

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision: 5th July, 2011

+ W.P.(C) 4652/2010

GNR B.D.KHENTE Petitioner
Through: Mr.D.S.Kauntae, Advocate

versus

UNION OF INDIA & OTHERS Respondents
Through: Ms.Barkha Babbar, Advocate with
Mr.Asit Tiwari, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J. (Oral)

1. The petitioner, a Gunner with the Indian Army was charged of having used his service firearm to pump bullets, intending to cause the death of Subedar (AIG) Randhir Singh, and the firearm injuries caused the death on 28.06.2006. The petitioner was tried at a General Court Martial at which 22 prosecution witnesses were examined and 1 defence witness was examined by the petitioner in his defence.

2. Verdict of guilt being returned against the petitioner for the charge of murder, sentence imposed is to undergo imprisonment for life and dismissal from service. Appeal filed by the petitioner under Section 15 of the Armed Forces Tribunal Act

2007 registered as OA No.5/2009 has been dismissed by the Tribunal and a perusal of the decision of the Tribunal would reveal that the Tribunal has reappraised the evidence led at the Court Martial against the petitioner.

3. Learned counsel for the petitioner urges that on the evidence led, it certainly stands proved that the petitioner used the firearm issued to him i.e. an INSAS Rifle and used the ammunition issued to him and fired the entire magazine having 20 bullets, 18 of which hit the deceased, who we note was the superior officer of the petitioner. Counsel states that at best offence made out is that of culpable homicide not amounting to murder and concedes that inadvertently in the writ petition it has been prayed that the offence made out is causing death by negligence.

4. We note that PW-4, PW-5, PW-7, PW-8, PW-9, PW-10, PW-11, PW-12, PW-16, PW-17 and PW-18 have deposed in sync about having heard sound of firing at around 21:30 hours on 28.06.2006 and of having heard, in the heat of the moment and the chaos, some jawan(s) shout '*Randhir Singh saheb ko Bhagwan Khente ney goli maar di*' or words to that effect. It is apparent that the testimony of said witnesses is relevant and admissible under Section 6 of the Evidence Act and would be '*res gestae*'. Contemporaneous utterances when the heat of the passion has not cooled, made by people in the vicinity i.e. by standers are admissible evidence being '*res gestae*'.

5. PW-11 and PW-12 deposed about having seen the petitioner standing near the body of the deceased with an INSAS rifle in his hand immediately after the firing. Corroborating further, in regards to the presence of the petitioner, at the spot

immediately after the incident, PW-4, PW-5, PW-6, PW-7, PW-8, PW-9, PW-10, PW-11, PW-12, PW-16, PW-17 and PW-18 deposed that they rushed outside the OR Lines after the firing stopped and saw petitioner being caught by a few Jawans who brought him inside the OR Lines and tied him to a bed using ropes.

6. PW-18 and PW-19 deposed that after the petitioner was caught and tied to a bed, PW-18 slapped the petitioner and asked him as to why he had shot the deceased, to which the petitioner replied (quote) '*Saheb Ney Mereko Dupahar ko mara tha, isliye maine sahib ko maar diya*'.

7. We note that PW-21, a ballistic expert has opined that 18 fired cartridges recovered from the spot were fired from the rifle which was issued to the petitioner.

8. Thus, there is overwhelming evidence that the petitioner caused the death of the deceased by firing at the deceased and 18 bullets piercing the body of the deceased.

9. The defence of the petitioner, as projected today before us, stands on the testimony of PW-16 and PW-7 who deposed facts which throw considerable light as to why the petitioner shot at the deceased. PW-16 deposed that at about 14:00 hours on the date of the incident, in his presence, the deceased came to the petitioner and bullied him for having taken off his shoes without his permission and slapped the petitioner 2 to 3 times. PW-7 deposed that he had seen the deceased admonish and slap the petitioner inside the OR lines at about 07:30 hours. PW-4 deposed that he had seen the petitioner and the deceased leave together and on his return, the petitioner told him that the deceased had beaten him.

10. From the testimony of the four persons the motive would emerge i.e. that of revenge.

11. PW-11 and PW-13 deposed that they saw the petitioner looking disturbed and crying and that upon their asking the petitioner told them that the deceased had beaten him. PW-19 further deposed that he saw the petitioner in the company of the deceased in a room at around 14:00 hours where the petitioner was crying. Later that day he met the petitioner near the water heating point and asked him as to why he was crying earlier, to which the petitioner replied (quote) '*Sahab ney mere ko bahut mara aur pant kholney ko bataya aur mere mana karne par mujhe phir pitta*'.

12. With reference to the testimony of PW-19 it is sought to be urged that since the deceased had acted improperly with the petitioner by requiring the petitioner to remove his pant and probably sodomized him, it is urged that since the incident took place at 14:00 hours, the provocation lasted till early night when the petitioner, on seeing the deceased, was overcome by emotion and passion: the very face of the deceased became a provocation and thus the claim is for the benefit under Exception 1 to Section 300 IPC.

13. Suffice would it be to state that the petitioner, when incriminating circumstances were put to him, never stated that he was sodomized by the deceased in the late afternoon and as he came face to face with the deceased at around 21:30 hours on the same day, he was frozen by fear or the very face of his tormentor became the provocation and overcome by emotions he fired at the deceased. On the contrary, since a motive was emerging through the testimony of PW-4, PW-16, PW-7, PW-11,

PW-13, PW-18 and PW-19, when the circumstance was put with reference to their testimony, the petitioner denied the same.

14. That apart, PW-19 has only said that the petitioner told him that the deceased after slapping him had told him to open his pant. The witness does not say that the petitioner told him that the deceased had sodomized him. Now, one way of humiliating a person is to shame him by stripping him and thus the testimony of PW-19 would bring out, at best, that the deceased had humiliated the petitioner by making the petitioner strip naked and no more.

15. Revenge is to be provoked in taking justice in your own hands for a wrong committed by the opposite party; and nobody is entitled to take revenge. But where the wrong is sudden and grave, for the reason the person wronged would lose self control, as every other reasonable person would, law mitigates the offence, in case death results, from that of murder to culpable homicide not amounting to murder.

16. Twin requirement must be satisfied. The provocation must be grave. The provocation must be sudden. Howsoever grave may be a provocation, but if there is sufficient cooling time, any act in retaliation, being not the result of the suddenness of the provocation, would not mitigate the offence.

17. An inquiry pertaining to a sudden and grave provocation involves a probe, beyond the realm of reason, into the dark recesses of the human mind where lurk the turbulent passions and animals instincts of man, which are supposed to be suppressed by civility, but which even a reasonable person may sometimes find hard to curb, for the situation may be such that

a person may get out of self-control. *'Tasyaham Nigraham Manye Vayoriva Sudushkar'am' – My mind O' Krishna, is as hard to curb as the turbulent wind.*

18. The test is to see whether the situation would trigger the impulses and frailties of the normal man and his likely reaction in the given circumstance and to borrow the words of Bernard Shaw, *'The bursting strain'* of the normal human soul under similar provocation has to be discovered.

19. We could have appreciated the argument if the petitioner would have pleaded that since he was sodomized by the deceased in the afternoon, being wronged in body, soul and mind, the petitioner continued to lose self-control and the humiliated, tortured and tormented mind was overcome by fear upon seeing the face of the deceased and the thought that the deceased may recommit the wrong led the petitioner to act after loss of self-control and that the very sight of the deceased became a provocation. The petitioner has not so said. Thus, the only evidence we have is that the deceased had slapped the petitioner in the afternoon and probably, to humiliate the petitioner, had required the petitioner, to remove his pants. Whether or not the pants were removed is not known. But even if it was, evidence brings out that the humiliation was in private and not in public. This took place at 14:00 hours. The petitioner fired at 21:30 hours. There was sufficient cooling period. We do not find the defence of sudden and grave provocation being made out.

20. Before concluding we would note that the Armed Forces Tribunal has reconsidered the entire evidence as a Court of Appeal and under Article 226 of the Constitution of India we

are not to re-appreciate the evidence; that apart on merits it has been conceded before us that there is sufficient evidence to conclude that the petitioner fired at the deceased. Only argument projected was whether the defence of sudden and grave provocation was made out.

21. In light of the discussion above, the defence of sudden and grave provocation has not been established. We thus dismiss the writ petition.

22. No costs.

PRADEEP NANDRAJOG, J.

SUNIL GAUR, J.

JULY 05, 2011
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