

DALBIR SINGH

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v.

UNION OF INDIA & ORS.

(Civil Appeal No.9885 of 2011)

JULY 02, 2019

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[M. R. SHAH AND A.S. BOPANNA, JJ.]

Armed Forces – Appellant was posted to 3 Rashtriya Rifles (RR) Battalion in 2006 – According to the prosecution while the appellant was so serving, it was ordered on August 13, 2006 to cordon and carry out search in a village in the Jammu and Kashmir – On reaching the village there was exchange of fire, after which the militants took cover in a maize field – When the appellant and the group in which he was given the responsibility to search the house was searching the said house, they heard firing from the direction of the maize field and as such the group exited the house and the cordon was thereafter adjusted around the maize field – In that regard the Light Machine Gun (LMG) was also placed and the LMG was manned by Sapper ‘GS’ and the appellant – Intense fire came from the direction of the maize field towards the LMG spot wherein Sapper ‘GS’ and the appellant were also positioned – Charge against the appellant is that he left his post, jumped across the stone wall and failed to retaliate against the militants due to which the militants broke the cordon and killed ‘GS’ – Appellant dismissed from service, sentenced to undergo imprisonment for six months by the Summary General Court Martial (SGCM) – Armed Forces Tribunal (AFT) upheld the order – On appeal, held: Task assigned to the group of officers was to cordon the area and prevent the militants from breaking through – Apart from the fact that the appellant was hit by a bullet in the leg while jumping over the wall, the other actions indicate that the appellant did not rise to the occasion more particularly when his colleague was attacked and killed – Though he contended that he jumped the wall to protect himself, there is no reasonable explanation as to why he did not use the weapons with him when the attack from the militants had already taken place and his colleague was injured – Tribunal rightly concluded that the theory of the appellant having become

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- A *unconscious cannot be accepted since all incidents which occurred from the time there was attack by the militants including the act of the militants in taking away the LMG was explained by the appellant, which he would not have been aware of if he was actually unconscious – In that circumstance, when the evidence has been*
- B *adverted to by the AFT and when such conclusion reached does not indicate any perversity it would not be appropriate to interfere in the matter – No other material or circumstance brought on record by the appellant to indicate, but for the incident that there was any other reason due to which he was victimized or to show that it is a*
- C *malafide action – Order of dismissal justified – However, in the peculiar facts and circumstance of the case, the order to undergo rigorous imprisonment is set aside – Army Act, 1950 – s.34(c) – Service Law.*

- Service Law – Disciplined Forces – Grant of punishment – Considerations for – Held: Though in service matters the past*
- D *conduct, both positive and negative will be relevant not only while referring to the misconduct but also in deciding the proportionality of the punishment, the Court should be cautious while considering the case of an officer/soldier/employee of a disciplined force and the same yardstick or sympathetic consideration as in other cases cannot be applied.*

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Disposing of the appeal, the Court

- HELD: 1. The task assigned to the group of officers was to cordon the area and prevent the militants from breaking through. From the evidence of the witnesses the manner in which**
- F **the incident had occurred has been referred to in detail. Insofar as charge against the appellant, apart from the fact that he was injured the other actions would indicate that the appellant did not rise to the occasion more particularly when his colleague was attacked and killed. Though he contended that he had jumped the wall to protect himself, there is no reasonable explanation as**
- G **to why he had not used the weapons which were with him when the attack from the militants had already taken place and his colleague was injured. Even if the explanation sought to be put forth by him that he was unconscious for about 10 to 12 seconds**

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is taken note the same was not of such a long duration which had prevented him from taking any action even thereafter and that too in a situation when the militants had killed a soldier and also had taken away the LMG. While taking note of the said explanation sought to be put forth by the appellant the Tribunal rightly arrived at the conclusion that the theory of the appellant having become unconscious cannot be accepted since all incidents which occurred from the time there was an attack by the militants including the act of the militants in taking away the LMG was explained by the appellant, which he would not have been aware of if he was actually unconscious. In that circumstance, when the evidence has been adverted to by the Armed Forces Tribunal and when such conclusion reached does not indicate any perversity it would not be appropriate for Supreme Court to interfere in the matter. Further, there is no other material or circumstance brought on record by the appellant to indicate, but for the incident there was any other reason due to which he was victimized or to show that it is a malafide action. Though in service matters the past conduct, both positive and negative will be relevant not only while referring to the misconduct but also in deciding the proportionality of the punishment, the Court should be cautious while considering the case of an officer/soldier/employee of a disciplined force and the same yardstick or sympathetic consideration as in other cases cannot be applied. The resources of the country are spent on training a soldier to retaliate and fight when the integrity of the nation is threatened and there is aggression. In such grave situation if a soldier turns his back to the challenge, it will certainly amount to cowardice. The SGCM and the Armed Forces Tribunal were justified. The order of dismissal is justified and does not call for interference. In so far as the order for imprisonment, in the present facts and circumstance it is noticed that though the appellant had exhibited cowardice, the fact remains that he had also received a gunshot injury in the incident. Further, there is long lapse of time and as such in the peculiar facts and circumstance the order of imprisonment need not be implemented at this stage. [Paras 6-9] [35-A, D-H; 36-A-G]

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A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9885
of 2011

From the Judgment and Order dated 26.08.2011 of the Armed
Forces Tribunal, Regional Bench at Chandigarh, Chandimandir in OA
No. 296 of 2010

B Jay Kishor Singh, Ravindra Keshavrao Adsure, Advs. for the
Appellant.

R. Balasubramanian, Sr. Adv., S. K. Tyagi, Shankar Divate,
A.K. Sharma, Ms. Saudamini Sharma, Advs. for the Respondents.

C The Judgment of the Court was delivered by

A.S. BOPANNA, J.

1. The appellant is before this Court assailing the order dated
August 26, 2011 passed by the Armed Forces Tribunal, Chandigarh
Regional Bench at Chandimandir whereby the appeal filed by the
D appellant herein has been dismissed and the sentence imposed by the
Summary General Court Martial ('SGCM' for short) has been upheld.

2. The appellant was enrolled in the Army on April 06, 1999 and
was posted to 3 Rashtriya Rifles (RR) Battalion (Bn) in the year 2006.
While he was so serving, in respect of an incident which occurred on
E August 13, 2006, action was initiated under Section 34(c) of the Army
Act, proceedings were held by the SGCM and the sentence to undergo
imprisonment for six months and dismissal from service was imposed.
The appellant assailing the same was before the Armed Forces Tribunal
and in the said proceedings the order impugned dated August 26, 2011 is
F passed. The incident referred to is that according to the prosecution
while the appellant was posted to 3 Rashtriya Rifles (RR) Battalion
(Bn), it was ordered on August 13, 2006 to cordon and search be carried
out in village Darigidiyan in the Jammu and Kashmir. The details of the
officers who formed a part of the contingent is also referred in the
proceedings. On reaching the village there was a brief contact with the
G militant and exchange of fire, after which the militants took cover in a
maize field. In that view, for the purpose of operation two teams were
formed, among others the appellant was a part of the second team. At
about 0800 Hrs on August 13, 2006 the team under Subedar Subhash
Chand in which the appellant was also a member was divided into two
H groups. When the appellant and the group in which he was given the

responsibility to search the house along with Naik Sukhdev Raj and Sapper Bachitar Singh was searching, they heard firing from the direction of the maize field and as such the group exited the house from the window and the cordon was thereafter adjusted for the night around the maize field. In that regard the Light Machine Gun (LMG) was also placed and the LMG was manned by Sapper Gurmail Singh and the appellant. To provide support, Sapper Bachitar Singh was positioned to his left at about 5-7 meters. At about 2300 Hrs intense fire came from the direction of the maize field towards the LMG spot wherein Sapper Gurmail Singh, Subedar Dalbir Singh and the appellant were positioned. The charge against the appellant is that he left his post, jumped across the stone wall and failed to retaliate against the militants. He failed to use his AK-47 and a pistol which was with him due to which the militants broke the cordon, killed Sapper Gurmail Singh and took away the LMG. While jumping over the wall the appellant no doubt was hit by a bullet in the leg.

3. Based on such charge of exhibiting cowardice by abandoning his post, the proceedings were held in the SGCM. The witnesses were examined and on analysing the same the sentence dated March 06, 2008 was imposed. It is the said finding and sentence which was assailed in OA.No.296 of 2010 before the Armed Forces Tribunal. The Armed Forces Tribunal has referred to the evidence of each of the witnesses who had been examined in the SGCM while prosecuting the charge against the appellant and on such reappraisal had arrived at the conclusion that the sentence imposed on the appellant is justified.

4. The learned counsel for the appellant while assailing the finding and conclusion reached by the SGCM and the Armed Forces Tribunal has contended that the conclusion reached is erroneous inasmuch as the evidence tendered by the witnesses has not been properly appreciated. The learned counsel contends that if the case of the prosecution as narrated in the judgment of the Tribunal is taken note and, in that background, the evidence of the witness is referred to, the same would not be sufficient for establishing the charge. It is contended that the appellant himself was injured in the incident and in such circumstance, it cannot be concluded that he had abandoned the post and cannot be branded as a coward. The learned counsel has referred to the cross examination of the witnesses examined as PW-4 to PW-6 to contend that the said witnesses have stated that the appellant was a good soldier

- A and had on earlier occasions accompanied the said witnesses in several operations and the appellant is not scared to take part in the operation. The learned counsel, therefore, contends that when the appellant has such record of service, the charge that he had moved away from the post as an act of cowardice cannot be accepted and hence he seeks that the findings recorded by the SGCM and the conclusion reached by the
B Armed Forces Tribunal be set aside.

5. The learned counsel for the respondents has taken us through the appeal papers including the order passed by the Armed Forces Tribunal. In that regard, it is contended that the SGCM based on the evidence of the prosecution witnesses had arrived at its conclusion. It is
C pointed out that the Armed Forces Tribunal while considering the appeal filed by the appellant herein has reappreciated the evidence and has thereafter arrived at its conclusion. It is contended that in such circumstance in the appeal of the present nature the concurrent findings and orders rendered by the courts below do not call for interference.
- D On the factual aspect it is contended that though the appellant presently contends that he had not abandoned the post, there is no explanation as to why even in a grave situation he had not made use of either the AK-47 gun or the pistol which was in his possession as a mark of retaliation. In that circumstance, it is contended that when in the attack carried out
E by the militants the colleague of the appellant late Gurmail Singh had died and there was no action from the appellant, it is a grave situation which warranted the action taken and the same does not call for interference.

6. In the above background, keeping in view the scope available in examining a matter of the present nature we have taken note of the nature of the consideration made by the Armed Forces Tribunal as the same was in a statutory appeal against the proceedings by the SGCM. In the matter of the present nature when the task assigned to a soldier is cut out in a definite manner and when the duties are assigned, the only scope in a judicial proceeding is to find out whether the same has been
F performed by him based on the finding of fact that is recorded. In a matter where allegation of cowardice is made, the reason for which such allegation is made is to be taken note and considered. In that view, without adverting to all other aspects what is necessary to be taken note is the charge that was made and the reason for which the competent authority had arrived at the conclusion that the appellant instead of
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performing his duty had run away from it. Limited to that aspect, what is to be taken note is that in the background of the situation that had arisen, the task assigned to the group of officers was to cordon the area and prevent the militants from breaking through. The charge against the appellant is that despite the militants having attacked and killed Sapper Gurmail Singh who was in the group of the appellant and though the LMG was manned by the said deceased Sapper Gurmail Singh and the appellant, the appellant had not retaliated using either the AK-47 gun or the pistol which was in his possession. On the other hand, the appellant abandoned the post and jumped over the wall to escape from the spot. The defence of the appellant, however, was that he had jumped over the wall to protect himself and attack the militants and in that process he was also fired at, to his leg and was injured, in the process he had become unconscious for about 10 seconds and it is at that point the militants had picked up the LMG and carried it away. The appellant had also stated that his AK-47 was jammed when tried to use it.

7. From the evidence of the witnesses the manner in which the incident had occurred has been referred to in detail. Insofar as charge against the appellant, apart from the fact that he was injured the other actions would indicate that the appellant did not rise to the occasion more particularly when his colleague was attacked and killed. Though he has contended that he had jumped the wall to protect himself, there is no reasonable explanation as to why he had not used the weapons which were with him when the attack from the militants had already taken place and his colleague was injured. Even if the explanation sought to be put forth by him that he was unconscious for about 10 to 12 seconds is taken note the same was not of such a long duration which had prevented him from taking any action even thereafter and that too in a situation when the militants had killed a soldier and also had taken away the LMG. While taking note of the said explanation sought to be put forth by the appellant the Tribunal has rightly arrived at the conclusion that the theory of the appellant having become unconscious cannot be accepted since all incidents which occurred from the time there was an attack by the militants including the act of the militants in taking away the LMG was explained by the appellant, which he would not have been aware of if he was actually unconscious. In that circumstance, when the evidence has been adverted to by the Armed Forces Tribunal and when such conclusion reached does not indicate any perversity it would

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A not be appropriate for this Court to interfere in the matter. Further, there is no other material or circumstance brought on record by the appellant to indicate, but for the incident there was any other reason due to which he was victimized or to show that it is a malafide action.

B 8. Though the learned counsel for the appellant has sought to refer to the cross-examination of PW-4 to PW-6 to indicate that he had taken part in several operations earlier and the said witnesses have admitted him to be a good soldier, in the matter of protecting the border, a soldier cannot live merely on past glory but should rise to the occasion on every occasion to defend the integrity of the nation since such is the trust reposed in a soldier. Though in service matters the past conduct, C both positive and negative will be relevant not only while referring to the misconduct but also in deciding the proportionality of the punishment, the Court should be cautious while considering the case of an officer/soldier/employee of a disciplined force and the same yardstick or sympathetic consideration as in other cases cannot be applied. The D resources of the country are spent on training a soldier to retaliate and fight when the integrity of the nation is threatened and there is aggression. In such grave situation if a soldier turns his back to the challenge, it will certainly amount to cowardice. If in that background, the action taken against the appellant is taken note, we are of the opinion, that the SGCM and the Armed Forces Tribunal were justified. E

9. Having arrived at the above conclusion we also take note that the appellant apart from being dismissed from service has also been ordered to undergo rigorous imprisonment for six months. For the reasons recorded above, the order of dismissal is justified and does not call for interference. In so far as the order for imprisonment, in the present F facts and circumstance we notice that though the appellant had exhibited cowardice, the fact remains that he had also received a gunshot injury in the incident. Further, there is long lapse of time and as such in the peculiar facts and circumstance we are of the opinion that the order of imprisonment need not be implemented at this stage.

G 10. Consequently, the order of dismissal from service is upheld while the order to undergo rigorous imprisonment is set aside. The appeal is accordingly disposed of with no order as to costs.