SUPREME COURT OF INDIA

Union of India and Others

Vs

Devendra Nath Rai

Civil Appeal No. 206 of 2003

(Arijit Pasayat and Tarun Chatterjee, JJ)

10.01.2006

JUDGMENT

ARIJIT PASAYAT, J.

The Union of India, Chief of Army Staff (Army Headquarters), General Officer Commanding, Commanding Officer, 502, Area Defence Group and the Commanding officer, 1, Corps, Artillery brigade are in appeal against the judgment of a Division Bench of the Allahabad High Court directing the authorities to re-consider the question of sentence to be awarded to the respondent (hereinafter referred to as the 'accused'). In the Court martial proceedings, the accused was awarded death sentence for having caused homicidal death of two army personnel and for having caused grievous injuries with the intent of causing murder of two others. The award of death penalty by the Court Martial was affirmed by the Central Government under Sec. 153 of the Army Act, 1950 (in short the 'Army Act').

2. Factual position as projected by the appellants in a nutshell is as follows:-

On 15-10-1991, the accused was on the quarter guard duty along with SCR Swamy, Y. Prasad and GS Pandey respectively (P.Ws. 4, 5 and 6). The first one was the Guard Commander and the other two were the sentries. The Rifle bearing butt no. 32 and registered No. B V-3528 was being used by the sentries for performance of their duties. At about 5 p.m. the accused having finished his duty handed over the sentry duty to P.W. 6 and went for a wash and his meals. In turn, at about 7 p.m. P.W. 5 relieved P.W. 6 and took over as the sentry. His period of duty was up to 9 p.m., where after he was to be relieved by the accused. At about 9.15 p.m. the accused returned to the quarter guard after his dinner and told P.W. 5 to go for his dinner. Accordingly, he relieved P.W. 5 by taking over his duty. At that time, B.P. Verma (P.W. 7) was lodged in the quarter guard as a prisoner. All lights were on. After a few minutes, Tuki Ram (P.W. 8) dressed in ' civvies reached the quarter guard to write the "light out" report in the Register, kept for the purpose. He asked the accused for a pen, who told him that he did not have one. P.W. 8, therefore, kept the register on a bench lying outside the verandah of the quarter guard. In the meantime, Subash Bablo (P.W. 9) and Sigmn K. Parthasarthi (hereafter referred to as the 'deceased Parthasarthi') reached there to write the 'lights out" reports. Both of them were also dressed in civvies. P.W. 9 started writing in the Register, which he had picked up from the bench. The accused snatched the same and threw it away. The accused told them that since they were dressed in civvies and did not possess their Identity Cards, he would not let them make entries in the Register. P.W. 9 told him that he was personally known to him having served together and that there were no orders to the effect that the "lights out" entries were to be made only in uniform. The accused, even then, did not allow them to do the needful. On P.W. 8 proposing to return, the accused did not allow him and others to go and instructed them to sit down on the bench till the arrival of CHM R.S. Rathore (hereinafter referred to as deceased 'Rathore'). P.W. 8 shouted for the duty clerk, who was in the vicinity, to call the duty NCO. In the meantime, P.W. 5 returned and found P.W. 8, 9 and deceased Parthasarthi sitting on the bench. At that time, the light in the quarter guard as well as the street lights were on. P.W. 5 asked the accused to return his rifle so that he would resume his duty, but the accused did not return the rifle to P.W. 5 and instead asked him to call the CHM. On P.W. 5's query, the accused told him that CHM was required since the three persons sitting on the bench had come to write the "lights out" reports, dressed in civvies and without Identity Cards and so far as he was concerned they were terrorists. P.W. 5 advised him not to create a scene but he did not pay any heed. P.W. 5 again asked the accused to return the rifle and told him that if he wanted to call CHM, he should go himself. After some time, CHM (deceased 'Rathore') arrived in his combat uniform and learnt of the goings on from P.W. 8. When he enquired from the accused as to why he was not allowing them to sign the register, the accused told him that they were dressed in civvies and were not having their Identity Cards with them. The CHM (deceased 'Rathore) told the accused that there were no orders about the dress and they were well known being coy personnel. The CHM asked them to go ahead with the filling up of the register. He also enquired from the accused if he had consumed liquor. No sooner these words were uttered, the accused fired a shot at deceased Rathore who was standing at a distance of about four yards. On being hit by the bullet, Rathore fell down. Thereafter accused fired three shots at P.W. 8 and P.W. 9 and deceased Parthasarthi in quick succession. Each one of them fell down. P.W. 7 and P.W. 6 saw the firing incident. The accused found P.W. 6 inside the guard room, abused him and asked him to run away from the spot. Thereafter the accused went near the fuse box and the lights went off in the quarter guard. The incident was reported to the Commanding Officer Lt. Col. H.S. Teotra (P.W. 3) and Sub Maj B.R. Pawar (P.W. 1), who rushed to the scene of incident. The persons who had received injuries were taken to the hospital where Dr. Gangopadhya (P.W. 11) after examination declared Rathore and Parthasarthi as "brought dead" and found P.W. 8 and P.W. 9 to have received

injuries which were grievous in nature. The postmortem was carried out. On the basis of report given General Court Martial proceedings commenced and the accused faced trial under the Army Act. There were four charges under Section 69 of Army Act. The first two charges related to commission of civil offence that is murder contrary to Section 302 of the Indian Penal Code, 1860 (in short TPC) and the other two related to civil offence i.e., attempt to murder, contrary to Section 307 IPC. The accused took the plea that the scenario as described by the prosecution was not correct. The reports of proceedings and trial were submitted and on consideration thereof the Deputy Judge Advocate General was of the view that the evidence on record clearly established the guilt of the accused. Considering the materials on record he came to hold that this was a case which clearly was covered by the category of rarest of rare cases and deserved death sentence. The Judge Advocate General affirmed the view and the findings of the Deputy Judge Advocate General as regards the conviction and the sentence. The Central Government also affirmed those. A writ application was filed before the Allahabad High Court questioning the conviction and the sentence imposed. By the impugned judgment, the High Court held that the conviction was well merited, but felt that the case did not fall in the category of rarest of rare cases and therefore directed the authorities to pass a fresh order on the question of sentence. The writ application was allowed to that limited extent.

3. Mr. Rajiv Dutta learned senior counsel for the appellants submitted that the procedure to be followed while dealing with the question of sentence is clearly spelt out in the various guidelines. The statutory provisions of the Army Act and the concerned rules provide ample guidelines in the matter. Even going by the ratio of decisions of this Court in Bachan Singh v. State of Punjab [. and Machhi Singh and others v. State of Punjab , the judgment of the High Court cannot be maintained. The High Court lost sight of the fact that it was dealing with the case of a person belonging to a disciplined force. The murder was not only cruel and brutal but also pre-planned and pre-meditated. Even conduct of the accused after the incident was not one of remorse, but was to the effect that he was sorry that he could not kill the other two persons.

4. In response, learned counsel for the respondent submitted that the High Court has taken note of the relevant factors. The factors according to the High Court seem to be unblemished reputation and antecedents of the respondent which, as the records go to show, exemplary. Even if the evidence on record establishes that the accused was responsible for taking away the lives of two and seriously injuring the two others, that by itself cannot bring the case to the category of rarest of rare cases, as categorised by this Court in Bachan Singh and Machhi Singh's cases (supra). The rival stands need careful consideration.

5. In Bachan Singh's case, a Constitution Bench of this Court at paragraph 132 summed up the position as follows:

132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of

testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Arts. 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Receptionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion canalized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognized legal sanction for murder or some types of murder in most of the civilized countries in the world, if the framers of the Indian Constitution were fully aware - as we shall presently show they were - of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235 (2) and 354 (3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19".

6. Similarly in Machhi Singh's case (supra) in paragraph 38 the position was summed up as follows:

"38. In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the

option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight age and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

7. The position was again reiterated in Defender Pal Singh v. State of NCT of Delhi:

58. "From Bachan Singh v. State of Punjab and Machhi Singh v. State of Punjab the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. It was observed: The community may entertain such sentiment in the following circumstances;

(l)When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2)When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold blooded murder for gains of a person vis-�-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3)When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4)When the crime is enormous in proposition. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-�-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

8. What is culled out from the decisions noted above is that while deciding the question as to whether the extreme penalty of death sentence is to be awarded, a balance sheet of aggravating and mitigating circumstances has to be drawn up.

9. In the instant case, the High Court has not attempted to do that exercise and has come to an abrupt conclusion about the case being not covered by the rarest of rare category. That is clearly contrary to the principles set out by this Court in the decisions noted above. We deem it appropriate to remit the matter to the High Court to consider the matter afresh and take the decision as to the appropriate sentence; the exercise has only to be limited to that aspect alone as the High court it has in the impugned judgment found that the conviction was well merited.

10. The appeal is allowed to the aforesaid extent with no order as to costs.