

AFR**RESERVED****ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 129 of 2013****Thursday, this the 06th day of October, 2022****"Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)"**

No. 4082941W Rifleman Rajendra Singh son of Sri Pushkar Singh, resident of Village-Roli Dewar, Post Office-Gopeshwar, District-Chamoli (Uttarakhand) through his legally wedded wife Smt Deepa Negi, wife of Rajendra Singh, resident of Village-Roli, Post Office-Gopeshwar, District-Chamoli (Uttarakhand).

..... Applicant

Ld. Counsel for the: **Shri RP Shukla**, Advocate
Applicant **Shri VP Pandey**, Advocate

Versus

1. Union of India through the Secretary, Ministry of Defence, New Delhi.
2. The Chief of Army Staff, Integrated Head Quarter of Ministry of Defence, South Block, New Delhi-110001.
3. The General Officer Commanding, Headquarters Eastern Command, Kolkata.
4. The General Officer Commanding 20 Mountain Division, C/o 99 APO.
5. The General Court Martial through Presiding Officer IC-53793P Colonel Yogesh Batra.

.....Respondents

Ld. Counsel for the Respondents. **:ShriSunil Sharma**, Advocate
Central GovtCounsel

ORDER**"PER JUSTICE UMESH CHANDRA SRIVASTAVA, MEMBER (J)"**

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

(i) To set aside/quash the findings and sentence of General Court Martial as contained in Annexure No A-1 and rejection of pre-confirmation petition dated 23 Nov 2012 as contained in Annexure No A-2.

(i)(a) To set aside/quash the rejection order dated 12 Sep 2013 passed in post confirmation petition by respondent No 3 as contained in Annexure A-6.

(ii) To issue an order or direction to the respondents to re-instate the appellant in service with all consequential benefits.

(iii) Any other relief as considered proper by this Hon'ble Tribunal be awarded in favour of the applicant.

(iv) Cost of the appeal be awarded to the applicant.

Facts of the Case

2. The applicant was enrolled in the Army on 06.10.2000. He was serving with 15 GARHWAL RIFLES which was stationed at Cooch Behar under 20 Mountain

Division. On the night of 16/17 January 2011, Naik Mahendra Singh, Rifleman Ashish Thapliyal and the applicant were detailed for security duties at gate No 1 of the unit. While Naik Mahendra Singh was Guard Commander, the other two juniors were detailed for sentry duties. 5.56mm INSAS Rifles were drawn by both the sentries alongwith 10 cartridges for each rifle and the weapons were kept inside the nearby tent. The Guard Commander briefed the complete guard at around 1815 hours and thereafter all sentries except the applicant and Rifleman Ashish Thapliyal went to their company lines, close to gate No 1. At around 1950 hours applicant shouted at the Guard Commander and put the magazine in his INSAS Rifle and fired at Naik Mahendra Singh who immediately fell on the ground. The other sentry Rifleman Ashish Thapliyal ran towards Alpha company lines calling for help while the applicant shortly thereafter shot himself. Hearing call of Rifleman Ashish Thapliyal, Rifleman Meherban Singh and Naik Kamal Singh immediately reached the incident site and disarmed the applicant who was in an injured condition. In the meantime other persons of the unit reached the spot and the applicant was rushed to Medical Inspection Room (MI Room). Prior to

that Captain (Now Major) Amitabh Pandey, Regimental Medical Officer (RMO), reached the site and inspected Nk Mahendra Singh and declared him dead. In MI Room the RMO attended to the applicant and took him to 164 Military Hospital, Binaguri for further treatment where he was admitted.

3. On 17.01.2011 FIR was lodged with Police Station Kotwali Cooch Behar who submitted charge sheet against the applicant for offence under Section 302 I.P.C. before learned Chief Judicial Magistrate (CJM), Cooch Behar (West Bengal). A case was taken up by General Officer Commanding (GOC), 20 Mountain Division before the CJM for handing over the case to military authority for trial of charges levelled against the applicant by way of General Court Martial (GCM) and the CJM handed over the applicant to Army authorities in terms of Section 125 and 126 of the Army Act, 1950 read with Section 475 Cr.P.C. Thereafter, convening order for conducting GCM was issued by GOC, 20 Mountain Division on 15.06.2012 and the applicant was attached to 831 Light Regiment for trial.

4. The Charge Sheet dated 19.05.2012 was handed over to the applicant as per which he was to be tried by GCM on two charges i.e. (i) Army Act Section 69-

committing a civil offence, that is to say, murder, contrary to Section 302 of the IPC and (ii) Army Act Section 64 (c)- attempting to commit suicide and in such attempt doing an act towards the commission of the same. The GCM concluded on 25.08.2012 and found the applicant guilty of both the charges and sentenced him to suffer imprisonment for life and to be dismissed from service. After promulgation of sentence he was lodged in civil jail, Jalpaiguri (West Bengal). The applicant preferred pre-confirmation petition on 22.09.2012 under Section 164 (1) of the Army Act, 1950 against the findings of the GCM which was rejected vide order dated 23.11.2012. Thereafter, the applicant preferred post-confirmation petition dated 19.12.2012 under Section 164 (2) of the Army Act, 1950 which was also rejected vide order dated 12.09.2013. This O.A. has been filed to set aside findings and sentence of GCM, rejection of pre and post confirmation petitions dated 23.11.2012 and 12.09.2013 respectively and re-instate the applicant in service with all consequential benefits.

5. Learned counsel for the applicant submitted that on the fateful day the applicant was feeling very low and depressed on the ground of his leave cancellation. He

further submitted that he was mistreated and mentally tortured in front of his company fellows. It was further submitted that while on duty, with an intention of injuring himself and going on sick leave, he picked up the rifle, loaded the magazine and cocked it. Sitting on the table he put the barrel of the rifle on the upper part of his arm but before he could do anything, Rifleman Ashish Thapliyal tried to snatch the rifle and in the incident it got fired and hit the Guard Commander accidentally and not intentionally which resulted in his death.

6. Learned counsel for the applicant further submitted that in the General Court Martial 19 prosecution witnesses were examined but none of the prosecution witnesses supported the charge in its totality and have merely come and deposed with hearsay evidence and all the documentary evidence have been contradictory to one another, however the GCM relying on the testimony of interested witnesses arrived at its finding in which applicant was found guilty of both charges. He further submitted that the applicant had no animosity with the Guard Commander and therefore had no intention to kill Naik Mahendra Singh as when it came to the knowledge of the applicant that Naik Mahendra Singh died because of

the bullet which was fired from his weapon, he withdrew into a shell and came to a conscious state after two days in 158 Base Hospital where he was treated by Dr. Siddharth Dixit, a Psychiatrist.

7. The next submission advanced by the learned counsel for the applicant is that the nature of the offence alleged to have been committed by the applicant cannot by any stretch of imagination be said to be murder as defined in section 300, IPC, but at best can be said to be culpable homicide not amounting to murder under Section 304, IPC, for which a punishment lesser than life imprisonment may be awarded. Reference was also made to exception 4 to Section 300, IPC, which postulates that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. It was contended that even if the prosecution case is accepted, from the testimonies of the witnesses and the circumstances as emerging from the record, it is evident that there was no premeditation. Applicant who was in possession of loaded rifle shouted at the Guard Commander, whereupon the other sentry,

apprehending that there may be fight between the two, intended to snatch the rifle from the applicant and in the process of snatching the weapon by Rifleman Ashish Thapliyal it got accidentally fired and the bullet hit Naik Mahendra Singh. It was submitted that exception 4 to section 300, IPC would therefore, clearly be attracted in the present case and consequently, the conviction is required to be converted to one under section 304 Part-II instead of section 302 of the IPC. It was urged that the appellant has undergone 11 years imprisonment and he has no criminal antecedents; therefore, having regard to the overall circumstances, the conviction is required to be converted into a lesser offence of section 304 Part-II, IPC.

8. It was further averred that the GCM has failed to understand, interpret and appreciate the circumstances under which the applicant took the drastic step of shooting himself. His submission is that the applicant was not in sound state of mind, and that there have to be strong and specific reasons for the applicant commit the act.

9. The learned counsel pleaded that in view of the above it can be conveniently said that prosecution has miserably failed to prove any charge beyond reasonable

doubt, hence the applicant's sentence be set aside as the sentence meted out to the applicant is unduly harsh and disproportionate, as held by the Hon'ble Apex Court in the case of ***Ranjit Thakur vs UOI & Ors***, 1987 4 SCC 611 which held as under:-

"Court Martial punishment awarding of sentence though within the discretion of Court Martial but it has to suit the offence and the offender-it should not be vindictive or unduly harsh and should not be disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias-irrationality and perversity are recognised grounds for judicial review-court competent to interfere and correct the same."

10. He pleaded for setting aside the GCM sentence and to allow applicant to be re-instated in service with all consequential benefits.

11. Per contra, learned counsel for the respondents submitted that Naik Mahendra Singh of 15 GARH RIF was detailed as Guard Commander at gate No 1 of 15 GARH RIF at Cooch Behar on the night of 16/17 Jan 2011. Applicant and Rifleman Ashish Thapliyal were also detailed as sentries with the Guard Commander for first duty from 1800 hours to 2000 hours. He further submitted that at around 1950 hours the applicant put the magazine in his INSAS rifle and fired at the Guard Commander who immediately fell on the ground. Rifleman Ashish Thapliyal

ran towards Alpha company lines calling for help while the applicant thereafter shot himself.

12. Learned counsel for the respondents further submitted that after the incident, GCM was held in which 19 prosecution witnesses were produced and the applicant was found guilty on the basis of evidences, especially that of eye witness Rifleman Ashish Thapliyal, who was one meter away from the applicant. He submitted that the fact that the applicant was on duty on 16.01.2011 duly armed with INSAS rifle alongwith a magazine of 10 rounds, the fact that the deceased was on duty as Guard Commander, unarmed, at the same time, date and at the same place as that of the applicant, the fact that the applicant shouted at the deceased, the fact that he went inside the tent, took out the magazine from his pouch, fitted the magazine onto his rifle, cocked the rifle while coming out of the tent, directed the barrel towards the deceased and fired at him from almost hip position. All this has been clearly and unambiguously brought out by Rifleman Ashish Thapliyal, the eye witness and his act was not sudden but deliberate, with clear intent, due thought, preparation and importantly, without any provocation or any reason of fear from the deceased as he was unarmed.

It was further submitted that the applicant attempted to commit suicide by shooting himself on the left side of his chest and left thigh which fact has been corroborated by the medical officer who examined the applicant after the incident took place.

13. Learned counsel for the respondents further submitted that the Hon'ble Apex Court in ***Leela Ram vs State of Haryana***, 2000 SCC (Cr.)222 has observed that there are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety.....Different witnesses react differently under different situations.....There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise”.

14. Learned counsel for the respondents further submitted that Dr. Asit Kumar Paul (prosecution witness No 12) conducted post mortem who brought out that the bullet entry could be near the right nipple on the chest and exit wound could be 3 inch below the left shoulder. The

bullet punctured the vital organs of the deceased including his heart which was the cause of his death. It was further submitted that in the instant case so much of evidence was brought on record that even if the post mortem of the deceased was not done it would not have affected the prosecution case as held by the Hon'ble Apex Court in the case of ***Kehar Singh vs State (Delhi Admn)***, AIR 1988 SC 1883. He pleaded for dismissal of O.A. on the ground that the prosecution has proved the case and the applicant has rightly been punished for the offence committed.

15. Heard Shri RP Shukla and Shri VP Pandey, learned counsel for the applicant and Shri Sunil Sharma, learned counsel for the respondents and perused the material placed on record. We have also perused the original documents submitted by the respondents on 28.01.2022.

16. The undisputed case of the parties is that the applicant was enrolled in the Army on 06.10.2000. He was serving with 15 GARH RIF which was stationed at Cooch Behar under 20 Mountain Division. On the night of 16/17 January 2011, Naik Mahendra Singh, Rifleman Ashish Thapliyal and the applicant were detailed for security of gate No 1 of the unit. While Naik Mahendra Singh was Guard Commander, the two others were

detailed for sentry duties. 5.56mm INSAS Rifles were drawn by both the sentries alongwith 10 cartridges for each rifle and the weapons were kept inside the nearby tent. The Guard Commander briefed the complete guard at around 1815 hours and thereafter all sentries except the applicant and Rifleman Ashish Thapliyal went to their company lines, close to gate No 1. At around 1950 hours applicant put the magazine in his INSAS Rifle and fired at Naik Mahendra Singh who immediately fell on the ground. The other sentry Rifleman Ashish Thapliyal ran towards Alpha company lines calling for help while the applicant shortly thereafter shot himself. Hearing call of Rifleman Ashish Thapliyal, Rifleman Meharban Singh and Naik Kamal Singh immediately reached the incident site and disarmed the applicant who was lying in injured condition. In the meantime, other persons of the unit reached the spot and the applicant was rushed to Medical Inspection Room (MI Room). Prior to that Captain (Now Major) Amitabh Pandey, Regimental Medical Officer (RMO), reached the site and inspected Nk Mahendra Singh and declared him dead. In MI Room the RMO attended to the applicant and took him to 164 Military Hospital, Binaguri for further treatment. On 17.01.2011 FIR was lodged at

Police Station Kotwali Cooch Behar and weapon and ammunition used in the incident were handed over to Police Station on 12.03.2011 for forensic examination.

17. The applicant was admitted to Military Hospital and was discharged on 05.05.2011. C of I was convened and it was finalised on 23.04.2011. Subsequently, the applicant was handed over to Police Station Kotwali, Cooch Behar on 06.05.2011. He was produced before the learned CJM, Cooch Behar on 07.05.2011 and remanded to judicial custody for 14 days. Since the ballistic report of weapon was not received by the police authority, he was released on bail on 05.08.2011. On receipt of forensic report the applicant was handed over to police authorities on 14.11.2011 from where he was handed over to Army authorities for further processing of the case by military authorities. The applicant was attached to 831 Light Regiment w.e.f. 20.11.2011, where his trial by GCM commenced and he was sentenced to life imprisonment followed by dismissal from service.

18. We have examined and sifted all the statements recorded in Summary of Evidence (SoE) along with exhibits for the limited purpose of establishing whether or not case against the applicant is made out.

19. On having gone through the statements of witnesses recorded in Summary of Evidence and the documents appended thereto, we are of the opinion that there is evidence against the petitioner in support of the charges which in brief are as follows:

(i) Charge No. 1 (Army Act Section 69): Committing a Civil Offence, that is to say Murder, contrary to Section 302 of the Indian Penal Code in that he, at Cooch Behar on 16.01.2011, while on duty at sentry post No-1 at the main gate, by intentionally causing death of No 4077256F Naik Mahendra Singh of his unit, committed murder.

(ii) Charge No. 2 (Army Act Section 64 (c): Attempting to commit suicide and in such attempt doing an act towards the commission of the same-in that he, at Cooch Behar military station, on 16.01.2011 attempted to commit suicide by shooting himself on his left side chest and thigh.

20. Based on prosecution witnesses the aforesaid charges were proved and applicant was found guilty during the GCM proceedings. He was, thus, sentenced to suffer life imprisonment and dismissed from service.

21. It is noticed that against order dated 25.08.2012, which sentenced him to suffer life imprisonment and dismissal from service, applicant submitted pre-confirmation petition dated 22.09.2012 which was rejected vide order dated 23.11.2012. In his petition dated 22.09.2012 applicant's main contention was that he did not make any confessional statement before Major Amitabh Pandey, RMO, while getting first aid and he did not plead guilty during the GCM, but the Court did not appreciate the entire evidence on record and therefore, his sentence was disproportionate to the gravity of the offences for which the petitioner was convicted. It was further contended by the applicant that Army Rule 180 was not complied with during C of I and in subsequent proceedings. In this regard we observe that the pre-confirmation petition dated 22.09.2012 was rejected by GOC, 20 Mountain Division vide order dated 23.11.2012 in which all grievances and allegations were considered before being rejected. For convenience sake, order dated 23.11.2012 is reproduced as under:-

"ORDER OF THE GENERAL OFFICER COMMANDING 20 MOUNTAIN DIVISION ON THE PRE-CONFIRMATION PETITION DATED 22 SEPTEMBER 2012, SUBMITTED BY NO 4082941W RIFLEMAN RAJENDRA SINGH OF 15 GARHWAL RIFLES PREVIOUSLY ATTACHED TO 831 LIGHT REGIMENT, NOW

ATTACHED TO 19 BIHAR AGAINST FINDINGS AND SENTENCE
OF THE GENERAL COURT MARTIAL

1. I have perused the pre-confirmation petition dated 22 Sep 2012, submitted by No 4082941W Rifleman Rajendra Singh of 15 GARHWAL RIFLES previously attached to 831 Light Regiment, now attached to 19 BIHAR against the findings and sentence of the General Court Martial which tried him.

2. WHEREAS, the record reveals that the petitioner was tried by a General Court Martial on two charges. The first charge was laid under Army Act Section 69 for 'COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, MURDER, CONTRARY TO SECTION 302 OF THE INDIAN PENAL CODE', the particulars averring that he at Cooch Behar Military Station, on 16 January 2011, while on duty at sentry post No 1 at the main gate, by intentionally causing death of No 4077256F Naik Mahendra Singh of his unit committed murder. The second charge was laid under Army Act Section 64 (c) for 'ATTEMPTING TO COMMIT SUICIDE AND IN SUCH ATTEMPT DOING AN ACT TOWARDS THE COMMISSION OF THE SAME, the (sick) averring that he at Cooch Behar Military Station on 16 January, 2011 attempted to commit suicide by shooting on his left side chest and thigh. The petitioner pleaded 'Not Guilty' on both the charges. The Court, after the trial, found the petitioner 'Guilty' of all the charges. Thereafter, the Court sentenced the petitioner to suffer imprisonment for life and to be dismissed from the service.

3. WHEREAS, feeling aggrieved by the findings and sentence of the General Court Martial, the petitioner has submitted the instant pre-confirmation petition, wherein he has contended that the findings and sentence of the General Court Martial dated 25th August 2012 are contrary to the facts and evidence on record and are unsustainable. The petitioner has contended that there were gaps in the prosecution evidence, that the weapon and ammunition of Rifleman Ashish Thapliyal (Prosecution Witness-3) were not accounted for, that the tent which had bullet hole was not seized, that finger prints were not taken from the place of incident, that Rifleman Ashish Thapliyal (Prosecution Witness-3) did not actually see the incident in question and deposed falsely, that the petitioner had no intention to commit suicide and to cause death of the deceased, that the petitioner never made any confessional statement to Major Amitabh Pandey (Prosecution Witness-7), that the Court did not appreciate the entire evidence on record and that the sentence awarded to the petitioner was strikingly disproportionate to the gravity of the offences of which the petitioner was convicted. Other than the said factual issues, the petitioner has raised a legal point and contended that since provisions of Army Rule 180 were

not complied with at the Court of Inquiry in respect of the petitioner, the subsequent proceedings were bad in law.

4. *WHEREAS, the above contentions of the petitioner have been examined in the light of the evidence on record of the General Court Martial proceedings and connected documents and the same have been found to be bereft of merit. The evidence on record reveals that on 16 January 2011, the petitioner was detailed for first Guard duty from 1800 hours to 2000 hours at R.P. Gate No 1 of 15 GARHWAL RIFLES alongwith Naik mahendra Singh, the deceased, as the Guard Commander. As per Havildar Laxman Singh (Prosecution Witness-1), the RP Havildar Major, at about 1930 hours he checked the guard and found that the petitioner and Rifleman Ashish Thapliyal (Prosecution Witness-3) were on duty. After about 10 to 15 minutes, the petitioner asked Naik Mahendra Singh, the deceased, four to five times that either he should go the Kote or to the lines, however, the deceased refused to go. At that time, as deposed by Rifleman Ashish Thapliyal (Prosecution Witness-3), the eye witness to the incident, the petitioner went inside the 'Two man Tent' adjacent to the sentry post, loaded his rifle and cocked it while coming out of the tent. Seeing the petitioner coming out with his weapon, Rifleman Ashish Thapliyal (Prosecution Witness-3), who was standing at the main gate, ran towards the petitioner and shouted "ARE TU KYA KAR RAHA HAI?" ("Oh what are you doing?" or words to that effect), with a view to stop the petitioner but before Prosecution Witness-3 could reach near the petitioner, the petitioner had already aimed and fired at Naik Mahendra Singh (the deceased) from a distance of approximately one meter. Instantly thereafter, Naik Mahendra Singh (the deceased) fell on the ground and succumbed to the gun shot injuries caused by the petitioner. The intention of the petitioner to cause the death of Naik Mahendra Singh is evident from the facts that the petitioner, in a determined manner, loaded his Rifle, cocked it, aimed at the vital organs of the deceased and despite having been cautioned and an attempt to stop him, made by Rifleman Ashish Thapliyal (Prosecution Witness-3), the petitioner fired at the deceased from a close range of less than one meter. The petitioner being a trained soldier well knew the natural consequences of his aforesaid acts proved in evidence. The aforementioned clinching pieces of direct and circumstantial evidence clearly establish that the petitioner had intentionally shot at Naik Mahendra Singh, caused his death and thereby committed murder. Further, Major Amitabha Pandey (Prosecution Witness-7) has categorically deposed that the petitioner had confessed in front of him, while he was administering him medico-surgical procedures soon after the incident, that the petitioner had shot himself after shooting Naik Mahendra Singh.*

5. AND WHEREAS, considering the attendant circumstances of the case the cogent and reliable evidence on record, I, am of the considered view that the findings of 'Guilty' returned by the Court on both the above mentioned charges are fully supported by the evidence on record and are legally sustainable. As far as compliance of Army Rule 180 is concerned, the record reveals that the said provisions were complied with at the Court of Inquiry. Considering the nature and gravity of the offences committed by the petitioner to attendant circumstances of the case and the advice given by the Judge Advocate as regards considerations for award of sentence in such cases, the sentence as awarded by the Court is just and legal.

6. NOW THEREFORE, in view of the foregoing, in exercise of the powers conferred vide Army Act Section 164 (1), I hereby reject the pre-confirmation petition dated 22 Sep 2012, submitted by No 4082941W Rifleman Rajendra Singh of 15 GARHWAL RIFLES, the petitioner, as the same lacks substance and is devoid of merit."

22. After pre-confirmation petition being rejected the applicant submitted post-confirmation petition dated 19.12.2012 which was also rejected by General Officer Commanding-in-Chief (GOC-in-C), Eastern Command vide order dated 12.09.2013, the same for convenience sake is reproduced as under:-

"DIRECTIONS OF GENERAL OFFICER COMMANDING-IN-CHIEF, EASTERN COMMAND ON THE POST CONFIRMATION PETITION DATED 19 DEC 2012 SUBMITTED BY NUMBER 4082941W EX RIFLEMAN RAJENDRA SINGH OF 15 GARHWAL RIFLES, ATTACHED TO 831 LT REGT, AGAINST FINDINGS AND SENTENCE OF THE GENERAL COURT MARTIAL DATED 25 AUG 2012

1. Post confirmation petition dated 19 Dec 2012 submitted by NUMBER 4082941W ex Rifleman Rajendra Singh of 15 GARH RIF att to 831 Lt Regt against the findings and sentence of the GCM dated 25 Aug 2012, has been considered alongwith recommendations of Cdrs-in-chain. I agree with the recommendations of the General Officer Commanding 33 Corps.

2. The petitioner was tried by a General Court Martial on two charges. The first charge was laid under Army

Act Section 69 for, "COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, MURDER, CONTRARY TO SECTION 302 OF THE IPC", the particulars averring that, he at Cooch Behar Military Station, on 16 January 2011, while on duty at Sentry Post No-1 at the main gate, by intentionally causing death of No 4077256F Nk Mahendra Singh of his unit, committed murder. The second charge was laid under Army Act Section 64 (c) for "ATTEMPTING TO COMMIT SUICIDE AND IN SUCH ATTEMPT DOING AN ACT TOWARDS THE COMMISSION OF THE SAME", the particulars averring that, he at Cooch Behar Military Station, on 16 January 2011, attempted to commit suicide by shooting himself on his left side chest and thigh. The petitioner pleaded 'Not Guilty' to both the charges. The Court, after the trial, found the petitioner 'Guilty' of all the charges and sentenced the petitioner to suffer imprisonment for life and to be dismissed from the service.

3. Perusal of the case record shows that a total of nineteen witnesses were examined by the Prosecution at the GCM including Rfn Ashish Thapliyal (PW-3), being an eye-witness deposing that the accused went inside the tent, loaded his rifle, cocked it while coming out of the tent and fired at Nk Mahendra Singh, who succumbed to the gunshot injuries. He, thereafter, fired at himself and sustained gunshot injuries. The intention of the accused behind the above act can be duly judged in light of his confession before Maj Amitabh Pandey (PW-7) and Lt Col Sidharth Dixit (PW-14), before whom he had confessed the act of firing, and the same has been rightly appreciated by the Court. In the light of the testimony of the eye witness, which has been duly corroborated by other witnesses, and circumstances, the Court arrived at the right decision. The issues raised by the petitioner with regard to having been awarded harsh, vindictive and disproportionate sentence, non application of judicious mind in a mechanical manner and non appreciation of the fact that prosecution has failed to prove the case beyond the reasonable doubt, are devoid of merit. Considering the nature and gravity of the offences, the sentence awarded by the Court is just and legal.

4. I, therefore, direct that post confirmation petition dated 19 Dec 2012 submitted by Number 4082941W Ex Rifleman Rajendra Singh of 15 GARH RIF be rejected as the same lacks substance and is devoid of merit."

23. Learned counsel for the applicant has emphatically taken a plea that, keeping in view of exception 4 to

Section 300, IPC, the applicant's imprisonment should be reduced. In this regard we observe that the ingredient which is required to be satisfied for invoking exception 4 to section 300, IPC is that the offender must not have taken undue advantage or acted in a cruel or unusual manner. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. Where the deceased is unarmed and does not cause any injury to the accused even after a sudden quarrel and if the accused has directly fired on the deceased, exception 4 is not attracted and commission must be one of murder punishable under Section 302. To attract exception 4 it is necessary that fire should be exchanged from both the persons even if they do not find their target. Even if the fight is not premeditated and sudden, if the instrument or manner of retaliation is greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under exception 4. In the instant case the deceased was unarmed whereas the applicant was in possession of loaded rifle and fired towards the deceased. In ***Kehar Singh's*** case (supra)

the Hon'ble Supreme Court has held that if the appellant used deadly weapon against the unarmed man and struck him a blow on the head it must be held that he inflicted the blows with the knowledge that they would likely to cause death and he had taken undue advantage. He did not stop with the first blow, he inflicted two more blows on the fallen one and the third one proved fatal. He acted cruelly with no justification. By his conduct the applicant denied himself the benefit of exception 4 to Section 300 IPC. Reverting to the facts of this case, the deceased was unarmed when the applicant fired towards him and because of which he died on the spot. This fact was established not only by witnesses and post mortem report but also by the testimony of the medical witness. The fact that the appellant was armed whereas the deceased was not, leads to the inference that the applicant took undue advantage and proves that the applicant acted cruelly without any justification. Consequently, exception 4 cannot be invoked in the present case. Additionally, the last ingredient which is required to be satisfied viz., that the fight must have been with the person killed, is also not satisfied, inasmuch as, in the present case, the applicant shouted at the Guard

Commander (the deceased) and fired and there was no fight with the deceased. The applicant, therefore, by his conduct has denied himself the benefit of exception 4 to section 300, IPC.

24. The case record shows that a total of nineteen witnesses were examined by the Prosecution at the GCM, including Rfn Ashish Thapliyal (PW-3) who was an eye witness. He deposed that the accused went inside the tent, loaded his rifle, cocked it while coming out of the tent and fired at Nk Mahendra Singh, who succumbed to the gunshot injuries. He, thereafter, fired at himself and sustained gunshot injuries himself. The intention of the accused behind the above act can be duly judged in light of his confession before Maj Amitabh Pandey (PW-7) and Lt Col Sidharth Dixit (PW-14), before whom he had confessed the act of firing, and the same has been rightly appreciated by the Court. Thus, in light of the declaration of the eye witness, which has been duly corroborated by other witnesses, and other circumstantial evidence, the Court arrived at the right decision. The issues raised by the applicant with regard to having been awarded harsh and disproportionate sentence, are devoid of merit.

Considering the nature and gravity of the offences, the sentence awarded by the Court is just and legal.

25. **Defence Case**

(i) First case of the defence is that an essential ingredient to prove a person guilty is that a person committing an offence must have 'Mens Rea'. In the absence of which any conviction is illegal in the eyes of law as held by the Hon'ble Supreme Court in the case of ***R Balakrishna Pillai vs State Of Kerala***, decided on 28.02.2003.

(ii) Second case of the defence is that the prosecution must prove its case beyond reasonable doubt and not by conclusive proof as held by the Hon'ble Supreme Court in the case of ***State of Kerala Vs. Bahuleyan***, AIR (1986) 4 SCC 124 as per which the benefit of doubt, if any, should go to the accused and unless the guilt of the accused is proved beyond reasonable doubt, the accused cannot be convicted.

(iii) Third case of the defence is that where the views are different, the benefit should go to the accused and not to the prosecution as held by the

Hon'ble Supreme Court in the case of ***Sharad Bidhi Chand Sharda vs State of Maharashtra***, reported in (1984) 4 SCC 116.

(iv) PW-3 Rifleman Ashish Thapliyal deposed that he was busy checking the gate passes of the civilians and the out passes of the vehicles at the time when the alleged incident took place. It is moot as to how could he see what the accused doing when he went inside the tent. Moreover the prosecution has failed to procure a civilian witness to prove the charge. It was stated that being an unreliable eye witness, PW-3 cannot be relied upon as held by the Hon'ble Supreme Court in the case of ***Chandubhai Shanabhai Parmar vs State Of Gujarat***, AIR 1982 SC 1022.

(v) The other case of the defence is that when PW-6 Nb Sub Vikram Singh, has said that the accused was unconscious and non communicative, and the same has also been stated by PW-11, Lt Col Rajak Dutta in that the accused was totally non communicative, then how could he give a statement to PW-7 Capt Amitabh Pandey, RMO which the prosecution has alleged to be a voluntary statement of confession.

(vii) The prosecution has not examined any of the two Nursing Assistants present in the MI Room on the fateful night who could have heard the conversation between the accused and the RMO.

26. The defence has further submitted that there are a lot of important issues that have been left untouched and unanswered which are detrimental and cast a shadow of doubt on the case of prosecution. For example; (a) one bullet was not accounted for (b) tent not seized (c) no finger prints taken (c) PW-3 was not arrested and interrogated (e) How did the rifle of PW-3 reach the kote etc.

27. The defence has summarised the chain of events as under :-

"Accused was feeling very low and depressed and could not accept the fact that his leave was being cancelled and he was being sent to the centre in addition to the chain of events that had taken place the previous day and continued. With a thought of injuring himself and going on sick leave he picked up the rifle, loaded the magazine and cocked it. Sitting on the table he put the barrel of the rifle on the upper part of his arm but before he could do anything, Rfn Ashish Thapliyal, PW-3 had seen him and he came running towards the accused and as PW-3 approached the accused, his head turned towards PW-3 and by this time PW-3 was next to the accused and the accused got pushed by PW-3 on the right side, thus the rifle slipped and as the hand of the accused was on the trigger a shot got fired and before the accused could get control over his weapon again, PW-3 started shouting 'Maar Diya Maar Diya', Rajendra Pagal Ho gaya Hai and ran away from there. Accused did not know what had happened and what to do next and before Guard Commander Naik Mahender Singh or anyone else could come inside the tent, the accused put

the weapon on his chest and shot himself two times. Then the rifle slipped from the hand of the accused and the accused heard two shot being fired, but the accused did not know if they were fired from his weapon or were they the ones which hit him on his thigh. The accused became unconscious and did not know what happened next."

28. The defence further stated that prosecution has not been able to prove the facts as required to be proved in respect of the charges levelled against the applicant as per the charge sheet dated 19.05.2012 and therefore, it is crystal clear that the prosecution has miserably failed to prove its case beyond reasonable doubt and has not been able to prove the guilt of the accused in a conclusive manner and therefore, the benefit of doubt should go to the accused as held by the Hon'ble Supreme Court in the case of ***State Of Madhya Pradesh & Ors vs Shri Ram Singh*** decided on 01.02.2000.

29. The defence has tried to prove that the applicant is not guilty as he also pleaded 'not guilty' during GCM proceedings. In this regard having analysed the above submissions we scrutinised the documents placed on record and found that medical case sheet prepared by Lt Col Sidharth Dixit, Classified Specialist (Psychology) in which the Doctor has mentioned applicant's statement that "मुझे किए पर पछतावा है, मैं गुस्सा control नहीं कर पाता, ग्लानि होती है | x x

x x मैंने गलत काम किया है | "This statement of the applicant clearly indicates that the applicant had killed the Guard Commander when he refused to go to line or kote, as demanded by the applicant.

30. In our opinion when the incident took place before PW-3 Rifleman Ashish Thapliyal and he has made statement with regard to firing by Rifleman Rajendra Singh and killing Naik Mahendra Singh on the spot then requirement of civilian witness and witness from MI Room may not be required. If an eye-witness is examined and there is another, he **may be examined** to corroborate him, but the law does not compel this; on the other hand Section 134 clearly lays down that "no particular number of witnesses shall in any case be required for the proof of any fact." Moreover, it is established that at the time of occurrence only three persons namely Rifleman Rajendra Singh (accused), Rifleman Ashish Thapliyal (PW-3) and Naik Mahendra Singh (deceased) were on the spot and, in that situation, question of public witness being present and not examined does not arise.

31. It has been brought out by Maj (then Capt) Amitabha Pandey, RMO (PW-7) that on 16.01.2011 at around 2000 hours after receiving a message, he rushed towards the

main gate and on reaching there, examined the deceased who was lying on the ground in a pool of blood near the sentry post. PW-7 further submitted that on examining the vitals he concluded medically that there was no life in the deceased as there was no pulse and no heartbeat. The RMO gave cardio pulmonary resuscitation (CPR) but in vain. The RMO (PW-7) while administering the injured accused has also submitted that the applicant voluntarily confessed to him that he had killed Naik Mahendra Singh, the Guard Commander as he (the deceased) had been troubling him.

32. We have gone into the submissions made by the defence and we observe that as admitted by the applicant, he PW-3 and the deceased were on duty on 16.01.2011 from 1800 hours to 2000 hours when the incident took place. For convenience sake, question No 5 put to the applicant and its answer is reproduced as under:-

(i) **Question**-As per the evidence of PW-3 Rifleman Ashish Thapliyal and Exhibit 11, that on 16 January 2011, Rifleman Ashish Singh was detailed as the guard on duty on Regimental Police Gate along with you from 1800 hours to 2000 hours and deceased Naik Mahendra Singh was the Guard Commander. Do you wish to say anything in this regard?

Answer-Yes, Rifleman Ashish and Naik Mahendra Singh were detailed alongwith me as Sentry on duty and Guard Commander respectively on 16 January 2011 from 1800 hours to 2000 hours.

33. Applicant's contention is that he had no intention to kill Naik Mahendra Singh. In this regard it may be stated that the incident took place in presence of PW-3as has clearly emerged in the answer to the above question. On this regard the law is very clear, that in the case of direct evidence 'Mens Rea' loses its significance. Applicant has stated that he demanded that Naik Mahendra Singh should either to go to the unit lines or to the kote but he (Naik Mahendra Singh)denied to obey and questioned as to what will he (applicant) do. After that he did not say anything to him and directly went inside the tent, cocked the weapon and shot himself on his chest. He said that he did not come out of the tent thereafter. Further, applicant has admitted that, "when he fired the bullet inside the tent, Rifleman Ashish just ran away shouting 'Pagal Ho Gaya, Maar Diya Maar Diya'. He did not know whether Naik Mahendra Singh was also hit by a bullet. He just fired bullet on himself." Contrarily, PW-3 submitted that, "I saw the first bullet fired by the accused on Naik Mahendra Singh and that was the only bullet I saw him fire on Naik

Mahendra Singh". PW-3 has further said, "I can say that it was the bullet fired by the accused which hit Naik Mahendra Singh as I saw him fall immediately after the firing".

34. We are also of the view that the prosecution has proved the case beyond reasonable doubt as admitted by the applicant who stated that "when I came to know that Naik Mahendra Singh has died because of the bullet fired from my rifle, I felt sad and depressed."

35. There cannot be any different view, as we find that PW-3 was the eye witness who gave same statement from beginning to the end of the case and we find no deviation or contradictions in his statements. With regard to production of civilian witness it may be stated that PW-3 is not an interested witness as he was present there when the killing incident took place. There were only three persons i.e. the applicant, PW-3 and the deceased. Therefore, evidence of PW-3 who was on duty with the applicant and the deceased is reliable evidence.

36. During his treatment at 158 Base Hospital, he (applicant) made statement to doctor on duty as under:-

"I told the doctor at 158 Base Hospital that Naik Mahendra Singh has died because of the bullet fired by

my rifle because I came to know about the same when I was under treatment in 164 Military Hospital”.

37. We have scrutinised the record and we find that Rifleman Ashish Thapliyal, Rifleman Ashish Singh and Rifleman Ashish Pd is the same person who was present at the incident site because in the Army a unique service number is allotted to every soldier and service number of Rifleman Ashish Thapliyal, Rifleman Ashish Singh and Rifleman Ashish is same i.e. 4087289A in all documents including the duty roster of the day when incident took place. We also find that in the chain of events the defence has conceded that the applicant fired from his weapon.

38. During the course of GCM the applicant was asked, “Do you intend to call any witness in your defence?” He replied, “No, I do not wish to call any witness in my defence.”

39. Statement of PW-3 (No 4087289A Rifleman Ashish), an eye witness, being relevant and reliable is reproduced as under:-

“1. I was posted from Battalion Headquarters to A Company I platoon on 27 Dec 2010. On 16 Jan 2011 I was detailed as sentry on sentry post No 1, the Main Gate of 15 Garhwal Rifles at Cooch Behar Army Cantonment. I and No 4082941W Rifleman Rajendra were detailed on 1st duty from 1800 hrs to 2000 hrs. After getting the weapon issued from Kote 'A' Company Rfn Rajendra handed over 10 rounds of 5.56mm CTN to

me as he had collected 20 rounds for the duty. He kept 10 rounds in his magazine and I kept 10 rnds in my magazine and secured it in the pouch.

2. At about 1815 hrs the guard commander late No 4077256 Naik Mahendra Singh of 'A' Company briefed the complete guard party about being alert on the guard and check the civilians at the gate and check their passes. Thereafter, the other four sentries whose duty was later broken off and I along with guard commander and Rifleman No 4082941W Rajendra Singh took our position on the main gate and started checking the civilians at the gate as briefed.

3. Thereafter, at about 1900 hrs Rifleman Rajendra Singh took permission of guard commander to go to the lines and get his coat and torch. He came back after five minutes and rejoined his duty.

4. Thereafter, at about 1930 hrs No 4073229A Havildar Laxman Singh, who was performing the duties of Regimental Police, Company Havildar Major came to the sentry post and briefed the guard commander, Naik Mahendra Singh, about being alert as 26 January of approaching and no untoward incident should happen as there is only one Battalion in Cooch Behar and it could be a likely target.

5. After sometime, I heard Rifleman Rajendra Singh telling guard commander Mahendra Singh "to either go the kote or to the lines". This he repeated four to five times, but Naik Mahendra Singh said that after the sentry relieves the duty we will go to cook house to have our dinner together. Soon Rifleman Rajendra Singh went to the tent and loaded the magazine and cocked his Rifle and fired a round at Naik Mahendra Singh, who fell on the ground. All this happened in a second before I could understand or intervene him not to use his weapon against Naik Mahendra Singh.

6. Thereafter, I ran from the sentry post shouting towards the lines that Rifleman Rajendra Singh has gone mad and is firing and has shot Naik Mahendra Singh. While running I saw Rifleman Rajendra Singh coming out of the tent and firing towards the sky. After I reached the lines I met No 4085165 Rifleman Meherban Singh and told him about the incident and thereafter about 15-20 pers moved towards the tent and stopped about 50 meter away from the tent as we could hear gunshots being fired from that side. Soon it became still and no further gunshots were heard. No 4085165M Rifleman Meherban Singh and No 4077934W Naik Kamal Singh moved towards the tent and I was told to move to the lines with my wpn and amn taken away from me. I did not see anything after I moved to the lines and stayed inside the lines as I was deeply shocked by the incident which happened in front of me."

40. From the statement made by the eye witness it is crystal clear that Rifleman Rajendra Singh had fired from his weapon in front of PW-3 killing Nk Mahendra Singh on the spot. In the circumstances points raised by the defence in Para 26 above have no bearing.

41. From the facts on record we find that the prosecution has been able to prove that the applicant himself killed the Guard Commander and later he tried to commit suicide by firing two cartridges by the same rifle which was used for killing Nk Mahendra Singh, the deceased.

42. We further notice that some material placed on record clearly establishes that all the persons were drunk but in C of I it could not be proved. It could also not be proved that the applicant fired under influence of alcohol. Forensic report established that the applicant used same rifle for killing the Guard Commander and committing suicide. As per forensic report all bullets were fired from the same rifle. Therefore, the defence set up by learned counsel for the applicant has no substance. In our view it was not an accident but cold blooded murder.

43. In our considered opinion, the material placed before us and tested upon clearly leaves us at a point to conclude that there is a strong ground of presuming that the

applicant had committed the aforesaid offences and the charges against him are legally and factually sustainable. We are further of the view that Army Personnel who are involved in such activities should not be dealt leniently. Nobody should escape from the clutches of law in order to set an example to others with a view to maintain Army discipline.

44. Thus, considering the facts of the present case we are of the considered view that the GCM has considered all the aspects in proper perspective and there is no infirmity or illegality in the order passed by the GCM.

45. However, for the reasons aforesaid in so far as the applicant is concerned, we do not find any force in the petition to grant the relief sought. As such the petition is liable to be dismissed.

46. In view of the above, the O.A. being devoid of merit is hereby **dismissed**.

47. No order as to costs.

48. Pending misc applications, if any, shall stand disposed off.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated : 06.10.2022
rathore