WP(C) 3572/2006
BEFORE
THE HON'BLE MR. JUSTICE B.K. SHARMA

JUDGMENT AND ORDER

The petitioner, presently languishing in jail, is aggrieved by the order of penalty imposed on him, in terms of which, he has not only lost his job as Rifleman but is also serving the sentence of life imprisonment.

2. The petitioner was enrolled in the Assam Rifle way back in 1982 (26.5.1982). On the crucial date i.e. the date on which the order of penalty of dismissal from service and life imprisonment was passed, he had to his credit 17 years and 27 days of service.

3. In an otherwise unblemished service carrier, the petitioner was taken up for a general court-martial in the year 1999, with the charge of committing a civil offence i.e. murder under Section 302 IPC and attempt to murder under Section 307 IPC. The charge sheet (Annexure-A) is quoted below:

CHARGE SHEET

The accused, No. 410551F Rfn/Gd Utpal Saikia of 4 Assam Rifles, a person subject to Army Act as Sepoy under Section 4(I) thereof, read with SRO 117 dated 28 Mar 60 SRO 318 dated 06 Dec 62 as amended by SRO 325 dated 31Aug 77, is charged with:-

First Charge — COMMITTING A CIVIL OFFENCE THAT IS
Army Act — TO SAY MURDER, CONTRARY TO SECTION
Section 69 — 302 OF INDIAN PENAL CODE,

in that he,
at field, on 1 Oct 98, by intentionally causing the death of No. 411570 K. Rifleman (general duty) Rudra Bahadur Chhetri of the same unit, committed murder.

Second Charge — COMMITTING A CIVIL OFFENCE, THAT
Army acct — IS TO SAY, MURDER, CONTRARY TO
Section 69 — SECTION 302 OF INDIAN PENAL CODE,

in that he,
at field, on 01 Oct 98, by intentionally causing the death of No. 410538 H. Havildar (general duty) L. Kashipri of his unit committed murder.

Third Charge — COMMITTING A CIVIL OFFENCE, THAT IS
Army Act — TO SAY, ATTEMPT TO MURDER, CONTRARY
Section 69 — TO SEC 307 OF THE INDIAN PENAL CODE

in that he,
at field, on 01 Oct 98, did an act, to wit fired from a AK-47 Rifle at No. 410125 Y. Havildar (General duty) Ganesh Bahadur Khawas of the same unit and thereby wounded him with such intention and under the circumstances that if by the same act he had caused death of No. 410125 Y. Havildar (General duty) Ganesh Bahadur Khawas, he would have been guilty of murder.

4. In the proceeding, the prosecution examined 16 witnesses as against two witnesses by the petitioner as defence witnesses. On conclusion of the proceeding, the Presiding Officer recorded his finding vide Annexure-B dated 16.6.1999 holding the petitioner guilty of all the three charges with the exception in respe

ct of charge No. 1 in respect of which the petitioner was held not guilty of com mitting murder, but guilty of committing culpable homicide not amounting to murd er punishable under first part of Section 304 IPC.

5. In consideration of the materials on record including the aforesaid find ing, the petitioner was imposed with the sentence to suffer imprisonment for lif e coupled with dismissal from service. The sentence was announced on 16.6.1999. Being aggrieved, the petitioner had approached this Court by filing the writ pet ition being WP (Crl.) No. 8/2000. The writ petition was disposed of by order dat ed 9.1.2001 providing disposal of the statutory appeal to be preferred by the pe titioner. The appeal having been disposed of without any interference with the s entence, the petitioner has preferred the instant writ petition.

6. Altogether two persons were killed by the petitioner and the third one w as injured by him. In this judgment and order, they are referred to as deceased No. 1 and 2 and the injured. Incidentally, the injured was the defence witness s upporting the case of the petitioner in the general court-martial proceeding. So far as deceased No. 1 namely Rudra Bahadur Chhetri is concerned, the finding is that the petitioner is not guilty of committing murder, but guilty of committin g culpable homicide not amounting to murder punishable under Part-I of Section 3 04 IPC. However, in case of deceased No. 2 namely Habildar L. Kashipri Mao, the charge of committing murder under Section 302 IPC has been held to have been pro ved. Since the charge of committing murder under Section 302 IPC has been held p roved, the petitioner has been imposed with the penalty of imprisonment for life .

7. Mr. R.P. Sharma, learned Sr. Counsel, assisted by Mr. A. Nath and Mr. M. Adhikari, learned counsel for the petitioner, in his short but persuasive argum ents submitted that the elements and grounds, presence of which have persuaded t he Presiding Officer to hold that the offence committed under charge No. 1 does not come within the purview of Article 302 IPC, but comes under first part of Se ction 304 IPC being present in respect of charge No. 2 as well, the Presiding Of ficer could not have held the said charge proved under Section 302 IPC. He furth er submitted that in fact the offence committed by the petitioner could at best be punishable under Section 304 Part-II IPC with maximum sentence of 10 years im prisonment and the petitioner having already served more than 8 years of impriso nment, he is entitled to come out of the jail. In support of his argument, he ha s placed reliance on the decision of this Court as reported in 2007 Crl.J. 4599 (Guahati High Court) (Amolok Singh Vs. State of Tripura).

8. Mr. N. Bora, learned CGSC on the other hand supporting the penalty impos ed on the basis of the findings recorded submitted that the petitioner has been rightly awarded with the penalty of life imprisonment. He submitted that the gra vity of the offence committed by the petitioner in respect of the deceased No. 2 will have to be judged going by the circumstances as has been discussed by the Presiding Officer of the General Court-martial.

9. I have carefully gone through the entire records of the case. I have als o considered the rival submissions made by the learned counsel for the parties. The charges leveled against the petitioner, needless to say, are very serious in nature. In fact, learned counsel for the petitioner did not seriously argue tow ards absolving the petitioner from the charges. The only argument advanced was t o the effect that the ingredients and the evidence relating to the charge No. 1 being the same in respect of charge No. 2, the findings recorded by the Presidin g Officer so as to hold the petitioner guilty of murder under Section 302 IPC in respect of charge No. 2 is perverse and based on no evidence and that the petit ioner at best be punished under Section 304 Part-II IPC.

10. Firing of shots by the petitioner on the two deceased and the injured is an admitted fact. The only question before the Court (GCM) was as to whether th

e petitioner exceeded his right of self defence and that as to whether the provo cation meted out to the petitioner by the deceased was which justified so grave the action of the petitioner. The finding of the GCM is that the petitioner exce eded his right of self defence and that his case is also not covered by Exceptio n II of Section 300 IPC. It has been held that the action of the petitioner in r espect of charge No. 1 comes under Exception I of Section 300 IPC. Under Excepti on I of Section 300 IPC culpable homicide is not murder if the offender, whilst deprive of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other p erson by mistake or accident. Exception II speaks of culpable homicide being not murder, if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence with out pre-meditation, and without any intention of doing more harm than is necessa ry for the purpose of such defence.

11. Both the deceased No. 1 and 2 died of the same incident and the injured also sustained injuries of the same incident. It is not a case of committing mur der by the petitioner of the deceased No. 1 and 2 with any pre-meditation. The P residing Officer himself has recorded the same in his finding. As recorded in th e finding, the petitioner on the fateful day i.e. 1.10.1998, after taking his di nner returned to his barrack, put on the mosquito net and lied down on his bad. Till then everything was normal. It was the deceased No. 1 who picked up an argu ment with the petitioner over a petty matter. Inspite of the request of the peti tioner to discuss about the matter next day and making it clear to the deceased No. 1 that he was tired and wanted to take rest, the deceased insisted for sorti ng out the matter then and there. Not only that he came nearer to the bed of the petitioner and boxed him twice. Thereafter, scuffle ensured.

12. It was the injured (DW 2), who tried to intervene, but the deceased inst ead of stopping hitting the petitioner continued with the task. Being helpless, the petitioner told the deceased about his intention to go to the Commandant wit h a view to report the matter. It was at that stage the deceased No. 2, the Plat oon Havildar, the seniormost officer in the barrack emerged and instead of helpi ng the petitioner and stopping the deceased No. 1 aggravated the situation engag ing himself in the beating of the petitioner. He also threatened the petitioner with the remark that the petitioner would not report the matter and that he (des cribing himself as the father of the petitioner) would stand on his way.

13. As recorded by the Presiding Officer, the petitioner was beaten up sever ely by both the deceased. Somehow he could free himself from the clutches of the deceased and ran away from the barrack to the nearby Dhobi shop. Even there als o, he was beaten up by the deceased as a consequence of which he fell down on th e ground. The petitioner returned to the barrack after about 4/5 minutes. When h e was approaching the bed, he was again confronted by the deceased No. 1 and was pushed, as a consequence of which, the petitioner fell down on his cot and he s ub-consciously picked up his weapon and pointed the same to the deceased No. 1 t o scare him. When there was no reaction of the deceased No. 1 to that and he did not stop advancing towards the petitioner and came closure to him, the petition er fired at him.

14. With the above evidence on record as has been discussed by the Presiding Officer, the question necessarily comes up for consideration is as to whether t he petitioner fired the shot for self defence adduce to the provocation and as t o whether he exceeded his right of self defence or the provocation was so grave to justify the action to the extent possible. According to the Presiding Officer , the petitioner acceded the same. Consequently, it has been held that the act o f the petitioner, which resulted the death of the deceased No. 1 does not come u nder Exception II to Section 300 IPC. The Presiding Officer in his finding has h eld that the beating of the petitioner by the deceased No. 1, six years junior t

o him in presence of the deceased No. 2 was sufficient to cause grave and sudden provocation. However, a presumption has been drawn that since there was a gap of 4/5 minutes, same might have been sufficient for the petitioner to cool down. However, when the petitioner was again assaulted by the deceased No. 1 upon his return from Dhobi shop, same led to loss of self control due to grave and sudden provocation and the petitioner acted in a state of mind when he was deprived of his self control. With this finding recorded by the Presiding Office, the petitioner has been held guilty of committing culpable homicide not amounting to murder under first part of Section 304 IPC.

15. The question for determination on the basis of the evidence on record is as to whether the aforesaid finding of the Presiding Officer is equally applicable in respect of the charge No. 2 relating to deceased No. 2 and as to whether on the basis of the evidence on record it is a case under Section 304 Part-II IPC. It is in evidence that the deceased No. 2 was a Gold Medallist Boxer and had threatened to kill the petitioner. Unlike the charge No. 1, the Presiding Officer has not discussed the evidence on record in respect of charge No. 2. Only finding recorded is that at the time of firing the shot at the deceased No. 2, there was no occasion for the petitioner to exercise his right of self defence against the deceased No. 2. It is in this context, learned counsel for the petitioner argued that to that extent the finding recorded by the Presiding Officer is perverse and not on the basis of the evidence on record.

16. The Presiding Officer in his finding inspite of recording that the act of the deceased No. 2 in beating the petitioner and passing the aforesaid remarks were sufficient to provoke a reasonable man, has held that since there was a time gap, which could have been sufficient for the petitioner to cool down, the case of the petitioner in respect of charge No. 2 does not come within the purview of Exception I to Section 300 IPC. PW 2 in his deposition categorically stated that it was not only deceased No. 1, but deceased No. 2 as well gave blows to the petitioner. He followed the petitioner when he ran out of the barrack. Even outside the barrack both the deceased gave further blows to the petitioner, which the DW 2, the injured, could see being on the spot. As per his statement the petitioner had fallen down near the Dhobi shop, but the deceased continued to hit him.

17. PW 3 also stated the same thing. PW 9, in his deposition corroborated the statement of the DWs to the effect that both the deceased had beaten up the petitioner and chased him upto the Dhobi shop, where he was again beaten up. He also stated about the scuffles between the petitioner and the deceased. In fact, all the witnesses including the DWs in their statements while narrating the incident have not attributed any pre-determination on the part of the petitioner to kill the deceased. What has revealed from the evidence is that both the deceased were responsible in beating the petitioner inside the barrack as well as outside. The petitioner could not even save himself from such beating running out of the barrack. It is clearly on evidence, which also finds mention in the finding of the Presiding Officer that the petitioner ran out of the barrack to save himself, but was followed by both the deceased. He fell down on the ground near the Dhobi shop and even in that condition he was further beaten up. Even after return to the barrack both the deceased advanced towards him.

18. There might not have been any personal overt act on the part of the deceased No. 2 after the gap of 4/5 minutes when the petitioner returned to the barrack, but certainly there was overt act on the part of the deceased No. 1 which was duly supported by the deceased No. 2. It will have to be born in mind that the deceased No. 1 was junior to the petitioner and the deceased No. 2 was the Platoon Havildar and seniormost in the barrack. He was also a Boxer with gold medal to his credit. The beating of the petitioner by both of them, which is an admitted position led to the kind of situation in which Exception I, II and IV to Section 300 IPC was created. Inspite of the finding recorded by the Presiding Offic

er that the circumstances were sufficient to provoke a reasonable man, the Presi ding Officer solely on the ground of there being a gap of 4/5 minutes has held t hat the petitioner is not entitled to the benefit of Exception I to Section 300 IPC in respect of Charge No. 2. I am of the considered opinion that the finding recorded by the Presiding Officer is perverse to that extent and is not based on evidence.

19. When the evidences are overwhelming that the charge No. 2 also comes wit hin the purview of Exception I to Section 300 IPC, I see no reason as to why a d ifferent finding should be recorded in respect of the said charge. The incident was one and the same. There was no overt act on the part of the petitioner so as to provoke the deceased. It was rather other way round. The deceased No. 2 not only supported the assault meted out by the deceased No. 1 to the petitioner, bu t also engaged himself in such assault. He was a gold medallist Boxer. The fear in which, the petitioner ran away from the barrack did not yield any sympathy fr om the deceased No. 2, rather he followed him to the Dhobi shop where due to the assault of both the deceased, the petitioner fell down on the ground. After his return to the barrack, the deceased No. 1 again attacked him in presence of the deceased No. 2. It was a collective action on the part of both the deceased. In such a situation, if the action of the petitioner comes within the purview of E xception I to Section 300 IPC making him guilty of committing culpable homicide not amounting to murder punishable under first Part of Section 304 IPC as has be en held by the Presiding Officer, I see no reason as to why same should not be t he case in respect of charge No. 2 as well. The finding of the Presiding Officer being contrary to the evidence on record is perverse and liable to be interfere d with.

20. Evidences on record clearly establish that it is a case of committing of fence punishable under Section 304 Part-II IPC. The petitioner was severely beat en up by both the deceased and even after return to the barrack, he was threaten ed by the deceased No. 1 with the support of the deceased No. 2. After the beati ng and in the situation in which the petitioner and pushed him, the state of min d in which the petitioner was in, can well be understood. In such a situation, n ot only exception I, but Exception II and IV of Section 300 IPC as well, would c ome into play.

21. Once it is held that the charge No. 2 culd not have been brought within the purview of Section 302 IPC and that the petitioner is guilty of committing c ulpable homicide not amounting to murder, punishable under second part of Sectio n 304 IPC, the consequence will be to award him punishment as provided for that. The decision on which, the learned counsel for the petitioner has placed relian ce lends support to the case of the petitioner. As in the instant case, in the s aid case also, the accused was charged and convicted under Section 302 IPC and w as sentenced for life imprisonment with fine of Rs. 20,000/-. The accused in tha t case fired shots at his Platoon Commander preceded by quarrel between the appe llant and the said Commander. As in the instant case, in the said case also the appellant, after taking meal was sleeping when he was abused by the Platoon Comm ander and also threatened him of reporting his absence to the higher authority. Because of such provocation, the appellant went to the guard room, took his arm and fired at the Commander. The bullet not only hit him but also hit another, as a result of which both died. The Division bench of this Court considering the f act that there was no previous enmity and/or ill will between the appellant and the deceased and that there was no pre-meditation rather the incident took place in the heat of passion, held that the appellant was not guilty of committing mu rder Section 302 IPC but guilty of an offence punishable under Section 304 Part-II. Consequently, the sentence of life imprisonment was reduced to imprisonment for six years.

22. In the present case the situation and/or the mental state of mind in whi ch the petitioner was in when he fired the shots was much more graver. Both the

deceased gave blows to the petitioner. Not only that, they also chased him when he ran out of the barrack to save himself from such onslaught. Even after return , the deceased No. 1 again assaulted the petitioner in presence of the deceased No. 2. Everything happened within 4/5 minutes and naturally, the petitioner was under mental shock and grave provocation. Irrespective of exceeding the right of private defence, he was also within his right to exercise the right. There was also provocation meted out to him by the deceased persons. The Presiding Officer has discussed these aspects of the matter. However, contrary to the evidence on record he has returned the perverse finding that the petitioner is guilty of cu lpable homicide not amounting to murder under Section 304 Part-I. In such a situ ation I have no hesitation to hold that the petitioner is not guilty under Secti on 302 and 304 Part-I, but guilty under Section 304 Part-II IPC.

23. Once it is held that the petitioner is guilty under Section 304 Part-II IPC, the sentence imposed on him necessarily will have to be modified. The maxim um punishment prescribed for committing an offence under Section 304 Part-II is 10 years. The petitioner is in jail since the date of his conviction and sentenc e imposed by the impugned order dated 16.6.1999. Even prior to that he was in cu stody for 258 days. As per the statement furnished as to the character and antec edent of the petitioner, it was certified by the Commandant by his report dated 16.6.1999 that the petitioner’s general character was otherwise very good. As pe r the said report he had no Red Ink Entry in his service career. As noticed abov e, there was no pre-meditation on the part of the petitioner to commit the offen ce. At the time of filing the writ petition, he was 39 years of age. He is marri ed with the responsibility of his wife and two daughters, who were 13 and 9 year s of age studying Class-VIII and IV respectively at the time of filing of the wr it petition.

24. From the date of conviction and sentence i.e. 16.6.1999 and taking into account the 258 days of military custody during trial, the petitioner has alread y spent more than 9 years in jail. In the given facts and circumstances, I am of the considered opinion that the ends of justice would be met if the sentence is continued to the period already undergone in jail.

25. In view of the above, while not wholly interfering with the conviction, sentence and the penalty of dismissal from service, the conviction and sentence are modified to the extent indicated above. In other words the conviction of the petitioner is modified to Section 304 Part-II with the sentence of imprisonment for the period, which the petitioner has already undergone. The petitioner be f reed from jail forthwith.

26. The writ petition is allowed to the extent indicated above, without, how ever, any order as to costs.