

(2014) 01 DEL CK 0009
In the Delhi High Court
Case No : WP(C) 7354/2000

R.K. Pathak

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 02-01-2014

Acts Referred:

Border Security Force Act, 1968 — Section 46
Ranbir Penal Code, 1989 — Section 300, 307

Citation : (2014) 4 AD 712

Hon'ble Judges : Pradeep Nandrajog, J; Jayant Nath, J

Bench : Division Bench

Advocate : Arvind Kumar Gupta and Abhishek Goyal, Advocate for the Appellant; Bhupinder Sharma, DC, BSF, Advocate for the Respondent

Final Decision : Dismissed

Judgement

1. The petitioner was tried at a General Security Force Court on the following charge:- "BSF ACT Sec. 46 COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, ATTEMPT TO MURDER, PUNISHABLE U/S 307 RPC. In that he, at BOP Sewa, on 13.4.96, fired six shots, from his AK-47 Rifle, Butt No. 5, Body No. XM 1395, at No. 79010032 HC Anushil Kumar of the same Unit, with intent to kill him and thereby caused multiple wounds to the said HC Anushil Kumar."

The petitioner pleaded not guilty. 2. Proceedings before the General Security Force Court dated January 15, 1997 would reveal that permission was granted to the petitioner to be defended by a private counsel named Sh. Chandra Kant Gupta, Advocate, practising at the High Court of Jammu & Kashmir.

3. At the trial 11 witnesses were examined by the prosecution. Petitioner examined 3 witnesses in defence.

4. The testimony of the 11 prosecution witnesses would reveal that Subedar Ishpal Singh PW-1, Ct. Chaman Lal Sharma PW-2, Ct. Raj Kumar PW-3, Sub Insp. Balkar Singh PW-4, HC S.S. Dutta PW-7 and Ct. Hem Chand Murmu PW-8 were

witnesses who deposed to what they saw and heard immediately after the incident and thus the testimony of said witnesses would be *res gestae*.

5. PW-5 HC Anushil Kumar is the injured eye witness.

6. Nk. D.C. Roy PW-6 was incharge of the armour and his testimony would prove that an AK-47 rifle with Butt No. 5 as also a magazine was issued to the petitioner. His testimony, as would be noted hereinafter, would also prove the condition of the rifle which was seized soon after the incident took place.

7. Dr. Vinod Kumar PW-9 and Dr. Lalit Kumar PW-10 were doctors who rendered medical aid to HC Anushil Kumar (PW-5).

8. Deputy Commandant Dildar Singh Sandhu PW-11 was the officer who had conducted the proceedings pertaining to the record of evidence preceding the formal indictment of the petitioner.

9. The testimony of PW-1, PW-2, PW-3, PW-4, PW-7 and PW-8 would reveal that the sound of gun fire at around 21:45 hours on April 13, 1996 led them to the place wherefrom sound of fire was emanating. The witnesses have proved the contemporaneous utterance of the petitioner: "Jo maine karna tha kar diya". Their testimony would also establish that the petitioner was seen by them in a firing position. The testimony would further reveal that after the first shot was fired, there was a brief lull, followed by a burst of gun fire. The testimony of Nk. D.C. Roy PW-6 would reveal that when he seized the AK-47 rifle used as the weapon of offence, change lever of the weapon was on automatic move mode.

10. What led to the fire, spoken of by HC Anushil Kumar PW-5, may be noted in the words of PW-5:-

"On 13-04-96, I was on first patrolling duty, from 2000 hrs to 2230 hrs and HC R.K. Pathak was guard comdr of p1 post for 24 hours which was from 1800 hrs on 13-04-96 to 1800 hrs on 14-04-96. While I was performing duty in the front of the p1 post, HC R.K. Pathak came out from his room and went towards Coy HQ. HC R.K. Pathak while going to Coy HQ had asked Ct. Raj Kumar, who was on line sentry duty, as to who was on the patrolling duty. Ct. Raj Kumar had replied that I (Anushil Kumar) was on patrolling duty. After having been informed about the duty of mine, HC R.K. Pathak went towards Coy HQ and he again came back in between 2130 hrs and 2140 hrs. Then HC R.K. Pathak asked me to check duty of sentries throughout the night. I replied that since my duty hour would be terminating at 2230 hrs, as such I would not be able to check the duties of sentry during night. I had also asked him that since he was the Guard Comdr, he should carry out his duty and check the sentry during night. I also told him that I had no concern with him as I was doing my duty and he was to do his duty. I also make an indication through my hand asking him to go to his bed and sleep. HC R.K. Pathak then started telling me that (sic) (HC R.K. Pathak) would not go then what I would do. I again replied him, that just now I won't be doing anything, however, the matter would be reported to offg coy comdr , next day

morning. The moment I told that matter would be reported to the offg coy comdr in the morning, he took two steps back and fired a burst of 2 rounds, pointing barrel at me, with the result, I was hit by a bullet on my right knee. I was dump founded to see the action of HC R.K. Pathak as I had never expected that he would open fire at me. I ask him as to why he was killing me. I also beg to forgive/pardon and not to kill me. While begging to him, I also pushed the barrel towards ground to avoid rehitteing of bullets at me. In the meanwhile, HC R.K. Pathak again opened burst of fire at me and I was hit by two bullets on my right leg and two bullets in left leg. Consequent thereof, I fell down on the floor of the verandah of P1 post. The moment I fell down on the verandah, Ct. Raj Kumar who was on line sentry duty, came running and he told HC R.K. Pathak "APNE, APNE ADMI KO MARK KAR ACCHA NAHIN KIYA, AAPKO JISKO MARNA CHAHIYE USKO TO MAR NAHIN SAKTE AUT APNEHI ADMI KO MAR DIA" and words to this effect. HC R.K. Pathak replied "JO MAINE KARNA THA KAR DIYA" and went to his room and bolted the door from inside. Having seen my condition, Ct. Raj Kumar started weeping and screaming. I told him not to week and shift me to my cot. In the meanwhile, offg coy Comdr, SI Balkar Singh, CHM and other Coy Personnel also reached at the spot and they shifted me to my cot in the room. The offg coy comdr asked me as to who had fired at me. I replied that HC R.K. Pathak had fired at me."

11. Testimony of Subedar Ishpal Singh PW-1 would establish that Ct. Raj Kumar PW-3, was on sentry duty. Ct. Chaman Lal Sharma PW-2 corroborates said fact. Ct. Raj Kumar PW-3 has likewise deposed that he was on line sentry duty from 20:00 hours to 23:00 hours on April 13, 1996 and HC Anushil Kumar was on area patrolling duty. SI Balkar Singh PW-4 has further corroborated the fact of Ct. Raj Kumar being on line sentry duty.

12. Co-jointly read, testimony of the witnesses of the prosecution supports the indictment.

13. The version of the petitioner was that HC Anushil Kumar was refusing to obey his command and performing his duties. As per him, HC Anushil Kumar tried to snatch the AK-47 rifle which was issued to the petitioner and when jostling was on, accidental firing took place.

14. The 3 defence witnesses Nk. M.C. Jayaprakash DW-1, Ct. B.K. Das DW-2 and Ct. Joy Joseph DW-3 have stated that before the firing they heard the voice of HC R.K. Pathak i.e. the petitioner telling someone "Hatiyarchoro, Hatiyarchoro" and after about 10-15 seconds they heard a sound of burst fire.

15. The testimony of PW-10 and PW-11 establishes that HC Anushil Kumar PW-5 had received fire arm injuries on both lower limbs.

16. Accepting the version deposed to by the witnesses of the prosecution as correct and is disbelieving the defence witnesses the verdict of guilt has been pronounced against the petitioner.

17. Being concerned, exercising supervisory writ jurisdiction, whether procedures of law were followed during the trial and whether the attention of the Court was drawn to the relevant law and facts by the Law Officer while summing up the evidence we find that the two versions were succinctly summed up and the Court was called upon to decide as under:-

"18. Gentlemen, in view of the above discussion, two divergent versions have emerged before the Court. You have to rely upon the version of either of the party based on facts and circumstances adduced before you. If you rely upon the version of the accused that the firing was the result of scuffle between him and HC Anushil Kumar (victim), then you have to disbelieve the statement of PW-5, PW-3 and other prosecution witnesses . If you conclude that the accused was not holding his personal rifle in cocked/battle crouch position at the time of firing, then you are to decide as to how PW-5 and PW-3 have deposed to this effect; as to how the change lever mechanism shifted from safety to automatic fire and the trigger of the rifle operated; as to why bullets were fired in subsequent intervals at HC Anushil Kumar hitting at his both the legs; as to why the accused went to his room and bolted the door after the incident and replied "JO MAINE KARNA THA KAR DIA? and as to why the other facts have been corroborated by the prosecution witness PW-3. Your answer to these questions are to be based on evidence of record. Your verdict may depend on the aspects of belief, comment on the deposition of the different witnesses and entire circumstances of the case. Based on the above discussion and evidence on record, now gentlemen, you draw the conclusion. If it is up to your satisfaction that the accused fired 6 shots from his rifle AK-47, body No. XM 1395, butt No. 5, at HC Anushil Kumar with a requisite intention as envisaged in Section 300 RPC, then you may conclude this issue as proved, in case otherwise, resolve in favour of the accused."

18. On the procedural compliance with the law, learned counsel for the petitioner concedes that full opportunity was granted to the petitioner at the trial to defend himself and concedes that there is no procedural deficiency in the trial.

19. Conceding that HC Anushil Kumar suffered fire arm injuries and that the weapon was the AK-47 rifle issued to the petitioner, learned counsel for the petitioner would urge that from the fact that the lower limbs were the target of the fire it cannot be said that the petitioner had no intention to kill HC Anushil Kumar. The feeble attempt is made to urge that the nature of injury would suggest that the firing was accidental.

20. We have asked learned counsel for the petitioner to explain two facts. Firstly what was the petitioner doing with the AK-47 cocked up in the sentryline. Secondly, why was the rifle in a ready to fire stage evidenced by the fact that the change lever of the weapon was on the automatic move operation. The reason for the two questions is that the AK-47 rifle is to be in a cocked position when one is on active patrol duty. The change lever has to be on the automatic move mode during duty only when one is patrolling the border line for the reason the ambush may be sudden. But within the precincts of the sentry line the weapon is

neither to be in a cocked position nor in the ready to move fire position.

21. Indeed, the counsel has no answer.

22. This explains it all.

23. The motive for the crime is nothing but anger evidenced from the testimony of the injured eye witness.

24. The version of the petitioner that HC Anushil Kumar was not ready to perform his duties is belied from the testimony of the witnesses of the prosecution who have deposed in unison that HC Anushil Kumar was on duty. The testimony of HC Anushil Kumar would reveal, which is corroborated by the other witnesses of the prosecution, that a combing operation had to take place because presence of militants was suspected in the area. The petitioner had desired HC Anushil Kumar to check whether other deputed personnel were performing guard duties to which HC Anushil Kumar replied stating that it was not his job to check duty of sentries throughout the night. He told the petitioner that his duty would be coming to an end at 22:30 hours.

25. 6 bullets were fired, 3 of which caused injuries in the right lower limb and the left lower limb of HC Anushil Kumar.

26. The record would reveal that every aspect of the matter has been correctly considered and appreciated by the Court. The summing up of the evidence by the Law Officer would reveal that the attention of the Court was drawn to all the relevant facts.

27. Nothing emerges warranting this Court to interfere with the verdict of guilt.

28. Turning to the grounds urged we find vague pleas such as:-

(i) The proceedings pertaining to General Security Force Court were wrongly and illegally convened.

(ii) That the Court was not convened by a Competent Officer.

(iii) That the officer who confirmed the sentence of the General Security Force Court was not competent to do so.

29. Learned counsel for the petitioner concedes that the grounds have been pleaded just for the sake of pleading grounds.

30. Learned counsel would urge that the trial is vitiated on account of the proceedings not being supplied to the petitioner to enable the petitioner to make a representation against the verdict of guilt. But, the counsel would concede simultaneously that this plea cannot vitiate the trial. At best, it could only vitiate the decision taken by the authority concerned which decided the representation filed by the petitioner against the verdict of guilt.

31. However, nothing turns there or for the admitted reason, albeit belatedly,

entire record was supplied to the petitioner and he availed the statutory remedy of making a representation against the decision of the General Security Force Court. Noting that apart from being sentenced to undergo imprisonment for 2 years, a sentence which the petitioner has undergone, he has been dismissed from service, finding the sentence as also the penalty of dismissal commensurate with the gravity of the offence we dismiss the writ petition but without any orders as to costs.