

(2010) 01 DEL CK 0338
In the Delhi High Court
Case No : Writ Petition (C) 3270 of 2010

Ex. Ct. Rajesh Kumar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-01-2010

Acts Referred:

Border Security Force Act, 1968 — Section 93
Border Security Force Rules, 1969 — Rule 99
Penal Code, 1860 (IPC) — Section 100, 101, 102, 103, 104

Citation : (2010) 01 DEL CK 0338

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

Bench : Division Bench

Advocate : Rekha Palli, Punam Singh and Amrit Prakash, for the Appellant;
Sonia Sharma and Anuj Aggarwal and Bhupinder Sharma, Asstt. Cmdt., for the Respondent

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—Petitioner, employed as a Constable under Border Security Force and attached to the 63rd Bn. was on duty at the Indo-Bangladesh Border and deployed at BOP Ashrafpur on 25.7.2002. He caused the death of one Smt. Janani Choudhary W/o Baijnath Choudhary by firing shots from his 7.62 mm SLR (Self Loading Rifle). The Petitioner was charged for the offence punishable u/s 302 IPC i.e. of having murdered Smt. Janani Choudhary as per charge dated 27.3.2009 framed against the Petitioner. It may be noted that for the purposes of trial, the Petitioner was attached with the 123rd Bn. BSF and the trial was at the General Security Force Court. The Presiding Officer of the Court was Deputy Inspector General P.K. Mehta and the Law Officer to advise the Court was Subhash Kumar LO GDE-II/DC.

2. After the prosecution led evidence, the Petitioner, in presence of R.K. Kanwar 2-IC, the defending officer, made his statement in defence on 6.7.2009 which reads as under:

Before the Hon''ble members of GSFC,

On 25 July 2002, while at BOP Ashrafpur, I was detailed for OP duty at OP No. 2 along with No. 89007471 Ct. Pranjit Brahma who was OP Comdr. At about 1400 hrs, I observed through binocular approx 10-12 women going from village Falimari side towards IBB road and border. Some of them were carrying aluminum and plastic cans. I told about this to OP Comdr, who was making entries in register in respect of villagers who wanted to go ahead of IBB road for grass cutting, farming etc. On being told by OP Cmdr, I went to check that illegal movement of group of women since the women normally indulged in smuggling of country made liquor to Bangladesh. When I reached near them, I asked them to stop & not proceed ahead of IBB road without making entry in register at OP point and also to get their containers checked. Some of the women stepped back while others tried to forcibly go ahead by arguing and abusing me. While facing towards them I moved back towards forward slope of IBB Road. I again asked them to stop on which they started pelting stones towards me. Seeing their aggressive posture, in self-defence, I fired one round in upward direction while backing away from them and had also slipped while moving backwards on the steep gradient of forward slope of IBBR. The women did not stop, charged and threw dahs on me. Fearing imminent threat to my life, I fired two more rounds towards the women without aiming, in self defence. One of them women was injured and was evacuated to Distt. Hosp. Malda by Offg Coy Cdr who reached the P.O. immediately after the incident. Later, I learnt that she had died in Malda. I had fired purely in self defence to save myself. Had I not fired in self defence, I may not have survived since the villagers led by women had earlier also brutally beaten up, caused grievous hurt and maimed BSF persons on duty in the same area.

3. In view of the Petitioner having admitted firing the three shots which caused the fatal injuries resulting in the death of Smt. Japani Choudhary but gave justification thereof, it is apparent that the core issue to be decided was: Whether the Petitioner acted bona-fide in exercise of his right of private defence even to the extent of voluntarily causing death.

4. Section 96 - 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 illustrates the circumstances and situations where a killing is justified. In a nutshell, 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 a grievous hurt. In that event, the person apprehending assault can go to the extent of causing the latter's death in the exercise of the right of private defence, even though the latter may not have inflicted any blow or injury on him.

5. As held by the Supreme Court in the judgment reported as Darshan Singh Vs. State of Punjab and Another, , in order to justify the act of causing death of the assailant, the accused has simply to satisfy the Court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt.

6. The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no straitjacket 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.

7. It has to be kept in mind that where the opposite party is proved to be the aggressor, the reaction of the accused has not to be weighed in scales of gold and it has to be kept in mind that the accused had no time to ponder over and take a reasoned decision as to how much force must he use in retaliation. The issue of force used in retaliation has to be broadly considered in view of the attendant circumstances.

8. With the aforesaid preamble i.e. the statement of law, which is our guiding star, we proceed to note the evidence led during trial and thereafter our job would be to determine: Firstly, whether the attention of the Court was drawn to the law on the subject, 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 defence of private defence. Lastly, if we find in favour of the Petitioner on the first two questions, whether the defence of private defence has been made good.

9. It may be noted that the verdict of guilt returned after the trial is that the Petitioner is guilty of having committed an offence punishable u/s 304 Part-II IPC i.e. the offence of culpable homicide not amounting to murder.

10. It is apparent that the General Security Force Court has held the Petitioner not having any intention to cause death or to cause such bodily injury as is likely to cause death but having knowledge that his act is likely to cause death. It is also apparent that the right of private defence pleaded as a justification has been negated.

11. At the outset, it strikes us that after noting the evidence and the defence, while recording the findings, the Court has set out 3 issues to be decided and the same excludes the specific issue of whether the Petitioner acted in self-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 3rd issue, the Court has briefly touched upon the right of private defence and the same being exceeded.

12. The 3 issues settled by the Court while returning the findings are as under:

(i) First Issue: That the death of Smt. Japani Choudhary W/o Baijnath Choudhary R/o Village Falimari, was caused on 25th July 2002

(ii) Second Issue: That the death of said lady was caused by the accused by firing shots at her while on OP duty at OP No. 2 of BOP Ashrafpur.

(iii) Third Issue: That the above act was done by the accused with the requisite intention/knowledge as envisaged in Section 300 IPC.

13. In view of the defence taken by the Petitioner the answer to the first 2 issues had obviously to be in the affirmative, keeping in view the fact that the post-mortem report of Smt. Japani Choudhary evidenced that she received 3 gun-shot wounds and death was a direct consequence thereof.

14. The 3rd issue settled was certainly relevant for the reason, where a soldier armed with a Self Loading Rifle, fires 3 shots, issue of his having requisite intention or knowledge needs to be considered with clarity keeping in mind the body part targeted and the nature of the firing i.e. whether it was specifically directed towards the victim or was the firing random; keeping in the background the circumstance which necessitated the firing.

15. But, we cannot refrain from holding at the outset that a 4th specific issue needed to be settled and answered; in fact it should have been the 3rd issue settled to be answered and depending upon the answer, the 3rd issue settled was required to be considered as the 4th issue. The reason is obvious. The 3rd issue to be settled was: Whether the act of the accused in firing was in self-defence and if yes, whether the right to self-defence was exceeded. If the answer was in favour of the accused, nothing further was required to be considered. But if it was held that the right was exceeded, it was only then was it necessary to consider the matter further, with reference to the intention or knowledge of the accused.

16. Let us note the evidence on record and at the forefront we may note the evidence pertaining to the injuries suffered by Smt. Japani Choudhary which caused her death. The post-mortem report has not been proved by the author thereof Dr. Ajoy Kumar Das PW-8, but he deposed to the contents of the post-mortem report and his testimony evidences that the death of Smt. Japani Choudhary was due to gun-shot wounds, 2 out of 3 of which were fatal. The first gun-shot wound noted was not fatal inasmuch as the bullet pierced at a point on the outer aspect of upper part of left arm, traversing inwards and upwards, perforating the skin tissue making an exit at outer upper part of left arm. The second gun-shot wound entered the body at left inguinal region traversing

inwards and upwards towards right side of body, perforating the skin tissue muscles, the exit being at right interior abdomen below Umbilicus. The third gun-shot wound being the bullet entering at left gluttal region traversing inwards and upwards anteriorly, perforating skin tissue muscles, fracturing pelvis, intestines and urinary bladder and making no exit.

17. Undisputably, the 3 shots fired by the Petitioner have all hit Smt. Japani Choudhary. But the situs of the 3 injuries tell a story and is a circumstance relevant to the defence of private defence, and which circumstance, we find, not being highlighted in the advice Ex.R, by the Law Officer to the Court. Ex.R is the SUMMING UP BY LAW OFFICER AT THE TRIAL. We find that the evidence marshaled under the 3rd issue of the charge does not highlight this feature.

18. The feature of the evidence is that Japani Choudhary received 3 gun-shot wounds on the left side of her body. 1 gun-shot wound hit her on the upper part of the left arm. The 2nd gun-shot wound hit her at the left Inguinal region. It is apparent that the Petitioner was facing her in the front but was towards the left side of her body. The situs of the 3rd wound, entry point, is the left gluttal region and evidenced by the internal injury of pelvis being fractured as also the urinary bladder and intestines being damaged, it is apparent that the 3rd entry wound is towards the outer part of the left gluttal region. The 3 wounds are apparently conclusively suggestive of the fact that the first 2 shots hits Japani Choudhary before the 3rd and we say so for the reason, recreating the firing it would be apparent that as 2 shots hit Japani Choudhary, one on the upper left forearm and the other at the left inguinal region, and as she was turning, probably to retreat, the 3rd shot hit her at the left glouttal region i.e. the left buttock upper part. It is also relevant to note that the trajectory of the projectiles is upwards. It is apparent that Smt. Japani Choudhary was at a height and the Petitioner was below. This explains the upward trajectory of the projectiles. The weapon of offence was a Self Loading Rifle which fires shots with rapid fire and not that one bullet is loaded in the rifle and fired, followed by the second bullet being loaded and fired and so on. The 3 injuries further show the 3 shots being fired in rapid succession, for the reason, as already reasoned by us herein before, the situs of the 3 wounds show that as Japani Choudhary received a bullet shot on the arm and the inguinal region or vice versa, she was just about to turn, when she received the 3rd shot.

19. Unfortunately, neither the Court thought it prudent to bring on record the post-mortem report nor the Law Officer guiding the Court thought it advisable to do so. It may be noted that for the incident in question, 2 cross FIRs were registered by the civil police and apparently the post-mortem report of Japani Choudhary was obtained by the Investigating Officer therein. Evidence produced before us, as recorded, shows that Dr. Ajay Kumar Das PW-8 deposed to the contents of his post-mortem report, probably with reference to his record for we find the nature of injuries noted by him on the dead body were recorded as a part of his testimony.

20. Be that as it may, suffice would it be for us to highlight at this stage that the 3 injuries suffered by Japan Choudhary evidence the same to be the result of a rapid firing and that the Petitioner was armed with a Self Loading Rifle is a circumstance of relevance to consider the right of private defence and it being exceeded, the relevance would be to weigh the hostility of the situation stated to have been faced by the Petitioner and his pressing the trigger of the Self Loading Rifle, which weapon is a rapid fire weapon and not that the Petitioner had time to repeatedly load bullets in his rifle and keep on firing with an interval of time, giving him space of time, to reflect whether the assailants were retreating or not.

21. Time to note the evidence i.e. of the circumstances enwombing the act of the Petitioner.

22. Ct. Paramjeet Brahma PW-1 deposed that he was in the same company as that of the Petitioner which was deployed at BOP Ashrafpur and was present in the company on 25.7.2002 and along with the Petitioner was on duty from 06:00 hours to 18:00 hours. That the border under their area of responsibility was unfenced. At about 13:30 - 13:45 hours Ct. Rajesh i.e. Petitioner observed through binocular movement 8-10 women proceed towards Bangladesh side and he proceeded to check them. A little after, a boy informed him that a quarrel had taken place between the Petitioner and a group of women and as he rushed to the spot he heard sound of 3 shots within a second or two and on reaching the place of occurrence he saw Petitioner on forward down-slope on the IBB Road and a women lying injured about 15 yards away. He observed one "Dah" (chopper) and 8-10 stones near the Petitioner on the down-slope and a "Daraanti" (sickle), a plastic jerry can and an aluminum container near the lady on the road. On being cross-examined he admitted that everybody proceeding towards the border ahead of the IBB Road had to make an entry in the register kept at the OP point and that no entry was made in the said register by any woman. He stated that it appeared that the women were trying to move through the border in an illegal manner. He stated that smuggling of country made liquor from India to Bangladesh was rampant in the area. On being questioned by the Court as to whether he could give the exact number of jerry cans seized from the spot, he clarified that in addition to the number he had stated in his testimony, 2 more jerry cans with country made liquor having size between 5-10 litres were also recovered. He further informed the Court that when he saw the Petitioner soon after the incident, the Petitioner had a minor bruise on his left little finger.

23. Relevant would it be to note that as per the testimony of PW-1 the Petitioner was standing on the forward down-slope of the IBB Road and this corroborates the forensic evidence emerging from the post-mortem report of the deceased and confirms that the Petitioner was at a height disadvantage, being down-slope and the group of women of whom one died had the height advantage. This explains the upward trajectory of the 3 bullet wounds suffered by Japan Choudhary. The evidence of PW-1 further brings out that 3 plastic jerry cans and 1 aluminum container were at the site, 2 of which contained country made liquor.

1 chopper and 1 sickle was at the spot. 8-10 stones were lying near the Petitioner. The chopper was near the Petitioner who had a bruise injury on the left little finger. Evidence suggests that a chopper was hurled at the Petitioner. Stones were thrown at him. There were more than 4 persons, presumably, for the reason 4 containers were recovered from the spot. At least 2 persons were armed.

24. PW-2 Smt. Anita Choudhary, PW-3 Smt. Shanti Choudhary, PW-4 Smt. Arthi Choudhary have deposed in sync stating that they along with late Japani Choudhary went towards border to collect grass and a quarrel ensued between the Petitioner and Japani Choudhary at which Japani Choudhary threw a stone and a scuffle ensued whereupon Petitioner fired 3 shots at Japani Choudhary.

25. It is apparent that the 3 witnesses are not trustworthy witnesses, not for the reason they reside in the same village and belong to the same community as the deceased, but from the fact that the purpose of their visiting the area stated by them i.e. to collect grass runs in the teeth of 4 containers, 2 of which were containing country made liquor, being recovered from the spot. Secondly, the question of any scuffle between Japani Choudhary and the Petitioner does not arise for the reason if the firing was preceded by a scuffle the gun-shot wounds received by Japani Choudhary would have tatooing of the skin at the entry point of the bullets which is not the case.

26. Be that as it may, relevant would it be to note that PW-2, on being cross-examined admitted that at the relevant time Japani Choudhary was carrying an aluminum container filled with country made liquor and that even in the past she used to carry country made liquor to the border area. Questioned by the Court, she admitted that Japani Choudhary was not carrying the "Dah" (chopper) with her; stating that Japani Choudhary was carrying a sickle with her. It be noted that even PW-3 admitted that Japani Choudhary was carrying country made liquor with her. She further admitted that neither she nor Japani Choudhary was carrying a "Dah". Even PW-4, on being cross-examined, admitted Japani Choudhary carrying one aluminum container with her and that neither she nor Japani Choudhary was carrying a "Dah".

27. As per PW-2, PW-3 and PW-4, they and Japani Choudhary were the only 4 persons. All the witnesses have stated in unison that neither Japani Choudhary nor any of them was carrying the "Dah". It is obvious that if not more, there was one more person.

28. Now, as per the Petitioner, there was a group of 8-10 women.

29. The 3 stated eye-witnesses have obviously lied on oath and we see no reason not to believe the Petitioner that they were a group of 8-10 women.

30. HC Gadadhar Singh PW-5 deposed that on hearing sound of fire he came out of the barrack and rushed on a motorcycle to the place wherefrom sound of fire was heard and saw a lady injured on the border road. He deposed that a "Dah"

and stones were seen lying near the Petitioner. 1 sickle was also lying nearby. The aluminum container lying near the road was emitting smell of alcohol, though it was empty when he saw it. He further deposed that the accused i.e. the Petitioner told him the circumstance under which he had fired, which we note is the same as per the version of the Petitioner in his statement of defence.

31. Asstt. Commandant Jaswant Singh PW-6, another person who had reached the place of the occurrence, deposed that SLR issued to the Petitioner on the day of the incident had body No. DC-3414 and Butt No. 182. He further deposed of what the Petitioner told him soon after the incident and further facts as deposed to by PW-5 with further addition that the Petitioner had shown him a scratch on the Butt of his rifle caused due to the Butt being hit by a stone thrown by a lady. He confirmed that the "Dah" was recovered where the Petitioner was standing. He confirmed that local women used to smuggle country made liquor to Bangladesh and in the past incidents had taken place where civilians had attacked BSF personnel when stopped from proceeding ahead of the IBB Road towards the border.

32. HC Chandan Singh PW-7 deposed that when the SLR used by the Petitioner was brought to the armory he could detect gas fouling in recoiling parts of the rifle and that he had noted that the SLR was bearing Butt No. 182.

33. PW-8, as noted above was the doctor who conducted the post-mortem on the body of the deceased. PW-9 is Insp. Uday Mazumdar from the local police station who deposed that he neither had with him the rough site plan of the place of the incident as also the various recovery memos prepared by him as they were filed in the Court concerned and hence we note that the witness could throw no light on the subject with reference to the scene of the crime soon after the incident.

34. A relevant fact needs to be noted, as noted under the observation by the Court, when the rifle having body No. DC-3414 was brought in the Court it had Butt No. 10 on it and the Court had noted that the rifle which was used was having Butt No. 182 and the one which was brought to Court had the Butt number changed to 10.

35. Let us now note the findings on the 3rd issue returned by the Court. We reproduce the same. The finding read as under:

This issue has been vehemently contested by the Defence. As regards this issue, the Court believe the testimony of PW-2 corroborated by PW-3 and PW-4 that the deceased had quarrel with the accused who was on duty at that time, and threw stone on him when he asked her not to go ahead of the IBB Road. The Court further find from the testimony of PW-9 corroborated by PW-5 and PW-6 that one "Dah" was recovered from the place of incident by PW-9. The Court also believe the version of the accused corroborated by the direct as well circumstance evidence on record that the accused was attacked with stoned by the group of women when he stopped them from going ahead of the IBB Road without making an entry in the register at OP Point. Though, there is no independent evidence

except some circumstance evidence on record to corroborate the contention of the accused that some of the women threw "Dah" on him, the Court intend to given benefit of the doubt on this matter to the accused. Thus, the Court further believe the contention of the accused that fearing imminent threat to his life, he fired in self-defence and the alleged act of the accused which caused death of the deceased was not done with the intention or knowledge as envisaged in Section 300 IPC and the case of the accused would be covered by exceptions II & III to Section 300 of IPC. But at the same time, the Court from over all facts and circumstance of the case and evidence on record also find that the accused had exceeded his right of private defence as well as exercise of legal powers by firing three shots which is without any justification. In such circumstances, the offence committed by the accused is culpable homicide not amounting to murder punishable u/s 304, Part II of IPC. Thus, the Court find this issue as "Proved" with above mentioned exceptions and variations.

36. A perusal of the summing up by the Law Officer at the trial would reveal 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 the enunciation of the Law of Evidence relating to circumstantial evidence, expert opinion, credibility of witnesses, discrepancies and contradictions, omissions, improvements and reasonable doubt. Thereafter, with respect to the charge, 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-?-vis the four limbs of Section 300 IPC. Intermingled with the address to the Court on the issue of when would an act be murder and when would it be culpable homicide not amounting to murder, the Law Officer highlighted the right to private defence; to quote:

Right to private defence.

The entire law relating to private defence of person and property including the extent of and limitation to exercise such right has been codified in Sections 96 - 106 of IPC. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. However, it does not define the expression "right of private defence".

Whether in a particular set of circumstances, a person acted in the exercise of right of private defence, is a question of fact to be determined on the facts and circumstances of each case. In determining this question of facts, the Court must consider all the surrounding circumstances. If the circumstances shows that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea and it is not necessary for the accused to plead in so many words that he acted in self defence. The principles as to right of private defence of body are as follows:

(a) There is no right of private defence against an act which is not in itself an

offence under the code.

(b) The right commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit an offence. Although the offence may not have been committed; it is co-terminus with the duration of such apprehension; (Sec 102 IPC) (read).

(c) It is defensive and not a punitive or retributive right. Therefore, in no case more harm than necessary to inflict in defence is permissible;

(d) The right extends to killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the crimes enumerated in the six clauses of Section 100 IPC (read).

37. Thereafter we find that the Law Officer summed up the evidence pertaining to the three issues of the charge, and pertaining to the 3rd issue of the charge summed up the evidence as under:

That the above act was done by the accused with the requisite intention/knowledge as envisaged in Section 300 IPC

Gentleman, this being a vital issue, you should devote full consideration to it. Your attention is invited to the evidence discussed by me while discussing first and second issue of the charge and provisions of Law relating to the charge, which I have already explained. I have also explained to you as to what is meant by "Intention", "knowledge" and "motive" in the foregoing paras of my summing up, while discussing the law relating to the charge, and you may refer to the same again if need be. "Intention" and "knowledge" are mental attitude and not capable of positive proof. However, it can be inferred from an overt act of the accused and circumstances of the case.

In the instant case, whether the accused had an "intention" or requisite "knowledge", besides overall facts and circumstances of the case, some of the points which you may consider are the type of weapon used and the part of body of the victim at where she was hit. You may also consider the various facts and circumstances of the case as brought out by the witnesses. In nutshell, you have been in the evidence through testimony of PW-1 that on the place of the incident he observed one "Dah" and 8-10 stones lying near the accused on the down slope of the IBB Road. One "Daraanti" (sickle), one plastic jerry can and aluminum "Dallu" (container) were also lying nearby the deceased on the road. He has also stated that two more plastic jerry cans of the size of about 5-10 litres and contained with country made liquor, were also lying on the road and the accused has also sustained minor bruise on little finger of left hand. PW-2, PW-3 and PW-4 have stated that when the accused stopped the deceased from going ahead of the IBB road, she had an altercation/quarrel with the accused and threw stone on him. PW-2 has stated that the aluminum container carried by the deceased was filled with country made liquor and she used to carry country made liquor to the border area. PW-2, PW-3 and PW-4 have also stated that the

deceased or they were not carrying any "Dah" at the time of incident. As per PW-2, the accused was never seen with the deceased prior to the incident. PW-5 and PW-6 have also generally corroborated the deposition of PW-1 in material particulars. PW-6 has stated that FIR bearing No. 80/02 was lodged by him in Police Station Habibpur on 25 July 2002 wherein it was mentioned that the accused fired in self-defence on the ladies who attacked him with stones and "Dah". He has also stated that no bodily injury was received by the accused in this incident. However, the accused showed PW-6 minor scratch on Butt of the Rifle caused due to hitting by stone thrown by the lady. Dr. Ajoy Kumar Das, Medical Officer (PW-8) has stated that the deceased suffered three bullet injuries caused by three single projectiles. As per him the death was due to effect of gun shot injuries which were anti-mortem and homicidal in nature and Injury No. 2 and 3 were most fatal and death was caused due to these injuries, however, first injury was not so fatal. He has also brought out that there was no blackening or tattooing surrounding the wounds.

The accused in his written statement (Exhibit-"O") has stated that he fired in his self defence. The accused in the course of his duty, after repeatedly trying to stop the women and despite firing one shot in upward direction, still found himself being attacked by the group of women throwing "Dahs" at him. The accused sensed imminent danger to his life and scenes of many such incidents in which BSF persons on duty had been brutally attacked by villagers, received grievous injuries and had been in some cases maimed for life, moved before his eyes,. Left with no other option, the accused without taking any particular aim fired towards the group of women in which the deceased got injured.

In the light of above discussion and evidence discussed in foregoing paras of my summing-up while discussing first and second issues of the charge, which you may refer to again if need be, you may decide on this issue. If you conclude in affirmative, you may convict the accused on the charge, otherwise the charge fails and the accused is entitled for acquittal as a matter of right. However, if you conclude, in view of the entire facts and circumstances of the case, that the case of the accused falls/is covered under any of the exceptions of Section 300 IPC, the law pertaining to which I have already explained to you, then the act of the accused is amounting to culpable homicide not amounting to murder and then you may record a special finding for which the Court is empowered under the provisions of Section 93 of the BSF Act read with Rule 99 of the BSF Rules (all read), otherwise the charge fails and the accused is entitled for acquittal as a matter of right. Further, if you conclude that the accused had caused the death of Smt. Japani Choudhary (the deceased) in exercise of his lawful right of private defence, law relating to which has already been discussed by me in preceding paras, you may hold him "not guilty" of the charge. If you entertain any doubt, you must resolve it in favour of the accused.

38. We have noted hereinabove in para 35 the findings pertaining to the third issue of the charge returned by the Court. We have underlined, to emphasize,

the verdict pertaining to the plea of self defence.

39. A perusal of the summing up by the Law Officer to the Court would reveal that the evidence relatable to the plea of self-defence as also whether the self defence was exceeded has been stated in a very cursory manner.

40. We may note at the outset that the learned Law Officer did not bring out the nuisances of the law pertaining to self defence in the context of the extent of force which can be used to ward off an act of aggression. It was not highlighted that at the core was to look at evidence wherefrom the mental condition of the accused could be gathered with reference to the formation of a reasonable belief in the mind of the accused that if he does not take defensive action, the aggressor may either kill him or cause grievous hurt. We highlight that if the circumstances of aggression are such that it can be reasonable inferred that the person who is the target of the aggression would form a reasonable belief/apprehension that he was likely to be grievously hurt, even then the right of private defence would be upheld.

41. With reference to the evidence led, we find that the learned Law Officer did not highlight the following features:

(i) That the Self Loading Rifle (SLR) has a magazine containing 40 bullets and is a rapid fire firearm.

(ii) The evidence of Dr. Ajay Kumar Dass, though establishes the deceased being hit with three bullets, brings out the trajectory of the bullets moving upwards and thus establishes that the victim had a height advantage vis-?-vis the accused.

(iii) The three gun-shot wounds establish that the Petitioner and the deceased were face to face, with the Petitioner being towards the left side of the victim and at a distance; i.e. the two were facing diagonally across each other.

(iv) The three shots were fired in rapid succession evidenced by what we have discussed in para 18 above and in respect whereof there was corroboration through the testimony of Ct. Paramjeet Brahma who categorically stated that he heard three shots being fired within a span of a second or two.

(v) Evidence establishes three plastic jerry-can and one aluminum container at the site, the jerry-cans containing country made liquor and the aluminum container empty but smell of liquor emitting therefrom as deposed to by HC Gadadhar Singh which establishes that liquor was being smuggled.

(vi) Evidence establishes that local women used to smuggle country made liquor to Bangladesh and there were past incidents of civilian attacking BSF personnel.

(vii) The version of PW-2, PW-3 and PW-4 that the three along with the deceased were approaching the border to collect grass was false and the purpose of the visit was to smuggle liquor.

(viii) A "Dah" (Chopper) was found lying near the Petitioner who had a bruise

injury on his left little finger as deposed to by PW-1 and that he had shown the butt of his SLR, with a scratch thereon to PW-6.

(ix) There were stones lying around the place where the Petitioner was standing.

(x) That the Petitioner was down slope and the jerry-cans were on the IBB Road which was above where the Petitioner was standing. PW-1 had clearly stated that the Petitioner was seen by him on forward down slope. A conclusion could be drawn therefrom that the Petitioner was cornered.

(xi) Much before the incident, when Petitioner detected movement towards the border, not knowing what would happen, Petitioner had told PW-1 that he had spotted 8 to 10 women move towards Bangladesh through the binoculars and this corroborated the version of the Petitioner that he was attacked by a group of 8 to 10 women, all of whom were carrying "Dah" or "Sickle".

(xii) Evidence establishes that other than the deceased, who could not run away as she was injured, all the women ran away and the benefit thereof had to be given to the Petitioner when he stated that all the women were armed.

(xiii) A "Dah" being thrown at the Petitioner and he being pelted with stones and the group of 8 to 10 women being armed with "Dah" or a "Sickle" was the evidence wherefrom it had to be inferred whether the Petitioner would have formed a reasonable belief, applying the test of a reasonable man, that he was in great danger of being grievously injured, if not killed.

42. Answering the three questions which we have posed to be answered for ourselves, in para 8 above, it is apparent that the answer to the first question is that the attention of the Court was not properly drawn to the law on the subject i.e. the right to private defence and it being exceeded. The answer to the 2nd question is that the attention of the Court was not drawn to the entirety of the evidence which had emerged. Thus, we proceed to answer the last question: whether the defence of acting in private defence has been made good.

43. As noted by us in para 35 above, where we have extracted the findings returned by the Court, the Court has held that the evidence establishes that the accused, fearing imminent threat to his life, fired in self defence. Indeed, the finding is correct and we need not re-highlight the evidence on the point, save and except to briefly sum up by recording that the evidence establishes that the liquor mafia was using women to smuggle liquor at the border and there were instances in the past of BSF jawans being attacked by civilians when prevented from smuggling liquor; nobody could proceed to the border without making an entry in the register kept at the OP point and that on the day of the incident 8 to 10 women, armed with "Dah" or "Sickle" were attempting to smuggle liquor and had made no entry in the register at the OP point. When challenged by the Petitioner to recede back to the territory of India, the women attacked him. A "Dah" was thrown at him. Stones were pelted at him. The Petitioner was outnumbered. He was stationed at a point where he had a height disadvantage.

The women were close enough to launch a lethal assault evidenced by the fact that a stone thrown at him and a "Dah" thrown at him not only reached him but injured, albeit, mildly, the little finger of the left hand and cause a scratch mark on the butt of his rifle. Any person in the given situation would reasonably form a reasonable opinion that his life and limb was in grave danger.

44. The Court has given no reasons as to why it was opining that the Petitioner has exceeded his right of private defence. The only trace of the reasoning we can find is, as noted by the Court, that the Petitioner fired 3 shots.

45. But, the Court has apparently glossed over the fact that a Self Loading Rifle is a rapid fire firearm and the three bullets were obviously the result of a rapid fire when the trigger of the Self Loading Rifle was instinctively pulled, thrice in the flash of a second or two as deposed to by PW-1. The post-mortem of the dead body of the deceased, for the reasons given by us in para 18 above, also suggests that the deceased received 3 gun shots in rapid succession and not with an interval of time of even a few seconds. The third injury on the left gluttal region and the trajectory of the projectile, with reference to the situs of the first two injuries establishes that when the shots fired through a rapid fire firearm, being three in number, hit her, the first two were received within the split of the second, one after the other evidenced by the two gun-shot wounds being, one on the upper part of the left arm and the other at the left inguinal region. The trajectory of the projectiles is upward and inward towards the right. The natural reaction would be to retreat immediately and this has what has happened evidenced by the fact that just when the deceased turned the third bullet hit the left gluttal region and the trajectory of the projectile shows that the bullet travelled diagonally, inwards and upwards fracturing the pelvis, damaging the urinary bladder and thereafter the intestines. It is apparent that it is not a case where the Petitioner fired once and then with a pause fired a second time and with further pause fired a third time. Had evidence been so, one would have then discussed the effect of the Petitioner not allowing the women to retreat and on the contrary, out of revenge, hatred or anger, repeatedly shooting and therefore exceeding the right of private defence. It could then have been argued that evidence establishes that the aggressors were in retreat and yet in spite thereof, the Petitioner acted trigger happy.

46. We bring the curtains down by emphasizing that the Court has returned the correct verdict; of the Petitioner being in a situation that anyone would fear imminent threat to life and hence justified in firing in self defence. We disagree with the non reasoned conclusion by the Court that the Petitioner exceeded the right of self defence and if the reasoning of the Tribunal is premised merely upon the fact that since three bullets were fired and therefrom an inference can be drawn that the right to self defence was exceeded, we have given enough reasons hereinabove to hold to the contrary by bringing out the evidence which was relevant, but has been ignored by the Court and which evidence we note has not been highlighted by the Law Officer in his address to the Court.

47. We note that as a result of being convicted, penalty of dismissal of service has been inflicted upon the Petitioner.

48. Disposing of the writ petition by allowing the same, we quash the verdict of guilt returned against the Petitioner and we also quash the order dismissing the statutory petition filed by him. We declare the Petitioner not guilty of the offence he was charged of and acquit him, holding that the Petitioner acted in self defence and did not exceed the right of self defence. The Petitioner is directed to be reinstated in service and for the period he was dismissed from service till he is reinstated, we direct the competent authority to pass a reasoned order as to the manner in which said period would be treated for purposes of pay and allowances, pensionary service rendered etc. Compliance would be made within a period of 12 weeks from today.

49. We refrain from imposing any costs against the Respondent.