

## ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

**RESERVED.**  
**(Court No. 3)****Transferred Application No. 82 of 2010**Friday the 16<sup>th</sup> day of January, 2015“Hon’ble Mr. Justice Abdul Mateen, Member (J)  
Hon’ble Lt. Gen. A.M. Verma, Member (A)”Rakesh Kumar No. 1081528L, Sowar (Acting Lance Dafadar), 33,  
Rashtriya Rifles Battalion (Gorkhas), Village and Post Bhanera (Near  
Allam), District Muzaffarnagar.

..... Petitioner

By Shri K.K. Mishra, counsel for the petitioner/applicant.

Versus

1. The Union of India, through Chief Army of Staff, New Delhi.
2. General Officer Commanding, No. 3 Corps, C/o 99 APO.
3. The Commanding Officer, 33, Rashtriya Rifles, Battalion C/o 99 APO.
4. The General Officer Commanding, 57, Mountain Division, C/o 99 APO.
5. The Superintendent, Central Jail, Bareilly.

..... Respondents

By Shri Prakhar Kankan, counsel for the respondents, & Capt. Priti Tyagi,  
Departmental Representative.**ORDER**

1. This Writ Petition (now Transferred Application) was filed seeking the following reliefs :

*“(i) Issue a writ, order or direction in the nature of certiorari quashing the findings and punishment awarded by Summary General Court Martial proceedings dated 4<sup>th</sup> October, 1998 (Annexure-3).*

*(ii) Issue a writ, order or direction in the nature of mandamus commanding the Superintendant and other Military Officers (respondents), Central Jail, Bareilly to release the petitioner during the pending disposal of writ petition.*

*(iii) Issue any other suitable writ, order or direction which this Hon’ble Court may deem fit and proper under the circumstances of the case.*

*(iv) Award the cost of the petition”*

2. The facts of the case, in brief, are that the petitioner was enrolled on 31.3.1984 in the Indian Army and had put in 14-1/2 years of service before his conviction by the Summary General Court Martial (SGCM). The petitioner was posted in 33 Rashtriya Rifles in 1997. On 12.7.1997 he was part of an escort party detailed to go to Railway Station Miriani on Assam-Nagaland Border to see off Major R.P. Sabu. Sub. Pritam Singh of 33 Rashtriya Rifles was JCO-in-Charge of this party. At the Railway Station the petitioner requested Sub. Pritam Singh to allow him to make a telephone call from STD booth since his mother was not in good health. On getting permission, the petitioner proceeded to the STD booth. After the train had left the Railway Station all personnel boarded the vehicle. However, they had to wait for the petitioner to return from the STD booth. Thereafter they (the escort party) returned to the Unit at 2315 hours and after which, as per the procedure, the arms and ammunitions were checked and the party was disbursed. Shortly thereafter, two gun-shots were heard, whereupon Sub. Pritam Singh reached the site of the gun-shots and found the petitioner with a rifle in his hand, and two persons, viz. Sep. Driver Prem Chand and Hav. Driver S. Shaji were lying injured. Sep. Prem Chand was injured on his face and Hav. Shaji had sustained injuries on his right shoulder. Sep. Prem Chand died in the hospital the next day. Hav. Shaji, after treatment, was discharged from the hospital. Thereafter Court of Inquiry was held and Summary of Evidence was recorded. The competent authority ordered trial by SGCM, which was conducted from 1.9.1998 to

4.10.1998. The SGCM awarded punishment of life imprisonment and to be dismissed from service. The sentence was confirmed by GOC, 57 Mountain Division, the confirming authority, and it was promulgated on 12.1.1999. The same day, i.e. on 12.1.1999, the petitioner was sent to civil prison Silchar from where he was transferred to Bareilly prison on 24.7.2000. The post-confirmation petition of the petitioner was considered by the authorities and was rejected on 12.3.1999. The petitioner is still in civil imprisonment at Bareilly.

3. Aggrieved by the trial at SGCM and the sentence awarded to him, the petitioner filed the present writ petition in the Hon'ble High Court at Allahabad in the year 2001. This writ petition was subsequently transferred to this Regional Bench of the Armed Forces Tribunal on 19.3.2010 and registered as Transferred Application No. 82 of 2010.

4. Shri K.K. Mishra, learned counsel for the petitioner, argued that as per the evidence on record there is no eye witness to the incident, except Hav. Shaji, who was also a victim, and, therefore, is not expected to be an independent witness but a biased witness. There was no ill-will or enmity between the petitioner and the deceased & the injured person and, therefore, according to learned counsel for the petitioner, 'intention to kill' does not arise. He also argued that out of four stages of crime, which are essentially required to make an offence under Section 302 IPC, three are missing in this case. According to learned counsel for the petitioner there are four stages for such crime, viz. 'intention', 'planning', 'preparation' and

‘commission or execution’. According to him there was no intention on the part of the petitioner to commit this offence and it happened at the spur of moment. According to the evidence, Hav. Shaji in his statement before the SGCM mentioned that on reaching the Unit he was asked by the petitioner as to why had he abused him. Shaji denied that he had abused him. On hearing this Sep. Prem Chand told the petitioner that the petitioner deserved more abuses since he had gone away without informing anybody. According to learned counsel for the petitioner, at this point the petitioner was holding the rifle in his right hand and the barrel was resting on the toe of his right foot. The petitioner told Sep. Prem Chand, according to learned counsel for the petitioner, that if you abuse again I will shoot you or words to this effect and he cocked his rifle with his left hand. The moment the accused cocked his rifle, Hav. Shaji turned back and tried to run away, but was hit by a bullet on his right shoulder. Sep. Prem Chand too was hit by a bullet and he fell down on the ground. In reply to a question by SGCM Hav. Shaji stated that the petitioner lost his temper. The petitioner stated that the SGCM ignored the fact that he was suffering from ill-health and his mother was not well and at that time he was abused which acted as provocation. He further stated that SGCM ignored that the SLR had not been cocked and that there was no previous enmity between the petitioner and the injured persons. According to the petitioner the Medical Board report indicates that there was a blast on the left side of the face of Prem Chand but there was no bullet hole. According to the petitioner the bullet was recovered from the

stomach of Prem Chand. The petitioner also goes on to plead that the charges were not proved beyond reasonable doubt and that the sentence was too harsh. Learned counsel for the petitioner argued that the petitioner had knowledge that by firing the rifle bullet the persons were going to suffer injuries and, therefore, he ought to have been convicted under Section 304 Part II of the IPC and not under Section 302 IPC. Learned counsel for the petitioner pleaded that the petitioner deserves to be released from jail as the sentence awarded by the Court is illegal and unjust, more so the petitioner has already undergone a sufficient period in jail.

5. The respondents, through their counter affidavit and as per argument put forth by Shri Prakhar Kankan, learned counsel for the respondents as well as Capt. Priti Tyagi, Departmental Representative, admitted that the petitioner's Unit, i.e. 33 RR was at Rawariah near Miriani at Assam-Nagaland Border on 12.7.1999. A protection party under Sub. Pritam Singh was sent to Miriani Railway Station to see off Major Sabu. The petitioner had obtained permission to make a telephone call due to which the entire party had to wait for little while and they reached the Unit at 2315 hours. After being disbursed, Hav. Shaji was hailed by the petitioner and was asked as to why did he abuse him. Hav. Shaji denied this allegation. On hearing this Sep. Prem Chand reached the spot and said that the petitioner deserved greater calling of names whereupon the petitioner dared Sep. Prem Chand to abuse him. The petitioner cocked his rifle and fired at Hav. Shaji who was running away at that time. Hav. Shaji received

bullet injury on his right shoulder. The petitioner then fired a second shot at Sep. Prem Chand who received injury on his face. Sep. Prem Chand died in hospital the next day. The Court of Inquiry was conducted followed by recording of Summary of Evidence. The petitioner was tried by SGCM on two charges, i.e. under Section 69 of the Army Act read with Section 302 IPC for knowingly causing death and under Section 69 of the Army Act read with Section 307 IPC for firing at Hav. Shaji with intent to murder him. He was found guilty of both the charges and was sentenced to imprisonment for life and dismissal from service. This award was confirmed by GOC, 57 Mountain Division and the sentence was promulgated on 12.1.1999. Thereafter the petitioner was sent to civil prison at Silchar the same day. The respondents stated that the bullet was recovered from the 'left cerebrum' of Sep. Prem Chand and not from his stomach, as alleged by the petitioner. The ill-health of the petitioner had no co-relation with the offence committed by him and there is nothing to establish that this offence was committed in a disturbed state of mind. It was a deliberate act and was committed with the intention of causing injury and death. The allegation of manhandling by the petitioner is incorrect. There was no manhandling involved at all. According to learned counsel for the respondents the petition is devoid of merit and deserves to be dismissed.

6. We have heard both the sides and gone through the records.

7. The petitioner, according to the Jail report dated 12.7.2011, had been allowed to proceed on parole seven times and he spent 228 days on parole. The Jail report also indicates that every time when he was went on parole, he returned to Jail on time. His conduct in the Jail is good and he has not been given any punishment inside Jail.

8. Reconstruction of events that took place on 12.7.1997 indicates that the entire protection party had to wait for the return of the petitioner after he made a telephone call and they were somewhat delayed in reaching the Unit. This may have caused some resentment to the other personnel of the protection party. During the journey from Railway Station to the Unit the petitioner was in a Truck 1 ton along with Sub. Pritam Singh whereas Hav. Shaji was the driver of the Lorry 3 ton which too was part of this protection party. On return to the Unit and during checking of the arms and ammunitions there was no incident or interaction between the petitioner and the injured persons. After they had been disbursed, the petitioner called out Hav. Shaji and accused him of inflicting abuses on him. While this was going on Sep. Prem Chand arrived and stated that the petitioner deserved to be abused even more. The petitioner at that stage cocked his rifle with his left hand. On hearing the cocking of the rifle Hav. Shaji turned and began to run. After he had covered just few steps, he was hit by a bullet on the back side of his right shoulder. The petitioner thereafter fired the second shot which hit Sep. Prem Chand on the left side of his face. On hearing



these two shots, Sub. Pritam Singh arrived at the spot and he found the petitioner with a rifle in his hand and these two persons lying injured.

9. We have noted that in the rejoinder affidavit the petitioner has stated that there was some physical violence between Sep. Prem Chand and Hav. Shaji and that during this scuffle the petitioner lost control and fired by mistake not taking any aim on any one or with any intention to kill anybody. However, during the final hearing, learned counsel for the petitioner stated that there had been no physical contact or scuffle between the petitioner and the two injured persons. The respondents also in their counter affidavit have stated that there was no manhandling or physical contact.

10. We have scrutinized the copy of the GCM proceedings, submitted by the respondents. In the GCM proceedings nine P.Ws. were examined. However, there was only one eye-witness, viz. Hav. S. Shaji, who had been injured due to firing by the petitioner. Hav. Shaji was examined as P.W. 2 during the SGCM.

11. Hav. Shaji, in his deposition during the SGCM, narrated the sequence of events. Primarily he corroborated the facts of the delay caused in returning to the Unit owing to the petitioner having gone to make a phone call. On return to the Unit, Hav. Shaji heard somebody calling 'Sir, Sir ....' from behind. He found it was the petitioner who said Hav. Shaji had abused him by saying "*Maa bahin ka gali diya*" or words to that effect.

Hav. Shaji told the petitioner he had not abused the petitioner. Sep. Prem Chand came to the place where this conversation took place and the petitioner told Sep. Prem Chand that Hav. Shaji had abused him. Sep. Prem Chand told the petitioner to go away, but the petitioner “repeated the same”. On this Sep. Prem Chand said “*Tum ko o ur bhi galid dena chahiye, tum log bina bataye idhar udhar chale jate ho*”. The petitioner told Sep. Prem Chand “*Abhi mare ko gali do .... Mai tere ko goli mar dunga*” or words to that effect, and he cocked his rifle with his left hand. At that moment, Hav. Shaji turned back and tried to run away but he could have hardly gone a step when a bullet hit his right shoulder from behind. Hav. Shaji managed to reach the FOL Dump. In the meantime Hav. Shaji heard another round of gunfire. Thereafter, he saw Sep. Prem Chand fallen on ground. Hav. Shaji shouted for help and was evacuated to hospital.

12. In the cross-examination, Hav. Shaji stated that he did not say “loss of temper or control”. He had said “*akar ke baat kar raha tha*”. Hav. Shaji further said in the cross-examination “It is incorrect to suggest that Sep. Prem Chand grabbed the neck of the accused and due to which he had fallen down”. Hav. Shaji explained that nothing of that sort had taken place.

13. The statement of Hav. Shaji, the only eye-witness, establishes that no manhandling had taken place and that the petitioner had made known his intention when he said ‘*goli maar dunga*’ following which he cocked his rifle and fired two shots.

14. The provocation may have been the abuse, however the factum of cocking and firing two shots one after another indicates that the petitioner had every intention of causing injury and/or death to the two persons, viz. Hav. Shaji and Sep. Prem Chand. We are of the view that this was a deliberate act on the part of the petitioner and the lack of intention on the part of the petitioner, as argued by learned counsel for the petitioner, is legally not sustainable. The petitioner was correctly tried on charges under Section 302 IPC and Section 307 IPC.

15. The SGCM was conducted in the manner prescribed by law and the sentence was confirmed by the competent authority. The post-confirmation petition too was considered by the competent authority and was rejected. We find no infirmity in the proceedings of SGCM.

16. In the light of the above, we find that the petition to be devoid of merit and deserves to be dismissed. Accordingly, this Transferred Application No. 82 of 2010 is dismissed and the conviction and sentence dated 4.10.1998 awarded by the SCGM is hereby affirmed. No order as to costs.

(Lt. Gen. A.M. Verma)  
Member (A)

(Justice Abdul Mateen)  
Member (J)

PG.