

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP No. 544/2001

Date of Decision: **17.04.2009**

Devinder Singh

v.

U.O.I and anr.

CORAM:

MR. JUSTICE J. P. SINGH, JUDGE.

Appearing counsel:

For Petitioner(s) : Mr. Rahul Dev Singh, Advocate.

For Respondent(s) : Mr. Tashi Rabstan, CGSC.

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| i) | Whether approved for reporting
in Press/Journal/Media | : Yes |
| ii) | Whether to be reported
in Digest/Journal | : Yes |
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Devinder Singh, a Sepoy in the 22nd Battalion of The Punjab Regiment, tried by the Summary General Court Martial (for short ~~SGCM~~ ~~SGCM~~), convened by Major General Bhupinder Singh, the General Officer Commanding 26 Infantry Division, for committing MURDER of No. 2489554L Sep. Harjinder Singh of his Unit, by intentionally firing at him with Rifle (INSAS), on July 15, 1999 at 0045 hours, and causing his death has been punished to (1) Imprisonment for life and (2) Dismissal from service.

The sentence awarded by the SGCM stands confirmed by the General Officer Commanding 26 Infantry Division, on June 10, 2000.

Not getting any response to his Post Confirmation Petition filed under Section 164 (2) of the Army Act, 1950, the petitioner has approached this Court seeking quashing of the findings and sentence recorded by the SGCM on March 30, 2000.

Referring to the statements of the witnesses examined during the currency of trial, and projecting misappreciation of evidence by the SGCM, the petitioner, seeks quashment of the verdict of the SGCM, questioning its findings and judgment, *inter alia*, on the ground that neither any mens rea, could, in law be attributed to him, because of his being in the state of intoxication at the time of alleged commission of offence, nor can he be said to have committed the offence punishable under Section 302 RPC.

Contesting petitioner's writ petition, Union of India has questioned the maintainability of petitioner's writ petition urging, *inter alia*, that the reach of jurisdiction under Article 226 of the Constitution of India, may not permit re-appreciation of evidence assessed by the SGCM, by this Court, for, the

Judicial Review jurisdiction of the High Court is not appellate in nature .

According to the learned counsel, the SGCM has, even otherwise, properly evaluated and considered the evidence while recording its verdict, which may not thus need interference, in the facts and circumstances of the case.

Refuting the case set up by the petitioner, it is stated by the respondents that the petitioner has not been found entitled to the benefit of Section 85 of the Ranbir Penal Code because no liquor had been found by the SGCM to have been administered to him against his will or knowledge.

On merits of the case, on facts, it is stated that the petitioner and the deceased, who had been deputed along with others for CSD collection, missed their Unit Vehicle for the return journey. They thereafter consumed liquor at a wayside Restaurant before boarding a Civil Bus for travelling to Vijaypur where they again consumed liquor before taking meals. After their dinner, they returned to the Unit in Civil Transport.

Petitioner and the deceased were given Pack punishment at around 2230 hours for coming late, whereafter, without

taking food, they went to sleep at 2300 hours. It was around mid-night that the petitioner fired at the deceased, who was sleeping outside the Tent, which resulted in his death because of the Fire arm injuries.

Petitioner had fired at the deceased because of latter ~~to~~ act of committing sodomy on him while on their way back to the Unit when the petitioner was in the state of intoxication.

Justifying the findings arrived at, and the sentence awarded by the SGCM, the respondents have relied upon the ~~the~~ brief reasons ~~of~~ which the SGCM has recorded in support of its finding.

Concentrating on his short submission, petitioner ~~to~~ learned counsel urged that petitioner ~~to~~ conviction under Section 302 of the Ranbir Penal Code was unwarranted, in that, the SGCM had misconstrued the provisions of Section 300 of the Ranbir Penal Code in recording conviction against the petitioner, without taking into consideration the effect of Exception No.1 to Section 300 of the Ranbir Penal Code, which, in the facts and circumstances of the case, had full application to determine the offence which may be said to have been committed by the petitioner.

Learned counsel referred to various judgments delivered by the Hon^{ble} Supreme Court of India and other High Courts of the Country to support his submission. He submitted that the plea raised by him, being a pure question of law, can be examined by the Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

Relying on the judgments delivered by Hon^{ble} Supreme Court of India, Union of India [&] learned counsel submitted that the question raised by the petitioner was essentially, a question of fact, which may not be gone into, in exercise of the Court [&] jurisdiction under Article 226 of the Constitution of India. The findings recorded by the Military Court, according to the learned counsel, are supported by the evidence recorded during the petitioner [&] trial, and in view of the facts and circumstances of the case, and the reasons spelt out, in support of its findings, by the Court Martial, the petitioner has been rightly convicted and punished under Section 302 of the Ranbir Penal Code because Exception I to Section 300 of the Ranbir Penal Code was not attracted to the offence committed by him.

I have considered the submissions of learned counsel for the parties, gone through the proceedings of the SGCM and perused the judgments cited at the Bar.

After appreciating the evidence of the witnesses produced in support of the charge and considering the pleas projected by the petitioner, including the one which has been urged in this Court by his counsel, and referring to the statements of the witnesses who had appeared at the trial, the SGCM has spelt out reasons, in detail, supporting its findings and negating the pleas projected by the petitioner, And holding that the evidence and the surrounding circumstances had proved, beyond reasonable doubt, that the act of firing at the deceased was done by the accused in a pre-meditated manner, after sufficient time had elapsed after the incident of sodomy, for the accused to regain his self control, And that Exception I to Section 300 of the Ranbir Penal Code, being deprived of the self control, due to grave and sudden provocation, was not applicable in the case.

The findings recorded by the SGCM are spread over meaningful fourteen paragraphs.

In recording its findings, the SGCM has referred to, and appreciated the statements of Prosecution Witness nos.1, 2, 4, 5, 7, 9, 12, 14, 18, 19, 20 & 21, the unsworn statement of the petitioner, his confession made immediately after the occurrence, besides the circumstances justifying non-application of Exception I to Section 300 RPC pertaining to an act committed by a person whilst deprived of the power of self control by grave and sudden provocation.

Petitioner's learned counsel wants this Court to opine on the basis of the reasons recorded in support of its findings by the SGCM that the petitioner's case was covered by Exception I to Section 300 of the Ranbir Penal Code rendering his conviction under Section 302 of the Ranbir Penal Code unsustainable.

The question that, therefore, falls for consideration, in this petition, is as to whether, in the facts and circumstances of the case, the petitioner can be said to have caused the death of Harjinder Singh whilst deprived of the power of self control by grave and sudden provocation rendering his conviction by SGCM under Section 302 RPC unsustainable? And whether the

petitioner was entitled to the benefit of Section 85 of the Ranbir Penal Code.

Another important question which may require consideration is as to whether or not the aforementioned questions can be answered by this Court while exercising jurisdiction under Article 226 of the Constitution of India.

I am afraid, the issues raised by the petitioner for consideration of the Court, may not be within the reach of the jurisdiction of the Court under Article 226 of the Constitution of India, in that, the issues which shall have to be gone into, before recording any finding, as to whether or not the petitioner had caused the death of Harjinder Singh whilst deprived of the power of self control because the provocation was grave and sudden enough to prevent the offence from amounting to Murder, and as to whether the petitioner was incapable of judgment of his act by reason of intoxication, are, **essentially questions of fact**, findings whereon may be returned only after minute examination of the records of the SGCM and re-appreciation of the evidence which it had considered and evaluated.

This exercise can be done only in exercise of appellate jurisdiction by taking one or the other view about the acceptance or otherwise of the evidence and the prosecution case.

The question as to whether or not the provocation was grave and sudden enough to prevent the offence from amounting to Murder, is a question of fact as indicated in the explanation appended to Exception I appearing in Section 300 of the Ranbir Penal Code, which for facility of reference is reproduced hereunder :-

Exception I.- When culpable homicide is not murder ~~अ~~Culpable is not murder if the offender, whilst deprived 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 person by mistake or accident.

The above exception is subject to the following provisions-

First- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly-That the provocation is not given by anything done in obedience to the law or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly-That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.め

Judicial Review permissible in exercise of jurisdiction under Article 226 of the Constitution of India may not, in my view, thus permit such exercise, for, the Judicial Review is confined only to the decision making process and not to the correctness or otherwise of the decision.

The case law cited by petitioner & learned counsel is distinguishable and is not of any help to the petitioner, on the questions which have been dealt with in this judgment.

Petitioner & learned counsel & submission that the issue raised in the petition as to whether or not petitioner & conviction under Section 302 RPC was justified, is a question of law which can be gone into in exercise of jurisdiction under Article 226 of the Constitution of India is, accordingly, found unsustainable, hence rejected.

Perusal of the proceedings of the Summary General Court Martial reveal that the respondents had conducted the trial of the petitioner after following the procedure prescribed therefor under the Army Act and the Army Rules and the petitioner had contested the proceedings through an Advocate of his choice. The verdict delivered by the Court Martial, based on the

appreciation of the evidence produced before it, is backed by reasons assigned in support thereof.

For all what has been said above, I do not find any case to have been made out by the petitioner for exercise of jurisdiction under Article 226 of the Constitution of India to interfere with the well reasoned findings of the Summary General Court Martial which do not suffer from any error of law or jurisdiction.

Lacking substance, this petition is, accordingly, dismissed without any order as to costs.

(J. P. Singh)
Judge

JAMMU:
17.04.2009
Pawan Chopra