
(2011) 07 DEL CK 0172
In the Delhi High Court
Case No : Writ Petition (C) 1579 of 2010

Daya Ram

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:

Border Security Force Act, 1968 — Section 107, 117(2), 80
Border Security Force Rules, 1969 — Rule 45, 48(3), 53(2), 85
Constitution of India, 1950 — Article 226, 227
Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 100, 106, 299, 300, 302

Citation : (2011) 183 DLT 688

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Jos Chiramel and Ramesh Kumar, for the Appellant; Anil Gautam and Dy. Commandant Bhupinder Sharma, BSF, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Shorn of unnecessary details, the facts leading to the filing of the present petition are that the Petitioner, employed as a Lance Naik with Border Security Force and attached to "A" Coy of the 54th Bn. was on duty at the Indo-Bangladesh border and deployed at BOP Lyngkhat on 09.03.2004.

2. On 09.03.2004 "A" Coy was detailed to proceed for election duty in Manipur and thus was required to move from BOP Lyngkhat to Manipur. At about 07.20 P.M. Assistant Commandant Ravinder Thakur PW-15, Coy Commander of the 54th Bn. was briefing the Coy personnel of "A" Coy about the movement of "A" Coy in the guest room of BOP Lyngkhat, when he heard the sound of firing from towards the road head towards BOP Lyngkhat (hereinafter referred to as the "place of occurrence") whereupon, accompanied by other officers, he proceeded towards the place of occurrence. While on his way to the place of occurrence, Assistant Commandant Ravinder Thakur learnt from some BSF personnel that the Petitioner is firing indiscriminately from a rifle, and on reaching there he learnt

that the Petitioner had fled into the forest. Thereafter Assistant Commandant Ravinder Thakur conducted a search of the place of occurrence upon which he saw that Const. Gulam Mohinuddin Dar (herein after referred to as the "deceased"), who was sleeping in a bus shed at the place of occurrence was hit by a bullet. The deceased was immediately removed to the hospital but his life could not be saved. In the meantime, Assistant Commandant Ravinder Thakur seized two empty magazines, 39 empty cartridges and 4 live rounds at the place of occurrence. A roll call was made and absence of the Petitioner was recorded.

3. Assistant Commandant Ravinder Thakur immediately went to police station Pynursla, Shillong, and got lodged an FIR bearing No. 4(3)04 for offences u/s 302 and 307 IPC pertaining to the incident in question.

4. Since the force personnel had named the Petitioner as the offender, Assistant Commandant Ravinder Thakur formed search parties to search for the Petitioner, but with no success. However, on 10.03.2004, one search party found, in the forest, a SLR bearing Butt No. 31, Body No. EC-2606, while it was searching for the Petitioner. The aforesaid SLR found by the search party, together with its magazine, which was removed from the SLR, and 39 empty cartridges recovered from the place of occurrence were seized by Inspector M.R. Marak, who had reached the place of occurrence to conduct investigation on receiving a copy of the afore-noted FIR.

5. The dead body of Const. Gulam Mohinuddin Dar was sent to the mortuary, where on 11.03.2004, Dr. A.A. Dkhar PW-8, conducted the post-mortem and prepared a report in the said regard.

6. On 12.03.2004, Mohinder Singh, Commandant of 54th Bn., conducted a preliminary enquiry into the matter and prepared spot verification and preliminary inquiry reports in said regard. The relevant portion of the spot verification report prepared by the Commandant reads as under:

...

2. On 9th Mar" 2004 at about 2010 hrs after receiving the information of a shoot out incident at BOP Lyngkhat, I immediately rushed to the spot after informing DIG, BSF Shillong.

3. On reaching BOB Lyngkhat, I came to know that No. 86001011 L/NK Daya Ram of "A" Coy after consuming country liquor fired indiscriminately at road Lyngkhat and absconded from there taking away one SLR Butt No. 31, Body No. EC-2606 of No. 02131085 Const. Kajal S.K. of "A" Coy.

4. Following facts have come out after preliminary enquiry and spot verification:....

b) No. 86001011 L/NK Daya Ram was on OP/patrolling duty from 090630 hrs to 1230 hrs. Since morning Coy personnel of "A" Coy were busy in shifting of stores to road head from BOP. Since F Coy had relieved A Coy, stores, personnel

luggage and weapons were also shifted to road head. No. 86001011 L/NK Daya Ram after taking lunch also shifted his luggage to road head. While men of the Coy were busy in shifting Coy stores from BOP Lyngkhat to Road head, No. 86001011 L/NK Daya Ram was seen sitting with No. 860014368 HC Bijendra Singh and No. 860433217 HC Satish Kumar of A Coy and taking liquor at road head from 1630 hrs to 1730 hrs....

c) Before the incident, No. 90544100 Ct Biteshwar Dayal while coming towards BOP from road head crossed L/NK Daya Ram, who was going towards road head. He heard L/NK Daya Ram saying under influence of liquor that he will see everybody.

d) At about 091940 hrs, No. 86001011 L/NK Daya Ram came to Road head and picked one of the Rifle lying near waiting shed in absence of any sentry. As 03 Mag and 50 Rds were issued to the troops, he after taking Rifle started firing indiscriminately using his own magazine and ammunition. No. 95403621 Const. Gulam Mohiuddin Dar who happened to be there in his bed inside mosquito net near waiting shed probably got initial bullet on his forehead, as he could not move from his bed....

(Emphasis Supplied)

7. The relevant portion of the preliminary inquiry report prepared by the Commandant reads as under:

...

2. On 9th Mar 2004, Coy Comdr "A" Coy Lyngkhat reported that one shooting out case at Road head of BOP Lyngkhat has taken place. After informing DIG BSF Shillong, Commandant immediately left for BOP Lyngkhat. During the course of preliminary questioning, following came to notice:

... 9. No. 95403621 Constable Gulam Mohiuddin Dar who happens to be resting near the place of incident by making a cot/bed of boxes and his mosquito net was also tied around the bed when No. 86001011 L/NK Daya Ram started firing. Most probably first or second bullet hit No. 95403621 Const. Gulam Mohiuddin Dar....

(Emphasis Supplied)

8. Inspector M.R. Marak PW-14, apprehended the Petitioner on 13.03.2004 and handed him over to the Commandant of the 54th Bn.

9. In the meanwhile, on 10.03.2004, i.e. the day next of the incident, a Staff Court of Inquiry (herein after referred to as "SCOI") was convened by the Headquarter, SHG Sector, BSF to inquire into the incident in question. It be noted here, that one witness examined by the SCOI was Dr. Debashish Nag. He stated that he had examined the Petitioner on 13.03.2004 and prepared the injury report of the Petitioner. The witness handed over a copy of the injury report of the Petitioner to the SCOI, the relevant portion whereof reads as under:

7. Description of Injury:

- Multiple lacerated injury - Scalp parietal region.... Centre of head 7 cm x 11 cm- bone deep, loss of soft tissue in most area..... - Age of injury - 72- 96 hrs.....

9. Imp - Grievous injury....

10. The SCOI concluded its proceedings on 04.04.2004 and submitted its findings and opinion to DIG, BSF Shillong, the gist whereof was that on 09.03.2004, the Petitioner along with HC Satish Kumar and HC Bijender Singh consumed liquor after illegally purchasing the same from Lyngkhat village; that at about 07.30 P.M. the Petitioner who was annoyed over something started firing indiscriminately from the rifle of Const. S.K. Kajal and caused the death of the deceased; that the Petitioner absconded after firing from the rifle and was apprehended by the police on 13.03.2004 and that during the period of his abscondence the Petitioner attempted to commit suicide by hitting his head on a stone. The SCOI recommended disciplinary action to be initiated against HC Bijender Singh and HC Satish Kumar for consuming country made liquor after unauthorizedly purchasing the same from Lyngkhat village.

11. In the meantime, Inspector M.R. Marak sent the rifle recovered by the search party and 39 empty cartridges, recovered from the place of occurrence to the Ballistic Division of the Forensic Science Laboratory, Meghalaya, where Mr. A. Ghosh subjected the same to ballistic opinion.

12. On receipt of the findings and opinion of the SCOI, DIG, BSF Shillong, required matter to be further looked into and hence further deliberations took place by the SCOI which submitted its additional findings and opinion to DIG, BSF Shillong, wherein it was recommended that disciplinary action be taken against HC Satish Kumar, Const. T. Kandulna and HC Bijender Singh for intentionally hiding facts pertaining to consumption of liquor by them and the Petitioner on the date of the occurrence. Relevant would it be to note that statements of various persons were recorded during SCOI and the Petitioner also made a statement in which he said that he fired under influence of alcohol and did not intend to cause the death of anyone. It may be highlighted that the Petitioner never claimed to have fired in self defence.

13. For clarity, we may pen, as the facts hereinafter would unfold themselves, the said 3 constables i.e. HC Satish Kumar, Const. T. Kandulana and HC Bijender Singh as also the Petitioner had indulged in the illegal activity of purchasing country made liquor and had consumed the same and while intoxicated either quarreled or had a squabble which led to indiscriminate firing and the 3 constables, for reasons obvious, attempted to hide the truth at the SCOI.

14. On 23.08.2004, the Commandant, 54th Bn. BSF, issued a charge sheet under Rule 53(2) of the Border Security Force Rules, 1969 (herein after referred to as the "Rules") to the Petitioner. The charges framed against the Petitioner read as under:

Ist Charge BSF ACT 1968 SECTION 46 COMMITTING A CIVIL OFFENCE THAT IS TO SAY MURDER, PUNISHABLE U/S 302 OF IPC

In that he, at BOP Lyngkhat at Road Head on

09/03/2004

at about 1940 hrs by firing shots from 7.62mm SLR bearing Butt No.31 body No.EC-2606 at Const. Gulam Mohinnuddin Dar of the same Bn, caused the death of said No.95403621 Const. Gulam Mohinnuddin Dar.

IIInd Charge BSF ACT 1968 SECTION 46 COMMITTING A CIVIL OFFENCE THAT IS TO SAY ATTEMPT TO MURDER PUNISHABLE U/S 307 IPC

In that he, at BOP Lyngkhat at Road Head on 09/03/2004 at about 1940 hrs fired 39 shots from 7.62 mm SLR bearing Butt No.31 Body No.EC-2606 at No.860014368 HC Bijender Singh No.860433217 HC Satish Kumar No.785440189 HC/Dvr Shishupal Singh No.77003508 HC/Dvr Z R Khan No.870099599 HC/Dvr Antony K T No.95145205 Ct/Dvr B Ramanna No.907559919 Ct/Dvr Narinder Singh and No.965440006 Const. Pirzada Irshad Ahmad with intent to kill them.

15. On the same day i.e. 23.08.2004, the Commandant passed an order directing Sh.J.R. Khaswan, 2 I/C to prepare a record of evidence (herein after referred to as the "ROE"). 16. During the ROE, statements of various witnesses were recorded and thereafter the Petitioner made a statement as contemplated by Rule 48(3) of BSF Rules, 1969, wherein he stated that on the evening of 09.03.2004, along with HC Satish Chand, HC Brijender Singh and Const. T. Khandulna, he consumed liquor near post office situated at the place of occurrence and there was a sudden exchange of hot words between them. Thereafter, he went to a nearby bus stand where arms were kept and picked up a rifle belonging to Const. S.K. Kajal and started firing indiscriminately from the said rifle and fired till all the rounds were finished. He was not aware as to who was hit from the bullets fired by him. He immediately ran from there and threw the rifle at some distance from the place of the incident. After sometime, he came to know that the deceased was hit by the bullets fired by him causing his death. He never wanted to kill anyone. He fired under the influence of alcohol.

17. Relevant would it be to note that in his statement, Petitioner never stated that he fired, when assaulted, acting in private defence.

18. On 17.03.2005, the Commandant directed Mr. J.R. Khaswan, 2 I/C to prepare an Additional Record of Evidence (hereinafter referred to as the "Additional ROE").

19. On 18.03.2005, the police filed a charge sheet in the court of the Additional District Magistrate, Shillong naming the Petitioner as an accused and requiring his trial for an offence punishable u/s 302 IPC. On 31.03.2005, the Deputy Inspector General, Station Headquarters, BSF Shillong, passed an order u/s 80 of the BSF Act, 1968, directing that the trial of the Petitioner shall be instituted

before a Security Force Court and the proceedings pending in the criminal court in respect of the FIR registered against the Petitioner be dropped.

20. On 07.07.2005, Inspector General, BSF Shillong, directed that a General Security Force Court be convened to conduct a trial in respect of the first charge framed against the Petitioner as per the charge sheet dated 23.8.2004.

21. At the trial, 21 witnesses were examined by the prosecution.

22. HCH.S. Rai PW-1, deposed that on 09.03.2004 A Coy was required to move from BOP Lyngkhat to Manipur as it was detailed for election duty in Manipur. At about 6.25 P.M. Coy Commander was briefing him about the move of A Coy when he heard the sound of firing. At that time HCS. Dung Dung came there and informed them that firing is going on at the place of occurrence, whereupon they rushed to the place of occurrence. On their way to the place of occurrence they were informed by some personnel that the Petitioner is firing at the place of occurrence. When he reached the place of occurrence he saw a person firing from near a jackfruit tree whose face he could not see. When the firing stopped he found the deceased lying injured on the ground and 2 empty magazines of SLR and some cartridges lying there. After some time he took a roll call of the jawans at the place of occurrence and found the Petitioner missing. After some time Const. S.K. Kajal reported that his rifle is missing. He formed search parties to look for the Petitioner. On the next day, a search party found one 7.62 MM SLR, Butt No. 31, Body No. EC-2606, with one empty magazine in the forest. Coy Commander Ravinder Singh checked the weapons of all the Coy personnel by smelling the barrels of their weapons and concluded that none of the personnel had fired from his rifle around the time of the incident. An inspection of the place of occurrence showed that the bullets were fired at the direction where Coy personnel were sleeping or hiding themselves. On being questioned about the conduct of the Petitioner, he stated (Quote): "The accused was a well disciplined Jawan of our Coy. Accused has good relations with the other jawans of the Coy. I have not seen accused fighting with any Coy personnel." On being questioned about the place of occurrence, he stated that (Quote): "Distance between Jackfruit tree and bus stand is about 15 feet and distance from where the firing was done on the victim Const. Gulam Mohinnudin Dar is approximately 60 feet.

23. Const. T. Kandulna PW-2, deposed that on 09.03.2004, when he was taking dinner he heard the sound of fire. As he proceeded towards the place of fire, he learnt that the Petitioner was firing from a rifle. He himself did not see the Petitioner firing. Coy Commander Ravinder Singh checked the weapons of all the jawans by smelling the barrels of the weapons.

24. HC Bijender Singh PW-3, deposed that on 09.03.2004, at about 04.00 P.M. the Petitioner gave him money to purchase country made liquor from the village. He purchased the liquor and handed over the same to the Petitioner. At about 05.30 P.M. along with the Petitioner and Const. T. Kandula he consumed the liquor purchased by him. After consuming the liquor he rested in the courtyard of

the post office building. At about 07.30 P.M. he woke up on hearing the sound of fire. He saw that all the personnel present there were hiding themselves to escape the fire. He also hid himself behind the tyre of a bus. When the firing stopped all the personnel present there gathered near the shed of a bus stand and saw that blood was oozing out of the head of the deceased, who was sleeping in the shed. Coy Commander Ravinder Singh checked the weapons all the jawans by smelling the barrels of the weapons. On being questioned about the conduct of the Petitioner, he stated that (Quote): "The accused was having cordial relations with all Coy personnel. I have not seen the accused in angry mood in any time.

25. Const./Driver Narinder Singh Bali PW-4, deposed that on 08.03.2004 he was given the duty to take charge of the bus bearing registration No. PB-88-AA-0057. On 09.03.2004 he was sitting in his bus, when suddenly at about 07.30 P.M. - 07.45 P.M. he heard sound of fire whereupon he got out of the bus and hid behind a mile stone. Const/Driver B. Ramana was present with him at that time. He could make out that one person was firing at the place of occurrence. At that time the Petitioner challenged them to come out of their hiding and face him. While firing the Petitioner challenged them to come out and that a bulled or two hit his bus. From the voice he could recognize that it was the Petitioner who was firing. In the meantime 1 magazine fell on the ground. He requested Const/Driver B. Ramana to join him to apprehend the Petitioner but he refused. Thereafter the Petitioner started firing again. When the firing stopped, Assistant Commander Ravinder Thakur, Assistant Commandant Rahul Dev along with other Coy personnel reached the place of occurrence. The deceased, who was sleeping in the shed of a bus stand was injured by a bullet which had hit him on his head. Assistant Commandant checked the weapons of all the personnel.

26. Lance Naik A. Murali Krishna PW-5 and HC Satish Kumar PW-7, deposed in harmony with each other stating that on 09.03.2004, at about 07.30 P.M. they heard the sound of fire from the place of occurrence. Additionally, HC Satish Kumar deposed that while he was going towards the place of occurrence after hearing the sound of fire someone told him that the Petitioner is firing and he told the said fact to Assistant Commandant Ravinder Thakur and Rahul Dev. HC Satish Kumar denied having taken liquor on 09.03.2004 along with the Petitioner, HC Bijender Singh and Const. T. Kandulna. On being questioned about the statement made by him to SCOI that he consumed liquor on 09.03.2004, HC Satish Kumar stated that he never made such statement to SCOI.

27. Const/Driver B. Ramana PW-6, deposed in similar terms as Const/Driver Narinder Singh Bali.

28. Const. A.A. Dkhar PW-8, deposed that he conducted the post-mortem of the body of the deceased; that two wounds were found on the deceased namely, (i) punctured wound of (3 x 0.5 cm) size, found over left side of forehead, directed medial backwards, lying 4 cm above middle of left eyebrow with inverted skin and lacerated margins - entry wound, and (ii) lacerated wound of (10x3) cm

size, found over the middle of head and right parietal region of the head directed towards right and backward of the head, lying above 6 cm above the medial end of the right eyebrow and 9 cm above the right ear, margins of soft tissue are averted with pieces of skull bone found and brain matters (blood stained) oozed out of the wound - exit wound; that cause of death of the deceased was due to shock and hemorrhage following bullet injuries on the head and that the shot which caused the death of the deceased was fired at him from a distance of 1-6 meter. On being questioned about the size of the wound, he stated (Quote): "If some-one fire from 6.5 mtrs, the size of entry and exit wound will be almost similar.

29. HC/Driver Z.R. Khan PW-9, deposed that on 09.03.2004 at about 07.30 P.M. he was resting in a tin shed at the place of occurrence when he heard the sound of the fire. He heard the person who was firing saying "The one who is courageous should come out, he would shoot everyone". After that, he heard someone saying "Sentry, why are you firing" and then he heard someone saying "Daya Ram why are you firing". After sometime, the firing stopped.

30. Const. S.K. Kajal PW-10, deposed that he had kept his rifle in a shed of a bus stand at the place of occurrence, along with the weapons of other Coy personnel. At about 07.20 P.M. when he was taking his dinner, he heard the sound of firing. After sometime he discovered that his rifle was missing from the shed. On being questioned about the relations between the deceased and the Petitioner, he deposed (Quote): "There was no personal enmity between the accused and the deceased.

31. HC Subash Chandra Sen PW-11, deposed that the rifle recovered by the search party was issued to Const. S.K. Kajal.

32. Const.P. Arshad PW-12, deposed that on 09.03.2004 he was sleeping on the roof of a bus parked at the place of occurrence, when at around 07.20 P.M. he heard the sound of fire. The firing continued for about 5-7 minutes after which he heard the sound of a magazine falling on the ground. Within no time firing started again and was directed towards him. After a few minutes, he heard the voice of CHM of "F" Coy, who was saying: "Daya Ram you have gone mad, stop firing". After sometime the firing stopped.

33.A. Ghosh PW-13, Deputy Superintendent of Police, I/C Ballistic Division, Forensic Science Laboratory, Meghalaya, Shillong deposed that the rifle recovered by the search party was examined by him and was found to be in working condition. That 17 out of 39 empty cartridges recovered from the place of occurrence were fired from the rifle recovered by the search party and that no opinion could be given whether the remaining 22 cartridges, recovered from the area around place of occurrence, were fired from the rifle recovered by the search party. On being questioned about said 22 cartridges, recovered from the place of occurrence, he deposed (Quote): "I can found the opinion about the 22 EF Cs whether it is fired from this weapon or not. It may be fired from this

weapon or may not be fired from this weapon.... It may be possible that 22 cartridges i.e. Exhibit "Q-3" may be fired from other SLR also, because I did not come on any positive and negative on examining of these 22 EF Cs.

34. Relevant would it be to note that though not expressly stated by the witness, a meaningful reading of his testimony would reveal that due to lack of striation marks on the said 22 empty cartridges it was not possible to render any conclusive opinion whether they were fired from the same rifle. This is evident from the fact that the witness gave an inconclusive opinion qua said 22 empty cartridges, for if on all or anyone of them a definite and identifiable striation marks were to be found, the opinion would have been firm.

35. SIM.R. Marak PW-14, deposed that he conducted an investigation into the matter and apprehended the Petitioner on 13.10.2004. On being questioned about the investigation conducted by him, he deposed (Quote): "When I reached there the scene of crime was disturbed by the BSF as injured was evacuated to the hospital." On being questioned about the apprehension of the Petitioner, he stated (Quote): "When I apprehended the accused, there was a wound on his head and he stated that, he tried to commit suicide by hitting the stone on his head.

36. Assistant Commandant Ravinder Thakur PW-15, deposed that on 09.03.2004 at about 07.20 P.M. he was briefing the Coy personnel of "A" Coy pertaining to the movement of "A" Coy from BOP Lyngkhat to Manipur, when he heard sound of fire coming from the direction of the place of occurrence, pursuant to which, along with Assistant Commandant Rahul Dev he proceeded towards the place of occurrence. When they were proceeding towards the place of occurrence HC Satish Kumar met them and told them that "Daya Ram has gone mad and is firing". On reaching the place of occurrence they met Const.P. Arshad who told them that "Daya Ram is firing and has gone mad". When the firing stopped after sometime he met HCS. Dung Dung and HCH.S. Rai who told him that the Petitioner was firing and that he had fled in the forest. After sometime he checked the weapons of all the Coy personnel by smelling barrels of their weapons. On being questioned about the incident of consumption of liquor by the Petitioner on the date of the incident, he stated (Quote): "During my checking I came to know that HC Satish Kumar, HC Bijendra Singh and Const T Kandulna had consumed the liquor and all the three personnel have taken "Gutka or Pan Supari." On being questioned about the details of the incident, he stated (Quote): "From the bullet marks at the place of occurrence, I could make out that the accused was firing towards the personnel where they were sleeping whether it was bus stand shed, Post Office, on the vehicles or in the tin shed. The whole day accused was present at the place of occurrence and he was familiar with the place where the Coy personnel were sleeping or staying hence he fired upon them. Accused has not fired as aimed fire, because it was not possible due to darkness, but he has fired in general direction where the Coy personnel were sleeping.

37. Inspector Mukesh Kumar PW-16, deposed that on 13.03.2004 he had gone to Police Station Pynursla in his presence where the Petitioner told him that he attempted to commit suicide on 9th, 10th and 12th March 2004.

38. Assistant Commandant Rahul Dev PW-17, deposed in similar terms as Assistant Commandant Ravinder Thakur. On being questioned about the details of the incident, he stated (Quote): "It was pitch darkness, as we cannot see anything even at very close distance. It is not possible to do aimed fire from a distance of 2 mtrs and beyond, but with the previous knowledge of the area person can fire like aimed fire.

39. HCS. Dung Dung PW-18, deposed that on 09.03.2004 he learnt from someone that the Petitioner had indiscriminately fired from his rifle and that he counseled the Petitioner to stop firing. On being questioned about the details of the incident, he deposed (Quote): "It is correct to say that, there was pitch darkness on 9th March" 2004, one can't see other person standing just 3 to 4 yards.

40.J.R. Khaswan PW-21, deposed that he prepared ROE and additional ROE. That the Petitioner made a statement under Rule 48(3) of BSF Rules, 1969 before him wherein he admitted his guilt. Be it noted here that the said witness was not cross-examined on behalf of the Petitioner.

41. After conclusion of the evidence of the prosecution, the Petitioner filed his written statement, the relevant portion whereof reads as under:

... 2. On 9 Mar 04 I was detailed for OP duty with HC Vijay Shankar, CT Ganga Singh Rana and CT Khandulina, which I performed from 0600 hrs to 1200 hrs. On arrival at Coy HQ I had my meal, took rest for 2 hours and thereafter as ordered by CHM at about 1630 hrs, I shifted my personal luggage to place of occurrence as "A" Coy was to move to Bn HQ for further proceeding to Manipur for election duty.... At about 1600 hrs on 9th Mar 04, HC Bijendra Singh demanded a sum of Rs. 100/- from me for purchasing country made liquor from nearby Lygkhat village. HC Satish Kumar asked me to pay the money and also assured me that the money would be equally divided among those who consume liquor. I then paid Rs. 100 to HC Bijendra Singh.

3. At about 1630 hrs HC Bijendra Singh came back from village Lygkhat with jerricane containing approximately 2 Ltrs of country made liquor. At the place of occurrence, on the verandah of post office building, I alongwith HC Bijendra Singh, HC Satish Kumar and CT Kandulina consumed about 80% of country liquor. We remained on the verandah of post Office building from 1630 hrs to 1930 hrs. Meanwhile at about 1800 hrs Sh. Ravindra Thakur, AC reached at the place of occurrence and at that time for a while HC Bijendra Singh left the verandah of Post Office for the place where Sh. Ravindra Thakur, AC was standing. After the move of Sh. Ravindra Thakur, AC, HC Bijendra Singh again came back to the place where myself, HC Satish Kumar and CT Kandulina were sitting and started consuming liquor.

4. At about 1930 hrs I left hungry, got up from there and wanted to go to Lunger to have my food. At that time all we four were intoxicated. I asked HC Bijendra Singh, HC Satish Kumar and CT Kandulina to give me Rs. 25/- each for the liquor consumed by them. On this all three started abusing me by saying "MOTHER CHOOT, DARU PILAYA, PHIR PAISE BHI MANGE RAHAI HAI". HC Satish Kumar slapped me on my face and CT Kandulina picked up a lathi lying nearby and gave me a lathi blow on my head and blood started oozing from my injury. I immediately caught hold of Ct Kandulina's neck to escape from further attacks. That time HC Bijendra Singh fired a shot from his carbine machine, which was in his possession throughout the drinking session. When I heard the sound of fire, I got panic and feared about my death. In order to save my life, I ran towards the place where weapons of Coy personnel were lying, picked up one rifle and started firing to drive away my attackers.

5. I did the firing in self-defence and during which I fired the weapon in all directions as I thought that they might overpower and kill me. There was pitch darkness all around and I was not sure as to from which direction the attackers may come to me, hence I fired on all directions.

6. After the firing incident, I ran away from the place of occurrence. I do not know where I threw away my weapon as I was under fear. I kept on walking through out the night and finally reached in a jungle area by the next morning. I remained there without food and water for 3 days. Due to weakness most of the time I kept on sleeping. Finally on 13th I surrendered before the police party when they came to apprehend me.

7. Neither I tried to commit suicide nor gave statement to the police or others to the effect that I tried to commit suicide by striking my head with a stone. I sustained head injury when CT Khandulia gave me a lathi blow on my head. I came to know about the death of Gulam Mohamed Dar only when I was apprehended by the Police. I never wanted to kill anybody but the bullet hit the victim unintentionally and accidentally. On that night I fired only in self-defence.....

(Emphasis Supplied)

42. The Petitioner did not lead any evidence in defence.

43. After the conclusion of the closing address of the prosecution and defence, the Law Officer proceeded to address the Court. A perusal of the summing up of the Law Officer reveals that the Law Officer addressed the Court with reference to the Law of Evidence as to when would a fact be proved, disproved or not proved; followed by an enunciation of the Law of Evidence relating to admissions and confessions, circumstantial evidence, expert opinion, appreciation of evidence and discrepancies and contradictions and law of private defence. With respect to the charge framed against the Petitioner, the Law Officer addressed the Court, highlighting the ingredients of the offence of culpable homicide not amounting to murder and culpable homicide amounting to murder. The Law

Officer drew a distinction between the three limbs of Section 299 IPC vis-à-vis the four limbs of Section 300 IPC. Thereafter the Law Officer formulated 3 issues of the charge for the consideration of the court and summed up the evidence pertaining to each issue relating to the charge. Be it noted here that while summing up the evidence on the 3 issues pertaining to the charge, the Law Officer did not address the Court on the factual aspect of defence taken by the Petitioner. Be it further noted here that the Law Officer very clearly brought the nuances of law of private defence before the General Security Force Court. The 3 issues pertaining to the charge formulated by the Law Officer reads as under:

FIRST ISSUE OF THE CHARGE

That on 09-03-04 at about 1940 hrs the death of No. 95403621 Const Gulam Mohiuddin Dar of 54 Bn BSF was caused. SECOND ISSUE OF THE CHARGE

That at road head near BOP Lyngkhat on 09-03-04 at around 1940 hrs the accused caused the death of said No. 95403621 Const Gulam Mohiuddin Dar of 54 Bn BSF by firing shots from 7.62 MM SLR bearing Butt No. 31, Body No. EC-2606. THIRD ISSUE OF THE CHARGE

That the above Act was done by the accused with requisite intention or knowledge as envisaged u/s 300 IPC.

44. On 25.07.2005, the Court returned a finding of guilt against the Petitioner and inflicted the punishment of imprisonment for life and dismissal from service upon the Petitioner. At this juncture, it is relevant to note the brief reasons given by the Court on the second and third aspects of the charge formulated by the Law Officer which are being reproduced here-in-under:

Second issue of the charge That at road head near BOP Lyngkhat on 09-03-04 at around 1940 hrs the accused caused the death of said No. 95403621 Const Gulam Mohiuddin Dar of 54 Bn BSF by firing shots from 7.62 MM SLR bearing Butt No. 31, Body No. EC-2606. The court believes the version of the prosecution that accused fired 39 rounds from 7.62 mm SLR Butt No. 31, Body No. EC-2606, issued to Const Kajal SK of the "A" Coy, which was picked up by the accused from the Bus Stand shed. After firing he ran away towards the jungle with the weapon of offence and later on weapon of offence was recovered from a place approx 200 yds away from the BOP, while and the accused was apprehended on 13/03/04 by the police. The said weapon was examined by Sh. A Ghosh (PW-13) and found to have been fired through. It is also on record, that the accused fired 39 rounds from 7.62 mm SLR Butt No. 31, Body No. EC-2606, on the day of the incident and none of the post personnel except the accused resorted to firing on that day. The accused in his statement at ROE has also admitted to have fired large quantity of ammunition from his weapon resulting which, one of his colleagues lost his life. At the trial, the accused pleaded that he fired in self defence and he had no intention to kill Ct Gulam Mohiuddin Dar. The court believes the version of the prosecution in view of above evidence. The court does not believe the version of the accused.

THIRD ISSUE OF THE CHARGE

That the above Act was done by the accused with requisite intention or knowledge as envisaged u/s 300 IPC

The court believes that the accused fired at the deceased with requisite intention and knowledge as he fired 4 shots towards Gulam Mohiduddin Dar (deceased) who was sleeping near the bus stand shed on boxes at Road Head, thereby causing his death and the accused ran away from the place of occurrence with 7.62 mm SLR Butt No. 31, Body No. EC-2606. The court further takes judicial notice of the fact that the accused was a trained soldier with almost 18 years of service at the time of the incident and knew the lethal effect of firing from 7.62 mm SLR. The injury on the person of the deceased has been found to be sufficient to cause death in the ordinary course nature to cause death. The accused has taken the plea of self defence by saying that he felt danger to his life from HC Bijendra Singh, Ct T Kandulna and HC Satish Kumar. The court does not accept the version of the accused as he had fired 39 rounds and killed the deceased. The accused only fired towards the places where the Coy personnel were sleeping and from where the voice of any Coy personnel came in the dark night. Moreover, it is in evidence that bullet marks were seen up to the height of 3 1/2 feet to 4 feet at the place of the occurrence in all the directions. It is also in evidence that the accused fired on the deceased from a near range i.e. up to 6 Mtrs which shows his clear intention to kill the deceased. During firing HC S Dung Dung also tried to stop him by saying "DAYA RAM FIRE KYON KAR RAHE HO, FIRE BAND KARO", but he did not stop.

The court does not believe the plea of self defence of the accused, because he fired 39 rounds up to 5 to 7 minutes, changed 3 magazines, and ran away towards the jungle with the weapon of offence. During this period no one hit him with DANDA neither any one fired upon him. Hence the court rejects the plea of the accused and finds him guilty of the charge.

45. On 02.09.2005, Director General, Border Security Force confirmed the finding and sentence of the Court in terms of the provisions of Section 107 of Border Security Force Act, 1968.

46. Aggrieved by the finding and sentence awarded by the General Security Force Court, which stood confirmed by the Director General, the Petitioner preferred a petition u/s 117(2) of Border Security Force Act, 1969 to the Directorate General Border Security Force, Ministry of Home Affairs, Government of India, which petition was rejected vide order dated 27.11.2008.

47. Aggrieved by the finding and sentence awarded by the General Security Force Court and the order dated 27.11.2008 passed by the Directorate General, Border Security Force, the Petitioner has filed the present petition under Articles 226 read with 227 of Constitution of India.

48. As recorded in our order dated 9.5.2011, learned Counsel for the Petitioner,

who had earlier made submissions extensively on 26.4.2011, continued to make submissions as if we were exercising Appellate jurisdiction and not supervisory jurisdiction. The Court repeatedly brought to the notice of the counsel that the Petitioner having pleaded having acted in private defence, the arguments should be restricted keeping in view the said defence taken by the Petitioner. Pointing out to learned Counsel that the law relating to private defence required that the prosecution had to discharge the initial onus by broadly proving the indictment i.e. to prove that as a result of the act committed by the accused death had resulted and there was either the requisite intention or the knowledge contemplated by the 4 limbs of Section 300 IPC attributable to the accused and if so achieved by the prosecution, the onus was on the accused to prove having acted in self defence. The Court pointed out to learned Counsel the incriminating evidence against the Petitioner, which we have extracted herein above, and required learned Counsel to attack the same or make good the plea of self defence. At which learned Counsel wanted us to record that it be penned in the order that the counsel was being prevented from arguing and as recorded in the order dated 9.5.2011, learned Counsel handed over written submissions and resumed his seat. We thereupon adjourned the matter requiring the Respondents to respond, in writing, to the written submissions filed by learned Counsel for the Petitioner.

49. We would like to pen a few words. Faced with docket explosion, and as the custodian of public time, since Courts are run on the tax-payers" money, howsoever offensive it may be to the learned members of the Bar, we feel that it is the duty of every Court to ensure that counsel argue matters after a thorough reading of the brief, a profound understanding of the law and make submissions on issues of fact pertaining to the law governing appreciation of evidence and pertaining to issues of law, with reference to the legal principles culled out in various decisions. Whereas every lawyer would certainly be entitled to have all the time to express his opinion on issues arising for consideration, but it must be remembered that opinions are rendered on a profound reading, thorough understanding followed by a refinement of the factual and the legal matrix; guesses are hazarded in ignorance; surely, in a Court of Law, nobody is entitled to hazard a guess under the garb of expressing an opinion.

50. This is our apology for transgressing a little.

51. A perusal of the written submissions filed, and indeed what was argued before us on 26.4.2011 as also 9.5.2011 would reveal that the first submission advanced was that the circumstances emerging from the evidence on record strongly probablizes that the star witnesses of the prosecution namely Const/Driver Narinder Singh Bali PW-4, Const/Driver B. Ramana PW-6, Const/Driver Z.R. Khan PW-9 and HCS. Dung Dung PW-18, who ostensibly established the identity of the Petitioner as the person who was firing shots on the day of the incident were planted witnesses and the basis to rest the argument was that the aforesaid witnesses were not examined at the SCOI i.e. the first inquiry

conducted in respect of the incident in question. Secondly the circumstance that Const/Driver Narinder Singh Bali PW-4 and Const.B. Ramana PW-6, omitted to state at the ROE proceedings that they had heard the Petitioner challenge BSF personnel to come out of the hiding and face him at the time of the incident. Said omission in the statement of Const/Driver Narinder Singh Bali PW-4 and Const.B. Ramana PW-6, recorded in the ROE proceedings, are alleged to raise serious doubt on the veracity of their testimony that they had had heard the Petitioner challenge the BSF personnel to come out of the hiding at the time of the incident. The third circumstance stated is predicated upon the spot verification and preliminary inquiry reports dated 12.03.2004 prepared by the Commandant in respect whereof it was highlighted that the reports record that the deceased was "most probably" hit by the shots fired by the Petitioner. The use of the expression "most probably" in the reports was used to highlight that the tentative nature of the opinion would conclude that contemporaneous with the time of the incident nothing definite could be opined upon, from which it is sought to be concluded that thereafter every piece of evidence becomes contrived and suspect.

52. The written submissions would reveal that the second point sought to be projected is that the prosecution has not been able to establish the facts that the Petitioner had indiscriminately fired shots from a rifle. The written submissions highlight that the prosecution sought to prove the aforesaid fact by establishing that 39 empty cartridges were recovered from the place of occurrence and with reference to the deposition of Inspector M.R. Marak PW-14, the officer who conducted spot investigation, who stated that the scene of crime was disturbed at the time when he arrived there, it is sought to be highlighted that BSF personnel had not preserved the scene of crime till the arrival of the police at the place of the occurrence and thus the seizure of 39 empty cartridges from the place of occurrence gets shrouded with suspicion.

53. Dovetailing another submission to the previous one, as can be extracted from the written submissions and indeed as was sought to be projected by learned Counsel during arguments it is stated that the police had registered an FIR for offences punishable under Sections 302 and 307 IPC against the Petitioner on the basis of the allegations leveled by Assistant Commandant Ravinder Thakur against the Petitioner that the Petitioner murdered the deceased and attempted to murder many other BSF personnel who were sleeping in the place of occurrence by indiscriminately firing shots from his rifle, however after the conclusion of the investigation, the police filed a charge sheet against the Petitioner only u/s 302 IPC. According to the counsel, the fact that the police filed a charge sheet against the Petitioner only u/s 302 IPC implies that the police did not find any truth in the allegations leveled against the Petitioner that the Petitioner attempted to murder the BSF personnel sleeping in the place of occurrence by indiscriminately firing shots from a rifle. Counsel argued that the aforesaid 2 circumstances raise serious question marks on the veracity of the case of the prosecution that the Petitioner had indiscriminately fired shots from a

rifle.

54. The written submissions would reveal that it is further contended that the prosecution has not been able to establish that the death of the deceased was caused by the bullet fired from a rifle used by the Petitioner inasmuch as 4 circumstances emerge from the evidence on record which strongly probablize that the bullet which caused the death was not fired by the Petitioner. The first circumstance pointed out is that there is a variance between ocular and medical evidence pertaining to the distance of the spot where the deceased was sleeping and the spot where the Petitioner was stately firing, inasmuch as Dr. A.A. Dkhar PW-8, who conducted the post-mortem of the deceased, deposed that the shot which caused the death of the deceased was fired at him from a distance of 1-6 meter whereas HCH.S. Rai PW-1, deposed that the distance between the places from where the Petitioner was firing and where the deceased was lying injured was 60 feet or 20 meter. The second circumstance pointed out is that A. Ghosh PW-13, the Ballistic Expert, deposed that 22 empty cartridges recovered from the place of occurrence could have been fired from a SLR other than that of the Petitioner. The third circumstance pointed out is that a close scrutiny of the evidence on record brings out that the weapons of all the personnel were not checked to see whether any shots were fired from them around the time of the occurrence, thereby implying that the bullet which caused the death of the deceased could have been fired from the weapon of any personnel. The fourth circumstance pointed out is that the weapons of the deceased and the Petitioner were lying unattended at the place of occurrence, thereby implying that any personnel could have picked said weapons and fired a shot at the deceased. 55. Lastly the written submissions bring out the case urged that there is a lacuna in the case of the prosecution which adversely affect the credibility of the case of the prosecution. The lacuna stated is that the prosecution did not prove the FIR registered against the Petitioner at the trial.

56. The written submissions then go on to plead, a case which actually needed to be pleaded and argued, that the circumstances emerging from the evidence on record probabalizes the existence of circumstances which necessitated the Petitioner to exercise a right of private defence. The first circumstance pointed out pertains to the testimony of HC Satish Kumar, HC Bijender Singh and Const. T. Kandulna. It is pointed out that the aforesaid persons intentionally hid facts at SCOI as opined by the SCOI and had also taken flip-flop stand in various proceedings conducted in the present case, for instance, HC Satish Kumar admitted the factum of having consumed liquor with the Petitioner, HC Bijender Singh and Const. T. Kandulna in ROE proceedings, but denied the same while deposing at the trial. From the aforesaid conduct of HC Satish Kumar, Const. T. Kandulna and HC Bijender Singh of hiding facts relating to the incident and giving contradictory evidence in various proceedings conducted in the present case, it is urged that the same lends credence to the claim of the Petitioner that he had fired in private defence when he was attacked by HC Satish Kumar, Const. T. Kandulna and HC Bijender Singh. The second circumstance pointed out

in the written submissions is that the statement of Dr. Debashish Nag in SCOI proceedings and the injury report of the Petitioner produced by him, brought out the fact that an injury was found on the head of the Petitioner at the time of his apprehension, which fact corroborated the defence of the Petitioner that he had fired in private defence when he was attacked by Const. T. Khandulna who gave a lathi blow on his head and HC Bijender Singh who fired a shot from his carbine. Referring to the fact that the prosecution did not examine Dr. Debashish Nag in the ROE proceedings or during the trial and also did not produce the injury report of the Petitioner at the trial, it is pleaded that the prosecution withheld relevant material for scrutiny of General Security Force Court, which would have established that a head injury was found on the person of the Petitioner at the time of his apprehension, leading credence to the plea of private defence taken by the Petitioner.

57. The written submissions then plead that even if the case set-up by the prosecution against the Petitioner is believed in its entirety, the act of the Petitioner attracts the offence of culpable homicide not amounting to murder. The first limb of the said submission is that the sine qua non of the offence of murder, punishable u/s 300 IPC is the existence of an intention of the accused to cause death or such bodily injury which would cause death of the deceased, which are pleaded to be missing in the instant case. It is pleaded that as many as 7 witnesses have deposed that the Petitioner had no previous enmity with the deceased. It is pleaded that the fact that the Petitioner had no motive to murder the deceased assumes importance in the light of the deposition of Assistant Commandant Rahul Dev PW-17 and HC S. Dung Dung PW-18, that there was pitch darkness at the place of occurrence at the time of the incident, due to which, it is pleaded that it is not possible to aim firing shot at someone, as even stated by the said 2 witnesses. As pleaded in the written submissions, in such circumstances it cannot be said that the Petitioner had an "intention" to cause the death of the deceased. A second limb of the submission is that the evidence brings out that the Petitioner had resorted to firing on account of a sudden fight which ensued between him and HC Satish Kumar, HC Bijendra Singh and Const. T. Kandulna and thus the act of the Petitioner would fall within the ambit of the fourth exception to Section 300 IPC.

58. The written submissions would further reveal that it is the case of the Petitioner that the trial of the Petitioner suffers from two material irregularities. The first material irregularity pointed out is that the provisions of Rule 45 of BSF Rules, 1969 were not followed by the Commandant while directing preparation of Record of Evidence against the Petitioner. It is submitted that in terms of Rule 45, an opportunity is required to be given to the accused to cross-examine the witnesses examined in the SCOI proceedings and make a statement of defence, which was not done in the instant case. The second material irregularity pointed out is that as many as 3 witnesses examined at the trial namely Assistant Commandant Rahul Dev PW-13, Inspector Mukesh Kumar PW-16 and Const. Arun Kumar PW-20, were not examined in the ROE proceedings.

59. The pleas pertaining to the evidence with reference to the Petitioner indiscriminately firing and lack of proof thereof need to be dealt with, in the context of the defence taken by the Petitioner, who admits having picked up a rifle and having fired shots at random. The pleas have to be considered with reference to the fact that we are not exercising appellate jurisdiction, but are exercising a supervisory jurisdiction over the trial conducted by the General Security Force Court. As would strike the reader, none of the submissions on the issue pertain to a jurisdictional infirmity at the trial or law being violated on the subject. Not only did the Petitioner admit having fired indiscriminately, the testimony of HCH.S. Rai PW-1 would bring out that when the firing stopped and a roll call of jawans was taken, the Petitioner was found missing. The testimony of Const/Driver Narinder Singh Bali PW-4 would bring out that from the voice they could identify that it was the Petitioner who was firing as he was challenging the jawans to come out. To similar effect is the testimony of Const/Driver B. Ramana PW-6. The testimony of L/Nk.A. Murali Krishna PW-5 and HC Satish Kumar PW-7 is akin to *res gestae* as also that of HC/Driver Z.R. Khan PW-9, Const.P. Arshad PW-12 and HCS. Dung Dung PW-18 would bring out that it was the Petitioner who was firing taking cover behind a jackfruit tree and he could be identified, notwithstanding it being pitch dark, from his voice. We highlight that the written submissions do not bring out any contradiction, in fact lays not even a challenge to the testimony of the said witnesses save and except that PW-4, PW-6, PW-9 and PW-18 were not examined during SCOI and that during ROE PW-4 and PW-6 never stated that they heard the Petitioner challenge and thus made material improvements.

60. To the submissions urged we may only state that neither PW-4 nor PW-6 were cross-examined with reference to the omission of not stating during ROE that they heard the Petitioner challenge the jawans in respect whereof we may note that in the decisions reported as *Rahim Khan Vs. Khurshid Ahmed and Others, State of U.P. Vs. Anil Singh, and Sunil Kumar v. State of Rajasthan* (2005) 9 SCC 298 it was held that unless a witness is given an opportunity to explain what is held against him, the same cannot be held against the witness.

61. That some of the persons examined at the trial were not examined at the SCOI is neither here nor there for the reason SCOI is akin to a fact finding inquiry and no law has been shown to us that a person not examined at SCOI would not be a competent witness at the trial. It may be highlighted that the SCOI is constituted under Chapter XIV of the BSF Rules 1969 to conduct a *prima-facie* inquiry into the truth of allegations leveled against a force personnel and is not required to be a full-fledged trial.

62. The plea that the spot verification and the preliminary inquiry reports use the expression "most probably" would evidence contrivance on the part of the prosecution. As we understand, the argument is that the prosecution got around persons to depose falsely against the Petitioner. The argument is predicated on an incorrect reading of the 2 reports, relevant extracts whereof have been

reproduced in para 6 and 7 above. The expressions "most probably" have been used with reference to the bullet injury on the forehead of the deceased and not with respect to the probability of the incident. Thus, we need not waste our energies any further, save and except to further note that expressions used in reports have not to be read as theorems of mathematics for the reason it is a matter of choice of words when a person expresses himself. It is settled law that reports have to be read as a whole and not by nit-picking on expressions here and there.

63. With respect to the second point urged and as noted in para 52 herein above, it would be relevant to note that 39 empty cartridges were recovered from the spot as deposed to by Asstt. Commandant Ravinder Thakur PW-15 and this happened in the presence of various force personnel, who have so deposed, but before the police arrived at the scene of the crime. The contention that the scene of the crime was disturbed is predicated on the fact that the cartridges were lifted from the scene of the crime. Now, what do we mean by disturbing the scene of the crime" It means doing of an act which would amount to interpolations being made on material aspects having a bearing on a crime. Does it not happen that a person stabs another and runs away with the knife and on being chased by 2 men, throws the knife and continues to run" 1 out of the 2 man chasing picks up the knife as his instincts tell him that being a weapon of offence would be a relevant object to be picked up and handed over to the police while the other man continues the chase. Would the picking up of the knife amount to disturbing the scene of the crime" The answer is an obvious "No". We do not intend to make a catalog of various decisions which have noted material exhibits being picked up from the scene of the crime by bystanders and handed over to the Investigating Officer and the Courts opining credibility on the same.

64. On the facts of the instant case it has to be noted that a service firearm was used for indiscriminate firing and there was chaos at the scene of the crime. The Asstt. Commandant securing the purity of the material exhibits i.e. the empty cartridges was an act of prudence and not an act of disturbing the scene of the crime. That apart, the argument is nothing but clutching to straws for the reason the Petitioner has taken a categorical defence i.e. he acted while exercising the right of private defence and admitted having fired indiscriminately from the weapon in question. On the issue of the firing being indiscriminate, the very fact that 39 shots were fired is proof enough of the same being indiscriminate.

65. The next submission urged and as noted in para 53 above is laughable. If an FIR is registered for offences punishable u/s 302 as also Section 307 IPC and the ultimate charge is laid for an offence punishable u/s 302 IPC is hardly a reason to suspect the truth of the allegations leveled. We note that the FIR was registered pertaining to the offence punishable u/s 302 IPC for the death of the deceased and pertaining to the offence punishable u/s 307 IPC for the possible death of other jawans in the vicinity. The charge u/s 307 IPC was rightly dropped for the reason the firing was indiscriminate and not intended to kill anybody and

no jawan got injured, save and except Const. Ghulam Mohiuddin Dar who died and for which death the charge was laid for the offence of murder. That apart, if either intentionally or even negligently, assuming an offence is made out, but the indictment is not laid would not be a ground to question the remainder of the indictment which is rightly laid.

66. Pertaining to the submission that the evidence casts a doubt whether at all it was a bullet fired by the Petitioner which caused the death of Ghulam Mohiuddin Dar, and in respect whereof 4 circumstances, as noted in para 54 above were laid, we find no variance between ocular and medical evidence with respect to the distance from where the shot was fired and the deceased was hit. Dr. A.A. Dhkar PW-8 has opined that the distance between the 2 spots could be anywhere between 1 to 6 meter whereas HCH.S. Rai had stated the distance to be about 20 meters. Now, nobody has extracted, by questioning HCH.S. Rai as to on what basis he said that the distance between the 2 spots was 20 meter. Recreating the scene of the offence, we note that it was dark and there was indiscriminate firing. The Petitioner was exhorting and challenging the jawans to challenge him. It was a panic situation. It was a scary situation. It was a life threatening situation. Nobody could have visualized as to in which direction the next bullet would fly. It was natural for the witnesses to be in a state of panic and terror and thus not in complete control of their faculties. Under the circumstances and that too while deposing after a considerable lapse of time, anybody misstating the distance is a natural thing to have happened and in any case no ground to hold that the ocular and the medical evidence contradicts each other. The second circumstance on which the argument was advanced, with respect to A. Ghosh, PW-13, rendering no conclusive opinion qua 22 empty cartridges, suffice would it be to state that on the fortuitous circumstance of striation marks or pin marks not forming with definite contours on the bullets it cannot be argued that a doubt creeps on the possibility of some other weapon being used. Relevant would it be to highlight that to no eye-witness was a suggestion given that when the Petitioner was firing, somebody else was also firing. We highlight that the only feeble suggestion given is that HC Bijender fired one shot at the Petitioner from his carbine and this compelled the Petitioner to fire back in self defence. We further highlight that even in the written statement of defence this is not the case pleaded by the Petitioner i.e. that as he was firing, somebody was also firing. We conclude on this limb of the argument by highlighting that the post mortem report of the deceased shows that the bullet which pierced the forehead made an exit and thus we cannot have medical evidence whether the bullet which caused the injury was fired from a carbine or an SLR. The third circumstance pointed out on the subject of all weapons i.e. the ones issued to all personnel not being checked, suffice would it be to state that as per the witnesses who spoke on the subject, Asstt. Commandant Ravinder Thakur PW-15 smelt the barrels of all the SLR rifles of the jawans, save and except 1 SLR rifle i.e. that of the Petitioner. It is thus apparent that, in theory, the shots could have been fired from the SLR issued to the Petitioner or the one which was issued to

Const. S.K. Kajal, which was found missing where it had been kept and was recovered from the forest where Petitioner absconded, and the recovery being the next day. The theoretical possibility resolves a deadlock to be broken and the weight of the evidence breaks the deadlock against the Petitioner who ran away in the jungle after firing indiscriminately and threw, in the jungle, the SLR used by him i.e. the one which was issued to Const. S.K. Kajal and qua which SLR 17 out of 39 empty cartridges were conclusively linked with. There is another reason which acts as a weighty evidence against the Petitioner and the same is his categorical plea that as HC Bijender fired a shot at him, and we highlight that the Petitioner has used the expression "one shot", he fired in self defence. He also categorically states that the bullet hit the victim accidentally and unintentionally. The fourth circumstance of the weapons lying unattended and anyone could have fired automatically stands repelled while dealing with the third circumstance urged and we need not reiterate our reasoning on the subject.

67. Before dealing with the contentions urged in para 56 and 57 above, as they relate to the defence of the right of private defence we deal with the submission of the FIR not being proved and the 2 alleged material irregularities at the trial, which submissions have been noted in para 58 herein above.

68. We find the FIR being a part of the record of the General Security Force Court, albeit as an unexhibited document. That the registration of the FIR was not formally proved is neither here nor there for the reason admittedly a BSF jawan died an unnatural death caused by a bullet injury on his forehead. The registration of an FIR is no doubt the sine qua non to commence investigation of a cognizable offence, but merely because somebody unintentionally omits to prove the FIR being registered would be no ground to hold that no offence was committed. Further, issues of registration of an FIR have a bearing on the point of time when an FIR is registered, for if found to be ante-timed, it would cast a doubt on the presence of those who claim to be eye-witnesses. But, to lay an argument on an FIR not being formally proved, a basis has to be laid while challenging the eye-witnesses or the one who investigated the offence and not merely to say that the FIR was not proved.

69. As regards the so-called material irregularities, it is settled law that where a trial is conducted, any irregularity in not permitting a witness to be cross-examined at the stage of record of evidence or at the stage of Staff Court of Inquiry loses significance. That apart, it be noted that the proceedings pertaining to the record of evidence dated 23.8.2004 would reveal that the Petitioner declined to cross-examine and witness whose statement was then recorded. The second so-called irregularity of the 3 witnesses being examined at the trial who were not examined at the ROE is an argument which stands defeated in the teeth of Rule 85 of the BFR Rules 1969 which permits evidence to be adduced not contained in the record of extracts of evidence.

70. At the heart of the matter remains the fact that the Petitioner having admitted fired the shot which caused fatal injuries resulting in the death of the

deceased but gave justification thereof (see the para 7 of the written statement filed by the Petitioner before the General Security Force Court), it is apparent that the core issues which were required to be decided by the General Security Force Court were: Whether there existed a situation which necessitated the Petitioner to exercise a right of private defence; and Whether the Petitioner acted bona-fide in exercise of a right of private defence even to the extent of voluntarily causing death.

71. Section 96 to 106 of the Indian Penal Code deal with the right of private defence and briefly stated, vide Section 96 of the Penal Code, nothing would be an offence which is done in the exercise of the right of private defence. Vide Section 97, subject to the restrictions contained in Section 99, every person has a right to defend his own body against any offence affecting the human body. The exception u/s 99 pertains to acts in relation to public servants acting in good faith and under colour of office. Section 100 of the Code justifies the killing of an aggressor when apprehension of a crime against the accused is likely, as enumerated in the 6 clauses of Section 100. The first clause applies to cases where there is reasonable apprehension of death; the second clause is attracted where a person has a genuine apprehension that his adversary is going to attack him and he reasonably believes that the attack will result in grievous hurt. In that event, the person apprehending assault can go to the extent of causing latter's death in the exercise of the right of private defence. The question whether the apprehension was genuine reasonable or not is a question of fact depending upon the facts and circumstances of each case and no strait jacket formula can be prescribed in this regard. The only guiding objective facts would be, the weapon used, the manner and nature of assault and other surrounding circumstances wherefrom it can be evaluated whether the apprehension was justified or not. The right to private defence is subject to certain basis restrictions, one of which is that harm inflicted in private defence must be no more than what is legitimately necessary for the purpose of defence. In terms of Section 105 of the Evidence Act the onus to prove the defence of private defence taken by the accused lies upon the accused. The accused has to discharge the said onus by bringing on record evidential material before the Court sufficient for a prudent person that the existence of the circumstances necessitating the accused to exercise his right of private defence is probable. The nature of burden on an accused claiming benefit of right of private defence, is not as onerous as the general burden which rests upon the prosecution to prove a charge beyond reasonable doubt. The accused may discharge his burden by establishing a mere balance of probabilities in his favor with regard to existence circumstances necessitating exercise of right of private defence by him.

72. With the aforesaid preamble i.e. the statement of law, which is our guiding star, we proceed to determine the correctness of the finding of guilt against the Petitioner, returned by the General Security Force Court. In doing so, our task would be to determine: Firstly, whether the attention of the Security Force Court was drawn to the law on the subject of private defence, for if not drawn, it would

obviously be a case of a misdirected trial. Secondly, if we find that the attention of the Court was drawn to the law on the subject, it would be our duty to find out whether the attention of the Court was drawn to the evidence which had emerged and was relevant to the right of private defence. Lastly, if we find in favor of the Petitioner on the first two questions, whether the defence of private defence has been made good by the Petitioner.

73. At the outset, it strikes us that after summing up the law and the evidence on record, the Law Officer had set out 3 issues for the consideration of the General Security Force Court and the same excluded the specific issue whether the Petitioner acted in private defence, and if yes, whether he used excessive force i.e. acted beyond the scope of private defence. However, we hasten to add that while discussing the third issue, the Court has touched upon the plea of private defence taken by the Petitioner and has rejected the same.

74. As already noted herein above, the learned Law Officer, brought out the nuances of law of private defence before the General Security Force Court in his summing up, but did not address the Court on the factual aspect of the plea of private defence taken by the Petitioner.

75. In view of the afore-noted and the settled legal position being that even in a case of private defence, the prosecution is required to lay the foundation of its case, we proceed to consider, whether the verdict of guilt is premised on legally admissible evidence and while so doing we would refrain from acting as a Court of Appeal.

76. The testimony of Const/Driver Narinder Singh Bali PW-4 and Const/Driver B. Ramana PW-6, that they had heard the Petitioner challenge BSF personnel to come out of the hiding and to face him at the time of the incident, when seen in the light of the testimony of Const./Driver Z.R. Khan PW-9, Const P. Arshad and HCS. Dung Dung PW-18, that they heard some persons asking the Petitioner to stop firing at the time of the incident goes a long way in establishing the identity of the Petitioner as the one who was firing at the time of the incident. The testimony of PW-1 establishes that the Petitioner was absconding, being found missing at the roll call. Abscondence is an indication of guilt. It is evidence of conduct. The prosecution has also successfully established that the Petitioner had fired indiscriminately by leading evidence to the effect that 39 empty cartridges were recovered from the place of occurrence.

77. It is no doubt true that HC Satish Kumar, HC Bijender Singh and Const. T. Kandulna had intentionally hit the true facts at the Staff Court of Inquiry but it must be remembered that the three persons had committed an offence along with the Petitioner of purchasing illicit alcohol and consuming the same and unfortunately for the four, something happened which triggered the Petitioner to fire indiscriminately. A life was lost. It is but natural that the three constables would attempt to speak in a language which is exculpatory of them all and this explains the attempt by the three to hide the truth. But, it has to be remembered

that the said three were not the only eye-witnesses. There were others as well. That apart, the Petitioner admits of having fired indiscriminately and claims at the trial that he did so in self defence.

78. Turning to the plea of self-defence, we find an inconsistency in what the Petitioner took as the defence at the SCOI and ROE wherein he never said that HC Bijender fired at him. It be highlighted that at the SCOI the Petitioner simply said that his leave not being sanctioned and he being annoyed and for the reason the force personnel use to indulge in smuggling, while intoxicated, the Petitioner fired randomly. At the ROE the Petitioner simply said that as he and HC Satish Kumar, HC Bijender Singh and Const. T. Khandulna consumed liquor, there was a sudden exchange of hot words and he went and picked up the rifle of Const. S.K. Kajal and fired indiscriminately, not aware of anyone being hit, he ran away. It is apparent that the Petitioner has gone about taking a stand at random from time to time and at the trial took up a stand which he thought would be convenient keeping in view the evidence led at the trial. It is no doubt true that the doctor who medically examined the Petitioner after the Petitioner was apprehended was not examined at the trial and therefore we have no evidence whether the injuries on the forehead of the Petitioner could or could not be self-inflicted, but the argument urged that the Petitioner should be given the benefit thereof, has to be negated for the reason at the SCOI the Petitioner never took the stand that anybody assaulted him and he acted in retaliation nor did he take the stand at the ROE. Even at the trial, the stand of the Petitioner was vincilating. It was not clear, whether, the Petitioner fired back when HC Bijender statelly fired at him or when he was assaulted. We would be failing not to note that PW-14 and PW-16 have categorically stated that when he was apprehended, and being found with an injury on his head, and questioned about the same, the Petitioner said that he attempted a suicide by hitting a stone on his head and we find that on said aspect the two witnesses have been simply given a suggestion that said part of their testimony was incorrect and we find no meaningful cross-examination on the issue.

79. It is true that the evidence brings out no particular intention on the part of the Petitioner to cause the death of the deceased or for that matter any particular force personnel. The evidence brings out that something happened involving the Petitioner and the three constables i.e. HC Bijender, HC Satish Kumar and Const. T. Kandulna or either of them and at that point of time all of them were drunk. In a drunken condition, the Petitioner picked up the SLR of Const. S.K. Kajal and started firing indiscriminately. The testimony of Const./ Driver Narinder Singh Bali PW-4 and that of Const/Driver B. Ramana PW-6 as also that of HC/Driver Z.R. Khan PW-9 would reveal that the Petitioner, although drunk, was aware of what he was doing. His contemporaneous utterances deposed to by the three of challenging those who had the courage to come out, would show that the Petitioner was conscious enough to understand and realize that he was in a position to kill anybody who dared to challenge him or expose himself from outside the place where the person was hiding. That apart, if the

Petitioner was responsible for intoxicating himself, he cannot predicate a defence thereon. The evidence brings out that there were force personnel around and some of them were resting and sleeping as the A Coy had to move. Arms had been issued to the jawans which they had kept at the bus shed nearby which the deceased was sleeping. The Petitioner knew this. The wanton act of indiscriminate firing, we find is not the result of any self defence but is an act committed over a trifling matter, nature whereof is not known, but involved the Petitioner and all three or any one or any two out of HC Bijender, HC Satish Kumar and Const. T. Kandulna. The Petitioner can be attributed with the knowledge contemplated by the fourth limb of Section 300 that as a result of the indiscriminate firing which is an act so imminently dangerous that in all probability would cause the death or such bodily injury as is likely to cause death. The Petitioner had no excuse for incurring the risk of causing death or the injury. The act of the Petitioner is akin to the situation contemplated by illustration "d" to Section 300 IPC which illustrates that "A" without any excuse fires a loaded canon into a crowd of persons and kills one of them. "A" is guilty of murder, although he may not have had a premeditated design to kill any particular individual. Firing 39 rounds from a Self Loading Rifle is akin to throwing a loaded canon. That there were force personnel around can certainly be said to be a crowd of persons around. We highlight that the evidence brings out that the Petitioner used 3 magazines and after the first was consumed, he removed the empty magazine, loaded the second and continued the firing, in spite of being told, by shouts, by force personnel to refrain from so doing.

80. We conclude at the penultimate stage of our opinion by noting that the Petitioner has firstly failed to prove that he acted in self defence and assuming he did, the plea of self defence, being a self limiting plea, restricting legitimate force to be used being restricted to the necessity of the purpose of the defence, by firing 39 times and in all directions, the plea of self defence would fail in the alternative.

81. We dismiss the writ petition but refrain from imposing any costs. The bail bond and surety bond furnished by the Petitioner are cancelled. The Petitioner is directed to surrender and undergo the remaining sentence.