

(2002) 10 AHC CK 0232
In the Allahabad High Court
Case No : C.M.W.P. No. 8723 of 1980

Satya Deo Giri

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-10-2002

Acts Referred:

Army Act, 1950 — Section 9(4)
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 34
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2002) 5 AWC 4185

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Advocate : S.P. Srivastava and M.B. Saxena, for the Appellant; V. K. Singh, Ashok Mohiley and Anshuman Singh, for the Respondent

Final Decision : Allowed

Judgement

Rakesh Tiwari, J.—Heard the learned Counsel for the parties and perused the records.

2. By means of this petition under Article 226 of the Constitution of India, Petitioner Satya Deo Giri has prayed for quashing of the judgment and order of conviction and consequential order of awarding sentence of imprisonment for life passed by the General Court Martial and Chief of Army Staff, Annexures-IV and v. to the writ petition.

3. The brief facts of the case are that the Petitioner along with Isa Nand Dubey and Khem Chand was charged with the offence of committing murders of Havaladar Ram Phal and Sepoy Jagannath Prasad, said to have taken place on 26.1.1974, at about 5.00 p.m.

4. The Petitioner was tried by the General Court Martial earlier. The case of the prosecution regarding motive was that on 19.1.1974, the two deceased, namely,

Havaladar Ram Phal and Sepoy Jagannath Prasad tried to molest the wife of the Petitioner. It is said that co-accused Khem Chand treated Smt. Meera Devi, wife of the Petitioner, as his sister. The Petitioner and his co-accused Khem Chand became annoyed and entered into a conspiracy to do away with the deceased and for this purpose on 26.1.1974, Khem Chand took a double barrel gun from Naib Subedar Pandey and thereafter the three accused, namely, Ram Chand, Isa Nand Dubey and the Petitioner in furtherance of their common intention committed the murder of Havaladar Ram Phal and Sepoy Jagannath Prasad near village Bhatagaon by shooting them down.

5. The Court of enquiry constituted according to Army Act conducted trial and recorded evidence of witnesses. All the witnesses named in the complaint showed their ignorance regarding the alleged incident. On completion of trial the court of enquiry, found that no prima facie case was made out against the charged accused including the Petitioner as no person saw the incident. Only dead bodies were found lying near village Bhatagaon. From the summary of proceedings it appears that all the three accused persons were arrested and taken into custody and thereafter they were taken to the police station. The Petitioner was put up for identification in the District Jail, Jhansi and was identified by four witnesses, namely, Damru Prasad (P.W. 12), Sewa Ram (P.W. 21), Munna Lal (P.W. 19) and Majjoo (P.W. 20).

6. The General Officer Commanding after going through the evidence given before the Court of enquiry ordered that General Court Martial cannot be ordered as the material against the Petitioner was insufficient. He, therefore, refused to grant permission for holding General Court Martial. Thereafter, additional summary evidence was recorded and the General Officer Commanding-in-Chief, Central Command, Lucknow sanctioned holding of a General Court Martial of the Petitioner and his co-accused.

7. In the General Court Martial proceedings, 31 witnesses were examined in support of the prosecution case and it returned the verdict of guilty.

8. It is purely a case of circumstantial evidence. There is absolutely no ocular account of the incident.

9. The motive alleged was that the wife of the Petitioner was tried to be molested by the deceased.

10. The other circumstances set out by prosecution are:

(1) On 26th January, 1974, accused Khem Chand obtained a double barrel gun belonging to Naib Subedar Pandey.

(2) At about 2.30 p.m. the two accused viz. Havaladar Ram Phal and Sepoy Jagannath Prasad were seen in village Bhatagaon, in the company of the three accused.

(3) At about 4.30 p.m. all the three accused and the two deceased were again

seen together.

(4) A little later, a sound of gun shot was heard and two of the accused viz., Satya Deo Giri and Khem Chand were seen running away from the scene of incident with a gun.

(5) The Petitioner admitted in the proceedings of summary of evidence that he had gone to play shikar and that Khem Chand had shot the two deceased.

(6) And that the Petitioner returned the gun to Naib Subedar Pandey afterwards.

11. The circumstantial evidence is as follows:

(i) Shri Gopal Kachhi (P.W. 13) on hearing the sound of firing of two shots, saw two persons going towards the field of Shri Asghar Ali but could not identify any of the accused persons and picked out a wrong person in the test identification parade.

(ii) P. Ws. 19 and 21 saw only accused No. 1 and accused No. 2 moving near the southern boundary of village Bhatagaon at about 17.00 hours on the day of incident.

(iii) accused Nos. 1 and 2 were found absent from evening roll call on the day of the incident while accused No. 3 was found present at the roll call. These two persons in their evidence do not back there with story of conspiracy.

(iv) P.W. 14 the Investigating Officer admitted that charge-sheet against accused Nos. 1 and 2 were forwarded to A.D.M. (J.) Jhansi u/s 302 read with Section 34, I.P.C. He did not find sufficient evidence to substantiate the charge against accused No. 3 so he recommended for his release which was accepted by A.D.M. (J.).

12. Learned Counsel for the Petitioner further submitted that P.W. 20 Majjoo stated before the Court Martial that while his goats were grazing in the jungle, he saw three persons alighting from a Jeep with a Sub-Inspector. The Petitioner, accused No. 2 was one of them. The statement does not show that accused was seen by him near the place of occurrence at the time of incident. It further shows that the Petitioner along with his companions was seen for the first in the police custody. The next witness P.W. 19 Munna Lal stated that:

I stated at the summary of evidence that I saw them at a distance of about 50 yards and cannot make out their figure.

This statement also shows that this witness was not in a position to identify are accused when he first saw them. This evidence of identification thus lacks requisite credibility. In view of this, it is argued that there is no evidence against the accused and their statements have been discarded as serious improvements were made by them in their statements before the General Court Martial as a result of afterthought.

13. The case of the Petitioner in defence is that none of the witnesses had in fact

seen the Petitioner but were shown to the witnesses at the police station, that is why they have identified the Petitioner. Regarding evidence of identification, the counsel for the Petitioner has assailed it on the ground that there is no evidence of identification and finding to this effect is perverse. He referred to the statement of P.W. 20 Majjoo who stated that it is incorrect to say that he had seen the accused, i.e., Petitioner residing in the house of Kamla Prasad. There is no evidence to show that the Petitioner was known to the witness from before. Referring to the statement of P.W. 12 Damroo, it was argued that this witness stated that at the time of site inspection, he saw all the accused for about 14 seconds. At that time he was watching for flow of water in his field and a wall of hedge in between the place where he was watering and the way the accused passed. He also stated that he had not seen any thing and had identified the three accused on the basis or help given by the civil police.

14. Thus, these witnesses had no chance to see the accused and identification by them is a farce and cannot be relied upon and has to be discarded.

15. The Petitioner has challenged the verdict of guilty on the ground that the circumstances given above do not make out any case and offence is not proved against him.

16. It is further contended by the counsel for the Petitioner that once the General Officer Commanding passed an order that there was no prima facie case the General Officer Commanding, Central Command had no jurisdiction to order for General Court Martial and in any case, the Petitioner could not be proceeded against under Army Act as he was only a Store Keeper (Technical) and, therefore, is not an Army personnel.

17. The learned Counsel has further contended that the co-accused Isa Nand Dubey, who was also awarded life imprisonment along with Petitioner, filed a writ petition being Isa Nand Dubey v. Union of India and others Writ Petition No. 1664 of 1977, which was allowed by a Bench of this Court by judgment and order dated 6.4.1978 and his conviction and sentence was set aside hence factum of criminal conspiracy and common intention has no basis and conviction of Petitioner is illegal. So far as circumstances from which finding of guilt can be drawn must fully and conclusively establish the guilt. The facts so establish should be consistent with only one conclusion. The link must be complete so as to exclude any possibility of it being impregnated by the hypothesis of his innocence. All the circumstances taken together must conclusively establish that the crime was committed by the accused alone.

18. The case of the prosecution is that there was common intention and under pre-arranged plan between accused Nos. 1,2 and 3 and they participated in the crime/act. It is settled principle of criminal law that common intention within the meaning of Section 34 of the I.P.C. implies a pre-arranged plan the criminal act must be result of that plan. An accused can be convicted of an offence u/s 34 of the Code of Criminal Procedure only if it is proved that the criminal act was done

in concert pursuant to the pre-arranged plan. In *Mahbub Shah v. Emperor* AIR 1945 (32) PC 118, it has been held:

That the inference of common intention within the meaning of the term in Section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.

19. Applying the ratio of *Mahboob Shah* (supra), it is found that there is no material on the record to show that all or any of the accused had common intention to kill Havaldar Ram Phal and Sepoy Jagannath Prasad and in furtherance of that common intention, they committed murder. To bring the case of the Petitioner u/s 34, I.P.C., it is essential to be shown that the accused persons had a prior meeting of minds and in furtherance of that common intention, committed the murders. There is not an iota of evidence to show as to when and where was the plan hatched or made and that the accused went with the deceased in a pre-planned manner with common intention to commit the crime. The theory of said common intention and pre-laid plan, in the instant case, is wholly baseless. On the other hand, it is admitted that all the accused and the deceased, went to the jungle to prey. In the circumstances, it was natural for them to have the gun which was borrowed by co-accused Khem Chand from Naib Subedar Pandey. The deceased were with the three accused for two hours together in the jungle between 2.30 p.m. and 4.30 p.m. They had enough time inside the jungle where they had gone together on a false pretext of hunting but the bodies of the deceased were found at the outskirts of village Bhatagaon. Why a person with a pre-meditated plan would come out of the jungle and commit murders outside the jungle. This does not stand scrutiny. Once hunting was used as device to commit the crime/murders, obviously there would have been many occasions or opportunities inside the jungle itself to do so.

20. There was no forensic examination of the victims nor the gun was examined by a ballistic expert to prove that alleged gun was used in the crime. No one has stated that deceased was killed by the gun taken by Khem Chand from Naib Subedar Pandey. The shot could have come from anywhere and seeing the accused running away, could be a natural reflex action not connected with the crime.

21. The only evidence against the Petitioner remains is that of Isa Nand Dubey who is said to have admitted in proceedings of Summary of Evidence that Khem Chand had shot the two deceased. No role has been assigned to the accused Satya Deo Giri, the Petitioner, muchless any part played by him in furtherance of their common intention. The law is that any confession could be accepted in evidence only if it is also inculpatory. The admission made by co-accused Isa Nand was in nature of confession of a co-accused. If it is not inculpatory, it cannot be relied upon while accepting it that the General Court Martial failed to take into its account this sanguine and time-tested principle of law.

22. Merely because a gun shot was heard and Petitioner was seen in the

company of the deceased going in the jungle and coming back, it cannot be taken a conclusive circumstance. Without any other corroborative piece of evidence, it fails to conclusively prove that the Petitioner had committed murder of the two deceased in furtherance of any common intention in execution their some pre-planned manner. The note of caution sounded in *Mahboob Shah v. Emperor* (supra) has full application to the facts of this case.

23. In *Pandurang, Tukia and Bhillia Vs. The State of Hyderabad*, , the Apex Court advertng to the nature of evidence of prior concert, applicability and scope of Section 34, in paras 32, 33 and 34 held:

(32) Now in the case of Section 34 we think it is well established that a common intention pre-supposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly there must have been a prior meeting of minds.

It is not enough, to have the same intention, independently of each other, i.e. the intention to rescue another, and, if necessary to kill those who oppose.

24. Applying the said principle, I find that there is no evidence whatsoever in the present case that the three accused ever met or made a plan. There was no prior concert and arrangement and the alleged action of killing the two deceased near the village out of jungle when admittedly they remained for two hours inside the jungle. Had there been a pre-arranged calculated plan, the accused including the Petitioner had ample opportunity to do away with the two deceased safely inside the jungle. The circumstance by itself excludes any such probability.

25. In *Sharad Birdhichand Sarda Vs. State of Maharashtra*, , a Constitution Bench of the Apex Court laid down following principle/conditions precedent which must be fulfilled in a case before an accused based on circumstantial evidence can be said to be fully established:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved.

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

(6) Various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(7) The said circumstances point to the guilt of the accused with reasonable definiteness.

(8) The circumstances is in proximity to the time and situation.

26. At this stage, it is relevant to revert to the judgment given by this Court in W.P. No. 1664 of 1977, *Isa Nand Dubey v. Union of India and others*. W.P. No. 1664 of 1977 In this judgment, this Court observed:

So far as circumstance No. 3 viz. that ; shortly before the incident, in which Havaladar Ram Phal and Jagannath Prasad lost their lives, the two deceased were seen in the company of the Petitioner and the remaining two accused is concerned, only evidence relied upon by the prosecution was that of P.W. 12 Damroo who deposed that on 26th January, 1974 at about 4.30 p.m. while he was watering a field, he noticed five persons coming from the side of village Singhara and going to Polatha. One of them was carrying a gun. After about 15 minutes, he heard the sound of firing of two shots, one after the other, in an interval of about two minutes coming from towards the side of Polatha. He identified the Petitioner and the other two accused as three of the five persons whom he had seen on that occasion. It is significant to note that after the incident, the case was at one stage investigated by the civil police. He also went to jail to identify the persons whom he had claimed to have seen, shortly before he heard the gun fire, in the company of the two deceased. There, he had picked up the Petitioner as one of the three persons accompanying the two deceased. Subsequently, when the court of enquiry proceedings took place before the military authorities, Damroo was interrogated by Lt. Col. R. Khasla, the officer, who was entrusted with the recording of the summary of the evidence. Lt. Col. R. Khasla made a note (Annexure-1) to the petition stating that amongst other, Damroo had confirmed to him that he had no first hand knowledge of the case and that he had earlier given a statement under duress and coercion from the civil police. Damroo had further confirmed to him that before the identification parade, he had been tutored and told about the person whom he had to pick out in that parade. In his cross-examination before the Court Martial, Damroo admitted that it was correct to suggest that he told Lt. Col. R. Khasla that he had not seen any thing relating to the case and that he had identified the three accused persons on the suggestion of the civil police.

27. In this case, the Court further held:

In the instant case, the circumstances established by the prosecution merely show that the Petitioner who had absolutely no motive to do away with the two deceased had joined Khem Chand and Satya Dev Giri and the two deceased for shikar

28. After the incident, two of the accused persons were seen running away

together from the scene. Subsequently, the Petitioner handed back licence of the gun which Khem Chand had obtained from Naib Subedar Pandey.

29. Thus, the theory of common intention and circumstantial evidence was also not believed in the aforesaid case.

30. The counsel for the Respondent has only one objection that this Court has no jurisdiction under Article 226 of the Constitution to interfere in the punishment of imprisonment for life awarded by the General Court Martial. In this context, he relied upon the case of Ruval Kumar Vasave v. Chief of Army Staff, Army Head Quarters, New Delhi and Ors. 1986 UPLBEC 663. In this case, the prosecution had produced as many as 21 witnesses and also filed documents which included the post-mortem report and the recovery memo relating to iron rod, with which the deceased was killed. This iron rod was taken out by the accused No. 1 himself from the vehicle in which it was hidden. There was evidence in this case to show that the Petitioner of the said case along with others had marked bitterness bordering on enmity between them. There were number of witnesses who deposed about the implicity of the accused in the offence, though some of them were not eye-witnesses (i.e., some of them were eye-witnesses). It was a case in which the Court held that:

if the evidence of all of them was taken together and it was found on that basis that the Petitioner had caused murder of sepoy driver Ram Chandra, it is not possible for this Court under Article 226 of the Constitution of India to set aside the conviction.

The Court further held:

This Court under Article 226 of the Constitution does not sit as a court of appeal and as such, is not entitled to re-appraise evidence and come to its own findings. The Army Act and the Rules framed thereunder provide the procedure relating to the investigation and trial of an army personnel and the proceedings if under the Act had become final, this Court cannot, under Article 226 of the Constitution reverse that finding. The Petitioners counsel failed to satisfy us that the General Court Martial proceeding holding the Petitioner to be guilty of offence is neither mala fide or is not based on the evidence. The Army Act makes the findings and sentences of the Court Martial final, conclusive and binding, upon all. We could not be satisfied that the Petitioner did not have a fair trial in the General Court Martial.

31. It is true that this Court will not sit as a court of appeal or appreciate the evidence of the General Court Martial. However, it is well-settled that if the findings arrived at by the Court Martial are without any basis or perverse the circumstantial evidence lead to the conclusive guilt of the accused, then this Court can in exercise of its powers under Article 226 of the Constitution interfere and quash the decision of the authority concerned. In Dr. Chetkar Jha Vs. Dr. Vishwanath Prasad Verma and Others, (Para 9), the Apex Court held:

It is true that in a writ petition for certiorari, a superior court would not interfere on the mere ground of an error of fact or even of law, but if the error of law is apparent on the record, or consists of a misconstruction of a law on which assumption of jurisdiction is made which otherwise does not exist, a certiorari can issue. The question, therefore, is whether in the instant case that was the position? The question, in other words, would be whether the Chancellor, on the four grounds on which he annulled the syndicate's resolution, appropriated to himself the jurisdiction to interfere which he did not have u/s 9(4) of the Act.

32. Thus, from the evidence on record and the circumstances of the case relied upon by the prosecution, it cannot be said that they conclusively lead to the guilt of the Petitioner or do not leave room for reasonable doubt. In the present case, it cannot be said that the prosecution has succeeded in establishing the charge against the Petitioner on the basis of circumstantial evidence, as the evidence relied upon by the prosecution ; is neither conclusive nor has any nexus of proving the guilt conclusively. In absence of any such material, Petitioner's conviction u/s 302 read with Section 34, I.P.C. cannot be upheld. The Petitioner did not have a fair trial at the General Court Martial. The verdict of the General Court Martial relating to the guilt dated 21.1.1975 is liable to be quashed. The evidence of exculpatory confession of co-accused Isa Nand and the circumstances of the Petitioner being seen entering the jungle with his so-called accomplices and the coming out of the jungle in the same manner, hearing of two gun shots and running away of other two co-accused including Isa Nand are wholly insufficient inasmuch as running away will be a natural reflex activity of any person who will happen to see such a situation. If there is no pre-plan, their running away from the spot, therefore, does not prove any pre-meeting of minds. The evidence, therefore, is without any basis and is such that no inference of any pre-concern or any prior meeting of minds is desirable. There is evidence of the initial proceedings that the guilt of these accused established from the summary of evidence. The Court is at a loss to find complete absence of any reason for the Commanding Officer Western Command to re-open the case and direct a General Court Martial. The Respondents have also not brought any material on record to establish the cogent reasons which impelled the said officer to hold a General Court Martial overruling completely the preliminary enquiry which was also confined by the immediate superior officer.

33. The findings returned by this Court in the case of Isa Nand Dubey referred to above in this judgment squarely applies to the case of this petition. As a matter of fact, the Petitioner stands on a much better footing than Isa Nand Dubey.

34. In view of the above findings of this Court the Petitioner is not only entitled to acquittal but also entitled to restoration of service and all benefits accruing to him in the course of his litigation pursuant to his conviction.

35. No other point has been raised by the counsel for the Respondents.

36. The writ petition succeeds and is allowed with costs. The impugned order/

verdict of the General Court Martial dated 21.1.1975, convicting and sentencing the Petitioner to life imprisonment and dismissing him from service is quashed. Consequential order of the Chief of the Army Staff rejecting the Petitioner's representation is also quashed as a consequence of the quashing of the impugned order/ verdict dated 21.1.1975. The Petitioner, who is in custody, shall be released forthwith unless required in some other case.