

(2011) 02 GAU CK 0047

In the Gauhati High Court

Case No : Writ Petition (Criminal) 8 (K) of 2009

Shri Lavito Sema, Ex-Head Constable, BSF

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 23-02-2011

Acts Referred:

Border Security Force Act, 1968 — Section 117(2), 46
Penal Code, 1860 (IPC) — Section 302

Citation : (2011) 02 GAU CK 0047

Hon'ble Judges : Ketulhou Meruno, J; Biplab Kumar Sharma, J

Bench : Division Bench

Advocate : C.T. Jamir, K. Alien Rongmai, Wati Jamir, Imkong Jamir and N.L. Kr, for the Appellant; T.B. Jamir, CGC, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—This writ petition is directed against the judgment and finding of the General Security Force Court (GSFC) dated 30.4.2007 (Annexure-XXIV), by which the Petitioner has been held to be guilty of the offence u/s 302 IPC and sentenced to suffer imprisonment for life with consequential dismissal from service. The Petitioner has also questioned the order dated 31.5.2007 (Annexure-XXVI) by which the findings of the said Court has been sustained. Another challenge made by the Petitioner is the order dated 6.7.09 (Annexure-XXXI), by which the Govt. of India in the Ministry of Home Affairs, Directorate General, Border Security Force has rejected the petition submitted by the Petitioner against the aforesaid orders. The orders so passed is pursuant to the order of this Court dated 9.3.2009 passed in WP(CrI) 4(K)/2007, filed by the Petitioner against his conviction and sentenced with consequential dismissal from service. By the said order, a direction was issued to dispose of the petition filed by the Petitioner against the order of confirmation under the provisions of Section 117(2) of the BSF Act, 1968.

2. The Petitioner while was serving as Head Constable in BSF, he was tried by a

GSFC in April, 2007 on a charge u/s 46 of the BSF Act for committing a civil offence i.e. murder, punishable u/s 302 IPC. According to the said charge, the Petitioner while was posted in the particular station, on 21.2.2006 at about 0730 hrs., caused death of another Head Constable namely Yogesh Kumar of the same station by firing 2(two) shots from 9 mm CM Butt No. 20, Body No. LL8491 and thereby committed murder of Head Constable Yogesh Kumar.

3. During trial, the Petitioner pleaded not guilty of the charge and accordingly the Court proceeded with the proceeding. The prosecution examined as many as 14 witnesses. The accused Petitioner submitted written statement of defence but did not examine any witness in support of his defence. In Appreciation of the evidence on record, the GSFC held the Petitioner guilty of the charge and sentenced him to suffer imprisonment for life with consequential dismissal from service.

4. The pre-confirmation petition dated 5.5.07 submitted by the Petitioner against the findings and sentence of the GSFC having been rejected by the confirming Authority vide order dated 31.5.07, the Petitioner approached this Court by filling the aforesaid writ petition being WP(Crl) No. 4(K)/2007. The writ petition was disposed of by order dated 9.3.09 with the direction to dispose of the petition submitted by the Petitioner u/s 117(2) of the BSF Act, 1968. The said petition having been rejected by the aforementioned Annexure-XXXI order dated 6.7.09, the Petitioner has filed the instant writ petition, challenging all the aforesaid 3(three) orders.

5. We have heard Mr. C.T. Jamir, learned senior counsel for the Petitioner as well as Mr. T.B. Jamir, learned CGC. While the learned Counsel for the Petitioner upon exclusive reference to the evidence on records has submitted that there being inherent contradiction in the depositions made by the P Ws coupled with the fact that it was a case of accidental firing, the Petitioner is not liable to be convicted u/s 302 IPC, learned CGC on the other hand submits that there being overwhelming evidence against the Petitioner, more particularly, when the plea of accidental firing was never raised by the Petitioner, when was caught on the spot, the writ petition is liable to be dismissed.

6. We have considered the rival submissions made by the learned Counsel for the parties as well as the entire materials on records. According to Mr. Jamir, learned Counsel for the Petitioner, on a meticulous reading of the depositions of the P Ws, inherent contradictions are apparent. In this connection, he has most specifically referred to the depositions made by PW-1, PW-2, PW-3, PW-4 and so also the PW-12 and PW-14.

7. There is no dispute rather it is admitted by the learned Counsel for the Petitioner and is also indicated in the entire evidence on record that at the time of the incident, there was none else present inside the room where the incident took place except the deceased Yogesh Kumar and the Petitioner. It was only on hearing of the gun shot, the P Ws entered into the room to find Yogesh Kumar

lying on the floor with pool of blood and the accused Petitioner near the body of the deceased.

8. PW-1 in his deposition has stated that while he was sitting in his office, he heard some body stating about a firing incident and as to how he immediately rushed to the place of occurrence along with 4/5 Copy personnel. According to this witness, while he was descending, he came to know that the accused had caused the bullet injury to the deceased by firing with his Carbine Machine. He has further stated in his deposition that when he had reached the spot which was on the road side, the accused saluted him and surrendered before him. On being asked as to why did he open fire, the accused replied that he did not know as how that happened.

9. PW-2 in his deposition has also stated about the firing that had taken place inside the hut and as to how he immediately rushed inside the said hut. Upon entering the hut, he saw that the deceased lying in the ground in injured condition. He also noticed that the accused turning away from the deceased in bend position. Thereafter, this witness snatched the carbine machine from the accused. In response to the questions asked by the Court, this witness stated about seeing the accused in bend position carrying his carbine machine in his both hands and turning away from the deceased, who was lying injured on the ground.

10. PW-3 has also stated about arriving at the place of occurrence upon hearing the sound of firing, followed by a crying. He saw the PW-2 who had already entered inside the hut and snatching away the carbine machine from the accused Petitioner. He also saw the deceased lying injured on the floor in the hut. He also said about some utterances allegedly made by the accused Petitioner.

11. PW-4 in his deposition also stated the same thing of entering into the hut upon hearing the sound of firing. This witness also testified that upon entering the hut he found the deceased lying on the ground. Meanwhile all the other party personnel gathered inside the said hut. This witness took notice a bullet piecing hole on the left side of the chest of the deceased. In reply to the question put by the defending officer by way of cross examination, this witness stated that when the accused had made some utterances, he was facing the deceased. On being asked by the Court, this witness stated about hearing sound of firing of two shots without any cause.

12. PW-5, PW-6 and PW-7 are also BSF personnel who attended the spot after the incident had occurred. PW-8 is the Inspector of the CID Department (Special Branch) of Manipur Police. At that relevant point of time, he was posted as Officer-in-Charge, Jessami Police Station. He in his deposition has stated about receipt of a written complaint in the Police Station on the date of occurrence, as per which the accused Petitioner had fired two rounds with his 9 mm Carbine Machine upon the deceased of the same Company. He in his deposition has stated about seizure made which were exhibited during the proceeding. In his statement, he also stated about the empty cartridges.

13. PW-9, PW-10 and PW-11 are also BSF personnel, who in their deposition stated about hearing of sound of firing. PW-12 is the Doctor, who conducted the inquest on the dead body. PW-13 is the Ballistic Expert, who in his deposition on the question asked by the Court, stated thus:

If a 9mm Carbine Machine, fitted with a loaded magazine fall down on the floor from some height, it can not fire until and unless it is defective.

I did not find any defect in the Carbine Machine examined by me.

14. PW-14 is the Doctor who had conducted the post-mortem examination. He in his deposition has stated thus:

I conducted the post mortem examination on the dead body of Late HC Yogesh Kumar, Sex male, aged about 40 years at 1020 hrs on 22nd Feb'2006, on the directions of the CMO Kohima. The dead body was identified by Inspr S. Muivah of Police Station, Jessami. During the post mortem examination, following injuries were observed on the above stated dead body.

1. One bullet entrance wound on the left sternum just above the left nipple with corresponding exit wound at left border of right scapula.

2. One bullet entrance wound on the left deltoid (upper part of left arm) with corresponding exit wound on back on left Scapula.

The first bullet pieced through the left lung causing injuries to big blood vessels (Aorta) and further passed through the right upper lung and came out through the left border of right scapula.

The second bullet pierced through the upper part of left arm causing injury to left upper part of left lung and came out through the left scapula.

In my opinion, the cause of death of victim was due to massive hemorrhage leading to cardiac pulmonary arrest. I did not find any bullet head lodged inside the dead body. Both the injuries were anti-mortem in nature and were sufficient to cause death of human being in normal course of nature. The rigour mortis was present all over the dead body and the death of the victim might have been caused about 12 to 14 hours before the post mortem examination. The bullet entry marks were straight and parallel to the ground. The dead body was handed over to the BSF personnel after conducting the post mortem examination.

A bullet can deviate in any direction after hitting the ribs etc inside the body.

15. In the statement made by the accused Petitioner, he has stated that it was a case of accidental firing. Referring to the good relationship with the deceased, the accused Petitioner in his deposition has stated about his accidental fall inside the hut. According to his statement, he suddenly fall on his back and in the process, the butt of the Carbine Machine which was on his right side also struck on the ground, because of which there was accidental firing.

16. Annexure-XXIV is the findings of the GSFC dated 30.4.2007. Dealing with the

particular issue (2nd issue), which is The death of HC Yogesh Kumar was caused by the accused HC Lavito Sema by firing shots from his Carbine Machine 9mm Butt No. 20, Body No. LL9491 at about 0730 hrs on 21st Feb"2006 in a hut near CI post, Akash Bridge, the Court was inclined to believe the testimony of PW-2, PW-3, PW-8 and PW-14. As regards the 3rd issue, which is the above act was done by the accused with the requisite intension/knowledge as envisaged in Sec. 300 IPC, the Court was inclined to believe that being a trained and experienced force personnel, proficient in handling the fire arms and knowledge of the act of firing at the victim from such a close range was sufficient to cause his death in normal course of nature, must be attributed to the accused Petitioner. Such a find has been recorded in appreciation of the fact that after the firing incident, the accused Petitioner was reluctant to handover the weapon to PW-2.

17. We have carefully examined the entire evidence on record and were inclined to accept the findings recorded by the Courts on the basis of the said evidence. As per PW-2, on 21.2.2006, he was on VCP duty at Akash Bridge. While he was on duty, he heard firing shots inside the hut where the deceased and the accused Petitioners were together. He immediately rushed inside the hut where he found the deceased lying injured on the ground on his back. He also saw the accused in bend position while turning away from the deceased carrying his Carbine Machine in both hands. This witness immediately caught the accused and took away the magazine from his Carbine Machine also snatched away the weapon. After snatching away the weapon, he came out from the hut and asked the PW-3 to inform the Coy HQ about the incident. On getting the information about the incident, PW-1 also reached the spot along with few other Coy personnel and then this witness handed over the said Carbine Machine along with the loaded magazine to him. This witness in his deposition has also stated that the floor of the hut was cemented and not slippery. PW-4, PW-5, PW-10 and PW-11 had also corroborated the statement of the PW-2 in particular. PW-3 has also stated that after hearing the firing shot, he also heard someone crying "mar diya re". This witness had also stated about the particular utterances made by the accused Petitioner.

18. It is true that there is no eye witness to the incident. Needless to say that in all such incident, there may not be eye witnesses but the circumstances coupled with the theory of last seen together will have to be considered. In the instant case, it is an admitted position that the deceased and the accused Petitioner were together inside the hut. The situation in which the P Ws had entered into the hut and the condition in which the deceased and the accused Petitioner were seen together, about which discussions have been made above, leave no manner of doubt that it is the accused Petitioner, who was responsible for the crime. All the authorities referred to above, having appreciated the evidence on record towards recording the findings of guilt against the accused Petitioner, based on the evidence on record and the said findings being causent, we see no reason to interfere with the said findings. Independent of the said findings, we have also perused the entire evidence on record and our discussions of the same are

recorded above. On the basis of the said appreciation of the evidence, we are also of the firm opinion that the accused Petitioner is guilty of the offence u/s 302 IPC. Consequently, we see no reason to interfere with the impugned orders. Consequently, the writ petition is dismissed. There shall be no order as to costs.