

NO.15138812Y L/NK GURSEWAK SINGH

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v.

UNION OF INDIA & ANR.

(Criminal Appeal No. 1791 of 2023)

JULY 27, 2023

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[ABHAY S. OKA AND SANJAY KAROL, JJ.]

Penal Code, 1860: s. 304 Part I, s 300 exception 4 – Punishment for culpable homicide not amounting to murder – Appellant and the victim, both Lance Naik in the Indian Army – Altercation between them on the issue of seniority, after consuming liquor – Appellant snatched the rifle from the hands of the victim and fired one bullet at him, resulting in the death of the victim – Appellant convicted by the court martial for the offence punishable u/s. 302 rw s. 69 of the Army Act and sentenced to imprisonment for life – Order of conviction and sentence upheld by the courts below – On appeal, held: There was no premeditation on the part of the appellant – There was a sudden fight between the appellant and the deceased over the issue of seniority – Every possibility that the said issue resulted in the appellant snatching the rifle held by the deceased and firing only one bullet in a heat of passion – Furthermore, the appellant did not run away and helped others to take the deceased to a hospital – Hence, there was no intention on his part to kill the deceased – Appellant cannot be said to have acted in such a cruel manner which would deprive him of the benefit of exception 4 to s. 300 – Term ‘cruel’ manner is a relative term, if the meaning used in common parlance is assigned, in no case exception 4 can be applied – Thus, exception 4 to s. 300 applicable, and appellant guilty of culpable homicide not amounting to murder – Conviction of the appellant altered to the one under Part I of s. 304 – In view of the good conduct of the appellant, he is sentenced to undergo imprisonment for the term which he has already undergone – Army Act, 1950 – s. 69.

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Partly allowing the appeal, the Court

HELD: 1.1 The facts brought on record show that there was no premeditation on the part of the appellant. Both the appellant and the deceased had consumed liquor. There was a

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- A **fight between him and the deceased over the issue of seniority.** In fact, when the appellant told the deceased to bring water for him, the deceased refused to do so on the ground that he was senior to the appellant. In a disciplined force like Army, the seniority has all the importance. Therefore, there is every possibility that the dispute over seniority resulted in the appellant doing the act in a heat of passion. It appears that in the heat of passion, the appellant snatched a rifle held by the deceased and fired only one bullet. If there was any premeditation on the part of the appellant or if he had any intention to kill the deceased, he would have fired more bullets at the deceased. Hence, there was no intention on his part to kill the deceased. Whether the appellant had done a cruel act or not, has to be appreciated after considering three facts. Firstly, the appellant was a soldier on guard duty, secondly, the appellant and the deceased had a fight over the seniority and thirdly, though there were 20 rounds in the rifle of the deceased, he fired only one round. The appellant cannot be said to have acted in such a cruel manner which would deprive him of the benefit of exception 4 to Section 300 IPC. The term cruel manner is a relative term. Exception 4 applies when a man kills another. By ordinary standards, this itself is a cruel act. The appellant fired only one bullet which proved to be fatal. He did not fire more bullets though available. He did not run away and he helped others to take the deceased to a hospital. If a meaning is assigned to the word 'cruel' used in exception 4 which is used in common parlance, in no case exception 4 can be applied. Therefore, exception 4 to Section 300 was applicable in this case. Therefore, the appellant is guilty of culpable homicide not amounting to murder. The appellant snatched the rifle from the hands of the deceased and fired one bullet at the deceased. This act was done with the intention of causing such bodily injury to the deceased as was likely to cause death. Therefore, the first part of Section 304 IPC would apply. Under the first part of Section 304 IPC, an accused can be punished with imprisonment for life or with imprisonment for a term which may extend to 10 years.
[Para 11][1145-C-H; 1146-A-D]
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1.2 PW-5 and PW-10 admitted that the accused had a 'nice reputation'. The conduct of the appellant would be a mitigating

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factor for determining the sentence. It is not in dispute that the appellant has undergone incarceration for a period of 9 years and approximately 3 months. Taking an overall view of the evidence on record, the sentence already undergone by the appellant would be an appropriate sentence in the facts of the case. The conviction of the appellant for the offence punishable u/s. 302 IPC is altered to the one under Part 1 of Section 304 IPC. The appellant is sentenced to undergo imprisonment for the term which he has already undergone. [Paras 12 and 13][1146-D-G]

Prakash Chand v. State of H.P. (2004) 11 SCC 381 : [2004] 3 Suppl. SCR 389; Sukhdev Singh v. Delhi State (Govt. of NCT of Delhi) (2003) 7 SCC 441 : [2003] 3 Suppl. SCR 224 – referred to.

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Case Law Reference

[2004] 3 Suppl. SCR 389 referred to Para 6

[2003] 3 Suppl. SCR 224 referred to Para 6

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1791 of 2023.

From the Judgment and Order dated 09.09.2013 of the Armed Force Tribunal Regional Bench at Chandimandir in TA No. 395 of 2010.

Ms. Eliza Barr, Sidhhant Saroha, Tushar Bathija, Praveer Singh, Abhimanyu Tewari, Advs. for the Appellant.

R Bala, Sr. Adv., A K Kaul, Ms. Rukhmini Bobde, Shiv Mangal Sharma, Ms. Priyanka Das, Rajan Kumar Chourasia, Ms. Sweksha, Arvind Kumar Sharma, Advs. for the Respondents.

The Judgment of the Court was delivered by

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. The appellant who was at the relevant time Lance Naik in the Indian Army was convicted by the Court Martial for the offence punishable under Section 302 of the IPC (for short, ‘IPC’) read with Section 69 of the Army Act, 1950 (for short, ‘the Army Act’). The Court Martial sentenced the appellant to suffer imprisonment for life. The Court Martial also dismissed the appellant from service. Thereafter, the

- A appellant filed pre-confirmation and additional pre-confirmation petitions which were rejected by the Major General Officer Commanding by his order dated 28th September 2005. Thereafter, the appellant filed a petition to the Chief of the Army Staff who rejected the same by his order dated 12th June 2006. Thereafter, the appellant filed a Petition under Article 226 read with Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (for short ‘CrPC’) before the Hon’ble High Court of Punjab and Haryana. The High Court transferred the matter to the Armed Forces Tribunal, Chandigarh. By the impugned judgment, the Armed Forces Tribunal, Chandigarh dismissed the Petition and confirmed the conviction and sentence of the appellant. Against the impugned order of the Tribunal, the Appellant again filed a Writ Petition before the Hon’ble High Court of Punjab and Haryana and by order dated 10.10.2018, the High Court while dismissing the Writ Petition granted liberty to the appellant to avail remedy under Section 30 of the Armed Forces Tribunal Act, 2007.
- D 2. On 4th December 2004, the appellant and deceased (Lance Naik Kala Singh) were posted for duty with the 13 Field Regiment at Ferozepur Cantonment. On the date of the incident, the appellant and the deceased were a part of the guard headed by Guard Commander Naik Amrik Singh (PW-13). Gunner Gurtej Singh (PW-14) was a sentry who was also a part of the guard.
- E 3. It is alleged that on the night of 4th December 2004, the deceased brought a bottle of country liquor. The appellant, the deceased and the Guard Commander Naik Amrik Singh consumed liquor. Thereafter, there was an altercation between the appellant and the deceased on the issue of inter-se seniority. At that time, the Guard commander intervened.
- F The deceased replaced gunner Gurtej Singh (PW-14) for guard duty outside the guard room. Thereafter, the appellant went out when there were heated arguments between the appellant and the deceased again on the issue of seniority. At that time, the appellant snatched the rifle from the hands of the deceased and fired one bullet at the deceased.
- G The appellant accompanied others for taking the deceased to a hospital where he was declared dead. The appellant was arrested on the same day.

SUBMISSIONS

- H 4. The learned counsel for the appellant has taken us through the notes of evidence and findings recorded by the Court Martial as well as

by the Armed Forces Tribunal (for short, ‘the Tribunal’). His basic contention is that the case will be governed by exception 4 to Section 300 of IPC. He submitted that the incident was an outcome of a sudden fight and the appellant acted in a heat of passion. He submitted that only one bullet was fired by the appellant though there were more bullets in the rifle at that time. His submission is that the appellant has not taken any undue advantage and has not acted in a cruel manner. The learned counsel has taken us through the evidence of the material prosecution witnesses and in particular the evidence of PW-13 Naik Amrik Singh and PW-14 Gunner Gurtej Singh. He would, therefore, submit that this was a case of an offence punishable under Section 304 (Part II) of IPC. He pointed out that the appellant had undergone incarceration for a period of about 9 years and 3 months.

5. Learned senior counsel appearing for the respondent pointed out that exception 4 to Section 300 will not apply in this case, as it cannot be said that there was a sudden fight. He submitted that the appellant has acted in a cruel manner. He submitted that the conduct of the appellant has to be judged in the light of the fact that he was on duty as a guard and was a member of a disciplined force. He would submit that no indulgence can be shown to the appellant.

6. The learned counsel appearing for the appellant relied upon decisions of this Court in the case of *Prakash Chand v. State of H.P.*¹ and *Sukhdev Singh v. Delhi State (Govt. of NCT of Delhi)*².

OUR VIEW

7. Hawaldar Malkiat Singh is PW-3 who stated that the appellant was not possessing any weapon. PW-8 Naib Subedar Chandrika Prasad deposed that after receiving a call from the operator he rushed to the place of the incident as he was informed that a sentry has been shot. He instructed the nursing assistant to move quickly and he, along with the nursing assistant, reached the spot in an ambulance. He questioned the appellant. At that time, the appellant told him that an altercation had taken place and he had fired one round. The witness stated in the cross-examination that while replying to him, the accused may have used the word “galti” meaning thereby that he fired a bullet by mistake.

¹(2004) 11 SCC 381

²(2003) 7 SCC 441

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- A 8. PW-13 Naik Amrik Singh was posted as a guard commander along with the appellant and deceased. He stated that as the appellant was the senior most, he treated him as second guard commander. He submitted that he, along with PW-14 Gunner Gurtej Singh and the appellant, were having dinner. At that time, the deceased stood on duty outside the guard room with a weapon and ammunition. He described that there was an altercation between the appellant and the deceased on the issue of seniority. According to his version, when he was sitting in the guard room, he heard a sound of a gunshot. When he looked outside, the appellant was holding a rifle. According to him, the appellant informed him that he had shot the deceased. PW-13 sought help. He tried to give a ring to headquarters but the telephone was engaged. He told PW-14 to shout for help from nearby posts. PW-13 further stated that he along with the appellant, lifted the deceased and after reaching the roadside, they laid the deceased on the ground. By that time ambulance reached the place. He stated that Naib Subedar Chandrika Prasad (PW-8), a nursing assistant and the appellant put the deceased into an ambulance and all of them took the deceased to hospital. We may note here that the learned prosecution counsel sought permission to declare PW-13 as a hostile witness. However, the Court Martial rejected the request of the prosecution counsel. PW-13 stated that the rifle used by the appellant was lying in the snake pit. There was an empty magazine and a filled magazine. There were 19 rounds in the filled magazine. The witness admitted that he, along with the deceased and the appellant, consumed liquor. But he claimed that it was one and half hours before the incident. In the cross-examination, the witness admitted that it was the deceased who brought the liquor bottle without consulting him. He admitted that the appellant and the deceased were friends before the incident. He stated that the appellant told him that he had committed a mistake and he had fired a bullet at the deceased. While answering the court question, the witness stated that he had not seen the appellant firing from the rifle. He saw the appellant immediately after hearing the sound of firing.
- G 9. PW-14 Gunner Gurtej Singh stated that he was having dinner on 4th December 2004 at about 2015 hrs with PW 13 in the guard room. After hearing the sound of a gunshot, he got up and saw the appellant holding a rifle and standing near the entrance of the guard room. He stated that the appellant took out the magazine from the rifle and threw it on a side. Thereafter, he made the rifle safe by cocking the rifle. He threw the rifle into a snake pit. He stated that when the appellant was

questioned by him, he responded by stating that he had committed a mistake. He stated that earlier he had heard the appellant asking the deceased to bring water for him. The deceased refused to get water by saying that he was senior to the appellant.

10. What emerges from the evidence is that the appellant, the deceased and PW-13 Naik Amrik Singh had consumed liquor at the time of dinner. There was a heated exchange of words between the appellant and the deceased on the issue of seniority. In fact, PW-13 stated in his examination-in-chief that the appellant was senior most after him and therefore, the appellant was designated as second guard commander. He stated that he treated the appellant to be senior.

11. The appellant did not have a weapon at that time and he used the weapon of the deceased. Out of 20 rounds in the magazine of the rifle, he fired only one bullet. Moreover, after the incident, the appellant did not run away and he along with PW -13 lifted the deceased and laid him by the side of the road. He frankly disclosed his version of the incident to PWs 13 and 14. The appellant along with two other army men, lifted the deceased for putting him in the ambulance and he accompanied the deceased to the hospital. These facts brought on record show that there was no pre-meditation on the part of the appellant. Both the appellant and the deceased had consumed liquor. There was a fight between him and the deceased over the issue of seniority. In fact, when the appellant told the deceased to bring water for him, the deceased refused to do so on the ground that he was senior to the appellant. In a disciplined force like Army, the seniority has all the importance. Therefore, there is every possibility that the dispute over seniority resulted in the appellant doing the act in a heat of passion. It appears that in the heat of passion, the appellant snatched a rifle held by the deceased and fired only one bullet. If there was any pre-meditation on the part of the appellant or if he had any intention to kill the deceased, he would have fired more bullets at the deceased. Hence, there was no intention on his part to kill the deceased. Whether the appellant had done a cruel act or not, has to be appreciated after considering three facts. Firstly, the appellant was a soldier on guard duty, secondly, the appellant and the deceased had a fight over the seniority and thirdly, though there were 20 rounds in the rifle of the deceased, he fired only one round. There was a sudden fight over seniority when the appellant and the deceased had consumed liquor. There was no premeditation. The appellant, in the facts

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- A of the case, cannot be said to have acted in such a cruel manner which will deprive him of the benefit of exception 4 to Section 300 of IPC. The term cruel manner is a relative term. Exception 4 applies when a man kills another. By ordinary standards, this itself is a cruel act. The appellant fired only one bullet which proved to be fatal. He did not fire more bullets though available. He did not run away and he helped others to take the deceased to a hospital. If we assign a meaning to the word 'cruel' used in exception 4 which is used in common parlance, in no case exception 4 can be applied. Therefore, in our view, exception 4 to Section 300 was applicable in this case. Therefore, the appellant is guilty of culpable homicide not amounting to murder. The appellant snatched the rifle from the hands of the deceased and fired one bullet at the deceased. This act was done with the intention of causing such bodily injury to the deceased as was likely to cause death. Therefore, the first part of Section 304 of IPC will apply in this case. Under the first part of Section 304 of IPC, an accused can be punished with imprisonment for life or with imprisonment for a term which may extend to 10 years.
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12. Prosecution examined PW-5 Naik Parwinder Singh. In the cross-examination, he stated that he knew the appellant since June 2003 and was good in terms of discipline. He stated that the appellant did not misbehave with the deceased earlier. PW-10 Lt.Col Purty admitted that the accused had a 'nice reputation'. The conduct of the appellant will be a mitigating factor for determining the sentence. It is not in dispute that the appellant has undergone incarceration for a period of 9 years and approximately 3 months. Taking an overall view of the evidence on record, the sentence already undergone by the appellant will be an appropriate sentence in the facts of the case.
13. Therefore, the appeal is partly allowed. The conviction of the appellant for the offence punishable under Section 302 of IPC is altered to the one under Part 1 of Section 304 of IPC. The appellant is sentenced to undergo imprisonment for the term which he has already undergone. The appellant was enlarged on bail by this Court on 8th April 2020. The bail bonds of the appellant shall stand cancelled.