

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 242 OF 2012

B.D. Khunte

...Appellant

Versus

Union of India & Ors.

...Respondents

WITH

CRIMINAL APPEAL NO.2328 OF 2014
(@ Special Leave Petition (Crl.) No.8457 of 2014
Crl. M.P. No.15455 of 2014)

J U D G M E N T

T.S. THAKUR, J.

Criminal Appeal No.242 of 2012:

1. High Court of Delhi has, while dismissing writ petition No.4652 of 2010 filed by the appellant, affirmed the orders passed by the Armed Forces Tribunal, New Delhi and that passed by the Summary General Court Martial holding the

appellant guilty for an offence punishable under Section 69 of the Army Act read with Section 302 of the Ranbir Penal Code and sentencing him to undergo imprisonment for life besides dismissal from service.

2. Enrolled on 30th July, 2004, the appellant was posted at Razdan in Baramulla Sector of the State Jammu and Kashmir. Deceased Sub Randhir Singh was serving as a Senior JCO/Post Commander at the very same place of posting. The prosecution case is that on 28th June, 2006 at about 9.30 p.m. the appellant while on guard duty shot Subedar (AIG) Randhir Singh dead with a 5.56 Insas Rifle issued to him. FIR No.137 of 2006 about the incident was lodged by the Brigade Commander concerned with the jurisdictional police Station at Bandipur who after completing its investigation of the incident filed a charge sheet against the appellant before the Jurisdictional Magistrate for commitment of the case to the Court of Sessions at Baramulla for trial.

3. The Court of Sessions at Baramulla in turn transferred the case to the Army Authorities for being dealt with under

the Army Act on an application filed before it by the GOC 15 Corps. A Summary General Court Martial was accordingly convened for the trial of the appellant who found the appellant guilty for the commission of offences punishable under Section 69 of the Army Act and Section 302 of the Ranbir Penal Code and sentenced him to undergo imprisonment for life and dismissal from service. Statutory remedies under the Army Act, 1950 having proved ineffective, the appellant filed OA No.5 of 2009 before the Armed Forces Tribunal, Principal Bench, New Delhi, which was heard and dismissed by the Tribunal by its order dated 27th August, 2009. The appellant then filed Writ Petition No.4652 of 2010 before the High Court of Delhi which too failed and was dismissed by a Division Bench of the High Court by its order dated 5th July, 2011. The present appeal assails the correctness of the judgment passed by the High Court and that passed by the Armed Forces Appellate Tribunal. It also challenges the conviction of the appellant for the offence of murder and the sentence awarded to him by the Summary General Court Martial.

4. Mr. Sisodia, senior counsel appearing for the appellant, raised a short point before us. He contended that the appellant was, in the facts and circumstances of the case, entitled to the benefit of Exception 1 to Section 300 of the IPC. He argued that according to appellant's version he was on 28th June, 2006 resting in his bunk after lunch when the deceased Sub Randhir Singh came to the appellant's cot in an inebriated state, slapped him mildly twice and asked the appellant to follow him. Thinking that he was being called for some kind of duty, the appellant followed the deceased to the store room where the deceased bolted the door from inside and asked the appellant to remove his pant suggesting thereby that the deceased intended to sodomise the appellant. When the appellant declined, the deceased punched him and kicked him repeatedly and asked him to put up his hand and hold the side beams of the top berth of the double bunk in the store room. The appellant's further case is that the deceased thereafter made unwelcome and improper advances like kissing his body, cheeks and stomach. While this was going on, two other personnel viz. Hadgal Vilas and Anil Gadge knocked at the door of the store

room. The deceased opened the store room door and asked them to go away and shut the door again only to continue the appellant's torture for half an hour. The appellant somehow managed to free himself and return to his barrack, shaken and crying inconsolably. He is alleged to have shared his grief and sorrow about the whole episode with his colleagues and immediate superior officers. No formal report was, however, lodged by the appellant before the superior officers, although according to the appellant, the superior officers pacified and advised the appellant to remain calm and keep his cool. The appellant's further case is that he and his colleagues planned to gather near the water heating point in the evening and beat up the deceased. With that resolve he performed his administrative tasks during the day till it was time for him to go for night picket guard duty commencing at 2000 hrs. along with Hadgal Villas carrying his service weapon duly loaded as the place where he was posted was an operational area. The appellant's version is that after taking early dinner he reached his place of night guard duty. While on duty he saw someone approaching him. As per the prevailing drill and procedure the appellant

claims to have challenged the approaching person, but the person paid no heed to the warning and continued to approach till the appellant could recognise him to be Sub Randhir Singh. Seeing the deceased and still seething with anger he opened fire upon him from his service weapon. Sub Randhir Singh was hit and dropped dead on the spot. The appellant was immediately taken into custody handcuffed and tied to the cot in the barrack. Investigation by the local police into the incident commenced leading to his trial by the Summary General Court Martial in which he was found guilty for the murder of Sub Randhir Singh and sentenced as mentioned earlier.

5. The above factual backdrop, argued Mr. Sisodia, was to bring the appellant's case within Exception 1 to Section 300 of the Indian Penal Code. It was contended that the day time incident in the store room had so deeply shaken the appellant that he was gravely and suddenly provoked when the appellant saw the deceased approaching the picket in the evening. Mr. Sisodia argued that although there was a time gap of several hours between the attempted

commission of an unnatural offence upon the appellant and the time when he was gunned down by the appellant, yet keeping in view the nature of the incident and the effect the same had upon the appellant the interval was not of much consequence in the matter of restoring the appellant's equilibrium. The appellant was, according to the learned Counsel, so deeply disturbed and provoked into a state of complete loss of self-control that he had taken the extreme step of putting the deceased to death no sooner the latter came before him while the appellant was on guard duty armed with his service weapon. Mr. Sisodia contended that the question: whether an incident was sufficient to result in a provocation so grave and sudden as would deprive the person so provoked of the power of self-control will have to be decided in the facts and circumstances of each case. He urged that the appellant being a young jawan serving in the Indian Army when beaten up to make him succumb to a possible sexual assault was bound to provoke any reasonable person in his position especially when the provocation came from a superior who instead of protecting him had tried to take undue advantage of his position. The

provocation resulting from the day time store room incident had continued despite the intervening time gap as the appellant had been all the while seething with anger. His act of firing at the deceased no sooner he saw him must, therefore, be taken in the context of the attendant facts and circumstances. It was urged that an incident of this nature taking place in the Army is usually underplayed by the authorities by either denying the same totally or presenting a different picture which is neither true nor realistic.

6. On behalf of the respondents, it was *per contra* argued by Mr. Attri that while the question of grave and sudden provocation will have to be seen in the context of each individual case, the facts of the case at hand did not support the appellant's plea for invocation of Exception 1 to Section 300 of IPC. He urged that the test laid down by the decisions of this Court to determine whether the deceased had given any provocation to the accused, whether the provocation was sudden and whether the same was sufficiently grave so as to deprive the offender of his self-control were not satisfied in the case at hand. It was contended that even if

the appellant's version about the day time incident was accepted, a long interval between the alleged provocation by the deceased and the murderous assault by the appellant clearly denuded the provocation of its gravity and spontaneity. A provocation like the one allegedly given by the deceased at 1 p.m. would have sufficiently cooled down after long hours especially when even according to the appellant he had attended to other duties in the intervening period. The fact that the appellant and his colleagues had decided that they will in the evening give a beating to the deceased when they assembled at the water heating point also showed that the provocation was far from being sudden and grave enough for the appellant to shoot the deceased down when he saw him in the evening.

7. We must at the threshold point out that there is no challenge to the finding that it was the appellant who had shot the deceased using the weapon and the ammunition issued to him. The reason is obvious. Depositions of PWs 4, 5, 7, 8-12 and 16-18 clearly support the prosecution case that it was the appellant who had shot the deceased-Randhir

Singh and that he was moments after the incident seen standing near the former's dead body with the service rifle in his hand. The evidence also proves that the appellant was caught by two Jawans on the spot and brought inside the OR Lines and tied to the bed using ropes. PW-19 has further deposed that after the appellant was tied to the bed the witness slapped the appellant and asked him as to why he shot the deceased to which the appellant replied "SAHAB NEY MERE KO DUPHAAR KO MARA THA, ISLIYE MAINE SAHIB KO MAAR DIYA" (Sahab had beaten me at noon, therefore, I have killed Sahab). The use of the rifle issued to the appellant and the fact that 18 empties recovered from the spot had been fired from the said weapon is also established from the evidence of PW-18. That 18 bullets fired by the appellant had pierced the body of the deceased is also not in dispute. Any argument to discredit this overwhelming evidence or dispute the involvement of the appellant in the shooting incident would have been specious and futile to say the least. That is perhaps the reason why no attempt was made by Mr. Sisodia to argue that the

incident did not involve the appellant or that he was falsely implicated.

8. The only question, as seen earlier, is whether the incident that took place around 1400 hrs. in the store room could mitigate the offence committed by the appellant. The answer to that question would in turn depend upon the nature of the incident and whether the same would constitute grave and sudden provocation for the appellant to have shot the deceased long after the store room incident had taken place.

9. That an incident took place at 1400 hrs. in the store room cannot be denied. Depositions of PWs. 11 and 13 support the appellant's case that some incident had indeed taken place which had disturbed the appellant for he was found crying over the same. When asked as to why he was upset and crying, the appellant had, according to the said two witnesses, told them that the deceased had beaten him. To the same effect is the deposition of PW-19, according to whom, the appellant was in the company of the deceased in a room at around 1400 hrs. where the appellant was crying. Later that day when the appellant met the witness near the

water heating point and was asked as to why he was crying the appellant is said to have replied "SAHAB NEY MERE KO BAHUT MARA AUR PANT KHOLNEY KO BATAYA AUR MERE MANA KARNE PAR MUJHE PHIR PITA" (Sahab beat me up and asked me to open my pant and on my refusal to do so beat me again).

10. Suffice it to say that the appellant's version gets sufficient support from the prosecution witnesses themselves that an incident did take place at 1400 hrs. in the store room in which the appellant was beaten and humiliated. There is, however, no evidence nor is it the appellant's case that the deceased had actually sodomised him. Even PW-19 deposed that the appellant had not complained of having been sodomised by the deceased. The High Court has also taking note of this aspect held that while the physical assault on the appellant had humiliated the appellant, but there was nothing to show that he was actually sodomised. Whether or not the deceased had sodomised the appellant is not material. The question is whether an incident had taken place. If so, did the same constitute grave and sudden provocation? What is proved

by the evidence on record is that the deceased had, by his conduct, humiliated the appellant to an extent that he felt deeply disturbed and was seen crying by his colleagues in whom he had confided by telling them the cause for his distress.

11. What is critical for a case to fall under Exception 1 to Section 300 IPC is that the provocation must not only be grave but sudden as well. It is only where the following ingredients of Exception 1 are satisfied that an accused can claim mitigation of the offence committed by him from murder to culpable homicide not amounting to murder:

- (1) The deceased must have given provocation to the accused.
- (2) The provocation so given must have been grave.
- (3) The provocation given by the deceased must have been sudden.
- (4) The offender by reason of such grave and sudden provocation must have been deprived of his power of self-control; and
- (5) The offender must have killed the deceased or any other person by mistake or accident during the continuance of the deprivation of the power of self-control.

12. Applying the above tests to the case at hand there is no gainsaying that an able bodied youthful Jawan when physically assaulted by his superior may be in a state of provocation. The gravity of such a provocation may be heightened if the physical beating was meant to force him to submit to unnatural carnal intercourse to satisfy the superior's lust. The store room incident involving the appellant and the deceased is alleged to have taken place when the deceased had bolted the door of the store room to keep out any intruder from seeing what was happening inside. By any standard the act of a superior to humiliate and force his subordinate in a closed room to succumb to the lustful design of the former was a potent recipe for anyone placed in the appellant's position to revolt and retaliate against the treatment being given to him. What may have happened inside the store room if the appellant had indeed revolted and retaliated against the unbecoming conduct of the deceased is a matter of conjecture. The appellant or any one in his position may have retaliated violently to the grave peril of his tormentor. The fact of the matter, however, is that the appellant appears to have

borne the assault without any retaliation against the deceased-superior and somehow managed to escape from the room. The critical moment when the appellant could perhaps lose his cool and equilibrium to take retaliatory action against the deceased was thus allowed to pass uneventfully, grave and sudden provocation for any such action notwithstanding.

13. All that the evidence proves is that after the said incident the appellant was seen crying and depressed and when asked by his colleagues he is said to have narrated his tale of humiliation at the hands of the deceased. There is no evidence to prove that after the incident aforementioned the appellant had continued to suffer a prolonged spell of grave provocation. By their nature such provocation even when sudden and grave cool off with passage of time often lapsing into what would become a motive for taking revenge whenever an opportunity arises. That appears to have happened in the present case also for the appellant's version is that he and his colleagues had planned to avenge the humiliation by beating up the deceased in the evening when

they all assemble near the water heating point. That apart, the appellant attended to his normal duty during the day time and after the evening dinner, went to perform his guard duty at 2100 hrs. All these circumstances do not betray any signs of grave leave alone grave and sudden provocation to have continued haunting the appellant and disturbing his mental equilibrium or depriving him of self control that is an essential attribute of grave and sudden provocation to qualify as a mitigating factor under Exception 1 to Section 300 IPC.

14. It was contended by Mr. Sisodia that although between the incident that happened at noon and the shooting of the deceased at 2130 hrs. were separated by nearly seven hours interval, the nature of the provocation continued to be grave within the meaning of Exception 1 to Section 300 IPC. We find it difficult to accept that submission. Grave provocation within the meaning of Exception 1 is a provocation where judgment and reason take leave of the offender and violent passion takes over. Provocation has been defined by Oxford Dictionary, as an action, insult, etc.

that is likely to provoke physical retaliation. The term grave only adds an element of virulent intensity to what is otherwise likely to provoke retaliation.

15. In ***R. v. Duffy [1949] 1 All E.R. 932*** provocation has been explained as under:-

"The whole doctrine relating to provocation depends on the fact that it cause, or may causes, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negated. Consequently, where the provocation inspires an actual intention to kill, or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies."

16. The argument that the incident that took place around noon on that day was a grave provocation that continued to provoke the appellant right through the day till 9.30 evening when the appellant shot the deceased, does not, therefore, appeal to us, not only because the appellant had settled for a lesser act of retaliation like beating of the deceased in the evening by him and his colleagues when they assembled near the water heating point, but also because the appellant had performed his normal duties during the day time and

even in the evening except that he and some of his colleagues appear to have planned beating up the deceased.

17. This Court was in ***K.M. Nanavati v. State of Maharashtra AIR 1962 SC 605*** dealing with a somewhat similar question. In that case the wife of the accused had confessed her illicit intimacy with the deceased when the deceased was not present. The prosecution case as proved at the trial was that after the confession of the wife, the accused had driven her and the children to a cinema and left them there, gone to his ship to take a revolver loaded with six rounds and driven his car to the office of the deceased and then to his flat, gone to his bed room and shot him dead. This Court held that between 1.30 p.m. when the deceased left his house and 4.20 p.m. when the murder took place there was a gap of three hours which was sufficient time for him to regain his self control even if he had not regained it earlier. The following passage from the decision is significant when it deals with the expression grave within the meaning of Exception 1 to Section 300 IPC:

"86. Bearing these principles in mind, let us look at the facts of this case. When Sylvia confessed to her husband that she had illicit intimacy with Ahuja, the latter was not present. We will assume that he had momentarily lost his self-control. But, if his version is true — for the purpose of this argument we shall accept that what he has said is true — it shows that he was only thinking of the future of his wife and children and also of asking for an explanation from Ahuja for his conduct. This attitude of the accused clearly indicates that he had not only regained his self-control, but, on the other hand, was planning for the future. Then he drove his wife and children to a cinema, left them there, went to his ship, took a revolver on a false pretext, loaded it with six rounds, did some official business there, and drove his car to the office of Ahuja and then to his flat, went straight to the bedroom of Ahuja and shot him dead. Between 1.30 p.m., when he left his house, and 4.20 p.m., when the murder took place, three hours had elapsed, and therefore there was sufficient time for him to regain his self-control, even if he had not regained it earlier. On the other hand, his conduct clearly shows that the murder was a deliberate and calculated one. Even if any conversation took place between the accused and the deceased in the manner described by the accused — though we do not believe that — it does not affect the question, for the accused entered the bedroom of the deceased to shoot him. The mere fact that before the shooting the accused abused the deceased and the abuse provoked an equally abusive reply could not conceivably be a provocation for the murder. We, therefore, hold that the facts of the case do not attract the provisions of Exception 1 to Section 300 of the Indian Penal Code."

18. The position in the case at hand is no different. Between 1400 hrs. when the appellant was given a grave provocation and 2130 hrs., the time when the appellant shot the deceased there were seven hours which period was

sufficient for the appellant to cool down. A person who is under a grave and sudden provocation can regain his cool and composure. Grave provocation after all is a momentary loss of one's capacity to differentiate between what is right and what is not. So long as that critical moment does not result in any damage, the incident lapses into realm of memories to fuel his desire to take revenge and thus act as a motivation for the commission of a crime in future. But any such memory of a past event does not qualify as a grave and sudden provocation for mitigating the offence. The beating and humiliation which the accused had suffered may have acted as a motive for revenge against the deceased who had caused such humiliation but that is not what falls in Exception 1 to Section 300 of the IPC which is identical to Exception 1 to Section 300 of the Ranbir Penal Code applicable to the State of Jammu & Kashmir where the offence in question was committed by the appellant. We may, in this regard, extract the following passage from ***Mancini v. Director for Public Prosecutor [1941] 3 All E.R. 272*** :

"it is not all provocation that will reduce the crime of murder to manslaughter. Provocation to have that result, must be such as temporarily deprive the person provoked of the power of self-control as result of which he commits the unlawful act which caused death. The test to be applicable is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in Rex v. Lesbini so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

19. The contention that the day time incident being such that the appellant could get a grave provocation, the moment he saw the deceased coming towards the place where he was on guard duty, also has not appealed to us. It is not the case of the appellant that the deceased had come close to him or tried to act fresh with him so as to give to the appellant another provocation that could possibly justify his losing self-control and using his weapon. The appellant's version that he had called halt as all Jawans on guard duty

are trained to do in operational areas but when the person approaching him did not stop and when he recognised the person to be none other than the deceased shot him, clearly suggests that the deceased was not in close physical proximity to the appellant. The appellant may have been angry with the deceased for his act of misdemeanour. But any such anger would only constitute a motive for taking revenge upon the deceased. It could not be described as a grave and sudden provocation for which deceased could have been shot the moment he came in front of the appellant. The deceased, at any rate, could not be accused of having given any provocation to the appellant by moving towards the place where the appellant was on guard duty for the deceased was well within the sphere of his duty to keep an eye on those who were performing the guard duty. The very act of appearance of the deceased near the picket/post where the appellant was on duty could not, therefore, constitute a provocation within the meaning of Exception 1 to Section 300 IPC.

20. In the result this appeal fails and is hereby dismissed.

Criminal Appeal No.2328 OF 2014
(@ Special Leave Petition (Crl.) No. 8457 of 2014 Crl M.P.
No.15455/2014)

Delay condoned

Leave granted.

In view of our order of even date passed in Criminal Appeal No.242 of 2012, this appeal, filed by the appellant-B.D. Khunte, also fails and is, hereby, dismissed.

.....J.
(T.S. THAKUR)

.....J.
(ADARSH KUMAR GOEL)

JUDGMENT

.....J.
(R. BANUMATHI)

New Delhi,
October 30, 2014