

**IN THE ARMED FORCES TRIBUNAL
REGIONAL BENCH, GUWAHATI**

O.A.(A)- 17/2016.

**PRESENT
HON`BLE MR. JUSTICE B.P.KATAKEY,
OFFICIATING CHAIRPERSON
HON`BLE LT GEN SANJIV LANGER, MEMBER (A)**

Ex-Naik / Driver (MT),
Bidyapati Singha of 5004 ASC Battalion
Attached with 502 ASC Battalion,
Presently lodged in Central Jail, Dibrugarh, Assam
As life convict No. A/C/10584.

..... **Applicant.**

for

By Legal Aid Counsel

Applicant.
Mr. Iqbal Hussain.

-VERSUS-

1. Union of India,
Represented by the Secretary,
Govt. of India, Ministry of Defence
South Block, New Delhi – 110001.
2. General Officer Commanding,
Eastern Command, Fort William,
Kolkata-700021.
3. The General Officer Commanding,
2 Mountain Division, C/o 99 APO.
4. The Commanding Officer,
5005, Army Service Corps (ASC) Battalion,
C/o 99 APO.
5. The Commanding Officer,
502, Army Service Corps (ASC) Battalion,
C/o 99 APO.

..... **Respondents..**

By Legal Practitioner for the
Respondents
Brig N.Deka (Retd.), CGSC

Date of Hearing : 15.12.2016
Date of Order :

ORDER

(Justice B.P.Katakey, Officiating Chairperson)

This appeal, under Section 15 of the Armed Forces Tribunal Act, 2007, is directed against the findings and sentence dated 29.11.2002 passed by the General Court Martial (GCM) holding the appellant guilty of all the three charges under Section 38(1) of the Army Act, Section 52(a) of the Army Act read with Section 380/34 of the Indian Penal Code and Section 69 of the Army Act read with Section 302 of the IPC, as well as the order dated 12th February, 2003 passed by the General Officer Commanding, 2 Mountain Division confirming the findings and sentence awarded by the GCM and directing to carry out the sentence of imprisonment for life and confinement in civil prison, apart from the order dated 31st July, 2006 passed by the Chief of Army Staff.

2. The prosecution case in brief is that the appellant Nk Driver Bidyapati Singha and the deceased Nk Driver SNK Singh, who were posted to 5004 ASC Battalion and on active service were found absent from their Unit PT on 14th August, 2000 at about 06-00 Hours, who could not be traced even after conducting all the search of the Unit area. Thereafter, on being ordered to check the arms and ammunition it was found that one AK-47 Rifle and one Carbine along with the ammunitions and Magazines were missing from HQ Coy Kote. A First Information Report, thereafter, was lodged at Rangapara Police Station on 16th August, 2000 relating to the desertion of the appellant and the deceased with arms and ammunitions. According to the prosecution the appellant after his desertion with the arms and ammunitions intentionally caused the death of Nk Driver SNK Singh, based on which FIR was lodged in Barkhola Police Station on 17th August, 2000, which has been registered as Barkhola Police Station Case No. 123/2000 under Section 120(B)/302 IPC read with Section 25(1)(A)/27 of the Arms Act. A Court of Enquiry was held. Summary of evidence was also recorded. A General Court Martial was then directed, which started the trial against the appellant on the following 3 (three) charges:

“(a) First Charge: Under Army Act Section 38(1) ie. desertion from the unit, while he was on active service at Charduwar with 5004 Army Service Corps Battalion.

(b) Second Charge. Army Act Section 52(a)/Sec 380 Indian Penal Code read with section 34 of the Indian Penal Code, ie. commission of theft of Govt. property, which includes the following-

- (i) Rifle AK-47 bearing Butt Number 17 and Registration Number TN-0357.*
- (ii) Carbine Machine 9 mm bearing Butt Number- 560 and Registration Number C-7549.*
- (iii) 330 rounds live ammunition of Rifle AK-47*
- (iv) 30 rounds live ammunition of Carbine Machine 9 mm.*
- (v) Seven Magazines of Rifle AK-47.*
- (vi) One Magazine of Carbine Machine 9 mm.*

(c) Third Charge. Under Army Act Section 69/Sec 302 Indian Penal Code in which the accused intentionally caused death of No. 13887886X Naik/Driver (Mechanical Transport) SNK Singh of the same unit at Village-Rampur Basti, Police Station Borkhola, District- Kachar (Assam) on 17 Aug 2000. "

3. The prosecution in order to bring home the charges framed against the appellant examined 29 witnesses consisting of 19 Army personnel, who have adduced evidence relating to the first and the second charges, namely, the act of desertion and stealing of arms and ammunition and 10 (ten) civilians, who have rendered their evidences mostly relating to the third charge, namely, the charge under Section 69 of the Army Act read with Section 302 IPC for intentionally causing death of Naik/Driver (Mechanical Transport) SNK Singh of the same unit at Village Rampur Basti under Borkhola Police Station in the district of Cachar on 17th August, 2000. The defence also examined one witness. The witnesses were duly cross-examined by the respective parties. Out of 10 civilian witnesses, P.W. 21, Smt. Namita Das, is the eye witness to the occurrence. The prosecution, apart from examining the Doctor who conducted the post-mortem examination on the body of the deceased Nk Driver SNK Singh, has also proved the post-mortem examination report, which is marked as Ext. VV.

4. The GCM on conclusion of the trial has recorded the finding of guilt against the appellant in respect of all the three charges and sentenced him (a) to suffer imprisonment for life, (b) to be dismissed from service, and (c) to be reduced in rank, vide order dated 29th November, 2000.

5. The findings and sentence of GCM was confirmed by the General Officer Commanding, 2 Mountain Division on 12th February, 2003 and the appellant was directed to be confined in civil prison to carry out the sentence of imprisonment for life for causing

intentional death of Nk Driver SNK Singh. The application filed by the applicant challenging the finding and sentence has also been rejected by the Chief of Army Staff on 31st July, 2006.

6. We have heard Mr. I. Hussain, who has been appointed as Legal Aid Counsel by the State Legal Aid Authority, appearing for the appellant, since the appellant who has filed the appeal from custody is not represented. We have also heard Brig. N.Deka, learned Central Govt. Standing Counsel assisted by Col Anand, OIC, AFT Legal Cell, Guwahati, appearing for the respondents.

7. Mr. Hussain, the learned Legal aid Counsel, referring to the deposition of the prosecution witnesses, more particularly of P.W. 21, Smt. Namita Das, who according to the prosecution is the eye witness to the occurrence, has submitted that it is apparent from the deposition of the said witness that she has not seen the occurrence though the prosecution claimed to be so. According to the learned Counsel, P.W.-21 in her deposition in clear terms having stated that she was about 30/40 feet away from the place of occurrence, her version relating to the claim that she saw the appellant opening fire on the deceased could not have been accepted by the GCM as it is not reasonably possible to see the occurrence from such a distance. Learned Counsel further submits that it is also apparent from the deposition of the said witness, namely, P.W.-21, that there were altercations between the appellant and the deceased before the alleged incident of fire took place and hence, in any case, the GCM ought not to have convicted the appellant under Section 69 read with Section 302 IPC, there being grave and sudden provocation by the deceased resulting in the fire by the appellant and hence the appellant ought to have been convicted under Part-II of Section 304 IPC and not under Section 302 IPC. Learned Counsel further submits that there being absence of complete chain of events, undoubtedly pointing towards the guilt of the appellant, the findings of the GCM in respect of the Charge No. 3 cannot be sustained in law, so also the subsequent order of confirmation dated 12th February, 2003. Relating to the Charge No. 1 and 2 it has also been submitted by the learned Counsel that there is no evidence on record to demonstrate that the appellant has deserted the unit with arms and ammunition on 14th August, 2000, as he was not holding any arms and was not on duty and hence the finding of the GCM in relation to first and second charges are also not sustainable in law. Learned Counsel in support of his contention, more particularly, the contention relating to the conviction based on the circumstantial evidence as well as grave and sudden provocation

by the deceased resulting in firing which ultimately caused death of Nk Driver SNK Singh, has placed reliance on the following decisions of the Hon`ble Supreme Court:

- (1) Hari Ram Vs. State of Haryana, (1983) 1 SCC 193
- (2) Hem Raj Vs. The State (Delhi Admn.), 1990 (Supp) SCC 291
- (3) Madho Singh Vs. State of Rajasthan (2010) 15 SCC 588
- (4) State of Punjab Vs. Jagtar Singh & Ors., (2011) 14 SCC 678
- (5) Sahadevan & Anr. Vs. State of Tamil Nadu, (2012) 6 SCC 403

The learned Counsel has also placed reliance on the following judgments of the Hon`ble Gauhati High Court in support of his contention:

- (1) Abdul Hasim Vs. State of Assam (Crl. Appeal(J) No. 129/2010 decided on 17.09.2013), and
- (2) Shri Suresh Phukan Vs. State of Assam (Crl. Appeal (J) 125/2010 decided on 08.12.2014).

8. Brig N.Deka, learned Central Govt. Standing Counsel, per contra, referring to the deposition of the prosecution witnesses as well as the findings recorded by the GCM has submitted that it is apparent therefrom that the charges of desertion by the appellant on 14th August, 2000 with arms and ammunition have been proved beyond all reasonable doubt and hence the GCM has rightly recorded the findings of guilt. In so far as it relates to the third charge, namely, the charge under Section 69 of the Army Act read with Section 302 IPC, learned CGSC referring to the deposition of Smt. Namita Das, P.W.-21 has submitted that the prosecution could prove beyond reasonable doubt that the appellant has intentionally caused the death of Nk Driver SNK Singh on 17th August, 2000 by firing from the AK-47 Rifle which was stolen by the appellant from the unit. Referring to the deposition of P.W-21 it has been submitted by the learned CGSC that this witness has seen the occurrence and vividly described how it has occurred and how the appellant fired 4/5 rounds from the AK-47 Rifle which caused death of Nk Driver SNK Singh. Learned Counsel further submits that P.W.-21 in clear terms have stated that she has seen the occurrence from a distance of 30/40 ft. According to the learned Counsel the defence having failed to discredit this witness during cross-examination, in relation to such statement, the GCM has rightly recorded the finding of

guilt in so far as the third charge is concerned. Brig Deka further submits that the defence could not brought out anything even to suggests that there were obstructions between the P.W.-21 and the place of occurrence and hence it was not possible to see the occurrence by the P.W.-21. No suggestion in that respect even has been put by the defence while cross-examining the P.W.-21. Learned Counsel further submits that the occurrence having taken place in broad day light, i.e. at about 11-30 AM, that too in a summer, the P.W.-21 could clearly see the occurrence from a distance of 30/40 ft. The learned CGSC also submits that the version of the P.W.-21 relating to the opening of fire by means of AK-47 rifle on the deceased has been duly corroborated by the medical evidence, more particularly, the post-mortem examination report, Ext. VV. Learned Counsel also submits that the contention of the appellant that in any case the appellant could not have been convicted under Section 302 IPC as it does not amount to murder within the meaning of Section 300 IPC, but is culpable homicide not amounting to murder as the incident occurred because of grave and sudden provocation, also cannot be accepted in view of his statement recorded during summary of evidence wherefrom it appears that the accused had opened fire only after the deceased started running away with the bag. Learned Counsel further submits that it is also evident from the post-mortem examination report (Ext. VV) that all the entry wounds on the body of the deceased were found on the back and the exit from the front, which also proves that the deceased was fired upon from the back when he was running away from the scene of occurrence. Learned Counsel, therefore, submits that the confirming authority has rightly confirmed the findings recorded and sentence awarded by the GCM, which does not call for any interference by this Tribunal.

9. The arguments advanced by the learned Counsel for the parties received our due consideration. We have also gone through the records of the GCM, including the deposition of the witnesses examined, apart from the documents marked as Exts. We shall first discuss as to whether the first and second charges, namely, charges of desertion and theft could be proved by the prosecution. The appellant was in active service on 14th August, 2000, as per Notification SRO-6E dated 19th September, 1991 which has been proved by Col M.K.Bali (P.W.-17), which provides that all units and formation deployed (in OP Rhino) were deemed to be on active service under Section 9 of the Army Act. The list issued by the HQ 4 Corps on units/formation deployed in OP Rhino has also been proved by P.W. 17, which contains the unit of the appellant. P.W.-9, Hav. MDM Ali, as well as P.W.-4 Sep Sujit Ghosh

apart from P.W.-3 Sub M Narsimulu have also proved that since 14th October, 2000 the appellant along with the deceased were missing from the unit. The factum of missing have also been intimated to Cap VV Mekvan (P.W.-12) who in turn reported the same to the C.O. (P.W.-17).

10. The Board of Officers ordered by P.W.-17 carried out the detailed check and submitted report (Ext. LL and LL-1) relating to the missing of arms and ammunitions wherefrom it appears that one AK-47 Rifle, one Carbine and ammunitions for the AK-47 Rifle apart from Magazines, were found to be missing. The appellant as well as the deceased were shown absent in the respective Coy Parade State and in the Battalion Parade State which have been proved as Ext. - Z.

11. The testimony of the father-in-law of the appellant, Shri Lal Babu Singha (P.W.-23), is also relevant in so far as those charges are concerned. This witness has deposed that both the appellant and the deceased came to his house on 15th August, 2000 in their combat dress with weapons in the back and when asked how the accused come with arms and ammunition when they are not on duty, the appellant told him that both of them had ran away from their unit with arms and ammunition. P.W.-23 further stated that immediately, thereafter, he asked both of them to leave his house and then picking up the smaller weapon the appellant left the house when the deceased left the house with bigger weapon on his back. The testimony of P.W.-23 has been corroborated by Shri Mohan Lal Singha, P.W.-24, who saw the accused and the deceased in a combat dress and walking away from the house of P.W.-23 on the evening of 15th August, 2000. No contradiction could be brought out by the appellant during the cross examination of these witnesses. Their testimony, without any reasonable doubt, proved the intention of the appellant not to come back to the unit.

12. The charge under Section 52(a) of the Army Act read with Section 380 IPC can be substantiated only when the prosecution could prove the factum of intention of dishonestly moving out any immovable property out of the possession of any person without the person's consent. The evidence on record proves that on 14th August, 2000 at about 06-25 Hrs. the Senior JCO, HQ Coy Kote informed Cap VV Mekvan, P.W.-12, that the HQ Coy Kote had not opened by that time and that the deceased was missing from the unit. As discussed above, the Board of Officers after detailed check found the aforesaid arms and ammunition missing from HQ Coy Kote. The First Information Report was also lodged in Rangapara

Police Station which have been proved as Ext. EE. As discussed above, P.W.-23, the father-in-law of the appellant stated on oath that the appellant had told him about running away from the unit with the arms and ammunition, which amply proves the ingredients constituting the offence of theft within the meaning of Section 52(a) of the Army Act read with Section 378 of the IPC. It is not in dispute that the arms and ammunitions which were taken away are the property of the Govt. of India and has been moved out from the lawful possession without the consent. The intention to take away dishonestly of the said arms and ammunitions could be proved by the prosecution by adducing the evidences as discussed above. The defence version that the appellant had left the unit under threat and duress of the deceased, also cannot be believed as he was in the house of his father-in-law P.W.-23, for a considerable period of time, when he was not under constant watch of the deceased. Had the appellant been under threat, he definitely would have disclosed to his father-in-law, when he got that chance. Hence, in our considered opinion the GCM has rightly recorded the finding of guilt of the appellant in respect of the first and second charges are concerned.

13. The third charge relates to the allegation of intentional causing death of Nk Driver SNK Singh at Village Rampur Basti under Borkhola Police Station in the district of Cachar on 17th August, 2000. The prosecution, in order to bring home the said charge has examined Dr. Gunajit Dass, P.W.-20, who conducted the post-mortem examination on the body of deceased Nk Driver SNK Singh. This witness based on the said post-mortem examination report has deposed that the following injuries were found on the body of the deceased:

- "1. Circular punctured wound of .8 centimetre diameter with abraded and contused margins present over back of the right shoulder 3 Centimetre below the acromion (entry wound)*
- 2. An oval shaped punctured wound with lacerated margins with everted appearance present over front of right side thorax in upper part 3 centimetre right of midline, third inter coastal space (Exist wound of injury No. 1). The exit wound was on the right side of upper chest.*
- 3. Circular punctured wound of .8 centimetre diameter with abraded and contused margins present over upper part of dorsal aspect of right forearm (entry wound). The entry wound was in the forearm just below the elbow.*
- 4. Lacerated wound 1.5 centimetre diameter exactly on the same site correspondingly opposite side in right forearm with averted margins (Exit wound of Injury no.3).*
- 5. Lacerated injury over ulnar border of left forearm 3X3 centimetre exposing muscles and bones (caused in the same track of injury No. 3 and 4).*

In my opinion injury No. 5 could have been caused by the same bullet which caused injury No. 3 and 4.

- 6. A circular punctured wound of .8 centimetre diameter with abraded and contused margins present over right thigh in the upper part lateral aspect, 7 centimetre below iliac crest (entry wound).*
- 7. Lacerated wound with everted margins 6X3 centimetre over right inguinal region in its middle part (exit wound of injury no. 6).*
- 8. Circular punctured wound with abraded and contused margins of .8 centimetre diameter in the left flank in midaxillary line. 7 centimeter above the iliac crest (entry wound).*
- 9. Punctured wound at correspondingly opposite side over the right flank with everted margins (7X6 centimetre size) through which intestines are coming out (Exit wound of injury No. 8).*
- 10. Punctured wound of .8 centimetre diameter with abraded margins over left side of the back of abdominal wall. 3 centimetre left of mid line at level of second lumbar spine (entry wound).*
- 11. An oval shaped punctured wound with everted margins 4X2 centimetre of the mid line of the abdomen 3 centimeter above umbilicus (Exist wound of injury No. 10).*
- 12. Diffuse bruise (bluish in colour) over temporal region of left side including the area around left ear.*
- 13. Sub- dural haemorrhage over parietal and temporal area on the left side. Injury No. 13 is inter bleeding over the brain caused due to trauma."*

14. P.W.-20 opined that all the injuries are ante-mortem in nature and the cause of death was due to haemorrhage and shock resulting from the bullet injuries. It has further been opined that the Injury No. 1 to 11 are caused by Rifle and the rests are caused by blunt object. Though the prosecution has extensively cross-examined this witness, nothing could be brought out to doubt the said post mortem examination report in so far as the nature of injuries and cause of death are concerned. The prosecution, therefore, could prove the factum of homicidal death of Nk Driver SNK Singh.

15. The next question which requires for our determination is, as to whether the prosecution could prove beyond all reasonable doubt that the author of the crime was the appellant. In this regard the deposition of P.W.-21, Smt. Namita Das assumes importance, as the prosecution case, in so far as it relates to the third charge, rests mainly on the testimony of the said witness, who is an eye witness to the occurrence. P.W.-21 in clear term has narrated as to how she could see the incident of opening the fire by the appellant on the deceased. She has deposed that on 17th August, 2000 at about 11-30 hrs while she was having bath at the

pond near her house she heard both the accused and the deceased having loud conversation. She has further stated that she saw the accused walking behind the deceased and he crossed him and fired few bullets with the weapon he was holding, as a result of which the deceased fell on the ground. This witness has also stated that she saw the incident from a distance of 30/40 ft. Though this witness has been extensively cross-examined by the defence no contradictions on material parts could be brought out. According to this witness the appellants fired about 4/5 bullets. The testimony of this witness has been corroborated by the medical evidence, namely, by P.W.-20 and also by the post mortem examination report, Ext. VV. Though this witness has stated that she saw the occurrence from a distance of about 30/40 ft nothing could be brought out by the defence during cross examination that the situation was such that it was not possible on the part of this witness to see the occurrence from such a distance, there being any obstacle between her and the place of occurrence. The incident had occurred in the broad day light in summer. It is therefore, possible to see the occurrence from a distance of 30/40 ft. There is no evidence on record even to suggest that there was any type of obstruction between the place where the witness was present and the place of occurrence, even to create a doubt in the mind of this Tribunal about the possibility of seeing the occurrence by P.W.-21. Nothing could be demonstrated by the appellant to doubt the version of this witness. P.W.-21, in our considered opinion, is reliable and trustworthy.

16. The submission of the learned Legal Aid Counsel that as the appellant has fired by means of AK-47 Rifle because of the grave and sudden provocation, he could not have been punished under Section 302 IPC, also cannot be accepted, as to come within the first exception of Section 300 IPC, it must be proved that the appellant has committed the offence because of deprivation of the power of control by grave and sudden provocation. P.W.-21 has only stated about the loud conversation between the appellant and the deceased. She even did not say anything about the altercation. Merely because there was loud conversation between the appellant and the deceased it does not mean that there was grave and sudden provocation by the deceased resulting in loss of power of control by the appellant who caused the death of Nk Driver SNK Singh. Nothing in that regard could be brought out by the appellant during cross-examination of any of the witnesses. Nk Sub A.K.Singh, who has been examined as the lone defence witness has only deposed that he never heard or saw the appellant having any quarrel with any one. He has further deposed that he knew that

the appellant never been absent without leave. This witness did not speak anything relating to grave and sudden provocation by the deceased.

17. The decisions of the Hon`ble Supreme Court cited by the learned Legal Aid Counsel in Hari Ram (Supra), Hem Raj (Supra), Jagtar Singh (Supra) relate to the exception to Section 300 IPC, wherein it has been held that if the offence is committed on the spur of the moment upon a sudden quarrel or in the heat of the moment and when the intention to kill is absent, no conviction can be recorded under Section 302 IPC. There is no dispute on the proposition of law. In the instant case, however, as discussed above, nothing could be brought on record even to demonstrate that there was quarrel or altercation between the appellant and the deceased. On the other hand, it is evident from the statement of the appellant that he fired on the deceased when he was fleeing away from him.

18. The Apex Court in Madho Singh (Supra) as well as in Sahadevan (Supra) has reiterated the principles of admissibility and evidentiary value of extra-judicial confession and also when the conviction can be based on circumstantial evidence. In the instant case, in so far as the third charge is concerned, the same is based on eye witness account and not based on the circumstantial evidence. It is settled position of law that the conviction can be based on the testimony of a sole eye witness, if his/her testimony is reliable and trustworthy. The decision of the Hon`ble Gauhati High Court in Md. Abdul Hasim (Supra) and in Suresh Phukan(Supra), for the same reasons, are not also applicable in the case in hand as those relates to the exception to Section 300 IPC and the circumstantial evidence.

19. In view of the aforesaid discussion, we are of the considered opinion that the GCM has rightly recorded the finding of guilt of the appellant in respect of the charges framed and has also rightly sentenced him. Hence the findings recorded and the sentence awarded by the GCM, so also the order of confirmation and the order passed by the Chief of Army Staff do not require any interference by this Tribunal.

20. The O.A. (A) accordingly stands dismissed. No costs.

MEMBER (A)

OFFICIATING CHAIRPERSON.