
(2016) 10 CAL CK 0019
In the Calcutta High Court
Case No : W.P. No. 11501(W) of 2016

Amiya Ghosh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 05-10-2016

Acts Referred:

Border Security Force Act, 1968 — Section 11

Citation : (2017) 1 CalLT 1

Hon'ble Judges : Dipankar Datta, J.

Bench : Single Bench

Advocate : Mr. Amales Kumar Ray, Advocate Ms. Suman Sehanabis, Advocate, Mr. Deborshi Dhar, Advocate, for the Petitioner; Mr. Sabyasachi Bhattacharjee, Sr. Advocate, Ms. Chandreyi Alam, Advocate, Ms. Rajashree Venkat Kundalia, Advocate, for the Respondents

Final Decision : Allowed

Judgement

Dipankar Datta, J. - This is another instance of an unequal combat between a lion and a lamb. Faced with the prospect of an imminent termination of service, thereby leading to loss of livelihood, the petitioner has stepped into the portals of this Court complaining of a stand of the respondents that he perceives to be bereft of rationality, lacks objectivity and smacks of victimization. The high prerogative writ jurisdiction of this Court has been invoked to nullify a notice calling upon the petitioner to show cause why administrative action as per section 11 of the Border Security Force Act, 1968 (hereafter the BSF Act) read with rule 22(2) of the Border Security Force Rules, 1969 (hereafter the BSF Rules) should not be initiated against him for the charge under section 46 of the BSF Act [committing a civil offence i.e. culpable homicide not amounting to murder under section 304, Indian Penal Code (hereafter the IPC)], for which he was tried by the General Security Force Court (hereafter the GSFC).

2. The factual scenario in the backdrop whereof the challenge is laid to the show cause notice may be traced first.

3. The petitioner, a constable of the Border Security Force (hereafter the BSF), was charged with causing the death of a minor girl (hereafter the victim) on January 7, 2011 at an identified site on the Indo-Bangladesh border in Dinhata subdivision of Cooch Behar district by firing a shot from his service rifle (a 5.56 mm INSAS rifle) and thereby committed the offence noted above. He was tried by the GSFC. At the trial several witnesses for the prosecution were examined including the father of the victim and medical officers, who conducted post-mortem on the cadaver of the victim and attended to the petitioner sometime after the unfortunate incident of firing. Upon consideration of oral and documentary evidence that were tendered, the GSFC returned a finding that the petitioner was "NOT GUILTY" of the charge and announced its finding on September 5, 2013 subject to confirmation, required by section 107 of the BSF Act. The confirming authority [Inspector General and Officiating SPL DG (EC), HQ Special DG, BSF (EC)] did not concur with the finding of the GSFC and passed an order dated September 1, 2014 titled "REVISION ORDER", thereby requiring the GSFC to reconsider its earlier findings upon consideration of the several aspects mentioned in sub-paragraphs (a) to (g) of paragraph 4 thereof to arrive at a just and proper finding. The GSFC reassembled in terms of the revision order and upon considering the aspects required by such order, announced its finding on revision on July 2, 2015, respectfully adhering to its earlier finding of "NOT GUILTY", subject to confirmation. It was thereafter that the confirming authority [Addl. Director General (EC), HQrs Spl. Director General (EC)] issued the impugned show cause notice dated June 1, 2016, relevant portion whereof reads as follows:

"4. Whereas, the Court, after revision, adhered to its former finding of "Not Guilty" of the charge. After going through the entire trial proceedings including the proceedings of revision, I, as Addl. Director General (Eastern Command), being the Confirming Authority, am of the view that the reason recorded by the Court in support of finding of "Not Guilty" at the trial stage on 13/08/2013 and at the revision trial stage on 02/07/2015 are not convincing and, therefore, finding in respect of the charge is still not proper; and,

5. Whereas, the Court has erred in appreciating the evidence on record and found you "Not Guilty" of the charge despite sufficient evidence on record to substantiate the charge against you and, therefore, the finding of the Court, is perverse and against the weight of evidences; and,

6. Whereas, I, as the Confirming Authority, have not confirmed the finding of the Court, being against the weight of the evidences", and propose to initiate administrative action against you u/s 11 of the BSF Act, 1968 read with Rule 22 of BSF Rules, 1969; and,

7. I, therefore, call upon you to show cause as to why administrative action as per Sec 11 of BSF Act, 1968 read with Rule 22 of BSF Rules, 1969 should not be initiated against you for the charge preferred against you at the GSFC trial as mentioned herein above; and,

8. If you have anything to urge against the proposed action, you may do so within 30 days from the date of receipt of this letter. If no reply is received within the stipulated period, it would be presumed that you have nothing to say against the proposed action and ex-parte decision will be taken in this matter. Duplicate copy of GSFC trial proceedings is enclosed for ready reference."

4. The first ground on which the impugned show cause notice has been challenged by Mr. Roy, learned advocate for the petitioner, is that no reasons have been indicated why the finding of the GSFC was perceived by the confirming authority to be "not convincing", "perverse" and "against the weight of evidences" and, therefore, he contends that it is illegal and in breach of natural justice.

5. It has next been urged that the trial having been conducted by the GSFC prior to and after the revision order in accordance with law and the GSFC on both occasions having rendered the finding of "NOT GUILTY" against the petitioner, the confirming authority lacked jurisdiction to initiate proceedings for administrative action under section 11 of the BSF Act read with rule 22 of the BSF Rules to terminate his service and such action is non est in the eye of law.

6. Finally, it was contended that having regard to the nature of evidence that surfaced in course of the trial before the GSFC, no reasonable person could have formed an impression of any misconduct having been committed by the petitioner and that the respondents having demonstrated that they are inimical to the petitioner and that a premeditated, pre-judged and closed mind being apparent on the face of the records, the respondents lack the authority even to proceed with the show cause notice.

7. This point has been sought to be developed by Mr. Roy by referring not only to the contents of the impugned show cause notice but also to paragraph 19 of the counter affidavit of the respondents, the deponent whereof is the Deputy Inspector General, working for gain at Sector Headquarter, Border Security Force, Coochbehar, West Bengal.

8. Punctiliously fair as he is, Mr. Roy has invited the attention of this Bench to binding decisions for and against his contentions, to which reference shall be made at a later part of this judgment along with paragraph 19 of the respondents' counter affidavit.

9. Based on the contentions as recorded above, Mr. Roy prayed for orders in terms of prayers "a" and "b" of the writ petition reading as follows:

"(a) A writ and/or order or order (sic orders) and/or direction or directions in the nature of Mandamus directing the respondents and them to forebear from giving effect to and/or further effect to and rescind, recall, set aside and quash the impugned show cause notice dated 01.06.2016, issued by the respondent no. 3 (being Annexure ? P/7) forthwith;

(b) A writ and/or order or orders and/or direction and/or directions in the nature

of certiorari commanding the respondents and each of them to transmit and certify the records of the case so that conscionable justice may be done by quashing the impugned show cause notice dated 01.06.2016, issued by the respondent no. 3 (being Annexure-P/7);"

10. The writ petition has been resisted by Mr. Bhattacharya, learned senior advocate for the respondents by advancing counter arguments, which require due consideration.

11. According to Mr. Bhattacharya, the writ petition is premature and not maintainable at this stage. Relying on the decisions of the Supreme Court reported in (2004) 3 SCC 440 (Special Director v. Mohd. Ghulam Ghouse); (2006) 12 SCC 28 (Union of India v. Kunisetty Satyanarayana); (1991) 1 SCC 654 (Union of India v. Amrik Singh); and (1990) 4 SCC 594 (S.N. Mukherjee v. Union of India), he contended that there being no lack of jurisdiction to issue the impugned show cause notice (jurisdiction virtually having been exercised in terms of section 11 of the BSF Act read with rule 22 of the BSF Rules), the petitioner should be directed to respond thereto and if at all the confirming authority ultimately takes a view adverse to the interest of the petitioner, he may work out his remedy in accordance with law.

12. It was next urged by Mr. Bhattacharya that non-confirmation of the finding of the GSFC by the confirming authority is not under challenge in this writ petition. This is an additional ground for which the Bench ought to hold the writ petition to be not maintainable.

13. Mr. Bhattacharya further argued that the conclusion recorded by the GSFC of the petitioner not being guilty is perverse, would be evident from its discussion of the evidence led in course of the trial. According to him, the version of the petitioner that he had fired in self-defence resulting in the death of the victim did not merit acceptance on the anvil of section 100, IPC, since the shot fired by him was not targeted at any of his so-called assailants; therefore, the plea of causing death of the victim in exercise of the right of self-defence was not available to him.

14. Finally, it was contended that the confirming authority in terms of the statutory provisions is the final authority to take a decision on facts and the petitioner's endeavour to invite the Bench to appreciate the evidence on record ought to be discouraged.

15. Referring to the first ground of challenge raised by Mr. Roy, Mr. Bhattacharya submitted that the entire records were furnished to the petitioner along with the show cause notice and on perusal thereof it would be clear that the GSFC went wrong in not considering the evidence that pointed to the petitioner's guilt.

16. Next, it was submitted by referring to the decisions of the Supreme Court reported in (1985) 2 SCC 412 (Chief of Army Staff v. Major Dharam Pal Kukrety) and (2001) 5 SCC 593 (Union of India v. Harjeet Singh Sandhu), [both cited by

Mr. Roy in course of his submission], that there was no lack of authority of the confirming authority in issuing the impugned show cause notice and, therefore, the show cause notice is unexceptionable.

17. Answering the last contention of Mr. Roy, it was submitted that causing the death of the victim in course of performance of duty without sufficient reason is indeed a misconduct for which the petitioner exposed himself to be proceeded against and that the confirming authority did not err in the exercise of his jurisdiction in proceeding against the petitioner.

18. Mr. Bhattacharya, accordingly, prayed for dismissal of the writ petition.

19. This Bench has heard the parties at length and meticulously read the findings of the GSFC (annexed to the writ petition) as well as the revision order (annexed to the counter affidavit). The decisions cited at the bar have also been considered.

20. In the backdrop of the petitioner's grievance leading to presentation of the writ petition and the contentions urged at the bar, the following questions have emerged for decision:

- i) Is the writ petition maintainable at this stage?
- ii) Is the show cause notice dated June 1, 2016 non-est in the eye of law for absolute want of jurisdiction of the confirming authority to issue the same?
- iii) Is the impugned show cause notice bad on the ground that reasons have not been assigned by the confirming authority to indicate how the findings of the GSFC were perceived by him to be "not convincing", "perverse and against the weight of the evidences"?
- iv) Does the proceeding to initiate administrative action against the petitioner manifest premeditated, pre-judged and closed mind of the confirming authority to terminate the petitioner's service, regardless of what the petitioner could offer in his defence?
- v) Should questions 1 and 2 be answered in favour of the petitioner and the respondents respectively, and then questions 3 and 4 are answered in favour of the petitioner, what course of action this Bench ought to adopt and with what result?
- vi) What relief, if any, on facts and in the circumstances, the petitioner is entitled to?

Question - 1

21. It is quite true and well accepted that a writ court should be slow to entertain a writ petition which seeks to challenge a show-cause notice.

22. However, it is difficult to imprison the principles resting on which a writ petition against a show-cause notice may be entertained in a straitjacket. Mohd.

Ghulam Ghouse (supra) and Kunisetty Satyanarayana (supra) are certainly decisions sounding a warning that unless the impugned show-cause notice is demonstrably non-est on the ground of total lack of authority to investigate facts, the court ought to stay at a distance. A small window is thus available in terms of these decisions itself. The decision reported in (2007) 13 SCC 270 (Union of India v. VICCO Laboratories), taking a step further, has ruled that if a show cause notice is issued in an abuse of the process of law, the writ court should not hesitate to interfere. Challenge to a show-cause notice may also be laid when the premeditated, pre-judged, and closed mind of the authority issuing it is manifest and the noticee is called upon to dispel conclusions of guilt already drawn, and proceedings are initiated only to complete a legal formality. That is exactly what has been laid down by the Supreme Court in its decisions reported in (2006) 12 SCC 33 (Siemens Ltd. v. State of Maharashtra) and (2010) 13 SCC 427 [Oryx Fisheries (P) Ltd. v. Union of India] cited by Mr. Roy.

23. Having regard to the nature of challenge raised by the petitioner and the points on which the show-cause notice is sought to be assailed in particular, he does not deserve to be told off at the threshold and the journey must continue to decide the other questions. Mr. Bhattacharya's contention that the writ petition is premature fails and is, accordingly, overruled.

Question ? 2

24. To answer this question, the relevant provisions are required to be read.

25. Section 11 of the BSF Act and rule 22 of the BSF Rules are reproduced below:

"11. Dismissal, removal or reduction by the Director-General and by other officers.-(1) The Director-General or any Inspector General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.

(2) An officer not below the rank of Deputy Inspector General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.

(3) Any such officer as is mentioned in subsection (2) may reduce to a lower grade or rank or the ranks any person under his command except an officer or a subordinate officer.

(4) The exercise of any power under this section shall be subject to the provisions of this Act and the rules."

"22. Dismissal or removal of person other than officer on account of misconduct.?

(1) When it is proposed to terminate the service of a person subject to the Act other than an officer, he shall be given an opportunity by the authority competent to dismiss or remove him, to show cause in the manner specified in sub-rule (2) against such action: Provided that this sub-rule shall not apply-

(a) where the service is terminated on the ground of conduct which has led to his conviction by a criminal court or a Security Force Court; or

(b) where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause.

(2) When after considering the reports on the misconduct of the person concerned, the competent authority is satisfied that the trial of such a person is inexpedient or impracticable, but, is of the opinion that his further retention in the service is undesirable, it shall so inform him together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence: Provided that the competent authority may withhold from disclosure any such report or portion thereof, if, in his opinion, its disclosure is not in the public interest.

(3) The competent authority after considering his explanation and defence, if any, may dismiss or remove him from service with or without pension: Provided that a Deputy Inspector-General shall not dismiss or remove from service, a Subordinate Officer of and above the rank of a Subedar.

(4) All cases of dismissal or removal under this rule, shall be reported to the Director-General."

26. Mr. Roy has argued that notwithstanding section 11 and rule 22, administrative action against the petitioner is not authorised in law because a trial had been conducted according to well-established procedures and such trial having culminated in a finding favourable to the petitioner, recourse to sub-rule (2) of rule 22 was not available. According to him, a trial which is inexpedient or impracticable may be dispensed with in a given case while taking administrative action against a person governed by the provisions of the Act and the Rules but such action is not permissible where a trial has in fact been conducted in accordance with well-established procedures and the person tried has not been found to be guilty.

27. In support of his contention that recourse to rule 22 of the BSF Rules by a superior officer of the force to anyhow initiate administrative action for imposing penalty without a charge of misconduct having been proved in any security force court proceedings would be illegal and bad, reliance was placed on the decision of a Division Bench of this Court reported in 2005 (2) CHN 638 (Inspector General, BSF v. Ashok Kumar Mishra). The Division Bench had accepted the contention advanced on behalf of the member of the force that if at all rule 22 of the BSF Rules had to be invoked, it could have been invoked at the initial stage without the Summary Security Force Court (hereafter the SSFC) being asked to conduct a trial of such member. It was also held upon consideration of the provisions of the BSF Act and the BSF Rules that once an accused is acquitted of the charge levelled against him by the SSFC, it is no longer open to the authorities to reverse the findings of the SSFC during the trial.

28. Apart from citing the decisions in *Dharam Pal Kukrety* (supra) and *Harjeet Singh Sandhu* (supra), Mr. Roy cited the decision reported in (1996) 3 SCC 507 (*Major Radha Krishan v. Union of India*), for the proposition that the power under rule 14 of the Army Rules, 1954 (hereafter the Army Rules) could not have been exercised in a manner which would get over the bar of limitation laid down in the Army Act, 1950 (hereafter the Army Act) and that if rule 14 was to be interpreted to give such power, it would be clearly ultra vires.

29. This Bench need not discuss in detail the decision in *Major Radha Krishan* (supra), since the earlier decision in *Dharam Pal Kukrety* (supra) was not noticed therein and the subsequent decision in *Harjeet Singh Sandhu* (supra) has held that the propositions laid down in *Major Radha Krishan* (supra) were too broad to be acceptable.

30. In *Dharam Pal Kukrety* (supra), the Supreme Court was called upon to consider several provisions contained in the Army Act and rule 14(2) of the Army Rules. The facts giving rise to the civil appeal are noted in paragraphs 2 and 3 of the decision. The facts bear striking resemblance to the facts under consideration here and, therefore, are not repeated. The Supreme Court, however, thought it unnecessary to reproduce the charges that were levelled against the respondent in the appeal. After the General Court Martial (hereafter the GCM) which tried the respondent had adhered to its earlier finding of the respondent not having been found guilty of all the charges, administrative action under rule 14(2) of the Army Rules was sought to be taken. It is noted that rule 14 of the Army Rules and rule 22 of the BSF Rules are *pari materia*. The judgment under appeal had upheld the contention of the respondent and allowed the writ petition based on consideration of three decisions of the Allahabad High Court, the Punjab and Haryana High Court, and the Jammu and Kashmir High Court. Appearing in support of the appeal and seeking setting aside of the impugned judgement and granting liberty to proceed in accordance with law against the respondent, a contention was raised that the finding rendered by the GCM on review was perverse or against the weight of evidence on record. It is in such facts and circumstances, that the Supreme Court proceeded to rule as follows:

"13. It is pertinent to note that under Section 160 the confirming authority has the power to direct a revision of the finding of a court-martial only once. There is no power in the confirming authority, if it does not agree with the finding on revision, to direct a second revision of such finding. In the absence of any such confirmation, whether of the original finding or of the finding on revision, by reason of the provisions of Section 153 the finding is not valid. Therefore, in the case of the respondent, the finding of the general court-martial on revision not having been confirmed was not valid. Could he, therefore, be tried again by another court-martial on the same charges? Under Section 121, a person subject to the Army Act, who has been acquitted or convicted of an offence by a court-martial or by a criminal court, is not liable to be tried again for the same offence by a court-martial. It can well be argued that by reason of the provisions of

Section 153 under which no finding or sentence of a general, district or summary general court-martial is valid except insofar as it is confirmed as provided by the Army Act a person cannot be said to have been acquitted or convicted by a courtmartial until the finding of "guilty" or "not guilty" in his case has been confirmed by the confirming authority. There is, however, no express provision in the Army Act which empowers the holding of a fresh courtmartial when the finding of a court-martial on revision is not confirmed.

15. This being the position, what then is the course open to the Central Government or the Chief of the Army Staff when the finding of a courtmartial even on revision is perverse or against the weight of evidence on record? The High Court in its judgment under appeal has also held that in such a case a fresh trial by another court-martial is not permissible. The crucial question, therefore, is whether the Central Government or the Chief of the Army Staff can have resort to Rule 14 of the Army Rules. Though it is open to the Central Government or the Chief of the Army Staff to have recourse to that rule in the first instance without directing trial by a court-martial of the concerned officer, there is no provision in the Army Act or in Rule 14 or any of the other rules of the Army Rules which prohibits the Central Government or the Chief of the Army Staff from resorting in such a case to Rule 14. Can it, however, be said that in such a case a trial by a court-martial is inexpedient or impracticable? The Shorter Oxford English Dictionary, Third Edition, defines the word "inexpedient" as meaning "not expedient; disadvantageous in the circumstances, unadvisable, impolitic". The same dictionary defines "expedient" inter alia as meaning "advantageous; fit, proper, or suitable to the circumstances of the case". Webster's Third New International Dictionary also defines the term "expedient" inter alia as meaning "characterized by suitability, practicality, and efficiency in achieving a particular end: fit, proper, or advantageous under the circumstances".

16. In the present case, the Chief of the Army Staff had, on the one hand, the finding of a general court-martial which had not been confirmed and the Chief of the Army Staff was of the opinion that the further retention of the respondent in the service was undesirable and, on the other hand, there were the above three High Court decisions and the point was not concluded by a definitive pronouncement of this Court. In such circumstances, to order a fresh trial by a court-martial could certainly be said to be both inexpedient and impracticable and the only expedient and practicable course, therefore, open to the Chief of the Army Staff would be to take action against the respondent under Rule 14, which he did. The action of the Chief of the Army Staff in issuing the impugned notice was, therefore, neither without jurisdiction nor unwarranted in law."

31. Harjeet Singh Sandhu (supra) again arose out of the Army Act and the Army Rules and similar provisions (sections 19 and 122 and rule 14 were under consideration). The respondent and his co-associates were alleged to have used third-degree methods to extract a confession from a defence employee as a

result whereof he had died. A GCM was convened under section 109 of the Army Act which tried the respondent and the other officers. Upon conclusion of trial, the GCM awarded sentence of forfeiture of three years service for the purpose of promotion and severe reprimand to the respondent. The confirming authority formed an opinion that the sentence was very lenient and sent the case back for revision. On revision, the GCM enhanced the punishment. The Chief of Army Staff, however, annulled the GCM proceedings on the ground that the proceedings were unjust; but, a notice was issued to the respondent under section 19 of the Army Act read with rule 14 of the Army Rules calling upon him to show cause why his service should not be terminated. The response of the respondent was followed by another show-cause notice to the same effect in cancellation of the earlier notice, without mentioning the reasons for such cancellation. Considering the reply to the second show-cause notice given by the respondent, the Chief of Army Staff dismissed him from service. A writ petition was moved before the High Court of Allahabad and considering the decision in Major Radha Krishan (*supra*), the writ petition was allowed and the impugned order of termination quashed.

32. Another special leave petition was analogously heard wherein the judgment and order of the Delhi High Court allowing the writ petition filed by the other respondent was under challenge. The Delhi High Court had also relied on the decision in Major Radha Krishan (*supra*), and held the action of the Chief of Army Staff time barred.

33. In paragraph 14 of the decision in Harjeet Singh Sandhu (*supra*), the Supreme Court succinctly laid down the legal situation that emerged on a conjoint reading of section 19 of the Army Act and rule 14 of the Army Rules, as follows:

"14. Section 19 and Rule 14 so read together and analysed, the following legal situation emerges:

(1) The Central Government may dismiss, or remove from the service, any person subject to the Army Act, 1950, on the ground of misconduct.

(2) To initiate an action under Section 19, the Central Government or the Chief of the Army Staff after considering the reports on an officer's misconduct:

(a) must be satisfied that the trial of the officer by a Court Martial is inexpedient or impracticable;

(b) must be of the opinion that the further retention of the said officer in the service is undesirable.

(3) Such satisfaction having been arrived at and such opinion having been formed, as above said, the officer proceeded against shall be given an opportunity to show cause against the proposed action which opportunity shall include the officer being informed together with all reports adverse to him to submit in writing his explanation and defence. Any report on an officer's

misconduct or portion thereof may be withheld from being disclosed to the officer concerned if the Chief of the Army Staff is of the opinion that such disclosure is not in the interest of the security of the State.

(4) Opportunity to show cause in the manner as above said need not be given to an officer in the following two cases:

(a) where the misconduct forming the ground for termination of service is one which has led to the officer's conviction by a criminal court;

(b) where the Central Government is satisfied that for reasons to be recorded in writing, it is not expedient or reasonably practicable to give to the officer an opportunity of showing cause.

(5) The explanation of the officer shall be considered by the Chief of the Army Staff. If the explanation is found satisfactory, further proceedings need not be pursued. The explanation, if considered unsatisfactory by the Chief of the Army Staff or when so directed by the Central Government, in either case, shall be submitted to the Central Government with the officer's defence and the recommendation of the Chief of the Army Staff as to the termination of the officer's service i.e. whether the officer should be (a) dismissed; or (b) removed; or (c) compulsorily retired, from the service.

(6) The Central Government shall after taking into consideration the reports (on the officer's misconduct) the officer's defence, if any, and the recommendation of the Chief of the Army Staff, shall take a decision which if unfavourable to the officer may be (a) to dismiss or remove the officer with or without pension or gratuity; or (b) to compulsorily retire him from service with pension and gratuity, if any, admissible to him."

34. In course of hearing, the learned Additional Solicitor General for the appellant had cited few examples wherein trial by a court martial could be rendered impracticable. The same were noted in paragraph 36 of the decision and to the extent relevant for a decision on this writ petition, reads as follows:

"36. The learned Additional Solicitor-General cited a few examples wherein trial by Court Martial may be rendered "impracticable", to wit:

(iv) any finding or sentence of a Court Martial requiring confirmation having been ordered to be revised by order of the confirming authority but in spite of such revision having not been confirmed once again and a subsequent revision of finding or sentence being not contemplated by the provisions of the Act; rather a revision once only having been provided by Section 160;

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35. The Supreme Court then proceeded to provide resolutions to the several problems posed by the illustrations given by the learned Additional Solicitor

General. Paragraph 39 of the decision dealing with illustrations (iii) and (iv) is relevant and are quoted below:

"39. In Illustrations (iii) and (iv) also, in our opinion, the exercise of power under Section 19 read with Rule 14 cannot be excluded. The finding and sentence of the Court Martial are ineffective unless confirmed by the confirming authority. The Act does not contemplate that the finding and sentence of a Court Martial must necessarily be confirmed merely because they have been returned for the second time. Section 165 vests power in the Central Government, the Chief of the Army Staff and any prescribed officer, as the case may be, to annul the proceedings of any Court Martial if the same are found to be illegal or unjust. The delinquent officer cannot be allowed to escape the consequences of his misconduct solely because court-martial proceedings have been adjudged illegal or unjust for the second time. The power under Section 19 read with Rule 14 shall be available to be exercised in such a case though in an individual case the exercise of power may be vitiated as an abuse of power. The option to have a delinquent officer being tried by a Court Martial having been so exercised and finding as to guilt and sentence having been returned for or against the delinquent officer by the Court Martial for the second time, on just and legal trial, ordinarily such finding and sentence should be acceptable so as to be confirmed. Power to annul the proceedings cannot be exercised repeatedly on the sole ground that the finding or the sentence does not meet the expectation of the confirming authority. Refusal to confirm is a power to be exercised, like all other powers to take administrative decision, reasonably and fairly and not by whim, caprice or obstinacy. Exercising power under Section 19 read with Rule 14 consequent upon court-martial proceedings being annulled for the second time because of having been found to be illegal or unjust, the exercise would not suffer from lack of jurisdiction though it may be vitiated on the ground of "inexpediency" within the meaning of Rule 14(2) or on the ground of abuse of power or colourable exercise of power in a given case."

36. There cannot be any doubt that the observations made in *Dharam Pal Kukrety* (supra) and *Harjeet Singh Sandhu* (supra), dealing with *pari materia* provisions of the Army Act and the Army Rules, and the BSF Act and the BSF Rules, would also equally apply to cases governed by the latter.

37. Based on consideration of these two decisions, the contention of Mr. Roy that the confirming authority lacked the jurisdiction to even issue the impugned showcause notice cannot be upheld and, accordingly, stands overruled. Also, the said two decisions not having been placed for consideration before the Division Bench of this Court, this Bench may safely feel to be not bound by the decision in *Ashok Kumar Mishra* (supra).

38. Question 2 is, accordingly, answered by holding that recourse to section 11 of the Act BSF read with rule 22 of the BSF Rules, being the repository of power to initiate administrative action against a member of the force whose retention in service is found undesirable, even after findings returned by the GSFC upon trial

and then on revision, is not vitiated by lack of authority.

Question ? 3

39. What the impugned show-cause notice seeks to convey to the petitioner, has been noticed above. The confirming authority while disagreeing with the GSFC has opined that the latter's findings are not convincing because "the finding of the Court, is perverse and against the weight of evidences". Obviously, these are the conclusions reached by the confirming authority; however, there is no discussion by the confirming authority of the evidence adduced or materials placed before the GSFC worth the name resting whereon such conclusions could have reasonably been recorded. The confirming authority has drawn inspiration from the discussion in paragraph 15 of the decision in *Dharam Pal Kukrety* (supra), wherein the Supreme Court posed a question as to what would be the "course open to the Central Government or the Chief of the Army Staff when the finding of a court-martial even on revision is perverse or against the weight of evidence on record?"

(emphasis supplied).

40. To the mind of this Bench, mere quoting from the decision of the Supreme Court is not sufficient; what is required is application of mind to the materials on record, analysing the evidence adduced by the parties and drawing inferences/conclusions as are permissible based on due consideration of such materials/evidence on record.

41. Responding to a query of this Bench as to how the petitioner could possibly discern what was in the mind of the confirming authority qua disagreement with the findings recorded by the GSFC after conclusion of the trial as well as at the stage of revision, Mr. Bhattacharya submitted that the entire records were furnished to the petitioner and that would be sufficient compliance of adhering to a fair procedure before administrative action is taken against him. His other argument was that section 100, IPC was not attracted on facts and in the circumstances.

42. This Bench records its inability to agree with Mr. Bhattacharya. If only furnishing of the records, without anything more, were sufficient to meet procedural fairness, it would indeed be difficult to hold that reasonable and adequate opportunity of defence had been made available to the member of the force proceeded against. A person has to be told clearly and definitely the points on which the confirming authority disagrees with the GSFC, for, in the absence thereof, the petitioner cannot possibly by projecting his own imagination discover all the facts and circumstances that may be in the contemplation of the confirming authority to be established against him. Here, the view of the confirming authority that the petitioner ought to show-cause why administrative action should not be taken against him for the charge for which he was tried by the GSFC is so bare that it is not capable of being intelligently understood and not sufficiently definite to furnish materials to the petitioner to defend himself.

This view, the Bench has formed, on the basis of its reading of the decision of the Supreme Court reported in (1970) 3 SCC 548 (*Surath Chandra Chakrabarty v. State of West Bengal*), wherein the charges framed were not accompanied by the statements of allegations.

43. In its decision reported in (1998) 7 SCC 84 (*Punjab National Bank v. Kunj Behari Misra*), the Supreme Court had the occasion to deal with the Punjab National Bank Officer Employees' (Discipline and Appeal) Regulations, 1977. The Court read natural justice into regulation 7(2) thereof and proceeded to hold that whenever the disciplinary authority disagrees with the enquiring authority on any article of charge, then, before it records its findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent thereagainst. This, in turn, was based on the reasoning that the delinquent officer must be given an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer.

44. In the absence of even a bare reference to the evidence that the confirming authority perceived had not been duly considered by the GSFC, it is indeed impossible for the petitioner to persuade the confirming authority to accept the finding of the GSFC.

45. The argument of Mr. Bhattacharya touching inapplicability of section 100, IPC is worth acceptance but it must be remembered that the show-cause notice itself makes no reference to the same. Having regard to the law laid down in the decision reported in AIR 1978 SC 851 (*Mohinder Singh Gill v. Chief Election Commissioner*), the respondents cannot be allowed to support the impugned notice by supplementing fresh reasons in the shape of an affidavit or otherwise; the validity of the notice has to be judged in the light of the reasons disclosed therein.

46. It is too well-known that recording of reasons operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power and that such reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

47. As has been held by this Court in its decision reported in (2008) 1 CAL LT 1 (HC) (*Uniworth Resorts Limited v. Sri Ashok Mittal*), every judicial order must meet the twin test of "why" and "what". In paragraph 12 it was observed as follows:

"12. Judicial orders of such nature need to meet the twin tests of "why" and "what". It is the "why" that sustains the "what". Reasons are the safeguard against the ipsi dixit of the decision-making process. They discuss how the judicial mind has been applied to the matter in issue and convey the nexus between the matters that have been considered and the conclusion based thereon. The justification and the reasonableness of a conclusion depend on the

reasons given in support thereof. The order impugned has no element of "why" for the "what" therein to stand on."

There is no reason as to why the aforesaid observations would not apply to orders passed in proceedings which are quasi-judicial in nature, and even to show-cause notices to enable the notices put up an effective response in defence.

48. It is easy to say that a particular finding is "perverse" but one must understand what is meant by such term. An illuminating discussion on when a writ court would be justified in interfering with a decision of a tribunal on the ground of perversity in the finding reached by it, is available in an unreported decision of Hon'ble A.N. Sen, J. (as His Lordship then was), which finds reproduction in a subsequent Division Bench decision of this Court (of which His Lordship was the presiding judge) reported in 1974 CLJ 251 (Collector of Customs, Calcutta v. Biswanath Mukherjee). Relevant excerpts from the said decision read as under:

"It is, however, equally well settled that even in a writ petition under Article 226, the Court is entitled to interfere with the finding of the Tribunal on any question of fact which the Tribunal is competent to decide, if the Court is satisfied that the finding of the Tribunal is perverse and the finding of the Tribunal is considered to be perverse, if ?

- (a) The Tribunal has come to the finding on no evidence.
- (b) The Tribunal has based the finding on materials not admissible and has excluded relevant materials.
- (c) The Tribunal has not applied its mind to all the relevant materials and has not considered the same in coming to the conclusion.
- (d) The Tribunal has come to the conclusion by considering material which is irrelevant or by considering material which is partly relevant and partly irrelevant.
- (e) The Tribunal has disabled itself in reaching a fair decision by some considerations extraneous to the evidence and the merits of the case.
- (f) The Tribunal has based its finding upon conjectures, surmises and suspicion.
- (g) The Tribunal has based the finding upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found.
- (h) If the Tribunal in conducting the enquiry has acted in flagrant disregard of the rules of procedure or has violated the principles of natural justice, where no particular procedure is prescribed.

81. In any of the above cases and in any other case where the Court, in the particular facts of the case, considers the finding of the Tribunal to be perverse and where the Court is of the opinion that justice of the case so requires, the Court is entitled to interfere and set aside the finding of the Tribunal on any

question of fact. In such cases, the Court holds that there is an error of law on any of the above grounds."

49. To the mind of this Bench, it was obligatory for the confirming authority to briefly but specifically advert to the points of disagreement qua the findings of the GSFC that he had noted, and to convey such points to the petitioner to counter/rebut the same as part and parcel of a reasonable and adequate opportunity of defending himself. In the process the perceived perversity in the findings of the GSFC would have surfaced. Unfortunately, without granting such opportunity, it is considered most unfair and iniquitous to penalize the petitioner.

50. This Bench is also inclined to hold that it was all the more necessary for the confirming authority to indicate the further points of disagreement, particularly when the GSFC had meticulously dealt with all the seven aspects that the confirming authority by its order dated September 1, 2014 had wished the GSFC to consider on revision. The confirming authority apart from the borrowed verbosity of the findings being "perverse and against the weight of evidences", did not take the pain to say where and how the GSFC went wrong. Reference to materials/evidence on record which points to the petitioner's guilt is conspicuous by its absence in the impugned show-cause notice and, therefore, it is unsustainable in law.

51. The conclusions recorded by the confirming authority that the findings of the GSFC are "not convincing", "perverse and against the weight of evidences", reflect his ipsi dixit, which are unsustainable in law.

52. This discussion answers question 3.

Question - 4

53. From the narrative of facts, the perception that the respondents have rolled the ball in motion to complete a legal formality admits of no doubt. The respondents are bent upon penalizing the petitioner, even by not retaining him in service, without of course letting the petitioner himself know why his retention in service is considered undesirable.

54. In *Oryx Fisheries (P) Ltd.* (supra), a show-cause notice was under challenge whereby the petitioner was required to explain why a certificate of registration shall not be cancelled. It was held therein as follows:

"24. This Court finds that there is a lot of substance in the aforesaid contention. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show-cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

27. It is no doubt true that at the stage of show cause, the person proceeded

against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show-cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.

28. Justice is rooted in confidence and justice is the goal of a quasi-judicial proceeding also. If the functioning of a quasi-judicial authority has to inspire confidence in the minds of those subjected to its jurisdiction, such authority must act with utmost fairness. Its fairness is obviously to be manifested by the language in which charges are couched and conveyed to the person proceeded against.

31. It is of course true that the show-cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show-cause notice.

33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi-judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it."

55. In Siemens Ltd. (supra), on perusal of the order impugned before the High Court as also the statements made before the Supreme Court in the counter affidavit filed by the respondents, the Court was satisfied that the respondents had already determined the liability of the appellant and the only question remaining for consideration was quantification thereof, which does not remain in the realm of a show-cause notice, and it was observed that a show-cause notice issued with premeditation would make it amenable to a challenge before the writ court. The Court proceeded to set aside the impugned show-cause notice and granted liberty to proceed afresh. The discussion in paragraph 9 is relevant and is

thus quoted below:

"9. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including *State of U.P. v. Brahm Datt Sharma* : (1987) 2 SCC 179), *Special Director v. Mohd. Ghulam Ghouse* : (2004) 3 SCC 440 and *Union of India v. Kunisetty Satyanarayana* : (2006) 12 SCC 28, but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. [See *K.I. Shephard v. Union of India* : (1987) 4 SCC 431]. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice."

56. The situation here is not too different. Paragraph 19 of the counter affidavit has been placed before this Bench by Mr. Roy. It has been pleaded that:

"19. It is submitted that the weight of evidence reveal that the charge of culpable homicide not amounting to murder framed against the writ petitioner is actually proved beyond reasonable doubt."

57. Looking at the above pleading, the conclusion seems to be inescapable that the impugned show-cause notice is the product of a premeditated, pre-judged and closed mind of the confirming authority. That it has been issued without in any manner demonstrating application of mind and without a semblance of reasoning, affords ground to hold that the apprehension of the petitioner that the confirming authority has initiated proceedings under section 11 of the BSF Act read with rule 22 of the BSF Rules to complete a formality in law is not misconceived. Such a notice cannot be allowed to stand for a moment and the same is, accordingly, liable to be set aside.

58. Ordinarily, when a show-cause notice is set aside, the proper course is to remit the matter to the concerned authority for proceeding de novo by issuing a fresh notice to show-cause and to require the noticee to respond to the same for persuading the authority to take the proceeding to its logical conclusion in accordance with law.

59. However, such a course of action on facts and in the circumstances would be oppressive for the petitioner and an idle ceremony, having regard to the mind-set of the confirming authority.

60. Does a writ court have the power to review evaluation of facts by the decision maker? This question has been answered by the Supreme Court in its decision reported in (2004) 4 SCC 714 (*State of Uttar Pradesh v. Johri Mal*). Paragraph 30 of the decision is quoted below:

"30. It is well settled that while exercising the power of judicial review the court

is more concerned with the decision-making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact-finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision-maker's opinion on facts is final. But while examining and scrutinising the decision-making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can re appreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the court with special reference to a given case. This position is well settled in the Indian administrative law. Therefore, to a limited extent of scrutinising the decision-making process, it is always open to the court to review the evaluation of facts by the decision-maker."

61. In the given facts and circumstances, this Bench while answering question 5, proposes to review the evaluation of facts by the GSFC, both after conclusion of trial and upon revision, to ascertain as to whether there is really anything in the materials/evidence on record which escaped the notice of the GSFC leading to the confirming authority not agreeing with its findings, not once but twice.

62. While passing the order dated September 1, 2014, the confirming authority required the GSFC to consider seven aspects in all, on revision. Such aspects are summarised below:

- a) Doubt about the presence of sharp edged weapon at the place of occurrence and the version of the petitioner regarding the alleged attack on him;
- b) Although it has been the petitioner's version that he had fired in self defence, the natural course of action would be to either fire at the miscreants or over their heads in the air to scare them away but not side wise at about 450 angle, i.e. tangentially, and the reason for such firing;
- c) Filing of charge-sheet under section 307 of the IPC upon investigation of Dinhata PS FIR No. 23/2011 dated January 7, 2011 should not be viewed in isolation because the "issue of alleged homicide by the accused was neither raised nor investigated";
- d) That the shot was fired at an approximate angle of 450 piercing the person of the victim, as stated by Dr. Subrata Halder (PW-12), and the version of the petitioner that he fired in the air are difficult to reconcile and the point of bullet entry and exit creating wounds makes the version of the petitioner of firing in the air highly improbable and moreover, on the basis of the available evidence, the

circumstances that existed at the time of the incident do not appear to be grave enough to have occasioned the exercise of right of private defence by the petitioner; and further that the touts/miscreants having accomplished the task of crossing PW-07 (father of the victim) and the victim over the fence, whether attack on the petitioner, if any, could have served any purpose;

e) That the version of the victim's father (PW-7) that when the victim's clothes got entangled in the fencing wires and she started shouting "bachaobachao", "one BSF person came and fired one round" without any warning before opening fire, required due consideration along with his version that there were 4 (four) touts and that presence of footmarks is not a conclusive proof of 10-15 miscreants having attacked the petitioner, as alleged by him;

f) The statements of the petitioner at the stage of Record of Evidence and at the trial materially differ and whether the variation in the version at the trial is an afterthought or not; and

g) One Musharaff Sheikh, being an important witness in view of the testimony of SI Manoranjan Roy (PW-11), ought to be summoned and his testimony obtained to arrive at a just and proper conclusion.

63. It is clear from the reasons in support of the finding returned by the GSFC on revision that each one of the above aspects was meticulously dealt with including summoning of the said Musharaff Sheikh and it found that there was no reason to take a view different from the one expressed after conclusion of trial. In the absence of any point of disagreement having surfaced from the side of the confirming authority, it is difficult to comprehend what the confirming authority had in mind for not confirming the finding on revision. Notwithstanding the weighty argument that section 100, IPC could not have come to the petitioner's rescue, absence of reasons in the impugned show-cause notice is considered sufficient ground by this Bench to be disinclined to accept the stand of the confirming authority. However, this Bench would also proceed to give its own independent conclusions based on the materials/evidence on record as to how the confirming authority grossly erred in the decision making process leading to the impugned show-cause notice.

64. This Bench is conscious that it is not for the court of writ to analyse and appreciate evidence that is tendered before the GSFC, as if it were sitting in appeal. However, in appropriate cases, to prevent abuse of law as well as miscarriage of justice, it would not be improper for the Constitutional Court to protect the rights of individuals in an appropriate manner without subverting judicial discipline. The writ court may, on the basis of admitted facts and circumstances, itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion, is settled law. If any authority is required, one may usefully refer to paragraph 20 of the decision reported in AIR 1987 SC 537 (Comptroller and Auditor General v. K. S. Jagannathan).

65. This Bench before proceeding further also considers it appropriate to remind itself of the law laid down by the Supreme Court in its decision reported in (2012) 12 SCC 72 (Om Prakash v. State of Jharkhand). After an encounter killing, an FIR was registered on the complaint of the father of the deceased. The police officers sought for quashing of the FIR by invoking the jurisdiction of the High Court under section 482, Criminal Procedure Code. The petition having been dismissed, the Supreme Court was approached. This is what the Court held:

"42. It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. The plea regarding sanction can be raised at the inception.

43. In our considered opinion, in view of the facts which we have discussed herein above, no inference can be drawn in this case that the police action is indefensible or vindictive or that the police were not acting in discharge of their official duty.*****"

(underlining for emphasis)

66. The stage is now set to advert to certain undisputed facts and circumstances, emerging from the materials on record. The same are:

- 1) the incident of firing took place at the dawn of an early January morning;
- 2) because of dense fog, visibility was then restricted to 4/5 ft.;
- 3) the petitioner was entrusted with the duty of guarding the border to check infiltration and exfiltration;
- 4) there were at least 4 (four) touts, if not more, who were helping PW-7 (father of the victim) to secretly exit the country along with his daughter and succeeded in ensuring the PW-7's exit;
- 5) PW-7 and the victim had indulged in illegal acts of trying to cross the border;

- 6) the victim was shot at from a distance of not less than 15 yards i.e. 45 ft.;
- 7) the victim's body was found on top of the fence on the Bangladesh side; and
- 8) the shot was fired by the petitioner tangentially at an angle of 450.

67. The confirming authority has neither remarked nor is there any evidence that the petitioner had no authority to open fire even in case of dire necessity. The only direct evidence of the victim having been shot by a BSF person has been adduced by PW-7. The GSFC disbelieved the version of PW-7 that after his daughter started screaming for help, the petitioner appeared at the scene and fired on her. The reason cited is that the whole truth cannot be expected from a person who himself was "doing an illegal act". The confirming authority's view on this observation is found to be wanting. Be that as it may, circumstantial evidence is sufficient to establish that the victim died of the shot fired from the petitioner's rifle. The petitioner himself having admitted that he had fired in self-defence and there being no evidence of any other shot being fired at the material time, there can be little doubt that the shot fired by the petitioner caused the death of the victim. According to the petitioner, "the weather was dense foggy and it was complete dark at that time, as such he did not see the girl when he fired". Interestingly, PW-7 himself had crossed the fence and was waiting on the Bangladesh side for the victim to cross the fence. In the process of crossing the fence, the victim's clothes got entangled with the barbed wires of fencing. If, indeed, the petitioner had shot PW-7's daughter at close range, which seems to be his version, the same does not tally with the version of the autopsy surgeon (PW-12) who deposed that the shot, which pierced the victim, was fired from a distance of 15/20 yards. To accept the version of PW-7, there should have been evidence that the version of PW-12 was either flawed or that he deposed falsely. The version of PW-7 does not therefore seem to be credible in the light of the evidence of PW-12 and the GSFC appears to have proceeded in the right direction.

68. In its order dated September 1, 2014, the confirming authority observed that if at all the petitioner fired in exercise of his right of self-defence, he could have fired the shot at the miscreants or could have fired over their heads and not at an angle of 450. This is an acceptable proposition, no doubt. Instead of firing at an angle of 900, the petitioner may not have exercised discretion wisely in firing at an angle of 450; but mere indiscretion, in all cases, cannot be treated as an offence. Having regard to the fact that visibility was restricted only to 4/5 ft., and most importantly that none is supposed to cross the fencing by climbing on top of it, could the petitioner be accused of having knowledge that firing at an angle of 450 in that direction, and that too having regard to the weather conditions prevailing then, is likely to hit someone causing his/her death, and when the victim had almost crossed over? The answer to such question cannot possibly be in the affirmative. As held in *Om Prakash* (supra), there has to be unimpeachable evidence on record to establish that the firing is indefensible, mala fide and vindictive; however, none exists here.

69. Interestingly, the confirming authority has not indicated as to whether the offence allegedly committed by the petitioner comes within Part ? I of section 304 IPC or under Part ? II. He ought to have, by reference to the evidence, albeit tentatively, shown whether the death was caused with intention or knowledge. Circumstances exist to firmly show that the death of the victim was caused by the petitioner without intention and without knowledge, and hence, homicidal death has not been established. Section 304 IPC is not attracted at all in the facts of this case. The death of the victim is indeed unfortunate, but it seems to this Bench to be the consequence of an accident; and an accident, it is well known, is a tragedy which ordinarily has to be understood as unforeseen or which could not be comprehended. It might sound harsh but PW-7 and the victim by illegally attempting to cross over the fence (the victim must have attempted so because of insistence of her father) contributed to the injury suffered by the victim, to which she ultimately succumbed. The visibility on the relevant foggy morning was restricted to 4/5 ft. and particularly bearing in mind that none is supposed to be on top of the border fencing by climbing it illegally, the petitioner's act of firing tangentially at 450 can by no stretch of imagination be termed as a negligent act punishable under any law or that such act would render him unsuitable to be retained in service. Rather than a homicidal death, the victim died an accidental death for which, unfortunately, she and her father are responsible. This Bench unhesitatingly records that an accidental death, for which the petitioner is not liable, has been given the colour of homicidal death.

70. For the foregoing reasons, this Bench is of the considered view that the matter need not be remitted to the confirming authority and that the petitioner is entitled to succeed without a remand being ordered.

71. In view of the aforesaid finding that the petitioner has not committed any offence punishable under section 304 IPC, a fortiori a civil offence, the writ petition stands allowed. The impugned show-cause notice is set aside.

72. The parties shall, however, bear their own costs.

Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.