(2007) 02 GAU CK 0062

In the Gauhati High Court

Director General, Border Security Force and Others — APPELLANT

Vs

Iboton Singh (Kh) — RESPONDENT

Date of Decision : 12-02-2007

Acts Referred:

Army Act, 1950 — Section 128, 129, 130, 131, 132
Border Security Force Act, 1968 — Section 64, 68, 80, 82, 83
Constitution of India, 1950 — Article 21, 226, 227, 266, 33
Criminal Procedure Code, 1973 (CrPC) — Section 161, 297
Evidence Act, 1872 — Section 3
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 42, 50
Penal Code, 1860 (IPC) — Section 300, 302, 304, 320

Citation : (2007) 1 GLT 903

Hon'ble Judges : U.B. Saha, J;I.A. Ansari, J

Bench : Division Bench

Judgement

I.A. Ansari, J.—The respondent herein, namely, Kh. Iboton Singh, while working as a constable in 95 Bn. of the Border Security Force (in short, ''the BSF''), was arrested, on 15-12-84, by police in connection with Moreh Police Station Case No. 65 (12/1984) u/s 302 IPC on the allegation that he had stabbed to death constable Gharbaran Ram of 95 Bn. of BSF, the FIR against the accused having been lodged by the Coy. Commander, Moreh Coy. The BSF authorities exercised their discretion, u/s 80 of the Border Security Force Act, 1968 (in short, ''BSF Act''), to institute a General Security Force Court (in short, ''GSFC''). A GSFC was accordingly convened and the respondent herein faced the trial on the charge of having intentionally caused death of constable Gharbaran Ram, on 14-12-94, by stabbing him with a knife, and committing thereby the civil offence of murder punishable u/s 302 IPC, the case of the prosecution being, in brief, thus: On 14-12-84, while Barbar Keshab Thakur of 95 Bn. BSF was cooking chicken in the kitchen-room of Coy HQ, the accused-respondent was also present there along with constable Ghabaran Ram (since deceased). At that time, CQMH Mazumder came there and enquired as to why so many children were , dining in the kitchen-room daily. Constable Ghabaran Ram replied by saying that the children had been dining there since long. Reacting to what constable Gharbaran Ram had said, the accused remarked by replying that his child had taken food in the kitchen only once and he (the accused) would make payment for the same. Ghabaran Ram retorted by saying as to who he (the accused) was to make the payment. Following exchange of words between the accused and the deceased, a scuffle took place between them and both of them hurled abuses on each other. The deceased, then, left for the barrack, but the accused remained inside the kitchen-room. Shortly thereafter, Ghabaran Ram was heard shouting, "Iboton sale aoo; main batata hun." It was quite a dark night and as the deceased shouted exhorting the accused to come out of the kitchen- room, the accused also replied by saying, "Sale mareko mat bulao, accha nahi hoga." Barbar Keshab Thakur, in the meanwhile, went to fetch water and the accused went out of the kitchen-room. Moments thereafter, Barbar Keshab Thakur heard HC Lal Bahadur and constable Choubay Singh uttering, "Ghabaran Ram ko marker Iboton bhag gaya" or words to that effect. The other witnesses had also heard the deceased exhorting the accused to come out and the accused uttering to the effect that he was coming out and, two or three minutes thereafter, the deceased was seen coming back towards the door of the kitchen with injuries on his person and a knife in his right hand, the deceased holding the grip of the knife pointing towards himself and blade towards the opposite direction. Looking at the condition of injured Ghabaran Ram, HC Lal Bahadur Chetri asked the injured as to what had happened to him and the injured replied by saying, "Iboton ne maar diya" or words to that effect. The injured was, then, taken to Moreh hospital and while undergoing treatment there, the injured succumbed to his injuries. The accused disappeared in the darkness and remained untraceable. Pursuant to an FIR lodged by Coy. Commander, a case was registered, as mentioned above, against the accused. Thereafter, the accused was arrested and put on trial as indicated hereinabove.

2. In support of their case, the prosecution examined as many as 13 witnesses. The statement of the accused was, then, recorded. The accused also adduced evidence by examining himself as a witness, his case being, briefly stated, thus: An altercation had taken place between him and the deceased inside the kitchen-room. HC Nirmalaya Mazumder got them separated and sent the deceased towards his living barrack; whereas the accused stayed back inside the kitchen-room. While leaving the kitchen-room, the deceased abused the accused. Thereafter, the deceased called the accused repeatedly by saying, "Iboton aoo" whereupon the accused too retorted by saying "main araha hun"; but barely after taking about 10 steps towards the living barrack, the accused felt scared, because of the darkness and thought that he might be harmed by the deceased in the darkness. The accused, therefore, walked towards the market instead of proceeding towards their living barrack. On the way to the market, the accused fell down and sustained injury, whereupon he went to a dispensary in the market, but, having found the same closed, he went to the quarter of constable driver, Shekhar Singh, of Moreh Police Station, because the said driver was

known to the accused. As the said driver was not present in his residential quarter, the accused waited for the driver for quite sometime. However, when the driver arrived, he asked the accused by saying, "Tum ne apne BSF camp ka ek admi mar diya, woh hospital me mar giya; BSF ka admi rifle le kar turn ko mardene ke lie dhund raha hai." The accused felt stunned, because he had not injured or killed anyone and he was completely innocent. As the accused felt frightened, he left the residential quarter of the said driver and proceeded towards Moreh police station; but he did not go inside the police station and stayed in his deserted hut for the night and, on the following day, in the morning, he was arrested by the police from the said hut.

3. After the prosecution and the defence delivered their respective closing addresses, the Law Officer summed up the case and the Members of the Court returned the verdict of ''guilty'' against the accused. On the basis of the finding of guilt reached against the accused, the accused, on 30-7-88, was sentenced to imprisonment for life and also dismissal from service. The finding and sentence, so rendered, were confirmed by appropriate authority on 4-11-88. The accused, then, made an application seeking review of the finding reached against him by the GSFC and the sentence awarded to him. As this application did not yield any favourable result, the accused moved this High Court with an application under Article 226 of the Constitution of India challenging the finding of guilt reached by the GSFC and the sentence passed against him. This writ application gave rise to Civil Rule No. 444/1989. The learned Single Judge found, amongst others, that the case against the accused was based on circumstantial evidence, but the circumstantial evidence was not of conclusive nature. The learned Single Judge also found, as regards the oral dying declaration, which the deceased had allegedly made, that there was a qualitative difference as regard the words, which were said to have been used by the deceased, while describing the accused as his assailant. The learned Single Judge noted that the blood-stained knife had not been sent for chemical examination and nobody had proved that the knife, in question, was ever used. The learned Single Judge also noted that the summing up of the Law Officer was not legal and proper inasmuch as the Members of the Court had not been adequately told the difference between ''culpable homicide amounting to murder'' and ''culpable homicide not amounting to murder'', though the GSFC, in the facts and circumstances of the case, ought to have been told by the Law Officer that it is their duty to examine if the acts already done by the accused constituted offence of ''murder'' or ''culpable homicide not amounting to murder''. The learned Single Judge took the view that there was no sufficient evidence of conclusive nature, which could make a prudent person reach verdict of ''guilty'' against the accused. The learned Single Judge further took the view that even if the law and facts had been properly explained and summed up by the Law Officer, it was not possible to predicate that the accused could have been legally found ''guilty''. For the reasons, so assigned, the learned Single Judge held that the finding of guilt reached by the GSFC was not sustainable. The finding of guilt reached by the GSFC and the

sentence awarded to him were accordingly set aside by the impugned judgment and order, dated 20-6-97. Aggrieved by the outcome of the writ petition, the BSF authorities have preferred the present appeal.

4. We have heard Mr. C. Komal, learned Asst. Solicitor General, for the appellants, and Mr. A. Nilamani Singh, learned Sr. counsel appearing on behalf of the accused-respondent.

5. Appearing on behalf of the appellants, the learned Asst. Solicitor General has submitted that in the present case, the learned Single Judge has re-appreciated the entire evidence as if he was entertaining an appeal against the conviction. Such is, according to the learned Asst. Solicitor General, not the scope of judicial review under Article 226 against the findings of a Security Force Court (in short, ''SFC''). This apart, contends Mr. Komal, the evidence on record convincingly proves that it was the accused, who had intentionally killed the said deceased and, in these circumstances, when the GSFC had concluded that the accused was ''guilty'' of the charge, this finding could not have been legally substituted by a finding of ''not guilty'' as has been done, in the present case, by the learned Single Judge. It is further submitted by Mr. Komal that even if the learned Single Judge had noticed some infraction, in either following the procedure prescribed under the BSF Act and the Border Security Force Rules (in short, ''the BSF Rules'') framed thereunder or even if the learned Single Judge had found that the summing up by the Law Officer was not entirely in conformity with the relevant provisions of law, the remedy really lied in setting aside the finding and remanding the case, with necessary directions to the BSF authorities and not in setting aside the verdict of ''guilty'' reached against the accused, the sentence passed against him and letting him off completely free.

6. Resisting the submissions made on behalf of the appellant, Mr. A. Nilamani Singh, learned Senior counsel, appearing on behalf of the accused-respondent, has submitted that this appeal is only an appeal in principle and unless there is patent illegality or wrong committed by the learned Single Judge, this Court should not interfere with the direction given by the learned Single Judge. Further points out Mr. Singh that when two views of a case is possible and the learned Single Judge has accepted one of such views, a Division Bench should not substitute its views in place of the views of the learned Single Judge merely on the ground that the other view is more plausible and acceptable. In the case at hand, the learned Single Judge, submits Mr. Singh, reached conclusions in accordance with law and, in the face of such irrefutable conclusions reached by the learned Single Judge, the penultimate directions given by the learned Single Judge were in consonance with the law contained in that behalf and the impugned order, therefore, does not call for interference in appeal.

7. Resisting further the present appeal, Mr. Nilamani Singh further submits that the learned Single Judge has correctly held that there was no evidence to found conviction of the accused thereon and when the learned Single Judge has, on arriving at this definite conclusion, set aside the verdict of ''guilty'' and the

sentence passed against the accused, the order may not be interfered with.

8. Before we enter into the merit of the rival submissions made before us on behalf of the parties, and before we determine the correctness or otherwise of the ultimate directions given by the learned Single Judge, it is apposite to ascertain the scope of judicial review under Article 226 against the finding reached by a SFC.

9. While considering the ambit of the exercise of the power of judicial review by the High Court under Article 226, it may be borne in mind that the proceedings of a SFC (Security Force Court) stand on the same footing as do the proceedings of a Court Martial. Hence, the judicial pronouncements, which have been rendered on the scope of juridical review of the findings of the General Court Martial, would apply with equal vigour to the proceedings of a General Security Force Court (GSFC), inasmuch as the procedure prescribed for trial of an accused by a General Court Martial and the GFC are quite akin to each other.

10. While considering the scope of judicial review of the findings of a SFC, it also needs to be borne in mind that a SFC is not subject to power of superintendence of the High Court under Article 227 of the Constitution of India. Though the proceedings of the SFC fall outside the purview of Article 227, these proceedings are nonetheless subject to the, overall, power of judicial review by the High Court under Article 226 of the Constitution. If a SFC has been properly convened, there is no challenge to its constitution and if the procedure, which it followed, was in accordance with the procedure prescribed by the BSF Act and the BSF Rules, the High Court would not interfere with the findings of such a Court unless the findings reached by it are perverse, that is, when the finding reached is wholly without any supporting evidence or wholly against the evidence. The proceedings of a SFC are not to be compared with the proceedings of a trial, in the ordinary criminal courts, under the Code of Criminal Procedure. A SFC remains, to a great degree, an integral and specialized part of the overall mechanism by which discipline is maintained in a ''force '', such as, BSF. It is for the special needs of such a ''force'' that instead of ordinary criminal court, the offenders are tried by SFC even when the offence is punishable by Indian Penal Code. At the same time, what cannot be ignored is that a SFC functions as a Court to which the provisions of the Evidence Act are applicable. The concept of relevance of admissibility of evidence, the burden of proof, and the standard of proof, as envisaged in the Evidence Act, are applicable, without exception, to the trial of an accused by SFC. Viewed thus, it is clear that a SFC has the same responsibility, as any other criminal court, to protect the rights of an accused arraigned before it and, therefore, follow the procedural safeguards given to an accused in order to ensure that he has a fair trial.

11. When the provisions contained in the BSF Act and the BSF Rules are analysed, in the light of the various administrative instructions, which have been issued from time to time, it becomes manifestly clear that the procedure prescribed is a fair procedure for trial and it is for this reason that the High Court

does not, ordinarily, interfere with the proceedings of a trial held by a SFC. When there is sufficient evidence to sustain conviction, the SFC had the jurisdiction over the subject-matter, the SFC followed the prescribed procedure and the punishment awarded was also within its powers, the High Court would not allow challenge to the validity of the conviction and sentence. The High Court, while considering a challenge posed to the findings of guilt reached against an accused or the sentence passed against him, would not function as a Court of appeal. The role of the High Court, under Article 226, in such a case, would, ordinarily, be to review the decision-making process and not the decision as such. If the decisionmaking process suffers from non-consideration of relevant factors or consideration of irrelevant factors, the High Court may interfere with the decision, so reached, if the High Court is of the view that such a decision-making process has caused failure of justice. The merit of the decision of a SFC can be looked into by the High Court only when it is challenged on grounds of perversity. If two views on the basis of the materials on record are possible to be formed, the High Court would not substitute its views in place of the decision of the SFC merely because of the fact that the High Court is of the opinion that the view taken by it is more plausible and reasonable.

12. Referring to the scheme of the proceedings of a Court Martial, as conceived under the Army Act and the Rules made thereunder, a two Judge Bench of the Apex Court, in Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), , while holding that the procedure for trial prescribed by a Court Martial, is fair, observed and held as follows:

22. We find the proceedings of the General Court-Martial to be quite immaculate where trial was fair and every possible opportunity was afforded to the respondent to defend his case. Rather it would appear that the respondent made all efforts to delay the proceedings of the court-martial. Thrice he sought the intervention of the High Court. Withdrawal of the defence counsel in the midst of the proceedings was perhaps also a part of his plan to delay the proceedings and to make that a ground if the respondent was ultimately convicted and sentenced. Services of qualified defending officer were made available to the respondent to defend his case, but he had rejected their services without valid reasons. He was repeatedly asked to give the names of the defending officers of his choice but he declined to do so. The court-martial had been conducted in accordance with the Act and Rules and it is difficult to find any fault in the proceedings. The Division Bench said that the learned Single Judge minutely examined the record of the court-martial proceedings and after that came to the conclusion that the respondent was denied reasonable opportunity to defend himself. We think this was a fundamental mistake committed by the High Court. It was not necessary for the High Court to minutely examine the record of the General Court-Martial as if it was sitting in appeal. We find that on merit, the High Court has not said that there was no case against the respondent to hold him guilty of the offence charged.

23. Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law. It has been rightly said that court-martial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment.

13. Since the entire procedure of a trial by SFC is provided in the BSF Act and the Rules made thereunder and since the provisions contained therein require that the findings reached, and the sentence passed, against and accused by a SFC, be considered by a competent authority for the purpose of confirmation thereof, such confirmation of the findings and sentence by such an authority shall be final and shall not be, ordinarily, interfered with by invoking the power of judicial review under Article 226. Though it is true that notwithstanding the finality attached to the proceedings of a SFC, which stands confirmed by a competent authority, the High Court shall not, ordinarily, exercise its power of judicial review by invoking Article 226, the fact remains that constitutionally, there is no limitation, on the power of the High Court, to examine, under Article 226, if there has been any infraction of the provisions of the relevant enactments resulting into miscarriage of justice. Thus, for the limited purpose of determining if the proceedings of a SFC have been conducted in accordance with the

requirements of the law, the High Court''s power, under Article 226, would always remain available. The power, under Article 226, will also be available to find out if there has been violation of the principles of natural justice, while conducting the trial and whether such violation has vitiated the entire proceedings. The power of judicial review, so exercisable, does not, however, empower the High Court, if one can point out, to sit on the findings of a SFC or on the proceedings of a SFC as an appellate authority and re-appreciate the findings for the purpose of determining if the evidence were sufficient for the conclusion reached. However, when the findings reached are found to be perverse and/or contrary to, or in violation of, the provisions of the law relevant thereto and if such infraction has resulted, in the opinion of the High Court, failure of justice, it becomes the duty of the High Court to step in under Article 226 and undo the wrong. If the High Court sits over the findings of a SFC as if it is sitting as an appellate authority, then, such an approach of the High Court would amount to overstepping its jurisdiction. Pointing out these aspects of law, the Supreme Court, in Union of India and Others Vs. Himmat Singh Chahar, , observed:

4. Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of the Naval Staff and then by the Union Government then ordinarily there should be a finality to the findings arrived at by the competent authority in the court-martial proceedings. It is of course true that notwithstanding the finality attached to the orders of the competent authority in the court-martial proceedings the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been; violation of the principles of natural justice which vitiates the entire proceedings or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a power of an appellate authority permitting the High-Court to reappreciate the evidence and in coming to a conclusion that the evidence is insufficient for the conclusion arrived at by the competent authorities in court-martial proceedings. At any rate it cannot be higher than the jurisdiction of the High Court exercised under Article 227 against an order of an inferior tribunal. This being the parameter for exercise of power of judicial review against the findings of a competent authority in court-martial proceedings, and applying the same to the impugned judgment of the High Court we have no hesitation to come to the conclusion that the High Court overstepped its jurisdiction in trying to reappreciate the evidence of Mrs Nirmala Sharma and in coming to the conclusion that her evidence is not credible enough to give a finding of guilt against the respondent of a charge u/s 354. We have also perused the statement of Mrs Nirmala Sharma and the conclusion becomes inescapable on the basis of the said statement of Mrs Nirmala Sharma that the respondent has been rightly

found to have committed offence u/s 354 by the authorities in the court-martial proceedings.

14. While considering the scope of judicial review by the High Court in matters of the proceedings of a trial by a SFC, what is also pertinent to note is that Article 33 of the Constitution has conferred, on Parliament, the power to abridge the fundamental rights of not only armed forces, but also of the forces entrusted with the maintenance of public order. This, however, does not mean that merely because of the fact that a person belongs to an armed force or a force entrusted with the maintenance of public order, he is denuded of the constitutional guarantees given to him by Article 21 of the Constitution, which ensures to every person a fair trial in accordance with law. Viewed from this angle, it is clear that when the procedures prescribed are followed as a mere formality by a SFC and not in substance or in its true spirit, the accused may, in an appropriate case, be held to have been denied a fair trial and such a proceeding may warrant interference by the High Court in exercise of its extra-ordinary jurisdiction under Article 226. The procedure prescribed adopted for trial by a SFC has to be tested on the touchstone of Article 21 and if the procedural safeguards given to a person from the Border Security Force, under the BSF Act and/or the BSF Rules, are violated, violation thereof would, in substance, be denial of the right to a fair trial. A person, even when he comes from the BSF, is as much a citizen as any other citizen of India and he is entitled to all such protections as have been given to him by making various laws in conformity with the provisions of Article 21. The Constitution-makers were conscious of the fact that no more restriction should be placed than what are necessary and indispensable for ensuring maintenance of discipline and proper discharge" of duties by the armed forces and the forces entrusted-with the maintenance of public order. Hence, when an Indian citizen, being a member of any such forces, is tried under its own established mechanism, such as, SFC, on a charge of having committed the civil offence of ''murder'' punishable u/s 320 IPC, it is the duty of the High Court to examine, when such a person approaches the High Court with an application under Article 226, to determine if, while holding the trial, the provisions of the BSF Act and the Rules made thereunder, which provide protection to the accused, have been adhered to or not and whether, for the purpose of reaching its findings, the SFC has kept itself informed of all the relevant provisions of the Evidence Act and the Indian Penal Code.

15. It is for the reasons indicated above that in Union of India (UOI) and Others Vs. L.D. Balam Singh, , the Apex Court has pointed out that even an army personnel is entitled to the protection, which the Narcotic Drugs and Psychotropic Substances Act (in short, ''the NDPS Act'') gives to any other person. In other words, the protection available, in the form of Sections 42 and 50 of the NDPS Act, shall be applicable to the case of even an army personnel, for, there is nothing, in the law, that the protection, given in the NDPS Act, are not applicable to the members of the armed forces. Logically, therefore, when the Evidence Act is applicable to the proceedings of a trial by a SFC, it is but natural to interfere,

and, in fact, we have no hesitation in holding, that if the provisions of the Evidence Act are ignored or are not taken into account by a SGFC and/or when the provisions of the Indian Penal Code are not properly applied, such noncompliance may, in an appropriate case, compel the writ Court to interfere, in exercise of its powers under Article 266, with the findings, which may have been reached by either ignoring, or in ignorance of, the relevant provisions of law, particularly, when such non-compliance results in gross miscarriage of justice. This apart, and as already indicated above, the procedural safeguards, which the BSF Act and the Rules themselves provide, cannot be ignored, for, ignoring them may amount to, in a given case, denial of a fair procedure to a person accused of having committed offence under the Indian Penal Code.

16. We may also point out that the power of judicial review aims at ensuring that public bodies and adjudicatory authorities exercise powers within their own parameters. Not only that an erroneous exercise of power may, in a given case, be amenable to the power of judicial review, but even refusal or failure by such an authority may make the High Court interfere in exercise of its power of judicial review. The High Courts, under Article 226, are obliged to ensure that the adjudicatory authorities exercise the powers vested in them in the manner prescribed by law and that such exercise of power is within their limits; it is equally important for the High Court to ensure that the power, which belongs to an adjudicatory authority, is not left without being exercised and/or when it is exercised, such exercise is in conformity with the power conferred on it by the legislature. The judicial review is basically one of the facets and an adjunct of ''parliamentary sovereignty'' so as to ensure that the will of the legislature is acidulously observed by the concerned authority. The judicial review is, therefore, concerned with the legality of the decision and not necessarily with the merit of the decision. It is for this reason that it is the decisions-making process, which becomes the subject of judicial review, and, rarely, the decision itself. If, while reaching a decision, an adjudicatory authority does not take into account the relevant fact or relevant aspect of law, its action would be bad in law and can be interfered with by the High Court in exercise of its power of judicial review. Similarly, when an adjudicating authority takes into account a fact or a provision of law, which is irrelevant, the decision rendered would be bad in law and open to judicial review. According to Prof. Hilarie Barnett, what the courts essectially seek by judicial review to ensure are:

(i) that Acts of Parliament have been correctly interpreted,

(i) that discretion conferred by statutes has been lawfully exercised; and

(ii) that the decision-maker has acted fairly

17. What is, however, important to bear in mind is that while exercising power under Article 226 of the Constitution, the High Court cannot act as an appellate Court. The judicial review, if one can borrow the words of Lord Brightman, in Chief Constable of the North Wales Police v. Evans (1982) 1 WLR 1155 is not an

appeal from a decision, but a review of the manner in which the decision was made''. When an authority, executive or adjudicatory, while exercising its power and discretion, takes into consideration irrelevant and extraneous matters or overlooks the relevant materials, such a decision cannot be said to be a lawful decision.

18. In the present case, in exercise of power of judicial review, though it was not possible to re-appreciate the evidence for the purpose of determining if there were sufficient evidence warranting conviction of the accused-respondent or as to whether the accused-respondent ought to have been given benefit of doubt, it was nevertheless the duty of the learned Single Judge, while exercising the power under Article 226, and, it is, now, our duty too, to ascertain if the GSFC was conducted accordingly to law. The determination of the question as to whether, while conducting the trial, the procedures, prescribed by the BSF Act and the BSF Rules as well as the other provision of law relevant thereto, were followed by the GSFC and if the GSFC had not followed the relevant provisions of law, whether such omission had prejudiced the accused-respondent are questions, which come within the ambit of Article 226. If there were no evidence to come to a finding of ''guilty'', there is nothing in law, which could stop a High Court, under Article 226, from interfering with the conviction. For instance, if an accused faces a charge of murder and without even an iota of evidence to support such a charge, he is convicted by GSFC, he would be entitled to challenge his conviction before the High Court and the High Court would not be able to shirk its responsibility to determine if the finding of ''guilty'' reached against the accused is supported by any evidence at all.

19. Bearing in mind, as indicated above, the scope of judicial review of the decisions reached by adjudicatory authorities, we, now, revert to the case at hand. In this regard, it is noteworthy that the procedures for trial by SFCs are prescribed in Chapter-VII of the BSF Act and the procedures, so prescribed, are similar as those contained in Sections 128 to 152 of the Army Act, which prescribe the procedure for trial by court-martials. There are three different kinds of Security Force Courts as conceived in Chapter-VI of the BSF Act. These three Courts, according to Section 64, are General Security Force Courts (GSFC), Petty Security Force Courts (PSFC) and Summary Security Force Courts (SSFC). In the present case, the Court convened for trial of the accused-respondent was a General Security Forc Court which, according to Section 68, shall consist of not less than five officers, each of whom has held the post of Deputy Superintendent of Police for not less than three whole years and of whom not less than four are of a rank not below that of a confirmed Deputy Superintendent of Police.

20. The present one is a case of ''murder'' and, hence, it is nectary to determine as to v;Iiat role the Law Officer in such a case shall play. We may point out that the Law Officer, under the BSF Act, performs the same function as does a Judge Advocate in the proceedings of a court martial. Section 82 makes it clear that the senior-most member of the GSFC shall be the Presiding Officer. While the act of

taking decision rests with the Presiding Officer and members of the Court, it is the Law Officer, who plays a pivotal role at the trial, for, it is on him that the burden pests to guide the member of the Court, who may not be acquainted with law, to come to a decision in accordance with law.

21. Section 83 makes it clear that every GSFC shall be attended by a Law Officer and if no such officer is available, then, an officer approved by the General Law Officer, or a Law Officer. While Rule 66 vests in the accused a right to object to a person, who has been appointed as a member of the Court, from functioning as a member of the Court, Rule 70 of the BSF Rules disentitles such an accused from objecting to a person acting as a Law Officer. The Law Officer is, however, administered oath and is, therefore, expected to be above board and not align himself either with the prosecution or with the defence. Rule 89 makes it clear that the Presiding Officer, the Law Officer and any Member of the Court may put questions to a witness. Rule 97 further makes it clear that after examination of their respective witnesses, the prosecution and the defence shall deliver their closing addresses and after their closing addresses are over, the Law Officer shall, according to Rule 97, sum up, in the open Court, the evidence and ''advise'' the Court on the law relating to the case.

22. Coupled with the above, it is also worth noticing that the ''summing up'' of the ''evidence'' and the ''law'', relevant to a case, by a Law Officer, as indicated by Rule 97, is not an idle requirement or an empty formality; it is, rather, a solemn act, for, it is this summing up by the Law Officer, which helps the Court to come to a decision - correct or incorrect. Since the members of the Court may not be knowledgeable persons in law, it is incumbent, upon the Law Officer, to advise the Court on every aspect of law, which may be relevant to a case. It is equally important that the Law Officer shall not merely recite as to what witnesses have deposed, but he must marshall the evidence adduced by the parties to the trial and help the Court to come, in accordance with the law relevant thereto, to a correct and lawful decision. Since a Court must take into account all material aspects of ''evidence'' and ''law'' in order to reach a lawful decision, it is the onerous task of the Law Officer to not only marshall the evidence to help the Court, but also advise the Court on all such aspects of law, which may have a bearing on the trial of an accused.

23. The question, now, is as to what are the legal consequences of a ''summing up'', which is inadequate or incorrect either in fact or in law. For the purpose of correctly understanding the legal effect of an incorrect or inadequate ''summing up'', one has to ascertain not only the role of a Law Officer in a SFC, but also the importance thereof. Since a Law Officer, in a SFC, stands on the same footing as does a Judge Advocate, in a Court Martial, the judicial precedents describing the role and importance of a Judge Advocate would, therefore, apply, with equal force, to the case of a Law Officer also.

24. On the role of the Judge Advocate in a court-martial, the Apex Court has pointed out, in S.N. Mukherjee Vs. Union of India, , that the Judge Advocate

plays an important role during the course of trial at the General Court Martial and he is enjoined to maintain an impartial position. It is also pointed, in S.N. Mukherjee (supra), that the Court Martial records its findings after the Judge Advocate has summed up the evidence and has given his opinion upon the legal bearing of the case and that the members of the court have to express their opinion as to the finding, by word of mouth, on each charge separately, and the finding on each charge is to be recorded simply as a finding of "guilty" or of "not guilty".

25. In the case of Cheranjit S. Gill (supra), it was contended before the Supreme Court that in effect and in practice, the Judge Advocate is the court and the court martial is the ''jury'' for all practical purposes so far as the trial of an accused is concerned. Responding to this submission, the Apex Court observed that the Judge Advocate plays an important role during the course of trial at a General Court Martial and he is enjoined to maintain an impartial position. The Court Martial records its findings after the Judge Advocate has ''summed up'' the evidence and has given his opinion upon the legal bearing of the case. The Members of the Court have to express their opinion as to the finding by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of ''guilty'' or of ''not guilty''.

26. Emphasizing that a Judge Advocate must be free from such disqualification, which disentitles an officer to be a member of the Court Martial, the Apex Court in Cheranjit S. Gill (supra), emphasized that the Judge Advocate forms an integral part of the trial by Court Martial. The observations made by the Supreme Court, in Cheranjit S. Gill (supra), have crucial bearing on the present appeal; hence, the relevant observations, made in Cheranjit S. Gill (supra), are quoted herein below:

Referring to various provisions of the Act and the Rules as noticed earlier, the learned Counsel appearing for Respondent 1 has argued that in effect and practice the Judge Advocate is the "Court" and the "Court Martial" is the jury for all practical purposes so far as the trial of the accused is concerned. The argument may be an exaggerated version of the reality but is not totally without substance inasmuch as the powers exercised by the Judge Advocate indicate that though not forming part of the Court Martial, he is an integral part thereof particularly in Courts Martial which cannot be conducted in his absence. It cannot be denied that the justice dispensation system in the Army is based upon the system prevalent in Great Britain. The position of the Judge Advocate is by no means less than that of a Judge Advocate associated with a Court Martial in that country. The importance of the role of the Judge Advocate in U.K. was noticed and considered in R. v. Linzee (1956) 3 All ER 980.

It is true that a Judge Advocate theoretically performs no function as a Judge but it is equally true that he is an effective officer of the Court conducting the case against the accused under the Act. It is his duty to inform the Court of any defect or irregularity in the charge and in the constitution of the Court or in the proceedings. The quality of the advice tendered by the Judge Advocate is very crucial in a trial conducted under the Act. With the role assigned to him a Judge Advocate is in a position to sway the minds of the Members of the Court Martial as his advice or verdict cannot be taken lightly by the persons composing the Court who are admittedly not law-knowing persons. It is to be remembered that the Courts Martial are not part of the judicial system in the country and are not permanent courts.

27. From the observations, made in Charanjit S. Gill (supra), it is clear that to describe a ''court-martial'' as a ''jury trial'' may be an exaggeration, but not wholly without substance. Though a court-martial may differ from a ''jury trial'' and though a Judge Advocate does not form part of a court-martial, for, he is distinct from, and independent of, the members, who constitute a court-martial, and though a Judge Advocate does not theoretically perform the function of a Judge, in a jury'' trial, the fact remains that a Judge Advocate is an effective officer of the court conducting the case against the accused and the quality of advice, tendered by him, to the members of the court-martial, has a very crucial bearing on the trial and that with the kind of role, which a Judge Advocate has been assigned to perform, he is in a position to sway the minds of the members of the court-martial inasmuch as his advice or verdict cannot be taken lightly by the persons constituting the court, for, the members are admittedly, not law-knowing persons. It is, therefore, the duty of the Judge Advocate to inform the members of the court of such facts and law as may be relevant to a case tried by a court-martial.

28. Coupled with the above, it is also worth pointing out that Rule 110 of the BSF Rules provides that a court shall, where it is so directed by these rules, and may, in any other case, on any deliberation amongst the members, sit in closed Court and that no person shall be present in closed Court except the members of the Court, the Law Officer (if any) and any officers under instruction.

29. The provisions of Rule 110 show that whenever a SFC is required, by the rules or otherwise, to deliberate in ''closed" Court, none other than members of the Court shall be present unless someone is instructed by the Court to be present. The Law Officer shall, however, as a matter of rule, remain present in the ''closed" Court. Obviously, there is an intent and purpose for making the presence of the Law Officer mandatory in the ''closed" Court, for, on the Law Officer rests the responsibility of advising the Court on the questions of law and fact or to give such advice as may be sought for. For example, while deliberating in ''closed" Court, if the members of the Court seek to rely on a piece of evidence, which is inadmissible in law, the Law Officer would be, within his powers, to point out that the evidence, sought to be relied upon, is inadmissible in law. No wonder, therefore, as indicated in Charanjit S. Gill (supra), that the powers that the Judge Advocate possesses and the role that he performs, he (as a Judge Advocate or a Law Officer) may sway the minds of the Court.

30. A Judge Advocate, in the court-martial in India, points out the Supreme

Court, in Charanjit S. Gill (supra), holds the same place and position as a Judge Advocate does in a court-martial in the United Kingdom. The Supreme Court further points out, in Charanjit S. Gill (supra), that the importance of the role of the Judge Advocates, in the United Kingdom, was noticed and considered in R.V. Linzee (1956) 3 All E.R. 980.

31. Bearing in mind what has been pointed out above, if one turns to Linzee''s case (supra), it will be seen that though a court-martial is, to some degree, analogous to a ''jury'' trial, it is not same as a ''jury'' trial. Making this aspect clear, the Court, speaking through Lord Goddard, C.J., observed: "We have had some rather interesting discussions about the position of the court-martial, and how far it is analogous to a jury. I do not think it is analogous to a jury, and there is no true analogy between a court-martial - martial, a jury or a bench of magistrates. It is a court which is sui generis."

32. Notwithstanding, however, that the Court, in Linzee''s case (supra), held that a court-martial is not analogous to a ''jury'' trial, the Court still observed:

We have had read to us various passages from the summing-up, a summing-up, which we have all read with care ourselves, and the court cannot find misdirection of any sort or kind. We think that the judge-advocate gave a summing-up which is quite impeccable.

33. From the above observations made in Linzee''s case (supra), it becomes clear that the Court, in Linzee''s case (supra), had to read the ''summing-up'' by the Judge Advocate, at the court-martial, for the purpose of determining if there was ''misdirection'' and, upon such examination, held that there was no ''misdirection'' and that the ''summing-up'' was impeccable. The question, therefore, is as to what does a ''misdirection'' mean, convey or signify?

34. ''Misdirection'', it needs to be noted, is a concept developed in the realm of ''jury'' trial. While considering the concept of ''misdirection'' in a trial, it is pertinent to recall that under the Criminal Procedure Code, 1988, the Judge was required to sum up the evidence in terms of Section 297 thereof for the benefit of the ''jury'' and the High Court, under Sub-section (3) of Section 307, could interfere with the verdict of the ''jury'' if there was ''misdirection'' or ''non-direction'' by the Judge to the ''jury''. A ''non-direction'' by the Judge to the ''jury'' means that the Judge has not correctly advised and guided the ''jury'' by pointing out to them the relevant pieces of evidence, the legality thereof and other relevant provisions of law. A ''misdirection'' indicates that the Judge has failed to bring to the notice of the ''jury'' a relevant piece of evidence or a relevant provision of law or the Judge has put to the ''jury'' the evidence in such a manner, which was improper and could have misled the ''jury'' or the Judge has, while putting to the ''jury'' an aspect of law, though relevant, did not put the proposition of law correctly or in its entirety. The verdict of the ''jury'', in such circumstances, was liable to be set aside if it occasioned the failure of justice. ''Misdirection'' is something, which a Judge, in his charge to the ''jury'', tells the

''jury'', which is either wrong or in a manner, which is wrong and may tend to mislead the ''jury''. Even an omission, on the part of the Judge, to point out to the ''jury'' such matters, which are essential for proper appreciation of the case of the prosecution or of the defence, and help thereby the ''jury'' to reach a correct verdict, may amount to a ''misdirection''. However, each and every misdirection or non-direction cannot be a ground for setting aside a verdict in the absence of failure of justice.

35. In K. M. Nanavati (supra), the Supreme Court has described ''misdirection'' thus:

Misdirection'' is something which a judge in his charge tells the jury and is wrong or in a wrong manner tending to mislead them. Even an omission to mention matters which are essential to the prosecution or the defence case in order to help the jury to come to a correct verdict may also in certain circumstances amount to a misdirection. But, in either case, every misdirection or non-direction is not in itself sufficient to set aside a verdict, but it must be such that it has occasioned a failure of justice.

36. Though there is a difference between ''non-direction'' and ''mis-direction'', no real distinction, in some cases, can be drawn between ''non-direction'' and ''misdirection''. For the purpose of ascertaining if there is ''mis-direction'' or ''non-direction'', the summing up by the judge, as a whole, needs to be looked into and examined [See Fakira Appaya Vs. Emperor, In Reg. v. Fattechand Vastachand (1868-69) 5 B.H.C.R. 85 Cr, Sargent, J (as his Lordship then was), took the same view of the responsibilities of a judge, in a summing up to the jury, when his Lordship observed, "The summing up contemplated by this section cannot mean any statement of the evidence which a judge may, in his caprice, think proper to make to the jury, but a proper'' summing ''up, by which is to be understood a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest." In another passage, his Lordship observed, "I think, therefore, that the Judge committed an error in confining himself to so very brief a summary of the evidence, and in not giving a more careful analysis of that evidence".

37. ''Non-direction'' is a case, wherein the Judge fails to give to the Jury help and guidance, which they are entitled to expect from a Judge and which it is his duty to give. A summing up, having long rambling repetition of the evidence, without any attempt to marshall the facts under appropriate heads or to assist the Jury to sift and weigh the evidence, so that they will be in a position to understand, which are the really important parts of the evidence and which are of secondary importance, constitutes ''misdirection''. [See Nabi Khan and Others Vs. Emperor, No wonder, therefore, that observed by Henderson, J, in Mohsena Khatun and Another Vs. Emperor, thus,

It is the duty of a Judge to place the case before the jury in such a way as to enable them to come to a reasonable and fair conclusion. The Judge''s charge to the jury, in this case, is so confusing that I am sure that the jury received no assistance from it whatsoever. In fact, I think that the jury must have been confused by the charge of the learned Judge. In no part of the charge can one find a connected account of what the case for the prosecution is or what the defense case is. The learned Judge has mixed up the arguments of the defense with the statement of the case for the prosecution. The whole charge is muddled. Speaking for myself, the charge left me quite unable to form a clear idea of what the respective cases of the parties were. Apart from the other illegalities in this case, I am of opinion that this unsatisfactory feature of the charge to the jury by itself would be a sufficient ground for setting aside the verdict of the jury.

38. When a common man''s perception of an offence is, generally, different from the legal concept of an offence, it becomes the duty of the Judge to explain to the ''jury'' the ingredients of such an offence. For example, a common man''s understanding of an offence of cheating is different from what legally constitutes cheating. Similarly, it is too much to expect a common man to know the distinction between ''culpable homicide not amounting to murder'' and ''culpable homicide amounting to murder''. It is in this context that observed, Blacker, J. in Arnold Monteath Mathews v. Emperor AIR 1940 Lahore 87 thus,

Coming to the first question, the point taken by counsel is that in order to comply with S.297, Criminal P.C., the Judge should concisely, but lucidly explain to the jury the ingredients of the Section under which the accused is being charged and should also explain the meanings of any terms in the Section, which are not likely to be immediately understood by a layman. There is plenty of authority in support of the view put forward by counsel for the appellant. I think that in the present case, it was clearly the duty of the Judge to explain to the jury the necessary ingredients, which the prosecution had to prove before the charges could be held to be established. This is, particularly, necessary in a case like the present, where that main charges are of cheating. The criminal definition of cheating is not exactly what an ordinary layman in the ordinary use of the English language would understand by the term?. In a case of this sort, it is clearly necessary to point out to the jury the difference between a promise, which is not intended to be kept at the time it is made, and a promise, which is intended to be kept at the time it is made, but is subsequently broken?

39. Even in Nga Muga v. Emperor AIR 1916 LB 114 the Court held that when the facts appearing in a case may constitute a border line case, which may fall either u/s 302 or u/s 304 IPC, the judge is bound to explain to the jury not only as to what constitutes the offence of murder but also as to when a case of killing may become a culpable homicide not amounting to murder.

40. In fact, even, in Linzee''s case (supra), while holding that a court-martial is not analogous to a ''jury'' trial, the Court nevertheless held,

Then, if any question of law arose, we have to see whether or not the law has been correctly laid down by the judge-advocate.

X x x x

x x x x "We have to see that the summing-up was adequate."x x x

x x x x "The summing-up must be taken as a whole and it must be seen that there is no misstatement of law; that is the first thing."x x x

x x x x "The judge-advocate''s duty is to advise the court-martial on questions of law."x x x

x x x x "A judge directs an acquittal if there is no evidence, and so would a judge-advocate. He would say: "There is no evidence on which you can convict."

41. What surfaces from the above discussion is that if, in his ''summing up'', the Law Officer does not bring to the notice of the Court any relevant piece of evidence or a relevant provision of law, such an omission really amounts to ''misdirection'' or ''non-direction'' to a ''jury'' by a Judge and the findings reached, with such deficient summing up, may, in a given case, warrant interference by the court, in exercise of its power under Article 226, if such an omission, on the part of the Law Officer, has caused prejudice to the accused. Similarly, if in his summing up, the Law Officer summarizes the evidence in a manner, which conveys to the Court, some conjecture or surmises, which are not tenable in law, or when the Law Officer puts to the Court a provision of law, which is not relevant for the trial or a proposition of law, which is not correct, and thereby causes prejudice to the case of the defence, it will be the bounden duty of the High Court to step in and remedy the wrong, done to the accused, by invoking its extra-ordinary jurisdiction under Article 226.

42. We may, at this stage, pause here to point out that though a writ Court, while exercising jurisdiction under Article 226, would not re-appreciate evidence for the purpose of determining sufficiency or otherwise of the evidence, which formed the basis of conviction of an accused tried by a court martial or SFC, the fact remains that, the High Court may, in a given case, examine the record of the proceedings of the trial, to determine if, in the light of the evidence on record, the Judge Advocate or the Law Officer, as the case may be, has summed up the case not only adequately, but in such a manner that the members of the Court stood informed of all the relevant aspects of the case including such provisions of law, which were applicable to the facts of the given case. Such examination of the evidence by the High Court for the purposes, indicated hereinbefore, would not amount to re-appreciation of evidence.

43. Though in Linzee''s case (supra), the Court dealt with the appeal against the order of conviction by the court martial, what is important to note is that if in a court-martial, the Judge Advocate does not sum up the case in accordance with law and the lapse committed by him constitutes misdirection, it may justify interference by the High Court in exercise of its power under Article 226, if such misdirection is found to have caused prejudice to the accused. Thus, for the

purpose of determining if there was misdirection by the Law Officer, while summing up the case in the present case, and if such misdirection had caused prejudice to the accused-respondent, the High Court was free to examine the evidence on record and interfere, in exercise of its power under Article 226, if it was satisfied that there was misdirection and that such misdirection had caused prejudice to the accused warranting interference by the writ Court.

44. In the case at hand, it is the admitted position that there was no eye witness to the occurrence of assault on, or stabbing of, the deceased. The prosecution rested its case on circumstantial evidence and oral dying declaration. What we notice is that the Law Officer, while summing up the case to the Court, did tell the Court as to what would, generally, constitute offence of ''murder'' punishable u/s 302 IPC, he has spoken not even a word to let the members of the Court know as to when an act, though an act of ''killing'', may not necessarily amount to the offence of ''murder'' and fall in the category of those offences, which are described as ''culpable homicide not amounting to murder'' and covered by Section 304 IPC.

45. While considering the above aspect of the case, it is also important to bear in mind that an accused need not specifically plead that his case comes under any of the Exceptions to Section 300 IPC so as to bring the offence, even if committed by him, u/s 304 IPC and not one u/s 302 IPC. Under Exception 1 to Section 300 of the Indian Penal Code, ''culpable homicide'' is not ''murder'' if the following conditions are satisfied:

(i) The deceased must have given provocation to the accused;

(ii) The provocation must have been grave;

(iii) The provocation must have been sudden;

(iv) The offender, by reason of such provocation, shall have been deprived of his power of self-control;

(v) The offender should have killed the deceased during the period, when he remained deprived of the power of self-control; and

(vi) The offender must have caused the death of the person, who gave the provocation or that of any other person, by mistake or accident.

46. When, in a given case, the accused does not take specific defence that his act falls under Exception I to Section 300 IPC, it does not relieve the Court of its duty to ascertain if the facts of the given case are such, which attract Exception I to Section 300 IPC or not; and if the Court finds that the deceased had provoked the accused, the provocation was not only grave but also sudden and that the accused, because of such provocation, had been deprived of his power of self-control and killed the deceased during the continuance of the deprivation of his power of self-control, it becomes the duty of the Court to resort to Exception I to Section 300 IPC and, in such a case, the Court shall, instead of holding the

accused ''guilty'' of the offence of ''murder'', hold him ''guilty'' u/s 304 IPC.

47. In Mancini v. Director of Public Prosecutions 1942 AC 1 atpg. 9, Viscount Simon, L.C., defined the scope of the doctrine of ''provocation'' in the following words:

It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as a result of which he commits the unlawful act, which causes death....

48. One must, however, bear in mind that the ''provocation'', referred to in Section 300 IPC, is provocation of a reasonable man and not of an unusually excitable or pugnacious individual. While under the English Law, words and gestures were not, at one point of time, taken into account for the purpose of determining if there was provocation, the fact remains that words and gestures, in India, may, under certain circumstances, be treated to have caused ''grave and sudden provocation'' to an accused so as to deprive him of his power of self-control and bring his act of killing within the first Exception to Section 300 IPC. The mental condition, which the ''previous act'' of the victim might have caused to the accused, needs to be taken into account, while ascertaining if the ''subsequent act'' of the deceased caused ''grave and sudden provocation''. What is, however, of immense importance to note is that a ''reasonable man'' will differ from another according to social background and various other imponderables, such as, customs and traditions prevailing in his society, level of emotion etc. Describing the meaning and explaining the standard of ''reasonable man'', the Supreme Court, in K.M. Nanavati v. State of Maharashtra AIR 1062 SC 605, observed as follows:

Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision: it is for the court to decide in each case, having regard to the relevant circumstances.

49. A crucial factor, in the defence of ''provocation'' from earliest times, has been the relationship between the gravity of provocation and the way in which the accused retaliated, both being judged by the social standards of the day. As the law, in India, permits words being treated as provocation, even though unaccompanied by any other act, the gravity of verbal provocation may well depend on the characteristics or circumstances of the person to whom a taunt or insult is addressed. To taunt a person, because of his race, his physical infirmities or some shameful incident in his past, may well be considered by the ''jury'' to

be offensive to the person addressed. (See Lord Diplock''s observations in DPP v. Camplin (1978) 2 All E.R. 168). In fact, in Beddar v. DPP (1954) 2 All E.R. 801, the House of Lords had rejected as irrelevant the fact that the defendant had been taunted with impotence and, on having been so taunted, he had killed the deceased. Subsequent decision by the Privy Council, in Luc Thief Thuan V.R. 19962 All E.R. 1033, showed that the conclusion reached by the House of Lords in Beddar''s case (supra) was not good law.

50. Laying down as to what constitutes ''grave and sudden'' provocation and the tests therefor, the Supreme Court, in K.M. Nanavati (supra), held thus:

The Indian law, relevant to the present enquiry, may be stated thus: (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to Section 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.

51. While considering the present writ appeal, it is worth pointing out that to a common man, killing of a man amounts to murder, though ''murder'' is a well defined offence and every killing does not amount to ''murder''. To put it differently, there is really no difference to an ordinary man between the act of ''killing'' and ''murder '', though the reality remains that every act of ''killing'' may not amount to ''murder ''. It is for this reason that Rule 78 of the BSF Rules provides that when an accused pleads ''guilty'' to a charge, GSFC shall not, under Clause (c) of Sub-rule (2) of Rule 78, accept the plea of guilt of the accused if the accused is liable, on his conviction, to be sentenced to death. In other words, since a person, found ''guilty'' of an offence of murder, can be sentenced to death, the GSFC is not permitted to accept the plea of guilt of an accused to the charge of murder and Rule 78 makes it mandatory for the GSFC, in such a case, to record the plea of guilt as ''not guilty'''' and proceed with the trial. These provisions have been made for the purpose of ensuring that a person, who is arraigned on a charge of murder u/s 302 IPC, is not convicted of such an offence if the offence does not really fall u/s 302 IPC in accordance with law, for, i t is possible that even though an accused has killed a person and has, in his opinion and in the opinion of common man, committed thereby the offence of ''murder'', the act of killing may not, in law, amount to an, offence u/s 302 IPC, but an offence u/s 304 IPC.

52. In the case at hand, while the accused-respondent denied the charge and

denied the fact that he had killed the deceased, what cannot be ignored is that the accused-respondent admitted that he had altercation with the deceased in the kitchen and following the altercation, which he so had with the deceased, the deceased had called him and challenged him and in order to meet this challenge, he did go out of the kitchen-room. What the accused-respondent, however, denied was that he was the one, who had killed the deceased; rather, his defence was that he, on going out of the kitchen-room, felt frightened and, therefore, went away; but while so going away, he fell down and sustained injury on his person. Notwithstanding this defence version, which may not have been believed by the GSFC, the fact remains that if there were any material to show that either the accused had acted in ''self-defence'' or if there were any material to show that the accused had acted under ''grave and sudden provocation'', then, the act of the accused could not have fallen u/s 302 IPC, but under 304 IPC irrespective of the fact as to whether the accused had taken a specific plea of ''self-defence'' or of his having acted under ''grave and sudden provocation'' or not. So long as the evidence on record disclosed materials, which could attract an act of ''self-defence '' or of the accused having acted under ''grave and sudden provocation'', it was the bounden duty of the Law Officer to have told the members of the GSFC, while summing up the case, that there is something called ''culpable homicide not amounting to murder'', what this concept of ''culpable homicide not amounting to murder'' is, and when an act of an accused becomes an act of ''culpable homicide not amounting to murder''.

53. The Law Officer, in the present case, as we notice, has not, while ''summing up'' the case, brought to the notice of the members of the Court that they may consider if the case at hand was a case, which fell within the first Exception to Section 300 IPC. Though the case, as already indicated above, was, to a large extent, based on circumstantial evidence and the Law Officer, we find, had told the members of the Court as to what ''circumstantial evidence'', in general, is, he did not tell the members of the Court as to when circumstantial evidence may be taken as proof of the killing of an accused and/or as to when a false explanation given by an accused can be used as an additional link. The Supreme Court, in Gambhir Vs. State of Maharashtra, , succinctly described as to when ''circumstantial evidence'' can furnish basis for conviction of an accused. The observations of the Supreme Court, in Gambhir case (supra), run thus:

The law regarding circumstantial evidence is well-settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively; should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

54. In Sharad Birdhichand Sarda Vs. State of Maharashtra, , the Apex Court has made it clear that the following conditions must be fulfilled before a case against an accused, based on circumstantial evidence, can be said to be fully satisfied:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established,

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

55. The Law Officer, we notice, advised the members of the Court thus, "In the definition of the term "proved", no distinction is drawn between circumstantial evidence and direct evidence. In certain cases, circumstantial evidence is superior to direct evidence, for, it has become proverb that, "Facts cannot lie, whilst witnesses may". On the other hand, gentleman, it may also be borne in mind that, "If facts cannot lie, they may often deceive." Therefore, before judging an accused guilty on circumstantial evidence, the Court must be satisfied not only that circumstances are consistent with the accused having committed the act, but also that they are inconsistent with any other rational conclusion."

56. From the above advice tendered by the Law Officer, it is apparent that while the Law officer did tell the members of the Court that the circumstances must be consistent with the guilt of the accused and must be inconsistent with his innocence, he did not tell them that before ''circumstantial evidence'' is acted upon as basis for conviction of an accused, the ''circumstantial evidence'' must not only be consistent with the guilt of the accused and inconsistent with his innocence, but that every reasonable hypothesis of innocence of the accused needs to be excluded. In the present case, since it was an admitted case of the parties that the occurrence took place in pitch darkness of the night, the Law Officer ought to have pointed out that it is the duty of the members of the Court to exclude the possibility of the accused having acted in his ''self-defence'', for, the person of the accused bore injuries, he had not carried any knife or dagger, while going out of the kitchen, and, hence, he might have acted in his self-defence, though, while acting in his self-defence, he might have exceeded the right of his self-defence. The Law Officer also did not tell the members of the

Court that it is their duty, in the facts and circumstances of the present case, to consider if the accused had been provoked by the words, acts and/or gesture of the deceased and the ''provocation'' was so ''grave and sudden'' that it could have deprived a person, placed in the situation in which the accused was found placed, of his power of self-control leading him to cause stab wounds on the person of the deceased.

57. We also cannot ignore the fact that the Law Officer has not advised the members of the Court as regards the ''standard of proof'' expected from an accused in a case of present nature. The Law Officer ought to have told the Court that the accused need not discharge his burden beyond reasonable doubt and that it was enough, if the accused probablised his plea, either by adducing evidence or on the basis of the evidence already present on record, that he (accused) had acted in ''self defence'' or under ''grave and sudden provocation''. The Law Officer ought to have explained, in terms of Section 3 of the Evidence Act, that a fact is said to be ''proved'' when, after considering the matter before it, the Court either believes it to exist or consider its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

58. The Law Officer, we find, did not explain to the members of the Court as to what the evidentiary value of a statement recorded, at the time of preparation of the ''record of evidence'', is. A ''record of evidence '', it needs to be borne in mind, is a misnomer, for, it is not evidence as explained in Section 3 of the Evidence Act. A record of evidence is prepared at the stage of investigation. Though it is called the ''record of evidence'', the fact remains that what is stated, at the stage of investigation, is not really evidence. A statement, which is recorded at the stage of investigation, is not on oath and such a statement, though called record of evidence, stands on the same footing as does a previous statement of a witness recorded by police during investigation u/s 161 CrPC. Such a previous statement of a witness is not substantive evidence and can be used by the prosecution, with the leave of the Court, to contradict the testimony of the witness at the trial, and the defence can use such a statement, as a matter of right, for the purpose of contradicting the witness. No reliance can be placed on the previous statement of a witness or of an accused nor can a conviction be founded on such previous statements.

59. Sub-sections (6) and (7) of Section 97 of the BSF Act make it clear that a person may be held guilty of a lesser offence meaning thereby that though a person may have been charged with an offence u/s 302 IPC, he may be found guilty and convicted accordingly u/s 304 IPC. The Law Officer, in the present case, did not tell the members of the Court that if the acts of the accused did not amount to the offence of ''murder'', the Court must consider if the accused had killed the deceased and whether his act of ''killing'' fell u/s 304 IPC. The members of the Court were not told at all as to what offence, if any, a person commits if he, under ''grave and sudden provocation'', loses power of self-control

and kills a person: This aspect of the law was not at all told to the members of the Court.

60. It is also of immense importance to note that in the present case, the medical evidence on record shows that on conducting post-mortem on the dead body of Constable Charbaran Ram, the doctor found the following three injuries:

(i) Cut injury on the left side of the neck 1" x below the (L) Ear 2" x 1/2"

(ii) Cut injury (3"x 1/2 ") on the (L) Temporal region.

(iii) Cut injury 2" x 1/2 "on the (L) Chest wall below the (L) Nipple In mid clavicular line.

61. It is in the evidence of the doctor that these type of injuries could be caused by some sharp edged weapon. In the opinion of the doctor, the cause of death was due to excessive bleeding from the cut injury of left carotid artery leading to shock and cardio-respiratory failure, the age of injuries being around 15 to 17 hrs and that the injuries were ante-mortem in nature.

62. In his cross-examination, the doctor has clarified that a layman cannot recognize carotid artery, but if he happens to cut it or cause injury on it, it might be by chance or by accident.

63. The medical evidence on record clearly shows that the fatal injury sustained by the deceased might not have been necessarily intentional, but even accidental. When the oral evidence on record is considered, in the light of the medical evidence on record, it clearly follows that even if the deceased had sustained injuries at the hands of the accused, the fact remains that there is no evidence on record to show that the accused went out of the kitchen- room with a knife or any weapon in his hand or that the weapon (which was used as the weapon of assault) was a weapon carried to the place of occurrence by the accused nor is there any evidence to show that the accused could have seen as to where he was stabbing even if one were to believe the prosecution''s case that the accused was the assailant; rather, the evidence on record speaks loud and clear that the place of occurrence was under pitch darkness. In such circumstances, it was the bounden duty of the Law Officer to tell the members of the Court the law with regard to ''self-defence'' and also with regard to ''grave and sudden provocation'' so that the members of the Court could have determined for themselves if the accused had intentionally killed the deceased or he had killed him in his self-defence, though he might have exceeded the right of self-defence. The Law Officer did not tell the members of the Court to determine if the deceased had provoked the accused and if so, the provocation was so grave and sudden that it could have deprived a person, placed in the circumstances in which was placed the accused, of his power of self-control. The members of the Court ought to have been told by the Law Officer that, while considering this aspect of the case, it is necessary for the Court to bear in mind the social background and standard of the accused, for, two persons, coming

from two different social background, may not act or react similarly. The standard of the society to which an accused belongs and the standard of the society to which a judge belongs may well be different. It is, therefore, necessary, as observed in K.M. Nanavati (supra), that a Judge must place himself in the position of the accused and decide, in the backdrop of the social background of the accused, if the accused could have been provoked to such a level that his act falls within the ambit of Exception I to Section 300 IPC.

64. What crystallizes from the above discussion is that the summing up of the case at hand by the Law Officer was highly unsatisfactory and full of legal infirmities. In the face of such serious legal infirmities, one has no option, but to hold that the trial held was not in accordance with law and the procedural safeguards given to the accused was, most improperly, denied to him. We are wholly satisfied that in the present case, the accused did not receive a ''fair trial'' and that there was serious failure of justice in the present case.

65. The question, now, is as to whether the High Court could have interfered with the conviction of the accused in exercise of its power under Article 226 and if so, what ought to have been the directions by the Court.

66. While considering the above aspect of the case, it may be pointed out that though the High Court cannot sit as a court of appeal on the verdict of the GSFC, it is the duty of the High Court to ascertain, when the finding and sentence of a GSFC are challenged before it, if the decision making process suffers from any such legal infirmity, which can be treated to have caused prejudice to the accused. Since the judicial review is not directed against the decision, but against the decision making-process, it logically follows that the High Court will not look into the merit of the decision, but only determine if the decision has been reached by complying with the relevant provisions of law and in accordance with the procedure prescribed for the trial.

67. In the case at hand, the relevant provisions of law, as indicated above, were not taken into account or adhered to and this has resulted into failure of justice. But the present one is not a case, we are satisfied, which can be said to be a case of no evidence. Having considered the evidence on record, we do not find that one can say that there was no incriminating evidence against the accused-respondent. In such circumstances, the remedy lied in remanding the case for trial by the learned Court below with direction to the Law Officer to sum up the case in accordance with law. Instead of doing so, the learned Single Judge, we find, set aside the conviction and sentence passed against the accused-respondent and set him at liberty completely.

68. The fall-out of the above discussion is that while the conviction of the accused-respondent and the sentence passed against him cannot be sustained, the impugned order, dated 20.06.1997, passed in Civil Rule No. 444/89, can also not survive.

69. In the result, and for the reason discussed above, this appeal partly

succeeds. While the order of the learned Single Judge setting aside the finding and sentence is not interfered with, the case is remanded to the Inspector General of Border Security Force for convening a General Security Force Court and proceed with the trial from the stage of summing up of the case by the Law Officer. In view of the fact that it is possible that some members of the Court or even the Law Officer may have retired, the respondent authority shall remain at liberty to convene a General Security Force Court with such new members and Law Officer, as may be necessary in order to hold the trial from the stage as indicated hereinabove.

70. With the above observations and directions, this appeal shall stand disposed of.

Send back the LCR.

