Singh. It is, therefore, difficult to deny him the defence of the "excuse" contemplated u/s 300, Indian Penal Code.

Our attention is drawn to certain decisions dealing with similar cases. Charan Singh is a D. B. decision. AIR 1959 East Punjab 321, dealing with the exception contemplated under Sections 76 and 79 and interpretation, in that context of Section 300, Indian Penal Code. On facts, it was found that the order of superior authority was unlawful and, therefore, the "exception" was held not established. In Chaman Lal, AIR 1940 Lahore 210 the exception pleaded u/s 76, Indian Penal Code was again rejected on the ground that the several accused "were all engaged in an illegal act" and the conduct of the accused involving moral turpitude was also adverted to. In Allahrakhio, AIR 1924 Sind 33, the "excuse" pleaded in terms of Section 300, Indian Penal Code was rejected on the footing that the superior officer's order was illegal. In that case, the police party of six persons had gone to a village and demanded water and food when the Head Constable lost his temper and asked one of the constables to fire and teach the villagers a lesson.

On facts of this case, we have no hesitation to reach the conclusion that this case has many silent features which are difficult to be ignored. We cannot deny consideration to the place of occurrence, the time of occurrence, the situation at the locale (ground-realities) and the requirements of strict discipline in armed forces to be maintained in a hostile border demanding high degree of defence preparedness. Petitioner Purshottum Kumar's perceptions of the situation that prevailed when the occurrence took place are to be examined in that light to assess the validity of the "excuse" for firing the shot at deceased Sep. Avatar Singh on the order of his immediate superior Sadha Singh, the Commandant of the Platoon guarding the border at the post.

We conclude, therefore, that the finding of the Court Martial holding guilty the petitioner u/s 302, Indian Penal Code and the sentence of life imprisonment imposed on him are both without jurisdiction inasmuch as they are tainted with the infirmity aforestated. Factors which ought to have entered the decision-making process of the Court Martial have obviously escaped their attention and consideration necessary for reaching the requisite legal finding and imposing the legal sentence on the petitioner. We are constrained, therefore, to modify the finding and sentence of the Court Martial and correct the error.

Having reached the conclusion that the finding and sentence of the Court Martial suffer jurisdictional infirmity for the reason and in the manner, aforestated, we are consequently constrained also to hold that there was no scope for the same

to be confirmed in terms of Section 153 and Rule 70. The confirmation cannot therefore be said to have attained finality and is, along with the finding and sentence of the Court Martial, liable to be interfered on the Writ Side by this Court notwithstanding the remedy contemplated u/s 164. However, it appears from the records that the petitioner did complain to the Chief of Army Staff against his conviction, sentence and confirmation thereof and by order dated 19-9-1988 his petition has been rejected. This Court's decision in A.K. Handa's case, 1988 MPLJ 184, cited in respondents' return raising preliminary objection to the maintainability of this petition has, therefore, no application; so also *Som Datt Datta Vs. Union of India (UOI) and Others*, Vidya Prakash, AIR 1988 SC 705, and *Major G.S. Sodhi Vs. Union of India (UOI)*, cited by Shri Mittal, during hearing.

We may still observe, however, that in the instant case the order of confirmation has been rightly impugned also on the ground that it does not manifest consideration of "recommendation of mercy". Non-application of mind to the recommendation is indeed writ large on the order of confirmation dated 13-9-1986 (Annexure P/14) which refers only to the "finding and sentence" and "confirms" the same. It is true that the Confirming Authority is not bound to accept the "recommendation" but total non-consideration thereof affected its jurisdiction for the power to confirm statutorily bestowed is to be reasonably and not arbitrarily exercised. Army Rule 69 contemplates proceedings of a General Court Martial being submitted "for review to the Deputy or Assistant Judge -- Advocate General of the Command who shall then forward it to the Confirming Officer". It may be true that the Confirming Authority may not have power to grant pardon reserved for the President under Article 72 of the Constitution but it has power still to be exercised in terms of Army Rule 72 to alter any "finding" of the Court Martial "and if it seems just, mitigate, remit or commute the punishment awarded". We have no doubt that the statutorily contemplated "mercy-recommendation" is to be considered also at the time of confirmation of the finding and sentence because the provision in that regard would be otherwise rendered otiose. If the President's exercise of power of pardon under Article 72 can be judicially reviewed as held in *Kehar Singh and Another Vs. Union of India (UOI) and Another*, by the Constitution Bench, it will be too tall a claim to be sustained that the Confirming Authority can act arbitrarily under Army Rule 70 and refuse to pay any consideration to the "recommendation for mercy" contemplated under Rule 66.

In the result, the petition succeeds partially. The petitioner is found liable to be convicted u/s 304, Part II, Indian Penal Code and Court Martial's finding is accordingly, modified. His sentence is also modified accordingly as contemplated in law. The life sentence is quashed and we direct that the petitioner, who has already undergone about seven years' sentence, shall be released from confinement he is now suffering at Central Jail, Jammu. A copy of this order shall be mailed post-haste to G.O.C., 36 Infantry Division, C/o 56, A.P.O. A copy of this order shall also be mailed to the Superintendent, Central Jail, Jammu, for

doing the needful in that regard.