

(1990) 12 J&K CK 0004
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 144 of 1986

Ranbir Singh

APPELLANT

Vs

General Court Martial and Another

RESPONDENT

Date of Decision : 18-12-1990

Acts Referred:

Army Act, 1950 — Section 63
Army Rules, 1954 — Rule 101, 105, 147, 95
Constitution of India, 1950 — Article 12, 14, 141, 20, 21
Criminal Procedure Code, 1973 (CrPC) — Section 337
Ranbir Penal Code, 1989 — Section 302

Citation : (1991) CriLJ 2850

Hon'ble Judges : R.P. Sethi, J;K.K. Gupta, J

Bench : Division Bench

Advocate : R.P. Bakhshi, for the Appellant; D.P. Gupta, for the Respondent

Judgement

R.P. Sethi, J.—On the charge of committing murder of Capt. S. K. Mitra of 15th Bn. Jat Regt., the petitioner-accused, a sepoy in the said

regiment, was tried by the General Court Martial (GCM, for short) and sentenced to suffer death by being hanged by neck till he is dead. The

proceedings of the GCM are sought to be quashed on the grounds of violation of the provisions of the Army Act and the rules framed thereunder.

It is prayed that after setting aside the conviction and sentence the petitioner be set at liberty.

2. The facts relevant for the purpose of deciding this petition are : that on 7-3-1984, an escort was detailed consisting of Nk. Hazari Singh as

escort commander, sepoy Mohinder Singh, Nk. Rajinder Singh and the accused for Nk/Clk Rajinder Singh to take him on 8th March, 1984, for

medical examination for his summary court martial to ADS Nowshera. The

petitioner was issued rifle 7.62 mm SLR Butt No. 317 registered No.

CK-9322 and a magazine by the Kote NCO/Hav Dhanpal Singh. Nk. Hazari Singh is stated to have collected 50 rounds of 7.62 mm SLR from

Ratti Ram and in turn issued 10 rounds to the accused and 10 rounds to sepoy Mohinder Singh on 8-3-1984. Nk/Clk Rajinder Singh was taken

by the escort to ADS Nowshera for medical examination. After the medical examination Nk/Clk Rajinder Singh was brought at Bn. Hqrs. for

summary court martial. After reaching the unit location, escort party was replaced by another escort party consisting of Hav Mir Singh, Sepoy

Satir Singh and Sepoy Baljit Singh. As Satbir Singh was not armed with any weapon, sepoy Mohinder Singh was ordered to handover his rifle

with ammunition to him. After the escort party was relieved and before the summary court martial could commence the accused and sepoy

Mohinder Singh were ordered to go away behind the tentfly which was pitched on the adjacent ground. Nk. Hazari Singh after returning behind

the tentfly retrieved 10 rounds. After the summary court martial was concluded at about 12 noon Capt. S. K. Mitra came out of the court room

followed by Nk/Clk Rajinder Singh, Maj RC Tiwari and Sub-Maj. Jagdish Raj Singh. After coming out of the Commanding Officer's room, Capt.

S. K. Mitra was standing between the office of the Adjutant and the 2IC. After handcuffing Nk/Clk Rajinder Singh, he was being taken to the

ground opposite the office complex where the unit personnel had already assembled for promulgation. The moment Nk/Clk stepped down the

steps, he raised his left hand which immediately followed by rifle shots from behind the unit quarter-guard. Capt. S. K. Mitra got bullet hit and he

fell down. Sub Hoshiar Singh attended the injured and after about 5-7 minutes Nk/N.A. Jagdish Singh came who gave first aid to the injured. With

the help of Hav Jagbir Singh, Capt. S. K. Mitra was taken to ADS Nowshera where he was declared dead. The post-mortem was conducted and

it was opined that the gun shot injury received by Capt. Mitra was the cause of his death. The accused is stated to have told Maj P.C. Tiwari, that

he had fired upon the deceased. The accused was taken to the Commanding Officer and enquired as to why he has committed the crime to which

he replied that injustice was being done which he could not tolerate and fired upon Capt. Mitra. When the accused was asked to return 10 rounds

issued to him, he replied that he had fired all of them. Rifle was recovered and examined and it was found that the same had been fired recently.

The forensic expert gave his opinion that the gun had been fired. The accused denied the charges and was tried by the GCM.

3. The GCM examined a number of witnesses, afforded the accused-petitioner an opportunity of being heard and found him guilty for the

commission of the offence punishable u/s 302, C.P.C. and sentenced him to death as stated earlier.

4. We have heard learned counsel for the parties and perused the record.

5. Learned counsel appearing for the petitioner submitted that whole of the proceedings of the GCM were liable to be quashed as the same were

allegedly illegal and against the rules and conducted with a prejudiced mind. It is submitted that the order of the GCM is a non-speaking order

which deserves to be set aside. The petitioner has stated that he was not afforded the facilities provided under law of engaging a counsel of his

choice. It is also argued that he was not provided with a competent defending officer. The petitioner has further alleged that he was not afforded

full opportunity to produce his defence. Benefit of Section 337 of the State Cr. P.C. was not given to him and that the evidence produced was not

reliable.

6. The record of the GCM produced before us shows that it was constituted by the order of Maj General Vinod Badhwa, VVM, GOC, .25 Inf.

Div. on 24-7-1984 and was presided over by Brig. Narrinder Singh Lamba. The accused appears to have been charged on 12-7-1984 and the

trial commenced on 26-7-1984. The order of convening the court martial, the charge sheet and the summary of evidence were read before the

Court. The petitioner is shown to have defended by Mr. Ajit Singh, an Advocate of this Court.

The petitioner was asked as to whether he had any objection to be tried by the court martial to which he replied that he had no objection. In reply

to a question as to whether he wanted an adjournment on the ground that any rule relating to the procedure, before the trial, had not been complied

with or that he had been prejudiced thereby or on the ground that he had not sufficient opportunity for preparing his defence, the petitioner replied

that he wanted an adjournment as he was to engage Mr. R.P. Bakhshi, Advocate,

to defend his case. He stated that his relations have already contacted the learned counsel who had agreed to conduct the case. He further stated. ""I further submit that in case Mr. R. P. Bakhshi is not available I undertake to engage another defence counsel of my choice. I may be given 25 days of adjournment so that my defence counsel gets adequate time to prepare my defence. In case I am unable to engage Mr. R.P. Bakhshi or any other defence counsel of my choice until the next assembly of the court I am prepared to accept and proceed with Mr. Ajit Singh the present defence counsel engaged by the convening authority for me."" The GCM adjourned the case to 22-8-1984 on the advice of the Judge Advocate. On the adjourned date the accused submitted, ""I have not been able to engage either Mr. R. P. Bakhshi or any other counsel of my choice to defend me and I do not want to spend any money from my pocket"". The accused requested for providing him one of the officers as his defending officer. He again gave the list of 7 senior counsel of the Jammu and Kashmir High Court to be engaged for him. After getting the advice of the Judge Advocate the Court decided to over rule the submission of the accused and adjourned the case to 23-8-1984 for allowing the petitioner to prepare his case. On 23-8-1984 when the Court reassembled, the accused submitted, ""I have discussed my case with the defence counsel and the defending officer and prepared my defence. I wish to proceed with the present defence counsel Mr. Ajit Singh engaged by the convening authority to represent me at the trial as I have full faith in him"". The trial commenced thereafter in which the defence counsel Mr. Ajit Singh participated and cross-examined the prosecution witnesses at length. He also submitted his arguments. The trial was concluded on 10-9-1984 and the conviction and sentence recorded as stated earlier.

7. Army rule 101 provides that neither the prosecution nor the accused has any right to object to any counsel, if properly qualified. Counsel is deemed to be properly qualified if he is a legal practitioner authorised to practise with right of audience in a Court of Session in India or if he is recognised by the convening officer in any other country where the trial is held as having in that part, rights and duties similar to those of such legal practitioners in India and as being subject to punishment or disability for breach of professional rules. Rule 95 provides that at general or district

court martial, an accused may be represented by an officer subject to the Act called the defending officer and be assisted by any person whose services he may be able to procure.

8. Mr. Bakhshi has referred to Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, to urge that the petitioner like other

citizens of the country was entitled to all the fundamental rights and could not have been treated differently. The Supreme Court in Prithi Paul

Singh's case (supra) held that a person by enlisting or entering armed forces does not cease to be a citizen as to be wholly deprived of his rights

under the Constitution. It was further observed that in the larger interest of national security and military discipline the Parliament has the power to

restrict or abrogate such rights in their application to the armed forces. While dealing with the cases pertaining to the armed forces it has to be kept

in mind that the army cannot play its role effectively in defending the country if its discipline is jeopardised or allowed to be interfered with on the

grounds of technicalities of procedural law. This Court cannot convert itself into a court of appeal in respect of the decisions of the court martials

constituted under the Army Act or allow the relaxation in the matter which may result in degradation of the morale and breach of discipline having

disastrous results creating chaos and confusion seriously affecting the army and the entire people of the country. However, the rule of law in this

democratic set up is acknowledged and all the actions of the State and the authorities are subject to it. In Prithi Paul Singh's case (supra) also the

Supreme Court only recommended that ""with the expanding horizons of fair play in action even in administrative decision, the universal declaration

of human rights and retributive justice being relegated to the uncivilised days, a time has come when a step is required to be taken for at least one

review and it must truly be a judicial review as and by way of appeal to a body composed of non-military personnel or civil personnel. Army is

always on alert for repelling external aggression and suppressing internal disorder so that the peace loving citizens enjoy social order based on rule

of law"". The Supreme Court further observed, ""We, therefore, hope and believe that the changes all over the English speaking democracy will

awaken our Parliament to the changed value system. In this behalf we would like to draw pointed attention of the Government to the glaring

anomaly that Court martial even did not write a brief reasoned order in support of their conclusion, even in cases in which they impose the death

sentence. This must be remedied in order to ensure that a disciplined and dedicated Indian army may not nurse a grievance that the substance of

justice and fair play is denied to it." Despite the concern expressed by the Supreme Court, the army law stands as it was before Prithi Paul Singh's

case and has to be administered under the Act, rules thereunder and the guidelines issued from time to time.

9. It has been argued on behalf of the petitioner that right to be defended by a counsel of choice of the accused is a right arising out of Articles 20

& 21 of the Constitution and as the petitioner has been deprived of his right to get a counsel of his choice and a defending officer, the whole of the

proceedings are liable to be quashed. Whatever may be the legal position, the fact in the instant case is that the petitioner was properly defended

by the counsel and the defending officer when he stated before the court martial, "I have discussed my case with the defence counsel and the

defending officer and prepared my defence. I wish to proceed with the present defence counsel Mr. Ajit Singh engaged by the convening authority

to represent me at the trial as I have full faith in him." The record reveals that the main eye witnesses in the case were subjected to lengthy and

searching cross-examination by the defence counsel provided with which the petitioner was always satisfied. The defence counsel is also shown to

have submitted his closing address before the court martial which was taken note of by the Judge Advocate in his summing up address Ex. U filed

with the GCM proceedings. The reliance of the learned counsel for the petitioner on Sheela Barse Vs. State of Maharashtra, in support of his

contention that right to get legal assistance is a fundamental right, is misconceived and without any basis. The Supreme Court in that case held that

the legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his wife and personal liberty, is a constitutional imperative

mandated not only by Article 39-A but also by Articles 14 and 21 of the Constitution. In that case the Supreme Court referred to the condition of

a personnel who is lodged in a jail and does not know to whom he can turn for help in order to vindicate his innocence or defend his constitutional

or legal rights or to protect himself against the torture and ill-treatment or oppression and harassment at the hands of his custodians. The Supreme

Court in that case also suggested that lawyers must positively reach to those sections of the humanity who are poor, illiterate and ignorant and

who, when they are placed in crisis, do not know what to do or where to go or to whom to turn. The Supreme Court never held that getting of a

counsel of his choice was a fundamental right of an accused person. We, therefore, are convinced that there has not been violation of any rule in

the conduct of the court martial proceedings and that the petitioner was provided with a counsel to which he did not object and proceeded with the

trial. The plea raised is an after-thought, imaginary and concocted which deserves to be rejected.

10. It has been next contended on behalf of the petitioner that as the order of the GCM was a non-speaking order being opposed to the principles

of natural justice, same was liable to be quashed. The Supreme Court in *Som Datt Datta Vs. Union of India (UOI) and Others*, has held that there

was no express obligation imposed under the Army Act on the Court, confirming authority or upon the Central Government, to give reasons in

support of its decision to confirm the proceedings of the court martial. After considering the provisions of Section 63 of the Army Act, the

Supreme Court held, "Apart from any requirement imposed by the statute or statutory rule, expressly or by necessary implication, we are unable to

accept the contention of Mr. Dutta that there is any general principle or any rule of natural justice that a statutory tribunal should always and in

every case give reasons in support of its decision." Under the present law, no army court martial is required to pass a reasoned judgment while

convicting and sentencing any accused person.

11. It is then submitted by the petitioner that he was not supplied with the copies of the record of the proceedings of the GCM which rendered the

whole proceedings liable to be set aside. From the counter-affidavit it appears that on receipt of his request the petitioner was supplied with the

proceedings in terms of Army Rule 147 which he confirmed as having received vide his letter dated 8-4-1986. In his rejoinder the petitioner has

admitted supplying of the copies of the proceedings even though late. No injustice appears to have been done to the accused on this ground

rendering the proceedings liable to be quashed.

12. The petitioner preferred his appeal which was rejected by the competent

authority by confirming the findings of the GCM. The record reveals that the petitioner was afforded sufficient opportunity to produce his defence evidence and there is no substance in his submission that he was deprived of the opportunity of producing the evidence in defence.

13. Learned counsel for the petitioner wanted us to appreciate the evidence produced before the GCM and independently arrive at the conclusion

as to whether the petitioner was rightly convicted for the commission of offence u/s 302, C.P.C. or not. We fear we cannot accede to the request

of learned counsel for the petitioner in exercise of our powers under Article 226 of the Constitution of India. This Court is not a court of appeal

and cannot substitute its opinion for the opinion of the GCM. The Court martials are exclusively entrusted with the task of appreciating the

evidence and arriving at the conclusions keeping in view the traditions of the army, its discipline, procedure, conventions and professional ethics.

14. It has been argued in the alternative by learned counsel for the petitioner that the death sentence awarded in this case was uncalled for and that

the GCM exceeded its jurisdiction while awarding the sentence. The general principle is that this Court normally cannot interfere with the sentence

awarded after confirmation of the conviction. It also cannot be denied that the question of choice and quantum of punishment is within the

jurisdiction and discretion of the Court Martial with which the constitutional courts would normally not interfere. However, if the sentence is proved

to have been awarded against the provisions of law prevalent in the country, same can be corrected by this Court was all the actions of the

authorities under Article 12 of the Constitution of India are subject to the judicial review. It was held by the Supreme Court in *Ranjit Thakur Vs.*

Union of India (UOI) and Others, : at pages 163 & 164 :

.....Judicial review generally speaking is not directed against a decision, but is directed against the ""decision making process"". The question of

the choice and quantum of punishment is within the jurisdiction and discretion of the Court Martial. But the sentence has to suit to offence and the

offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in

itself to conclusive evidence of bias. The doctrine of Judicial review, would ensure that even on an aspect which is otherwise, within the exclusive

province of the Court Martial, of the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be

immune from correction. Irrationality and perversity are recognised grounds of judicial review. In Council of Civil Services Union v. Minister for

the Civil Service (1984) 3 WLR 1174 (HL) Lord Diplock said :

..... Judicial Review has I think, developed to a stage today when without reiterating any analysis of the steps by which the development has

come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review.

The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety.' That is not to say that further development

on a case by case basis may not in course of time and further grounds. I have in mind particularly the possible adoption in the future of the principle

of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community.....

In Bhagat Ram Vs. State of Himachal Pradesh and Others, this Court held:

It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the

gravity of the misconduct would be violative of Article 14 of the Constitution.

The point to note and emphasise is that all powers have legal limits. In the present case the punishment is so strikingly disproportionate as to call for

and justify interference. It cannot be allowed to remain uncorrected in judicial review.

15. The well recognized principle of law in this country is that death sentence can be awarded in the rarest of the rare cases when the alternative

option is unquestionably foreclosed Bachan Singh Vs. State of Punjab, . The Supreme Court in Rajendra Prasad Vs. State of Uttar Pradesh, , held

that sacrifice of a life is sanctioned only if otherwise public interest, social defence and public order would be smashed irretrievably. Social justice is

rooted in spiritual justice and regards individual dignity and human divinity with sensitivity. Extraordinary grounds and special reasons leaving no

option to the Court but to execute the offender can justify the imposition of death sentence. It further held, ""One stroke of murder hardly qualifies

for this drastic requirement, however, gruesome the killing or pathetic the situation, unless the inherent testimony oozing from that act is irresistible

that the murderous appetite of the convict is too chronic and deadly that ordered life in a given society or locality or in prison itself would be gone if

this man were now or later to be at large. If he is an irredeemable murderer, like a bloodthirsty tiger, he has to quit his terrestrial tenancy.

Exceptional circumstances beyond easy visualisation are needed to fill this bill.

16. In *Ediga Anamma Vs. State of Andhra Pradesh*, , the Supreme Court held that ""While deter-rance through threat of death may still be a

promising strategy in some areas of murderous crime, to espouse a monolithic theory of its deterrence efficacy is unscientific and so we think it right

to shift the emphasis, to accept composite factors of penal strategy and not to put all punitive act in hanging basket but hopefully to try the humane

mix"". It was further held. ""The larger thought that quick punishment, though only a life term, is more deterrant than leisurely judicial death awarded

with liberal interposition of executive clemency and that the stricter checking in illicit weapons by the police deters better as social defence against

murderous violence than a distance (distant?) death sentence, is not an extraneous component in a court verdict on form of punishment.

17. The Supreme Court in *Rajinder Singh v. Union of India* 1978 UJ (SC) 808 held that special reasons must be given for imposing severe penalty

of death sentence. The decisive factors for death sentence are :

(a) The crime may be shocking yet the accused may not deserve death penalty.

(b) The crime may be less shocking yet it may jeopardise the society with the callousness of such lethal economic offender.

(c) The accused may turn a habitual offender or hardened criminal such as a dacoit, robber or a trigger-happy murderer etc. having no nance to be

rehabilitated in a civilised society.

(d) If the officer enjoined to defend the peace of the people are treacherously killed to facilitate perpetration of crime, plunder etc. the accused is

dangerous to the security of life and property of the society.

(e) Death penalty should be sparingly inflicted.

(f) Number of death caused by an accused is not a criterion for a telling decision.

(g) Deaths caused by the accused should not necessarily end in the end of the accused. Destruction of an individual by the King is not his virtuous

act.

(h) Sudden provocation from the victim who initiated violent action.

18. In Dalbir Singh and Others Vs. State of Punjab, it was held:

.....The terrible nature of the murder should not frenzy the Court into necessary 'capital' penalty..... if life imprisonment will prevent further killing. Even in extreme cases, one has to judge whether the social circumstances, personal remorse, the excruciation of long pendency of the death sentence are not adequate infliction. All murders result in the loss of life. That, by itself, is not sufficient to justify the taking of another to make an equation as in a balance sheet.

In Shidagouda Ningappa Ghandavar Vs. State of Karnataka, , the Supreme Court held that the ""rule of normal sentence for the offence of murder

is life imprisonment"" should be observed both in letter and spirit. In Muniappan Vs. State of Tamil Nadu, it was held that when the conviction is for

an offence punishable with death, the judgment should in cases of sentence of death, state special reasons for such sentence.

19. It cannot be disputed that the law declared by the Supreme Court is binding on all courts within the territory of India under Article 141 of the

Constitution. However, in order to find out whether there has been any illegality, rationality or perversity in the instant case we are required to peep

through the procedure adopted and find out as to whether the Court Martial was properly advised regarding the points of law with respect to the

awarding of the death sentence. Rule 105 of the Army Rules deals with the powers and duties of the Judge Advocate who is required to be careful

in maintaining an entirely impartial position during the trial before the court martial. The Judge Advocate is also under an obligation to provide his

opinion both to the prosecutor and to the accused and any question of law relating to the charge or trial whether he is in or out of court. He is

responsible for informing the court of any infirmity or irregularity in the proceedings. Whether consulted or not, he is required to inform the

convening officer and the court of any infirmity or defect in the charge or the constitution of the Court and shall give his advice on any matter before

the Court. At the conclusion of the case he is to sum up the evidence and give his opinion upon the legal bearings of the case before the court

proceeds to deliberate upon its finding. The detailed summing up address of the Judge Advocate in the instant case, Ex. U. attached with the

proceedings of the GCM shows that he has advised the presiding officer of the Court about the facts and circumstances of the case but failed in his

duties to guide the court properly regarding the sentence provided for the offence of murder in view of the judgments of the Supreme Court which

were binding and were law in the country. The Judge Advocate was under an obligation to inform the Court that upon conviction of the petitioner

the court martial was to award the death sentence only if they found the case of the petitioner to be the "rarest of the rare cases" but not otherwise.

It was his duty to bring to the notice of the court the changed position of law on the basis of the pronouncements of the judgments of the Supreme

Court and latest developments in the criminal law in the country while administering justice. The Judge Advocate failed in his duty to inform the

Court about the legal position prevalent with the result that extreme penalty of death sentence was imposed upon the petitioner obviously ignoring

the judgments of the Supreme Court and law applicable in the country.

20. The record produced before us also reveals that the Judge Advocate General advised after conviction that lesser sentence of life imprisonment

be imposed upon the petitioner because he had no specific motive of killing a particular person. The army authorities appear to be emotionally

moved by the alleged "brutal murder" and directed the death sentence awarded to be confirmed. The death sentence awarded, therefore, is

required to be modified. We would have directed the reconstitution of the court martial but keeping in view the law of limitation and the judgment

of the Supreme Court reported in *Ranjit Thakur Vs. Union of India (UOI) and Others*, have decided to alter the sentence after confirming the

conviction of the petitioner.

21. Under the circumstances the writ petition is disposed of by upholding the proceedings of the General Court Martial and conviction of the

petitioner u/s 302 R.P.C. We, however, modify the sentence awarded to the petitioner and direct that instead of death sentence the petitioner shall

undergo life imprisonment.