

(2008) 07 GAU CK 0058
In the Gauhati High Court

Harendra Kumar Deka

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 02-07-2008

Acts Referred:

Armed Forces (Special Powers) Act, 1958 — Section 2, 3, 4, 6
Arms Act, 1959 — Section 3
Army Act, 1950 — Section 1, 2, 28, 41, 47
Constitution of India, 1950 — Article 14, 19, 21
Criminal Law (Amendment) Act, 1932 — Section 3
Criminal Law (Amendment) Act, 1961 — Section 3
Criminal Procedure Code, 1973 (CrPC) — Section 197, 46, 70, 71, 78
Penal Code, 1860 (IPC) — Section 106, 14, 299, 300, 302

Citation : (2009) 2 GLR 263 : (2008) 3 GLT 344

Hon'ble Judges : Jasti Chelameswar, C.J.;Hrishikesh Roy, J

Bench : Division Bench

Judgement

Jasti Chelameswar, C.J.—Heard Ms. M Deb, learned Counsel appearing for the petitioner. Also heard Ms. B Goyal, learned Govt. Advocate who represents the State respondents.

2. The present petition has been filed seeking direction of the Court for conducting an enquiry into the killing of the petitioner's son Prakash Deka @ Mridul who was killed in police firing on 8-8-2007 and also for directions for paying compensation to the petitioner and for taking appropriate actions against the guilty police officers.

3. Pursuant to the notice issued by this Court, counter affidavit on behalf of the Deputy Commissioner, Darrang, Mangaldoi of Darrang District is filed.

4. It is not in dispute that the petitioner's son died on account of police firing, while he was driving accompanied by six others and proceeding in a Maruti Van. It is not in the dispute that in the process one of the other passengers Smti Gita Kalita also sustained a bullet injury in her leg. It is also not in dispute that the vehicle driven by the son of the petitioner was involved in a hit and run, accident

a little before the police firing incident and the concerned vehicle was being driven at great speed to escape the mob which chased the vehicle after the vehicle driven by the son of the petitioner ran over a bicyclist, namely, Jiaul Haque (aged 13 years) at Maroi, who was killed by the said accident and which led to registration of Sipajhar P S Case No. 120/97.

5. The respondents do not dispute that the petitioner's son died on account of the police firing and also that Smti Gita Kalita received a bullet injury. The explanation by the respondents is that a police "naka" party was deployed to check vehicle on the spot on the eve of the independence day particularly in the concerned area where extremists are known to be active. The vehicle driven by the deceased was asked to stop by the said police party near Burha Police Outpost. The vehicle was not stopped or momentarily stopped only to be driven away and the police personnel in order to stop the vehicle resorted to fire resulting in the death of the petitioner's son and injury to Smti Gita Kalita.

6. Ms. M Deb, learned Counsel for the petitioner submits that the police could have fired at the tyres of the vehicle to stop it from escaping and there was no need to resort to fire to kill the driver of the vehicle.

7. It appears that the State ordered a Magisterial enquiry into the incident. From the statement of witnesses recorded in the inquiry conducted by the Sub-Divisional Magistrate that the vehicle driven by the deceased had knocked down a minor boy because of which the front glass of the Maruti Van was broken. Thereafter the Maruti Van was chased by the local public and the deceased in order to escape the mob fury, drove the vehicle at a great speed. The police, who were deployed as "naka" and were on alert because of the extremists activities in the area on the eve of the Independence Day, signaled the vehicle to stop. But even the witnesses who were traveling in the vehicle, namely, Witness No. 7, Nayanmoni Kalita, Witness No. 8, Trinkul Kr. Das, Witness No. 9, Jugal Nath, Witness No. 14, Smti Gita Kalita, Witness No. 15, Smti Rakhi Kalita and Witness No. 16, Smti Nimi Das indicated that the deceased tried to flee away from the police. In fact, the witnesses, who were traveling in the vehicle indicated that the deceased slowed down the vehicle without stopping the engine but suddenly he tried to speed away disregarding the police signal to bring the vehicle a halt. The report of such an enquiry is placed before us. In the report of the Sub-Divisional Magistrate, the statements given by the witnesses were noted and other evidence were considered. The inquiry finding is noted as follows:

F) Findings:- If we serialize the incidents taking place, the following points come out clearly:

1. An accident occurred at Maroi resulting in the death of one boy.
2. Public tried to attack and detain the vehicle after the accident.
3. The driver became nervous and to save the life of passengers and also to save the vehicle from public out-rage, drove the vehicle at abnormal speed.

4. Because of the abnormal speed he could not probably stop the vehicle properly, as signaled.

5. Police personnel on checking duty thought that the passengers traveling in the vehicle was ultras as the vehicle did not stop despite repeated signals to do so. Since it hit one Jawan on duty and tried to flee, the policemen were convinced that ultras might be traveling in the vehicle.

8. It further appears from the statement of the co-passengers of the vehicle driven by the deceased that the deceased ignored the clear advice of the co-passengers to stop the vehicle at the police signal and drove away the vehicle at a great speed.

9. Witness No. 17, Sri Bhupen Kalita who was on "naka" duty at the place of incident and other police constables present at site clearly deposed that they tried to stop the vehicle driven by the deceased by raising their hands and also by whistling, but the vehicle did not stop and went pass the first and the second group of the "naka" party. The constable Bhupen Kalita, who was with the third group of the "naka" party tried to stop the vehicle by standing on it's way and signaling the vehicle to stop but the vehicle driven by the deceased instead of stopping, hit him on the left knee and waist and tried to escape. The said constable jumped towards the road side and fired at the moving vehicle aiming at the wheels to stop it. Then it is found that the vehicle suddenly swerved directions and stopped after some distance. When the jowans gheraod the Maruti Van and asked the passengers to surrender, they found that the driver of the vehicle had succumbed to the injuries suffered from the police firing.

10. In our opinion, questions of far reaching consequence are involved in the present case. It is unfortunate that the assistance rendered at the Bar is not adequate proportionate to the momentousness of the issues involved. Nonetheless, we proceed to examine the various legal issues involved in the case.

11. Then the question is whether the killing of Prakash Deka by the police personnel of the State of Assam is justified in law ? Secondly, as to what is the procedure of law by which such a justification is to be established?

12. Culpable homicide is an offence u/s 299 of the IPC defined in the following words:

299. Culpable homicide.- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

In other words, causing death of a human being with the requisite intention or knowledge, as specified under the section, is an offence.

13. Section 300 of the IPC declares that except in those cases specified under Exceptions 1 to 3, in all other cases culpable homicide amounts to an offence of

murder if the act by which the death is caused is done with such intention as is specified in the said section. Both the offences of murder as well as culpable homicide are punishable u/s 302 and 304 of the IPC respectively.

14. Section 2 (Section 2. Punishment of offences committed within India.- Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.) of the IPC declares that every person shall be liable for punishment for every act or commission contrary thereof. Section 6 of the IPC declares that every definition of an offence and every penal provision under the IPC shall be understood subject to the exceptions contained in Chapter entitled "General Exceptions".

15. Chapter IV of the IPC commencing with Section 76 and ending with Section 106 deals with "General Exceptions". Firstly, some provisions in Chapter IV deal with situations in which an act of omission committed by a person would answer the description of "some offence" under the IPC but in the special circumstances recognized by the Legislature under the provisions of Chapter IV are not treated as offences. Secondly, some of the provisions of the Chapter deal with persons whose acts or omission would not constitute any offence at all even though such acts or omissions otherwise answer the description of "some offence" under the IPC, such as the act of children below the age of 7 years, act of person of unsound mind etc.

16. More relevant to the context of the present case are the Sections dealing with private defence, that is, Sections 96 to 106 of the IPC. While Section 96 declares that nothing is an offence which is done in exercise of the right of private defence. Section 97 declares that every person has a right to defend his own body and the body of any other person against any offence affecting the human body and also the property of himself or other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass etc. However, Section 97 specifies that such right is subject to the restrictions contained in Section 99 of the IPC, the details of which may not be necessary at present.

17. An examination of the Chapter of General Exceptions shows that except in those categories covered by some provision or the other of Chapter IV of the IPC persons committing acts or omissions which constitute "an offence" under the IPC are liable to be punished in accordance with law. Employees of the State are not an exception to the general principle.

The law does not recognize that even employees of the State who are members of such services, which by the very nature of the service requires them to carry arms, employed in connection with the defence of the country or maintenance of the law and order within the country.

18. The Constitution of India does not confer on any body a right either fundamental or otherwise to carry arms. On the other hand Article 19(1)(b) while

confers fundamental right to assemble peaceably declares that such right to assemble is only a right to assemble without arms.

Article 19. Protection of certain rights regarding freedom of speech, etc. - (1) All citizens shall have the right--

(a). . .

(b) to assemble peaceably and without arms;

19. The Arms Act, 1959 regulates the manufacture, acquisition, possession and carrying of fire arms. Acquisition and possession of weapons, except in accordance with the provisions of the Act, by any person is an offence under the said Act. However, Section . 41 of the Act enables the Govt. of India to exempt any person or class of persons from the operation of the Act. In the absence of any assistance from the Bar we can only presume that the members of the Armed Forces of the Union of India and the members of the Police Forces of the various States are carrying arms without exposing themselves to prosecution for violating the provisions of the Arms Act, by virtue of some exemption notification issued u/s 14 of the Arms Act.

20. Section 2 of the Army Act, 1950 makes specific provision dealing with the liability. u/s 69 of the said Act any person subject to the said Act who commits any "civil offence", which expression is defined u/s 3(ii) to mean an offence which is triable by a criminal court, is deemed to be guilty of an offence against the Act and is required to be punished in accordance with the provisions of the Army Act. In other words, if any person who is subject to the provisions of the Army Act, 1950 commits an offence defined under the IPC or any other law, which is to be tried in accordance with either the Code of Criminal Procedure or any other appropriate law, is required to be tried in accordance with the procedure established under the Army Act. Section 70 of the Army Act carves out an exception to Section 69 of the Act.

Section 70. Civil offences not triable by court-martial.- A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences--

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf.

It can be seen from the above that persons who are subject to the provisions of the Army Act but have committed an offence of either murder or culpable homicide not amounting to murder or rape are not deemed to be guilty of an

offence under the Act but are required to be tried in accordance with the normal procedure of law which is applicable to the persons not governed by the provisions of the Army Act except in the limited class of cases specified in the said Section. In short, even persons governed by the Army Act are not totally immune from penal consequences when they commit an offence. Depending on the nature of the offence and the circumstances in which it is committed, the procedure for inflicting the punishment varies.

21. Coming to the Police Force, the establishment of a Police Force is generally a matter falling within the jurisdiction of the State under Entry 2 of List II of Seventh Schedule of the Constitution of India. The said Entry is subject to Entry 2A of List I of the same Schedule.

The State of Assam made the Assam Police Act, 2007 which was published in the Assam Gazette Extraordinary on 6th August, 2007 and by virtue of Section 1(2) of the Act on such publication it came into force with effect from 18th September, 2007. Section 28 of the Act empowers the State Government to create Armed Police Units to assist the Civil Police in dealing with group protests and violent disturbances involving breaches of peace or law and order. Section 47 of the Act prescribed the role and functions of the police. It reads as follows:

47. Role and Functions of the Police ? The role and functions of the police shall broadly be;

(a) to uphold and enforce the law impartially, and to protect life, liberty, property, human rights, and dignity of the members of the public;

(b) to promote and preserve public order;

(c) to protect internal security, to prevent and control terrorist activities, breach of communal harmony, militant activities and other situations affecting Internal Security;

(d) to protect public properties including roads, railways, bridges, vital installations and establishment etc. against acts of vandalism, violence or any kind of attack;

(e) to prevent crimes, and reduce the opportunities for the commission of crimes through their own preventive action and measures as well as by aiding and cooperating with other relevant agencies in implementing due measures for prevention of crimes;

(f) to accurately register all complaints brought to them by a complainant or his representative, in person or received by post, e-mail or other means, and take prompt follow-up action thereon, after duly acknowledging the receipt of the complaint;

(g) to register and investigate all cognizable offences coming to their notice through such complaints of otherwise, duly supplying a copy of the First Information Report to the complainant, and where appropriate, to apprehend the

offenders, and extend requisite assistance in the prosecution of offenders;

(h) to create and maintain a feeling of security in the community, and as far as possible prevent conflicts and promote amity;

(i) to provide, as first responders, all possible help to people in situations arising out of natural or man-made disasters, and to provide active assistance to other agencies in relief and rehabilitation measures;

(j) to aid individuals who are in danger of physical harm to their person or property, and to provide necessary help and afford relief to people in distress situation;

(k) to facilitate orderly movement of people and vehicles, and to control and regulate traffic on roads and highways;

(l) to collect intelligence relating to matters affecting public peace, and all kind of crimes including social offences, communalism, extremism, terrorism and other matters relating to national security, and disseminate the same to all concerned agencies, besides acting, as appropriate on it themselves;

(m) to take charge, as a police officer on duty, of all unclaimed property and take action for their safe custody and disposal in accordance with the procedure prescribed.

It can be seen that u/s 47 the members of the Police Force of Assam, inter alia, have a duty to preserve public order, to prevent and control terrorist activities and also to prevent crimes and reduce opportunities of commission of crimes through preventive action.

22. We take it that the activity of the police party when it attempted to stop the vehicle by which the deceased in the instant case was traveling was in discharge of such duties arising u/s 47. Section 95 Power to reserve public places and erect barriers - (1) The District Superintendent of Police may, by public notice, temporarily reserve for any public purpose any street or other place, and prohibit the public from entering the area so reserved, except on such conditions as may be specified. (2)(a) The District Superintendent of Police may authorise any police officer to erect barriers and other necessary structures on public roads and streets, to check vehicles or occupants thereof for violation of any legal provisions by them.

(b) In making such order, the District Superintendent of Police shall prescribe the necessary steps for ensuring the safety of passers-by.

(c) These temporary structures shall be removed once the purpose for which they were installed is over.

of the Act empowers the Superintendent of Police to authorise any police officer to erect barriers or other necessary structures on public roads or streets to check vehicles or occupants thereof for violation of any legal provision. Therefore, when

the police in discharge of their functioning, referred to above, stop vehicles or attempt to stop vehicles, the occupants of the vehicles do have a corresponding legal obligation to obey the lawful command of the police officers. The deceased who was driving the vehicle, from the materials on record appears to have declined to comply with the lawful command of the police party. In such a case the police have by necessary implication the authority of law to stop the person, such as the deceased herein, who declines to obey the lawful command given to him even by the employment of force.

23. u/s 41 (When police may arrest without warrant. (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person - (a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or (b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of housebreaking; or (c) who has been proclaimed as an offender either under this Code or by order of the State government; or (d) in whose possession anything is found which may reasonably be suspected to be stole property and who may reasonably be suspected of having committed an offence with reference to such thing; or (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or (f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or (g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India, which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or (h) who, being a released convict, commits a breach of any rule, made under Sub-section (5) of Section 356; or (i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.) of the CrPC any police officer may without an order from the Magistrate and without a warrant arrest a person if such person obstructs the police officer while on execution of his duty. In the instant case, since the deceased declined to stop the vehicle in spite of lawful command given to him by the police officers he was liable to be arrested as refusal on the part of the deceased to stop the vehicle in our view would amount to obstructing the police officer in execution of his duty.

24. Section 46(2) (If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.) of the CrPC authorises the police officer attempting to arrest some person to use all means necessary to effect such

arrest if the person sought to be arrested forcibly resists or attempts to avoid the arrest. But the means contemplated under Sub-section (2) do not extend to the causing of death of the person avoiding arrest if such a person is not accused of an offence punishable with death or with imprisonment for life, as is expressly declared under Sub-section (3) (Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.).

25. Causing of death of any human being by another human being is treated to be not an offence, when it is done strictly in accordance with law, for example, the execution of a convict who is awarded the death penalty by the competent court. But for the immunity granted by Sections 77 and 78 of the IPC both the judge who award the death penalty to an accused and the executor who implement the judgment of the court would otherwise perfectly answer the description of a crime of murder but as both the judge and the executor are obligated by law to cause the death of a fellow human being in appropriate cases they are immune from action under law.

26. The members of the "armed forces" as defined u/s 2(a) of the Armed Forces (Special Power) Act, 1958, in the circumstances specified u/s 3 and 4 of the said Act are expressly authorised to use force even to the extent of causing of death. By virtue of Section Sub-section (2) of the said Act the Act applies only to the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. u/s 3 of the Act if the Governor of any one of those States or the Central Govt. is of the opinion that either the whole or any part of such State is in such a disturbed or dangerous condition and further that the use of armed forces in aid of the civil power is necessary, may make a declaration by a notification in the official gazette that such area is a "disturbed area". Once such a declaration is made and members of the armed forces are deployed in aid of the civil power in those areas the members of the armed forces are authorised u/s 4 (Special Powers of the armed forces.- Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area, - (a) if he is of opinion that it is necessary to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;) of the said Act to "fire upon or otherwise use force even to the causing of death against any person". But such a power is circumscribed by the following conditions:

That the members of the armed forces causing the death of another person must (1) be of the opinion that it is necessary to do for the maintenance of public order; (2) to give such due warning as the situation demands/permits that deadly force is likely to be employed and (3) employment of deadly force is

permissible against only those persons who are acting in contravention of any law or order for the time being in force which prohibits the assembly of five or more persons or prohibits the carrying of weapons or of things capable of being used as weapons or prohibits the carrying of fire arms, ammunition or explosive substances.

27. Section 6 of the Act grants the immunity against prosecution or other legal proceedings to any person in respect of anything done or purported to be done in exercise of the powers conferred by the Act. The immunity contemplated u/s 6 is not absolute. It only declares that neither a prosecution nor any other legal proceeding shall be instituted without the previous sanction of the Central Government.

6. Protection to persons acting under Act.-No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

In other words, the Central Government is obligated u/s 6 to examine whether any action of the Armed Forces, while acting in aid of the civil power in a disturbed area, is strictly in conformity with the authority granted to such armed forces by the provisions of the said Act. If the Central Government is not satisfied in a given case that the action of the armed forces is not strictly in accordance with the authority of law conferred upon them the Central Government can and is obliged to grant such a sanction for initiation of appropriate legal proceedings against the erring members of the armed forces, whether the proceedings be civil or criminal in nature.

28. Similarly, prosecution of any public servant who is alleged to have committed an offence while discharging the official duties is required to be proceeded by a sanction of the appropriate government u/s 197(1) CrPC. The appropriate government in each case is required to thoroughly enquire into the circumstances which led to the commission of the offence by the public servant and come to a logical conclusion whether the sanction for prosecution is required to be granted or not. It is not a mere formality nor the permission is meant to give absolute immunity to the erring public servants. The government is required to be absolutely satisfied that the public servant who is alleged to have committed the offence while discharging his duties had no option in law but to commit such an act or omission for the honest discharge of his duties.

29. From the above analysis it is clear that the law of this country does not recognize the authority of any person to cause the death of another person at will. The reason is obvious. Article 21 of the Constitution emphatically declares that the life and liberty of any person shall not be deprived by the State except in accordance with the procedure established by law and by a long catena of decisions of the Supreme Court such a procedure established by law must be a rational procedure consistent with the requirement of the mandate of Article 14

of the Constitution of India.

30. The existence of unlawful activities and widespread prevalence of crime, the employment of arms and ammunition and explosives in perpetrating such crime is a notorious fact in the State of Assam. It is only in recognition of such a fact the Parliament made the Armed Forces (Special Power) Act, 1958. As a matter of fact such a situation is not only peculiar to Assam but even to the other States to which the above mentioned Act is made applicable. In fact it is a phenomenon which is prevalent all over the world. Groups of individuals who are dissatisfied with the administration, to which they are subject to, for reasons which are justified or otherwise, resort to violent activities with the aid of arms and ammunitions. Such groups have come to be called all over the world by various names such as "terrorists", "extremists" etc. Control of such activities is a part of the responsibility of an organized State. It is notorious fact that the victims of such activities are more often innocent people whose lives and liberties an organized State is bound to protect. It is in pursuance of such a duty State makes stringent provisions both to prevent the occurrence of such a crime as well as punishing the perpetrators of such crime.

31. But, the more important aspect of the matter is even in its attempt to protect the innocent or preventing the crime the State cannot act beyond the authority of law.

32. In the instant case the death of Prakash Deka was admittedly caused by the personnel belonging to the police forces of the State of Assam. Though Assam is a disturbed area within the meaning of the Armed Forces (Special Power) Act, the personnel of the police forces of Assam, who caused the death of Prakash Deka, are not entitled to the protection of the said Act as they are not armed forces within the meaning of the expression as defined under the Act.

33. The first question is not peculiar to the State of Assam or India. The House of Lords in dealing with a substantially similar situation had an occasion to examine the relevant legal position in *Regina v. Clegg* (1995) 1 AC 482. The facts of the case were stated by the House of Lords in the following words:

on the night of 30 September 1990 the appellant, Lee William Clegg, a soldier serving with the Parachute Regiment, was on patrol in Glen Road, West Belfast, when the driver of a stolen car and one of his passengers were shot and killed. Private Clegg was charged with murder of the passenger, and attempted murder of the driver. His defence was that he fired in self-defence. He was convicted on 4 June 1993, after a trial before Campbell J, without a jury. His appeal to the Court of Appeal was dismissed. The Court of Appeal held that the firing of the shot which killed the passenger was, on the facts found by the judge, a grossly excessive and disproportionate use of force, and that any tribunal of fact properly directed would so have found. The certified question of law for your Lordships is whether a soldier on duty, who kills a person with the requisite intention for murder, but who would be entitled to rely on self-defence but for the use of

excessive force, is guilty of murder or manslaughter.

The patrol consisted of 15 men under the command of Lieutenant Oliver. It was accompanied by a police constable from the royal Ulster Constabulary. The purpose of the patrol was to catch joyriders. But this was not explained to Private Clegg. The patrol was divided into four teams or "bricks". Brick 11 formed a vehicle checkpoint at a bridge on the Glen road about six miles west of Belfast. Brick 10A, consisting of Lieutenant Oliver, Private Clegg, Private Aindow and another, were moving down the road towards Belfast. Private Aindow was on the right-hand side of the road. The others were all on the left-hand side. Bricks 12 and 14 were still further down the road, around a corner. As the stolen car approached the bridge from the west, it was stopped by a member of Brick 11. The car then accelerated away in the centre of the road towards Brick 10A with its headlights full on. Someone in Brick 11 shouted to stop it. All four members of Brick 10A fired at the approaching car. Private Clegg's evidence was that he fired three shots at the windscreen, and a fourth shot into the side of the car as it was passing. He then replaced his safety-catch. According to Private Clegg he fired all four shots because he thought Private Aindow's life was in danger. However, scientific evidence showed, and the trial judge found as a fact, that Private Clegg's fourth shot was fired after the car had passed, and was already over 50 feet along the road to Belfast. It struck a rear-seat passenger, Karen Reilly, in the back. It was later found lodged beneath her liver. The judge found that Private Clegg's fourth shot was an aimed shot fired with the intention of causing death or serious bodily harm. Although another bullet passed through Karen Reilly's body, Private Clegg's fourth shot was a significant cause of her death.

In relation to the first three shots, the judge accepted Private Clegg's defence that he fired in self-defence or in defence of Private Aindow. But with regard to the fourth shot he found that Private Clegg could not have been firing in defence of himself or Private Aindow, since, once the car had passed, they were no longer in any danger.

Having rejected Private Clegg's defence in relation to the fourth shot, the judge went on to consider, as was his duty, whether there was any other defence open on the evidence, even though Private Clegg had not raised the defence himself. One possible defence was that Private Clegg fired the fourth shot in order to arrest the driver. Section 3(1) of the Criminal Law Act (Northern Ireland) 1967 provides:

A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

The Judge held that there was insufficient evidence to raise such a defence. Accordingly he convicted Private Clegg of murder.

34. From the above it is clear that the accused, an armed officer of the State,

pleaded the self-defence which was negated on the facts of the case on the ground that the 4th shot was in excess of the requirement of self-defence. On the further defence whether the accused was justified in killing within the ambit of Section 3 of the Criminal Law Act (Northern Ireland) 1967, on the facts of the case, the Court of Appeal recorded that there was nothing in the evidence of the case that the accused thought that the driver of the vehicle was either a terrorist or that if he escaped the arrest he would carry out terrorist offences in future. The Court of Appeal, therefore, concluded that in those circumstances the use of lethal forces to arrest the driver of the car was so grossly disproportionate to the mischief to be averted.

The matter was carried to the House of Lords on certain certified questions of law which were stated by the House of Lords in the following words:

(1) Does the existing law allow a verdict of manslaughter instead of murder where the force used in self-defence is excessive? (2) Is the position the same where the excessive force is used in prevention of crime or in effecting or assisting in the lawful arrest of offenders? (3) Is there any difference between the position of a soldier or police officer acting in the course of his duty, on the one hand, and an ordinary member of the public on the other? (4) If a verdict of manslaughter is not available under the existing law in any of the above cases, is it open to this House to change the law?

The House of Lords on the question of self-defence held, on a review of the earlier authorities, that the plea of self-defence is of no avail if it is found on the facts that the force employed by the accused is disproportionate to the danger apprehended by him.

35. For the purpose of the present case we are not concerned in this writ petition with the 1st and 4th questions above, we are only concerned with the 2nd and 3rd.

Examining these questions the House of Lords quoted with approval a passage from the Report of the Royal Commission headed by Lord Blackburn in the year 1879. The passage reads as follows:

We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent.

In our view the passage contains a jurisprudential statement on the question of employment of excessive force in prevention of crime or in effecting the lawful arrest of the offenders.

36. The House of Lords held:

The second question is whether there is any distinction to be made between excessive force in self-defence and excessive force in the prevention of crime or in arresting offenders. In *Attorney General for Northern Ireland's Reference* (No. 1 of 1975) [1077] AC 105 Lord Diplock said, at p. 139, that the two cases were quite different. But I do not think it possible to say that a person who uses excessive force in preventing crime is always, or even generally, less culpable than a person who uses excessive force in self-defence, and even if excessive force in preventing crime were in general less culpable, it would not be practicable to draw a distinction between the two defences, since they so often overlap. Take, for example, the facts of the present case. The trial judge held that Private Clegg's first three shots might have been fired in defence of Private Aindow. But he could equally well have held that they were fired in the prevention of crime, namely, to prevent Private Aindow's death being caused by dangerous driving. As is pointed out in *Smith & Hogan, Criminal Law*, 6th ed. (1988), p.244; 7th ed. (1992), p.255, the degree of permissible force should be the same in both cases. So also should the consequences of excessive force.

37. In answering the question the House of Lords also took into consideration the situation prevalent in Northern Ireland where also army is deployed in aid of civil force, the nature of the duties of the members of the army when so deployed and also the nature of the weapons given to the members of the army for the said purpose. The House of Lords took note of the situation prevalent in Northern Ireland as reflected in the speech of Lord Diplock in *Attorney General for Northern Ireland's Reference* (1977) ACC 105. Lord Diplock summarized the situation as follows:

There is a little authority in English law concerning the rights and duties of a member of the armed forces of the Crown when acting in aid of the civil power; and what little authority there is relates almost entirely to the duties of soldiers when troops are called upon to assist in controlling a riotous assembly. Where used for such temporary purposes it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a description is in my view misleading in the circumstances in which the army is currently employed in aid of the civil power in Northern Ireland.... In theory it may be the duty of every citizen when an arrestable offence is about to be committed in his presence to take whatever reasonable measures are available to him to prevent the commission of the crime; but the duty is one of imperfect obligation and does not place him under any obligation to do anything by which he would expose himself to risk of personal injury, nor is he under any duty to search for criminals or seek out crime. In contrast to this a soldier who is employed in aid of the civil power in Northern Ireland is under a duty, enforceable under military law, to search for criminals if so ordered by his superior officer and to risk his own life should this be necessary in preventing terrorist acts. For the performance of this duty he is armed with a firearm, a self-

loading rifle, from which a bullet, if it hits the human body, is almost certain to cause serious injury if not death.

Then the House of Lords examined the case before it in the background of the above extracted statement of Lord Diplock and held as follows:

I would particularly emphasise the last sentence in the above quotation. In most cases of a person acting in self-defence, or a police officer arresting an offender, there is a choice as to the degree of force to be used, even if it is a choice which has to be exercised on the spur of the moment, without time for measured reflection. But in the case of a soldier in Northern Ireland, in the circumstances in which Private Clegg found himself, there is no scope for graduated force. The only choice lay between firing a high-velocity rifle which, if aimed accurately, was almost certain to kill or injure, and doing nothing at all.

38. It may be pointed out that the legal issue before the House of Lords ultimately was whether in the circumstances the accused who used excessive force could be held to be guilty of a lesser offence of culpable homicide but not murder in view of the fact that he was a member of the law enforcing agencies. The House of Lords clearly held No. The issue was not whether the accused was totally immune from any kind of criminal prosecution.

39. In the case on hand apparently no crime was registered in connection with the killing of Prakash Deka. Therefore, the question whether the force employed by the police personnel of the State of Assam was justified on the ground of self-defence, if pleaded by the members of the police party involved in the incident, cannot be decided in the present proceedings as it requires recording of evidence in an appropriate trial.

40. We have already reached the conclusion that the members of the police party would have been perfectly justified in attempting to arrest Prakash Deka. They were also entitled to employ appropriate force for accomplishing such arrest. But it is not the case of the State that either Prakash Deka or any one of the other co-passengers in the vehicle was a member of an extremist group or an extremist that the police party bona fide believed or that Prakash Deka or any one of his fellow passengers in the vehicle was guilty of an offence punishable with death or life imprisonment. Therefore, by virtue of Sub-section (3) of Section 46 of the CrPC unless one of the factors indicated above is established the causing of death in furtherance of power of arrest u/s 46 CrPC would not be justified.

41. To arrive at any definite conclusion various factors are required to be clearly established, such as - (1) the circumstances in which Prakash Deka was killed; (2) the amount of force employed by the police party, that is, the number of shots fired; (3) which one of the members fired those shots; identification of the person whose shot resulted in the death of Prakash Deka and (4) the intention of such a person in inflicting the deadly injury etc.

42. The second question: what is the procedure by which the above mentioned

factors are required to be established.

We have already noticed that u/s 197 CrPC no court shall take cognizance of an offence committed by a public servant while acting or purporting to act in discharge of his official duty except with the previous sanction of the appropriate government. The purpose is obvious. A public servant while acting or purporting to act in discharge of his official duties shall not be exposed to criminal prosecution so long as they adhere to the law. In the absence of such protection public servants will not be in a position to discharge their duties efficiently. But for such protection they constantly put under fear of being exposed to legal action either civil or criminal for every act of their in discharge of their official duties, a situation not very conducive for the efficient functioning of the State. But at the same time their protection shall not extend to the screening of all those public servants who exceeded the authority of law given to them in discharging their official duties. In our view Section 197 CrPC while conferring the protection to the public servants from unjustified prosecution creates a corresponding legal obligation on the State to constantly monitor the actions of the public servants, more particularly in the context of the commission of offences. Whenever there is an allegation of commission of an offence by public servants, such as the one in the instant case, the State is bound to examine all relevant facts and form a rational opinion whether the concerned public servant should be prosecuted or not. More particularly, in the context of the killing of a person by a public servant while acting in discharge of his official duties the responsibility of the State, in our opinion, is very heavy. While on one hand the State is bound to protect a law abiding public servant it also has a duty to bring to book the public servants who acted in excess of the authority conferred on him by law.

Such a duty of the State obligates the State to promptly cause an enquiry into all relevant facts and circumstances which resulted in the death of a person in the hands of a public servant. In the absence of such an impartial and effective enquiry the confidence of the public in the impartiality of the State in administering law evenhandedly stands shaken. What appropriate mechanism the State would devise for conduct of such an enquiry is for the State to decide. We may only indicate here that elsewhere in the world such complaints against public servants, more particularly, the members of the law enforcement agencies such as the police, are enquired into by an independent Board. For example, in Ireland such an enquiry is conducted by the Police Complaint Board which was set up in the year 1977 which was later replaced in the year 2000 by a statutory body called Police Ombudsman for Northern Ireland. Upon such an enquiry if the Board is satisfied that the police officer ought to be charged with a criminal offence the report of the Board is sent to the Director of Public Prosecution, once again an independent body, who on examination of the report takes a final decision whether to prosecute the police officer or not. The decisions of the Director of Public Prosecution are subject to the judicial review of the courts of England. The outline of the whole scheme was considered by the European Court

of Human Rights in a case titled Kelly and Ors. v. United Kingdom.

43. The Assam Police Act, 2007 to some extent deals with the situation. Section 70 of the Act contemplates the establishment of a State Level Police Accountability Commission, the composition of which is described u/s 71 of the Act as follows:

71. Composition of the Commission - The Commission shall have a Chairperson and three members with a credible record of integrity and commitment to human rights and shall consist of-

- (a) a retired High Court Judge, who shall be the Chairperson of the Commission;
- (b) a retired police officer superannuated in the rank of Director General of Police or Additional Director General of Police;
- (c) a person with a minimum of 10 years of experience either as a judicial officer, public prosecutor, practicing advocate, or a professor of law, or a person of repute and standing from the civil society; and
- (d) a retired officer with experience in public administration, not below the rank of Commissioner and Secretary to the State Government.

Section 78 of the Act describes the functions of the Commission as follows:

78. Functions of the Commission- (1) The Commission shall enquire into allegations of "serious misconduct" against police personnel, as detailed below, either suo moto or on a complaint received from any of the following,--

- (a) a victim or any person on his behalf;
- (b) the National or the State Human Rights Commission;
- (c) the police; or
- (d) any other source.

Explanation : "Serious misconduct" for the purpose of this Chapter shall mean any act or omission of a police officer that leads to or amounts to--

- (a) death in police custody;
- (b) grievous hurt, as defined in Section 320 of the Indian Penal Code, 1860;
- (c) molestation, rape or attempt to committing rape; or
- (d) arrest or detention without due process of law;
- (e) forceful deprivation of a person of his rightful ownership or possession of property;
- (g) blackmail or extortion;
- (h) non registration of First Information Report.

Provided that the Commission shall enquire into a complaint of such arrest or detention, only if it is satisfied prima facie about the veracity of the complaint.

(2) The Commission may also enquire into any other case referred to it by the Government or Director General of Police of the State if, in the opinion of the Commission, the nature of the case merits an independent enquiry.

(3) The Commission may monitor the status of departmental inquiries or departmental action on the complaints of "misconduct" against Gazetted Officer of and above the rank of Deputy/Assistant Superintendent of Police through a quarterly report obtained periodically from the Director General of Police of the State, and issue appropriate advice to the police department for expeditious completion of inquiry, if in the Commission's opinion the departmental inquiry or departmental action is getting unduly delayed in any such case.

Explanation "Misconduct" in this context shall mean any willful breach or neglect by a police officer of any law, rule, regulation applicable to the police that adversely affects the lights of any member of the public, excluding "serious misconduct" as defined in Sub-section (1)

(4) The Commission may also call for a report from, and issue appropriate advice for further action or, if necessary, a direction for a fresh inquiry by another officer, to the Director General of Police of the State when a complainant, being dissatisfied by the outcome of, 01 inordinate delay in the process of departmental inquiry into his complaint of "misconduct" as defined above, by any police officer, brings such matter to the notice of the Commission, ,and

(5) The Commission may lay down general guidelines for the State police to prevent misconduct on the part of police personnel

It can be seen from the said Section that the Commission is empowered to enquiry into allegations of serious misconduct which is described under the explanation to mean any act of omission of police officer that "leads or amount to death" in police custody. The expression "amounts to death in police custody" is significant. On the facts like the one on hand the deceased may not have been technically in the custody of the police but in the circumstances the death of Prakash Deka amounts to death in police custody. Any other interpretation, in our view, would be inconsistent with the scheme of Section 78 as an action of a police officer leading to the grievous hurt or death in police custody is a serious misconduct within the meaning of Section 78 but not the death of a person who was not technically in the custody of the police. u/s 82 the Commission is obligated upon completion of the enquiry to forward its findings to the Director General of Police of the State and the State Government with a direction either to register a first information report or initiate departmental proceedings. Section 82 further stipulates that such direction of the Commission shall be binding.

82 Decisions and Directions of the Commission - In the cases directly inquired by the Commission, it may, upon completion of the inquiry, communicate its findings

to the Director General of Police of the State and the State Government with a direction to--

(a) register a First Information Report, and/or

(b) initiate departmental action based on such findings, duly forwarding the evidence collected by it to the Police. Such directions of the Commission shall be binding."

Provided that the Commission, before finalizing its own opinion in all such cases shall give the Director General of Police of the State an opportunity to present the Department's view and additional facts, if any, not already in the notice of the Commission

Provided further that, in such cases, the Commission may review its findings upon receipt of additional information from the Director General of Police of the State that may have a material bearing on the case

44. Notwithstanding the mandate contained in the Assam Police Act, 2007, it appears that no steps have been taken by the respondents to have the incident, which resulted in the death of Prakash Deka, enquired by the Commission. We are informed that a Commission contemplated u/s 70 of the Assam Police Act is already constituted headed by Mr. Justice DN Chowdhury, a retired Judge of this Court.

45. In the circumstances, we direct the State to cause an enquiry into the incident which resulted in the death of Prakash Deka by the above mentioned Commission and take consequential action in accordance with the report of the Commission.

46. We also deem it appropriate to direct the first respondent State to pay the dependents of the deceased Prakash Deka an amount of Rs. 1,00,000/- and an amount of Rs. 1,00,000/- to the above mentioned Smti Gita Kalita towards public law damages. We further make it clear that such payment of public law damages would be without prejudice to the rights of the above mentioned persons to proceed against the respondents for damages in private law.

The writ petition is accordingly disposed of.

1. (Prosecution of Judges and public servants.-
(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction - (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, or the Central Government; (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in

connection with the affairs of a State, of the State Government:)