

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on : April 21, 2014*
Judgment Pronounced on : April 30, 2014

+ **W.P.(C) 2575/2003**

DINESH KUMAR Petitioner
Represented by: Mr.Ankur Chhibber, Advocate

Versus

UOI & ORS. Respondents
Represented by: Ms.Richa Kapur, Advocate with
Ms.Saahila Lamba, Advocate

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR.JUSTICE PRADEEP NANDRAJOG

PRADEEP NANDRAJOG, J.

1. The petitioner was enrolled as a follower (Washer man) in BSF on June 13, 1986. In the month of December, 2000 he was detailed to the 93rd Battalion of BSF which was deployed on Forwarded Defended Locality Khera-II (Here-in-after referred to as the 'FDL-II'), Kashmir.

2. In the intervening night of the 10th and 11th December, 2000, the petitioner, Ct.Dharampal Singh (hereinafter referred to as the 'Deceased') and Ct.S.Murmu were detailed to perform sentry duty at FDL-II from 12.00 midnight to 03.00 hrs. As per the detailment, the petitioner was to perform duty at the upper morcha, Ct.S.Murmu was to station himself at the telephone point and the deceased was to station himself at a water

tank. At around 01:10 hrs. the deceased was found shot dead with wounds on his head.

3. The same day i.e. December 11, 2000, an FIR No.187 for an offence punishable under Section 302 IPC was registered at the local police station. A DD entry was made in the Daily Diary Register maintained at FDL-II by BSF officers. Since the needle of suspicion was pointing towards the petitioner in as much as the self loading rifle issued to him was detected having been recently used and rounds of bullets from the magazine issued to the petitioner were found used, the petitioner was placed under close arrest. The next day i.e. on December 12, 2000, the DIG, BSF, Rajouri Sector, J&K constituted a one man Staff Court of Inquiry presided over by Deputy Commandant M.C.Pandey who submitted a report on December 19, 2000 opining that the deceased died as a result of gun shot fired at him by the petitioner. The report was placed before the DIG, BSF, Rajouri Sector, who prima facie agreed with the findings of the Staff Court of Inquiry and directed that admissible family pension be paid to the family of the deceased and that action be taken as per law against the petitioner. The file was placed before the IG, BSF, Jammu who on January 04, 2001 agreed with the opinion of the Staff Court of Inquiry and the remarks of the DIG, Rajouri Sector. He wrote that strict disciplinary action be taken against the petitioner.

4. As per Rule 45 of the BSF Rules, 1969 the Commandant was required to conduct proceedings pertaining to hearing of the charge. The record would evidence that the Commandant did so on January 19, 2001 and after hearing the witnesses and the petitioner directed a Record of Evidence to be drawn up.

5. At the Record of Evidence, the department examined eight witnesses viz. SI S.B.Ram PW-1, HC S.V.Kamble PW-2, Ct.Kajal Singha PW-3, Ct.S.Murmu PW-4, Sub.N.K.Singh PW-5, L.Nk. Sankar Halder PW-6, Dr.Amar Nath Roy PW-7 and SI/Clerk B.M.Gupta PW-8.

6. SI R.B.Ram PW-1, stated that on December 10, 2000, along with 7 ORs he had left FDL-II post to lay an ambush at Chuha Gali. Before leaving the post he had briefed HC S.V.Kamble who was the senior most NCO to remain careful and perform duty cautiously. On December 11, 2000 at about 03.00 A.M. he received information by wireless to report back to the Coy Headquarters. On returning he learnt that a firing incident had taken place at FDL-II post. Along with his party he proceeded to FDL post where he saw the deceased lying on the ground in a pool of blood and the petitioner was sitting at a nearby place under escort. On making enquiry he learnt that the petitioner had fired a shot at the deceased since the deceased had objected to the petitioner making tea in the night at the duty post. He assisted Major Gill in conducting investigation at the spot. HC S.V.Kamble brought the SLR issued to the petitioner and gave it to Major Gill. The petitioner had been issued five magazines containing hundred rounds. HC K.V.Kamble and he counted the ammunition and found ninety seven live rounds and one empty fired case from the pocket of the petitioner. After sometime senior officials came and made enquiries from jawans about the incident.

7. HC S.V.Kamble PW-2, stated that after his team completed guard duty at FDL-II at 12.00 mid-night the petitioner, the deceased and Ct.S.Murmu replaced them for guard duty at 12.00 mid-night. At about 01.00 hrs. he was woken up by Ct.S.Murmu who informed him that the

petitioner wanted to make tea for himself during duty hours. He told Ct.S.Murmu that the petitioner should not be allowed to make tea since lighting fire would expose the position of FDL which would be contrary to the existing instructions issued with regard to duty at FDL. Thus, Ct.Murmu and the deceased did not allow the petitioner to light a fire to prepare tea due to which there might have been some hot discussion/heated arguments between Ct.Murmu, the deceased and the petitioner. Soon thereafter on hearing loud voices he came out of his bunker and saw that Ct.S.Murmu and the deceased were present at their place of duty whereas the petitioner was going towards his place of duty. He told the deceased that in case the petitioner again tried to prepare tea by lighting fire he should be allowed to do so for the reason the Commandant was likely to visit the post the next day and the report pertaining to the indiscipline of petitioner could be submitted to him. He returned to his bunker. At about 02:00 hrs. he heard the sound of a bullet fire. Soon thereafter Ct.S.Murmu rushed inside his bunker and informed him that the petitioner had fired a shot from his SLR at the deceased. He immediately came out of his bunker and saw the petitioner standing near the deceased who was lying on the ground in a pool of blood and appeared to be dead. He snatched the SLR from the petitioner and informed Inspector N.K.Singh the Coy Commander of the incident. Senior officers reached the spot.

8. Ct.Kajal Singha PW-3, stated that on December 10, 2000 after he and HC S.V.Kamble and Ct.S.Karkatta completed guard duty at FDL-II they were replaced by the petitioner, the deceased and Ct.S.Murmu. After about 1-1½ hours he woke up on hearing some loud voices and at once

went outside the bunker. HC S.V.Kamble was present there and the deceased was lying on the ground in a pool of blood. He learnt that the petitioner had fired a round from his SLR at the deceased. HC S.V.Kamble took the SLR from the hand of the petitioner. The petitioner told him that he wanted to kill the deceased because he had prevented him from lighting a fire and prepared tea.

9. Ct.S.Murmu, PW-4, stated that on December 10, 2000 the petitioner, the deceased and he were detailed to perform night guard duty at FDL-II from 12.00 mid-night to 03:00 hrs. As per the detailment he was to be stationed at the telephone point, the petitioner was to be stationed at upper morcha and the deceased at the water tank. At about 01:00 hrs. the petitioner came down from the morcha and said that he wanted to make tea. He and the deceased cautioned the petitioner not to do so since their position would be exposed to the enemy. The petitioner insisted and tried to light a fire. The deceased pulled petitioner back. Apprehending that a quarrel might ensue between the petitioner and the deceased he went to the bunker of HC S.V.Kamble and informed him about the nuisance created by the petitioner whereupon HC S.V.Kamble came out of his bunker. By that time the petitioner and the deceased had gone back to their respective points/places of duty. HC S.V.Kamble went back to his bunker. After sometime the petitioner lit a fire near crawl trench and prepared tea. This time the deceased and he did not prevent the petitioner from making tea because the petitioner was not likely to listen to them. After preparing tea the petitioner went back to his morcha. After sometime the petitioner again came down and told him that he was going out to answer the call of the nature and went outside. After about 10

minutes the petitioner came back and told him that he was going to his place of duty at the upper morcha. At that time the deceased was seated on the wall of the water tank with his LMG. Hardly 1-2 minutes thereafter he heard the sound of bullet fire. In the moon-light he also saw the deceased lying on the ground with the petitioner nearby probably 4 to 5 feet away with his SLR in his hand. Realizing that the petitioner had fired he jumped into the adjacent crawling trench and went to the bunker of HC S.V.Kamble and informed him of the incident. HC S.V.Kamble immediately proceeded to the spot and disarmed the petitioner. Soon thereafter several senior officers came. As directed by Major Gill HC S.V.Kamble searched the magazines and the rounds issued to the petitioner whereupon they learnt that ninety seven rounds were in the five magazines issued to the petitioner. One empty fire case was recovered from the pocket of the petitioner.

10. Sub N.K.Singh PW-5, stated that when he reached the place of the occurrence on being informed of the incident the petitioner told him that he had killed the deceased because he was prevented from preparing tea. He deposed that ninety seven rounds and one empty fired case was recovered from the petitioner.

11. L.Nk.Sankar Halder PW-6 stated that the SLR which was handed over to him by HC S.V.Kamble was issued to the petitioner as also five magazines containing hundred rounds.

12. Dr.Amar Nath Roy PW-7, stated that on December 10, 2000 at about 02:30 hrs. he was informed over telephone by the Commandant of the 93rd Battalion about the incident in question pursuant where to he went

to FDL-II where he examined the deceased and declared him dead. The apparent cause of death was gunshot wounds in the skull. He removed the body to the Civil Hospital for post-mortem.

13. SI/Clerk B.M.Gupta PW-8, stated that a special report regarding the incident in question was sent to the Sector Headquarters and that an FIR was lodged in respect of the incident in question.

14. The petitioner chose not to make any statement before the Recording Officer.

15. Considering the Record of Evidence the Commandant directed the petitioner to be tried at a General Security Force Court. The file was placed before the IG, BSF, Jammu Frontier who passed an order on February 05, 2002 constituting the General Security Force Court.

16. In the meanwhile, the local police filed a charge-sheet before the concerned Magistrate. On a warrant issued, the petitioner who was in force custody was directed to be produced before the learned Magistrate on February 27, 2001, on which date the learned Magistrate sent the petitioner in judicial custody to the District Jail, Poonch and committed the case to the Sessions. The department filed a revision petition before the District & Sessions Judge, Poonch against the decision of the Magistrate committing the case to the Sessions. Vide order dated November 16, 2001 the District & Sessions Judge, Poonch transferred the FIR to the BSF authorities for the petitioner to be tried at the General Security Force Court.

17. The record, original whereof was produced before us would evidence that the arraignment before the General Security Force Court took place on February 12, 2002. Commandant K.G.Keswani was the Presiding Officer. Deputy Commandant S.C.Menon, Hari Singh, Balraj Singh and Ram Prakash were the Members. The petitioner was represented by a defending officer 2I/C K.K.Gulia. The charge of having shot dead the deceased was read out to the petitioner who pleaded not guilty. Since the defending officer told the Court that the petitioner desired to be defended by an advocate, the matter was adjourned for the next day when Sh.Murtaza Ahmed Khan, a lawyer appeared to defend the petitioner. As prayed by the counsel trial was adjourned to February 16, 2002. The trial commenced on February 16, 2002.

18. At the trial save and except SI/Clerk B.M.Gupta the prosecution examined all the witnesses examined by them at the Record of Evidence who deposed in harmony with the statements given by them before the Recording Officer. Pertinently, in addition to the statement made by him before the Recording Officer, HC S.V.Kamble deposed that when he came out of his bunker on being informed by Ct.S.S.Murmu about the incident he saw that the petitioner was standing near the deceased with his rifle stretched towards the deceased. He also saw the petitioner pick up something from the ground and put the same in his pocket.

19. In addition to the witnesses examined at the Record of Evidence, the prosecution examined four more witnesses at the trial viz. S.H.Bukhari PW-5, K.K.Raina PW-6, Dr.P.A.Khan PW-10 and SI Abdul Gani PW-11.

20. S.H. Bukhari PW-5, Scientific Officer Ballistics, deposed that the empty fire case which was recovered from the pocket of the petitioner was fired from the SLR issued to the petitioner. K.K.Raina PW-6, Scientific Officer, deposed that blood was detected on the articles seized at the place of occurrence. Dr.P.A.Khan PW-10, deposed that he had conducted the post-mortem of the body of the deceased. One bullet injury was found on the person of the deceased. The entry of the wound was on the nape of neck and the exit wound was on the right portion of the face. The cause of death was sudden cardio respiratory arrest due to bullet injury in the skull blowing out brain substance. SI Abdul Gani PW-11, J&K Police deposed regarding the investigation conducted by the police.

21. When the incriminating circumstances appearing in the evidence were put to the petitioner he admitted possessing the 7.62mm SLR since it was issued to him as also that five magazines containing hundred rounds were issued to him. He denied everything, but gave no explanation as to how the SLR issued to him was used and under what circumstances three bullets out of the hundred issued to him were used.

22. Vide decision dated March 09, 2002 the GFSC held the petitioner guilty of the charge framed against him and awarded the sentence to undergo imprisonment for life and to be dismissed from service upon the petitioner which finding and sentence was confirmed by the Inspector General, BSF.

23. Statutory petition filed by the petitioner to the DG, BSF was rejected on October 31, 2002.

24. Instant petition challenges the petitioner being convicted.

25. The writ petition came up for preliminary hearing on April 21, 2003 when Rule was issued. Application seeking suspension of sentence was dismissed. Unfortunately, learned counsel for the petitioner took no steps for either the writ petition to be listed for hearing or the petitioner to be admitted to bail. The counsel who filed the petition died. The writ petition matured for hearing as per its priority position on February 25, 2014. The respondents were directed to find out the prison in which the petitioner would be and on being informed that the petitioner was undergoing the sentence at the Central Jail, Kotbhalwal, Jammu, the petitioner was admitted to bail on furnishing a personal bond in sum of ₹2000/-. Since the petitioner indicated that he be provided a counsel at State expense, vide order dated March 07, 2014 Mr. Ankur Chibber, Advocate was appointed as the Amicus Curiae. The matter was ultimately heard by this Bench on April 21, 2014.

26. On going through the evidence led at the trial, learned counsel for the petitioner made no submissions on the indictment with reference to the evidence led for the reason once the petitioner admitted that the offending SLR was issued to him and so was he issued hundred rounds in the five magazines issued to him out of which three were fired, unless the petitioner gave an explanation of how his SLR was used and how three rounds were fired from the same, these being special facts to his personal knowledge, it would be a virtually open and shut case against him. Besides the testimony of Ct.S.Murmu who was an eye witness in the absence of being shaken would nail the guilt. The submissions made, were four in number as under:-

A Rule 175 of the BSF Rules, 1969 require that the proceedings of the Court of Inquiry shall be submitted by the Presiding Officer to the officer or authority who ordered the Court and such officer or authority on receiving the proceeding may either pass final orders on the proceeding himself or refer them to a superior authority. In the instant case, the next day after the incident i.e. on December 12, 2000 the DIG, BSF, Rajouri Sector, constituted a one man Staff Court of Inquiry to be presided over by Deputy Commandant M.C.Pandey who submitted a report on December 19, 2000 opining that the deceased died as a result of gun short fired at him by the petitioner which report was placed before the DIG, BSF, Rajouri Sector, who prima facie agreed with the findings of the Staff Court of Inquiry and directed admissible family pension to be paid to the family of the deceased and action to be taken against the petitioner as per law. Placed before the IG, BSF, Jammu, while penning his opinion on January 04, 2001, the IG, BSF returned a positive verdict of guilt against the petitioner. Learned counsel argued that since the highest level officer i.e. IG, BSF had returned a positive verdict of guilt against the petitioner the same would obviously colour the minds of the officers constituting the General Security Force Court because all of them were junior level officers and it is inconceivable that junior level officers would return findings contrary to the opinion expressed by the highest level officer. Learned counsel relied upon a decision of a learned Single Judge of this Court reported as 44 (1991) DLT (SN) 22 Lt.Col.Satish Kumar Sharma vs. UOI & Ors. as also the decision of the Supreme Court reported as (1998) 7 SCC 84 Punjab National Bank & Ors. vs. Kunj Bihari Mishra .

B Rule 45 of BSF Rules, 1969 was violated with impunity because record would evidence that custody of the petitioner was handed over to the BSF authorities only on November 16, 2001 when the District & Sessions Judge, Poonch transferred the FIR to the BSF authorities for the petitioner to be tried at the General Security Force Court and prior thereto the petitioner was in judicial custody. Learned counsel urged that under Rule 45 of the BSF Rules, 1969, taking cognizance of an offence report the Commandant has to hear the accused in the presence of the witnesses and thereafter form an opinion whether the charge has to be dismissed summarily or the accused has to be punished summarily or a Record of Evidence to be prepared. Learned counsel urged that proceedings under Rule 45 are akin to a pre-charge evidence and a valuable right is vested in the accused under the Rule.

C The Commandant Sh.G.K.Sharma and the Officiating Commandant Sh.M.S.Chauhan were witnesses, in that, being the two senior officers of the battalion to which the petitioner was detailed they had reached the place of the occurrence soon after the incident and had personal knowledge of what had happened at the spot. Learned counsel referred to Rule 46 of the BSF Rules, 1969 which provides that the Commandant of a battalion shall not deal with a case where the offence with which the accused is charged is against the Commandant himself or where the Commandant is a witness himself or where the Commandant is otherwise personally interested in the case.

D Rule 59 of the BSF Rules, 1969 was violated because on September 10, 2001 the Commandant decided that the petitioner should be tried at a

General Security Force Court. As per the Rule in question the decision had to be that of the Inspector General.

27. Dealing with the first contention urged, from the facts noted by us in paragraph 3 above, it is revealed that on December 12, 2000 the DIG, BSF, Rajouri Sector, J & K constituted a one man Staff Court of Inquiry to be presided over by Deputy Commandant M.C.Pandey who submitted a report on December 19, 2000 opining that the deceased died as a result of gun shot fired at him by the petitioner. Prima facie agreeing with the findings of the Staff Court of Inquiry the DIG, BSF, Rajouri Sector directed admissible family pension to be paid to the family of the deceased and the action to be taken as per law against the petitioner. The file was thereafter placed before the IG, BSF, Jammu, who on January 01, 2001 agreed with the opinion of the Staff Court of Inquiry and the remarks of the DIG, BSF, Rajouri Sector but wrote that strict disciplinary action be taken against the petitioner for killing Ct.Dharmapal Singh.

28. It is apparent that the IG, BSF has used inappropriate words while expressing himself. The purpose of a Staff Court of Inquiry is akin to a preliminary fact finding inquiry with which we all are familiar in service jurisprudence. Its aim is to identify the circumstances enwombing an incident; the probable cause thereof and the persons responsible for the same as also to gather evidence wherefrom an opinion can be formed as to what further course of action has to be chartered. Pertaining to the Armed Forces and Central Para Military Forces, if a force personnel dies an unnatural death while on duty, the findings at a Staff Court of Inquiry would determine not only what penal action has to be taken with respect

to proceedings to be initiated against the accused persons but also to determine what financial benefits have to be paid to the family of the deceased. What has happened in the instant case is that the IG, BSF has blurred the distinction which he had to keep in mind while passing necessary orders in light of the opinion of the Staff Court of Inquiry. On the subject of pensionary benefits and other financial benefits admissible as per Rules, he ought to have passed a conceptually distinct order opining that in view of the material gathered by the Staff Court of Inquiry it being writ large that the deceased died while on active duty the admissible financial benefits had to be the ones payable when a BSF jawan dies while on active duty. Since admittedly the death was homicidal, a conceptually distinct order has to be passed as to what further action should be initiated against the wrong doers identified by the Staff Court of Inquiry. The overzealous officer, by adding the word '*for killing Ct.Dharmpal Singh*' has given birth to an unnecessary controversy; the words which are determinative of a finding of guilt could have been avoided. But, it being settled law that opinions have to be construed meaningfully and purposively and not as statutes, meaningfully read, the opinion would be that since Ct.Dharmpal Singh died while on active duty financial benefits admissible under Rules when a Government servant dies on active duty should be paid to the family and that action as per law should be taken against the accused. We see no scope for an inference that the officers of the General Security Force Court would be influenced by the fact that their superior officer has returned a verdict of guilt and thus, come what may, they had to convict the petitioner. We would highlight that with reference to the evidence led at the trial the learned counsel for the

petitioner could not through light even on a minuscule area which would evidence a possible influence on the minds of the members of the General Security Force Court. The trial record evidences that the opinion as per the decision dated January 04, 2001 was not even before the Court. We need to highlight that the decision to try the petitioner at a General Security Force Court was the result of the consideration of the Record of Evidence by the Commandant followed by a concurrence thereto by the IG, BSF on February 05, 2002. In other words, nothing turns on the Court of Inquiry proceedings and the administrative decision taken thereon concerning the trial of the petitioner at the General Security Force Court.

29. Pertaining to the second contention concerning Rule 45 of the BSF Rules, 1969, the same has been premised on the fact that on November 16, 2001, custody of the petitioner was handed over to BSF officers for he to be tried at the General Security Force Court when the learned District & Sessions Judge, Poonch transferred the FIR to the BSF authorities. As noted above, proceedings under Rule 45 were held by the Commandant on January 19, 2001. The argument proceeds on the assumption that on the day of incident itself the petitioner was taken into custody by the police and thereafter the petitioner was sent to a civil prison in judicial custody by the Court and thus the petitioner could not be produced before the Commandant on January 19, 2001. The argument overlooks the fact that after the incident, the petitioner was taken into force custody and record would evidence that on January 19, 2001 he was produced before the Commandant. On a warrant issued by the Magistrate concerned before whom the local police filed a charge-sheet, the petitioner was produced before the learned Magistrate by the BSF authorities on February 27, 2001

on which date after committing the case to the Sessions the learned Magistrate took the petitioner in judicial custody and sent him to the District Jail, Poonch. Thus, the argument advanced is sans any factual basis.

30. The third contention is again without any factual basis because there is no evidence of the Commandant Sh.G.K.Sharma and the Officiating Commandant Sh.M.S.Chauhan being associated with any investigation. Of course, being superior officers they were kept aware of the ongoing proceedings concerning the investigation of the incident. Neither were the two examined at the Court of Inquiry nor at the Record of Evidence. The two were not cited as witnesses. The two were not examined as witnesses.

31. The last contention urged is also baseless for the reason the decision to try the petitioner at a General Security Force Court, as per record produced before us, being the decision dated February 05, 2002, has been taken by the IG, BSF. The recommendatory opinion of the Commandant is treated by the petitioner as the final decision to try him at a General Security Force Court. Inherent in a multitier decision making process is the opinions of the officers who have to deal with a file at different levels. Every opinion, by its inherent nature, contains a recommendation. The recommendatory opinions are not to be equated as decisions. The decision would be the final opinion expressed by the competent authority.

32. Though no submissions were advanced pertaining to the evidence, from the evidence led at the trial the following circumstances emerged:-

- The petitioner, the deceased and Ct.S.Murmu were detailed to perform night guard duty on December 10, 2000 from 12.00 mid-night to 03.00 A.M.
- Petitioner was angry with the deceased because the deceased had prevented the petitioner from making tea.
- Ct.S.Murmu had reported the deviant behaviour of the petitioner to HC S.V.Kamble who had to intervene by cautioning the petitioner not to do so.
- Soon thereafter a gun shot was fired. Ct.S.Murmu could see in the moon-light that the petitioner was standing near the dead body of the deceased with his SLR in his hand. He immediately informed HC S.V.Kamble who came out of his bunker.
- HC S.V.Kamble saw the petitioner pick up something from the ground and keeping the same in his pocket soon after the sound of fire was heard by him.
- An empty fire case was recovered from the pocket of the shirt of the petitioner.
- The empty fire case recovered from the pocket of the shirt of the deceased was fired from the SLR issued to the petitioner. Five magazines containing hundred rounds were issued to the petitioner out of which only ninety seven rounds were recovered from him.
- The petitioner had confessed before Ct.Kajal Singha and Sub. N.K.Singh that he had murdered the deceased.
- The petitioner admitted at the trial that the SLR in question was issued to him and that five magazines containing hundred rounds were issued to him. He gave no explanation as to how and under what

circumstances the SLR issued to him was used and under what circumstances three rounds were missing.

- The witnesses of the prosecution, particularly Ct.S.Murmu and HC S.V.Kamble, were cross-examined at length by the petitioner but nothing could be extracted therefrom which could discredit their testimonies.

33. From the facts/circumstances enumerated above, the inescapable conclusion which emerges is that the petitioner is the assailant of the deceased.

34. In view of submissions made above, the present petition deserves to be dismissed.

35. The petitioner shall surrender and serve the remaining sentence. We cancel the personal bond furnished by the petitioner when he was admitted to bail.

36. No costs.

(PRADEEP NANDRAJOG)
JUDGE

CHIEF JUSTICE

APRIL 30, 2014
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