

(2014) 01 DEL CK 0299

In the Delhi High Court

Case No : Writ Petition (C) 3838 of 1999

Sub. Inspector Gurbachan Singh

APPELLANT

Vs

Uoi and Others

RESPONDENT

Date of Decision : 23-01-2014

Acts Referred:

Border Security Force Act, 1968 — Section 108 117(2) 58

Constitution of India, 1950 — Article 226

Penal Code, 1860 (IPC) — Section 307 308

Citation : (2014) 01 DEL CK 0299

Hon'ble Judges : Pradeep Nandrajog, J; Jayant Nath, J

Bench : Division Bench

Advocate : J.S. Manhas, for the Appellant; Ruchir Mishra, Advocate and Mr. Bhupinder Sharma, Dy. Commandant, BSF, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Shorn of unnecessary details, the factual backdrop leading to the filing of the present petition, is that in the year 1967 the petitioner was enrolled as a Constable in Border Security Force and earned promotions to the rank of Sub-Inspector in course of time. In the year 1981 the petitioner was attached to the BSF Subsidiary Training Centre, Ranidanga, Silliguri (hereinafter referred to as the "STC Ranidanga"). On June 29, 1987 a charge sheet was served upon the petitioner in which four charges were laid against him as under:

2. On July 08, 1982 Inspector General, BSF, West Bengal directed that a General Security Force Court (hereinafter referred to as the "GFSC") be convened to conduct a trial in respect of the charges framed against the petitioner.

3. At the trial, the prosecution examined twelve witnesses; viz. HC Rahmat Subba PW-1, HC Basudev Bhat PW-2, HC B.B. Chhetri PW-3, Assistant Commandant S.D. Chaudhuri PW-4, Subedar Amrik Singh PW-5, SI Ajit Kumar PW-6, SI Harbans Singh PW-7, HC Tanu Babu Singh PW-8, Dr. Md. Azimuddin PW-9, Assistant Commandant Anil Kamboj PW-10, Subedar U.P. Rai PW-11 and

Deputy Commandant S.S. Chehar PW-12.

4. HC Rahmat Subba PW-1, deposed that since August 25, 1980 he was attached to STC Ranidanga. During month of December, 1981 the petitioner was undergoing Junior Leader Course at STC Ranidanga. On December 06, 1981 at about 08.00 P.M. he learnt that the petitioner was sitting near a washerman's shop with a revolver and was having a few rounds of ammunitions and thus he left for said shop. On reaching the shop he saw the petitioner sitting on a bench in a room adjacent to the shop. He saw a few rounds lying on a table in front of the bench where the petitioner was sitting. The petitioner told him that the rounds belonged to him. The room where the petitioner was sitting was out of bounds for BSF personnel for the reason liquor used to be sold illegally from there. During his conversation with the petitioner it appeared to him that the petitioner had consumed liquor. He persuaded the petitioner to accompany him to STC Ranidanga since it was getting late. At about 08.30 P.M. when they reached the gate of STC Ranidanga he requested the petitioner to deposit his revolver in the Kote but the petitioner refused in spite of being told of the standing orders, stating that the revolver was his personal property. At that the petitioner pushed him due to which he fell on the ground. The petitioner hurled abuses at him and proceeded towards the tent where the students/personnel undergoing Junior Leaders Course were staying. As he stood up, he saw the petitioner approach him. The petitioner was hurling abuses at him and branding him a thief. He again requested the petitioner to deposit the revolver in the Kote whereupon the petitioner gave a blow on his right shoulder as a result whereof he again fell on the ground. Thereafter the petitioner took out the pistol from his jacket and pointed the same towards him and said that he would shoot him. On sensing danger he immediately stood up from the ground and ran towards the parade ground. While running he heard the sound of a bullet viz passed his head. On reaching the office he rang up Adjutant STC Anil Kamboj and informed him about the incident. After sometime along with Adjutant Anil Kamboj and some other officers he went to STC Ranidanga where he saw the petitioner and Subedar Amrik Singh, in-charge of Junior Leaders Course, present there. He remained in STC Ranidanga for few minutes and thereafter left for his house. Being relevant, we note following portion of the cross-examination of the witness:-

I did not ask or shout for any help, at the time when I was pushed as well as abused by the accused...

The Defence Counsel confronts the witness with the portion of his statements at page 8 of the manuscript copy of the Record of Evidence. The same is side lined with red ink. It reads:-

after about 20 second or so I heard the sound of a fire behind me as though from a Sten or a pistol

Whereas the witness to-day before the Court, has said that he heard the sound

of a shot having been fired from a revolver. The witness explains that it was correct that he had made a statement before the Recording Officer on 22nd December, 1981 and had also signed the same in token of its correctness. On being shown he also points out and identifies his signature, at the end of his statement. He further explains that it is correct that he had made the aforesaid statement before the Recording Officer, on the date indicated above, since he was not sure at that time whether the sound could be that of a shot of Sten or Pistol. He further adds that whatever he had stated on 22nd December, 1981 before the Recording Officer as well as now before this Court, are absolutely correct.

To-day I used the word revolver since I had seen the accused in possession of the same, on the night of 6th December, 1981...

Questioned by the Court

I did see the accused firing at me, while I was running. I had seen the accused, while turning my neck towards him. he was aiming at me with a straightened hand...There was no external injury on my body, as a result of push, given by the accused, on the night of 6th December, 1981. However, I did feel some pain over my shoulder where I was hit...I did not make any hue and cry when I was being fired upon by the accused. Since I apprehended that the accused may not fire upon me, after taking cue, from sound. When the accused abused me on the night of 6th December, 1981, his pitch was high. I did not notice any sentry close-by, rushing to the place of incident, after having heard the abuses as well as the sound of the fire shot.

(Emphasis Supplied)

5. HC Basudev Bhat PW-2, deposed that in the month of December, 1981 he was performing the duties of a Kote under officer in the Bn HQ Kote at Kadamtala. On December 21, 1981 he was instructed by his superior officers to deposit one revolver belonging to one SI Gurbachan Singh (petitioner) in the Bn HQ Kote at Kadamtala. When he had received said revolver the same was not sealed.

6. HC B.B. Chhetri PW-3, deposed that in the month of December, 1981 he was attached to STC Ranidanga as an Instructor was residing in a barrack inside the premises of STC Ranidanga. On December 06, 1981 at about 10.00 A.M. there was a weapon cleaning parade in which weapons were taken out from the Kote for cleaning. On said day the petitioner came to him and asked for his personal revolver which he had deposited in the Kote stating that he wanted to clean the same. He handed over the revolver to the petitioner. On December 06, 1981 at about 08.30 P.M. he was standing near the verandah of his barrack when he saw the petitioner, accompanied by HC Rahmat Subba, coming towards the barrack. He could hear the petitioner talking, at times in low pitch and at times in high pitch. The gait of the petitioner was not normal. When the petitioner and HC Rahmat Subba passed in front of him he immediately went to SI Ram Lal Dogra who was sitting near SO's Mess and informed him that the petitioner had come

inside the premises of STC Ranidanga and was behaving in an abnormal fashion. When he left from SO's Mess he heard the sound of firing of a shot. After sometime HC Tanu Babu and Subedar Amrik Singh who were senior students of Junior Leaders Course came to him and handed over a revolver to him and told him that the same belonged to the petitioner. On receiving the said revolver he checked the same and found it to be empty. Thereafter he deposited said revolver in Kote as per the instructions of his superior officers. Being relevant, we note following portion of the cross-examination of the witness:-

...I did not have any conversation with the accused nor with HC Ramat Subba when I first saw them, on the night of 6th December, 1981.

...

I could hear the accused talking to HC Ramat Subba but I did not know, as to, about what they were talking.

...

It is also wrong to say that the accused was walking as well as talking in a normal fashion, when I had seen him, for the first time on the night of 6th December, 1981. As a matter of fact what I am stating to-day is correct and there is no falsehood in the same.

QUESTIONED BY THE COURT

I did not ask the accused on the night of 6th December, 1981, when I saw him for the first time in the STC, about the revolver Exhibit-N, not been deposited by him, since the accused appeared to me to be behaving an abnormal fashion.

7. Assistant Commandant S.D. Chaudhuri PW-4, deposed that on December 30, 1981 he was handed over a box containing two empty fired cartridges of .38 caliber, twenty live cartridges of 12 bore, eighteen live ammunition of .38 caliber, one live ammunition of .45 caliber and one empty fired care of .38 caliber belonging to the petitioner.

8. Subedar Amrik Singh PW-5, deposed that in the month of December, 1981, the petitioner, eighteen other officers and he were undergoing Junior Leader's Course at STC Ranidanga and staying in a tent pitched in STC premises. On December 06, 1981 at about 05.30 P.M. the petitioner was absent in the roll call of the students attending Junior Leader's Course. Being senior student of said course, he informed HC Tanu Babu, Senior Course Instructor, about the absence of petitioner in the roll call. At about 08.45 P.M. while he was present in the tent he heard the sound of firing of a shot whereupon he came out of the tent and saw the petitioner entering the tent. The petitioner was carrying a revolver in his hand at that time. He asked the petitioner as to why he fired a shot but he did not give any reply to him. Thereafter he went out of the tent for a while. When he returned to the tent he saw the petitioner cleaning his revolver with a cleaning rod. He asked the petitioner that either he should deposit his revolver

himself or give the same to him at which the petitioner handed over his revolver to him. He went to HC Tanu Babu and handed over the revolver to him who in turn handed over the same to HC B.B. Chetri. After sometime he along with HC Tanu Babu returned to the tent. The petitioner who was standing outside the tent shouted at him and enquired about his revolver. He informed him that his revolver has been deposited in Kote whereupon the petitioner started hurling abuses at him. When he admonished him for abusing him the petitioner rushed towards him and held him by his throat. The petitioner had assaulted him in the presence of HC Tanu Banu and SI Ajit Kumar. Thereafter the petitioner insisted for seeing his revolver whereupon the petitioner, HC Tanu Babu and he proceeded towards Kote. When they reached near the staff barrack he saw Assistant Commandant Anil Kamboj and some other officers getting down from a vehicle. He heard Anil Kamboj chiding the petitioner for some wrong committed by him. After sometime he and the petitioner returned to the tent where the petitioner again assaulted him for having complained against him. Thereafter he left the tent and informed Assistant Commandant Anil Kamboj that the petitioner has again assaulted him. Accompanied by Assistant Commandant Anil Kamboj and Subedar U.P. Rai he came to the tent and saw that the petitioner was lying on a tent. Assistant Commandant Anil Kamboj repeatedly ordered the petitioner to get up and come outside the tent but he refused to obey his orders. After sometime Assistant Commandant Anil Kamboj and Subedar U.P. Rai left from there. Soon thereafter he saw the belongings of petitioner being shifted from the tent to the canteen. When the belongings of petitioner were being shifted he saw the petitioner going out of the tent. After sometime he heard that the petitioner has been apprehended. At about 11.30 P.M. he accompanied the petitioner to BSF Base Hospital, Kadamtala for his medical examination. On the next day i.e. December 7, 1981 he was instructed by superior officers to prepare a seizure list of belongings of the petitioner. Live and empty cartridges were recovered from the belongings of the petitioner and the same were seized. Being relevant, we note following portion of the cross-examination of the witness:-

...

No quarrel between myself as well as the accused had taken place prior to 6th December, 1981. The accused had picked up a quarrel with a constable of STC, during the training for the Junior Leader's Course.

...

It is wrong to suggest that I took away the revolver from the accused by force and had also caused injuries on his person, since he had refused to part with the same.

...

It is wrong to say that I had beaten the accused and that was why I did not ask for any help. As a matter of fact the accused had beaten me and I had tried to separate myself from him.

...

QUESTIONED BY THE COURT

...When the accused had come to the tent, on 6th December, 1981 at 1930 hrs alongwith other three BSF personnel, from his talk, it appeared as if he had taken liquor.

9. SI Ajit Kumar PW-6, deposed that in the month of December, 1981 he was undergoing Junior Leader's Course at STC Ranidanga and was staying along with the petitioner and Subedar Amrik Singh in a tent at STC Ranidanga. Subedar Amrik Singh, Senior Course Student, gave a report regarding absence of the petitioner from the roll call of the students held on 05.30 P.M. on December 06, 1981. On December 06, 1981 at about 07.30 P.M. a heavy vehicle halted near the tent where he was staying. Three BSF personnel and the petitioner got down from the said vehicle and came inside the tent. He heard the petitioner telling the three personnel that he would shoot Subedar Amrik Singh. After sometime the three BSF personnel left the tent. At about 08.45 P.M. he heard the petitioner saying that today the people would come to know whether he possessed a revolver or not. After sometime the petitioner went out of the tent. After few seconds he heard the sound of firing of a shot. He saw Subedar Amrik Singh going out of the tent. Immediately thereafter he saw the petitioner entering the tent with a revolver in his hand. After sometime he saw the petitioner cleaning his revolver. Few seconds thereafter he saw Subedar Amrik Singh coming inside the tent and petitioner handing over his revolver to him. Few minutes thereafter Subedar Amrik Singh left the tent carrying revolver of petitioner in his hand. At about 09.30 P.M. he saw the petitioner, Subedar Amrik Singh and HC Tanu Babu standing outside the tent. The petitioner was repeatedly asking Subedar Amrik Singh to return his revolver to him. After sometime he saw the petitioner assaulting Subedar Amrik Singh whereupon he with the help of HC Tanu Babu rescued Subedar Amrik Singh from the clutches of petitioner. At about 10.00 P.M. the petitioner returned to the tent. Ten minutes thereafter Subedar Amrik Singh also returned to the tent. Sometime thereafter he heard the petitioner abusing Subedar Amrik Singh for having deposited his revolver. He then saw the petitioner again assaulting Subedar Amrik Singh. Thereafter he shouted for help whereupon SI Harbans Singh came there and helped him in rescuing Subedar Amrik Singh. Thereafter Subedar Amrik Singh left the tent and the petitioner rested on his cot. At about 10.15 P.M. Assistant Commandant Anil Kamboj came in the tent and repeatedly ordered the petitioner to get up and come outside the tent but he refused to obey his orders. After sometime Assistant Commandant Anil Kamboj left. Soon thereafter he saw the belongings of petitioner being removed from the tent. After sometime he saw the petitioner going out of the tent. Being relevant, it would be relevant to note the following portion of the cross-examination of the witness:-

...

I had seen the accused beating Subedar Amrik Singh outside the tent from a distance of 10 yds or so. I did not hear Subedar Amrik Singh raising any hue and cry, at the time when he was being beaten, by the accused outside the tent.

...

Subedar Amrik Singh was under such a pressure by the accused that he was not in a position to make any hue and cry. Excepting one bruise on the forehead, over the left eye, I cannot say as to whether Subedar Amrik Singh sustained any other injuries, due to the beating, given by the accused. I did not see the accused giving blows to the Subedar. I only saw him pulling him down with force. I had seen the accused mounting on Subedar Singh inside the tent for about ten minutes.

...

It is wrong to say that Subedar Amrik Singh had taken the revolver from the accused without his permission. As a matter of fact the accused had handed over the said revolver to the said subedar.

It is incorrect to suggest that since the accused did not hand over the revolver to Subedar, Subedar Amrik Singh got annoyed over him and being a senior course student he beat the accused, thereby causing injuries on his person.

...

The Defence Counsel confronts the witness with the portion of his statement at page 20 of the manuscript copy which reads as under:-

Inspector Amrik Singh came to the tent and took the revolver from SI Gurbachan Singh on the pretext that he would be cleaning. SI Gurbachan Singh got busied in his other works and Inspector Amrik Singh took the opportunity to go out of the tent with the revolver which I later learnt he had given to deposit.

The said portion has been side lined in red ink in the manuscript copy of R.O.E.

Whereas to-day before this Court, the witness has stated that the accused had handed over the revolver to Subedar Amrik Singh.

The witness explains that whatever he has stated to-day is correct. As a matter of fact he meant to convey the same, on the date he had made his statement on 24th December, 1981. He does not know as to how the aforesaid portion, conveys the meaning other than what he has stated today.

It is correct that in my earlier statement, before the Recording Officer, I had not stated that the accused had come to the tent and while going out of the tent had challenged that to-day the people would know as to whether he had got a revolver or not. I have stated this fact to-day before this Court. It is false to say that what I have stated to-day about the above fact, is on being tutored by somebody. I have stated the said fact since I had heard the same on the night of 6th December, 1981.

(Emphasis Supplied)

10. SI Harbans Singh PW-7, deposed that in the month of December 1981, he was undergoing Junior Leader's Course at STC, Ranidanga and staying along with the petitioner and Subedar Amrik Singh, Senior Course Student, in a tent pitched in STC. On December 06, 1981 at about 05.30 P.M. a roll call of students undergoing Junior Leader's Course was held and the petitioner was absent from said roll call. At about 07.30 P.M. the petitioner along with three BSF personnel came to the tent in a heavy vehicle. After sometime the three BSF personnel left from there. After few minutes of departure of three BSF personnel from the tent the petitioner also left from tent. At about 08.45 P.M. the petitioner returned to the tent and came near his cot. Immediately thereafter he again left the tent. At that time the petitioner was saying that today the people would come to know that he possessed a revolver. After a couple of minutes he heard the sound of firing of a shot. It appeared that the shot was fired from a pistol or revolver or sten. Thereafter he saw Subedar Amrik Singh going out of the tent. After a few minutes he saw the petitioner entering the tent with a revolver in his hand. He saw the petitioner cleaning his revolver with a cleaning rod which he had taken out from his pillow. When the petitioner was cleaning the revolver he went out of the tent for urinating. After sometime the petitioner also went out of the tent. When he was lying on his cot he heard the petitioner hurling abuses at Subedar Amrik Singh. The petitioner was accusing Subedar Amrik Singh of having deposited his revolver in Kote with a view to falsely implicate him in a case. Subedar Amrik Singh was denying aforesaid accusation and informing the petitioner that it was HC Ramat Subba who had lodged a complaint against him for having fired a shot at him and beating him. Thereafter he saw the petitioner push Subedar Amrik Singh to the ground and was mounting on him. With the help of SI Ajit Singh he rescued Subedar Amrik Singh from the clutches of the petitioner. He advised Subedar Amrik Singh to go from the tent to avoid any further altercations whereupon Subedar Amrik Singh went out of the tent. The petitioner went to his cot and he could hear him i.e. the petitioner abusing Subedar Amrik Singh. At about 10.00 P.M. Assistant Commandant Anil Kamboj accompanied by Subedar U.P. Rai and some other officers came in the tent and repeatedly ordered the petitioner to get up and come outside the tent but he refused to obey his orders. After sometime Assistant Commandant Anil Kamboj left from there. Soon thereafter he saw the belongings of petitioner being removed from the tent. After sometime he saw the petitioner going out of the tent. At about 11.15 P.M. he saw the petitioner returning to the tent. After sometime the petitioner again left the tent. The petitioner was abusing at that time. He does not know what happened thereafter. Being relevant, it would be relevant to note the following portion of the cross-examination of the witness:-

...

At about 1815 hrs I had gone to take my meals. I do not know whether the accused was unwell on 6th December, 1981. I am not aware whether he took

permission from Subedar Amrik Singh that since he (accused) was not well, he would not be able to attend roll call. As a matter of fact I did not see the accused, in the evening roll call.

...

I had seen the accused holding Subedar Amrik Singh by his hair. Subedar Amrik Singh was also struggling to extricate himself from the accused. I did not see any injury, whatsoever on the person of the accused.

It is incorrect to say that I in collusion with Subedar Amrik Singh and SI Ajit Kumar have given a false evidence, in order to implicate the accused. It is wrong to say that Subedar Amrik Singh had beaten the accused.

It is correct that earlier in my statement in R.O.E. I did not say that the accused while leaving the tent at about 2045 hrs had challenged that people would know to-day as to whether he got a revolver or not. I had not mentioned his fact, earlier, in my statement before the Recording Officer and have mentioned today before this Court, since I forgot to mention about the same, on the date when my statement was recorded...

(Emphasis Supplied)

11. HC Tanu Babu PW-8, deposed that in the month of December, 1981 he was attached to STC Ranidanga for performing instructional duties in Junior Leader's Course. On December 06, 1981 he was informed by Subedar Amrik Singh, Senior Course Student, that the petitioner was absent from the roll call of the students held at about 05.30 P.M. At about 07.00 P.M. he went to the tent where the students undergoing Junior Leader's Course were staying to see whether the petitioner is present in the tent. On seeing that the petitioner is not present in the tent he returned to his barrack. At about 09.00 P.M. Subedar Amrik Singh came to the staff barrack where he was staying and handed him a revolver and informed him that said revolver belongs to the petitioner and a shot has been recently fired from said revolver. He inspected the barrel of said revolver and smell of gun powder was coming from the barrel. Thereafter he handed over said revolver to HC B.B. Chhetri who in turn deposited the same in Kote. He asked HC B.B. Chhetri to check whether the said revolver belongs to the petitioner. After checking the registration number and other details of the revolver HC B.B. Chhetri informed him that said revolver belongs to the petitioner. At about 09.15 P.M. along with Subedar Amrik Singh he came to the tent and the petitioner was present inside the tent at that time. He heard the petitioner shouting at Subedar Amrik Singh and making enquiries about his revolver. Subedar Amrik and he informed the petitioner that his revolver has been safely deposited in Kote and that he should not worry about the same. Thereafter the petitioner started hurling abuses at Subedar Amrik Singh and beating him. With the help of SI Ajit Kumar he rescued Subedar Amrik Singh from the clutches of the petitioner. Thereafter Subedar Amrik Singh, petitioner and he started proceeding towards Kote to satisfy the petitioner that his revolver has been safely deposited in the

Kote. On their way to Kote they met by Assistant Commandant Anil Kamboj and Subedar U.P. Rai. Thereafter Subedar Amrik Singh and petitioner went back to their tent while he went to his barrack. At about 11.30 P.M. he took the petitioner to Base Hospital, Kadamtala for medical examination. On the next day i.e. December 7, 1981 he participated in the seizure of the personal belongings of the petitioner. Amongst other articles the personal articles of the petitioner included live/fired ammunitions. Being relevant, we note following portion of the cross-examination of the witness:-

...

...At the time when I had shouted for help I found SI Ajit Kumar. I did not see anybody else around there.

...I did not see any injury whatsoever on the person of the accused on the night of 6th December, 1981.

...

It is absolutely wrong to say that I alongwith Subedar Amrik Singh, HC Ramat Subba, HC B.B. Chhetri fabricated a false case against the accused, with a view to involve him...

(Emphasis Supplied)

12. Doctor Md. Azimuddin PW-9, deposed that in the month of December, 1981 he was posted at BSF Base Hospital, Kadamtala. In the intervening night of December 06/07, 1981 he received a telephonic call informing that one patient from STC Ranidanga is to be medically examined whereupon he reached Base Hospital. On reaching there the petitioner, Assistant Commandant Anil Kamboj and some other officers were present there. Assistant Commandant Anil Kamboj requested him to conduct the medical examination of the petitioner. At the first instance he examined the gait of the petitioner and noticed that petitioner was trembling while walking. Smell of liquor was coming from the mouth of the deceased. The speech of petitioner was slurring. The petitioner was not able to walk straight and his co-ordination was disoriented. On carrying out finger to nose test on the petitioner he found that the finger of the petitioner was not correctly touching his nose. The pupils of the petitioner were dilated and reacting to light. After medically examining the petitioner he concluded that the petitioner was moderately intoxicated. Although the petitioner was under the influence of liquor he was conscious of his actions as he was responding to his instructions. As per his opinion, the petitioner was in a position to use physical force against any other person. Being relevant, we note following portion of the cross-examination of the witness:-

...

It is wrong to say that Shri Anil Kamboj, AC at the outset told me that the accused was under a state of intoxication. As a matter of fact he had said that

the accused had consumed liquor.

...

It is wrong to say that I had been influenced by others to issue a certificate as well as to give a opinion that the accused was under the influence of liquor. As a matter of fact my opinion is based on the clinical tests, carried out in the Base Hospital, on the night of 6/7 December, 1981.

It is correct that I did not carry out any chemical test, in respect of the said accused. It is not correct to say that only based on chemical test one can give opinion that a person is intoxicated or otherwise. Even by clinical test, one can give opinion.

The witness after having refreshed his memory from the records says that on the night of 6/7 December, 1981, the accused had multiple bruises over his face and one bruise over his left thigh. Since these were very superficial injuries (bruises), I did not think it appropriate to record the description of the same.

...

There might have been about 5/6 bruises on the face of the accused. Such bruises could have been given by blows (fists). The multiple bruises on the face of the accused would be due to fall on any hard object. Such bruises would also be due to friction against some hard object. The fall, could also cause bruises.

RE-EXAMINATION BY THE PROSECUTOR

The bruises, which I have described above, can also be due to a fall or friction on any hard object like tree, bamboo or stone.

(Emphasis Supplied)

13. Assistant Commandant Anil Kamboj PW-10, deposed that in the month of December, 1981 he was performing the duties of Adjutant and Quarter Master at STC Ranidanga. On December 06, 1981 he received a telephone call from HC Ramat Subba that the petitioner has been roaming in the STC premises with a loaded revolver in his hands. He i.e. HC Ramat Subba further informed him that the petitioner had fired a shot at him and beaten him. He gave a report about the incident to Commandant, STC Ranidanga. After sometime accompanied by Subedar U.P. Rai, HC Ramat Subba he left for STC Ranidanga. When they reached near STC they met the petitioner. He enquired from the petitioner about the complaint against him by HC Ramat Subba whereupon the petitioner rudely replied that nothing happened. When he told the petitioner that he had learnt that he has fired a shot from his revolver, the petitioner again rudely replied that he can do whatever he wants from his revolver. Smell of liquor was coming from the mouth of the petitioner when he was talking to him. Thereafter he inspected the revolver of the petitioner and noted that smell of gun powder coming from its barrel. At about 10.05 P.M. he met Subedar Amrik Singh who informed him that today i.e. December 06, 1981 he was beaten by the petitioner on two occasions.

Thereafter he went to the tent where the petitioner was lying on a cot and repeatedly ordered him to come out of the tent but the petitioner flatly refused to obey his orders. Thereafter he along with Subedar U.P. Rai left the tent and came to Kadamtala and reported the matter to the Commandant. Thereafter he returned to tent and shifted the belongings of the petitioner from the tent to a nearby canteen. After sometime he learnt that the petitioner has run away whereupon he instructed Subedar U.P. Rai to apprehend the petitioner. Subedar U.P. Rai managed to apprehend the petitioner. Even after being apprehended the petitioner was creating ruckus by shouting at the top of his voice. When he admonished him for creating a nuisance the petitioner rudely asked him to shut up and made aggressive gestures towards him. Being relevant, we note following portion of the cross-examination of the witness:-

...

On reaching STC, after having got the information from HC Ramat Subba, I did not ask about the incident from the students in the tent, where the accused used to stay.

...

As far as I remember I had submitted a detailed report about the incident of 6th December, 1981 to Commandant STC.

...

I do not remember as to whether the accused was produced before the Commandant, following the said incident. I did not ask about the said incident on the night of 6th December, 1981 from the other inmates of the tent, where the accused used to stay. I had only enquired about this incident from Subedar Amrik Singh, HC B.B. Chhetri and the accused...

(Emphasis Supplied)

14. Subedar U.P. Rai PW-14, deposed that in the month of December, 1981 he was attached to STC Ranidanga for performing instructional duties. On December 06, 1981 at about 09.15 P.M. HC Ramat Subba came to his residence and informed him that the petitioner had fired a shot at him and that Assistant Commandant Anil Kamboj was calling him to his residence. On reaching the residence of Anil Kamboj, he along with Anil Kamboj and HC Ramat Subba left for STC Ranidanga. When they reached near STC they met the petitioner. Anil Kamboj made enquiry from the petitioner about the complaint against him by HC Ramat Subba whereupon the petitioner rudely replied that nothing happened. When Anil Kamboj told the petitioner that he had learnt that he has fired a shot from his revolver the petitioner again rudely replied that he can do whatever he wants from his revolver. Thereafter Anil Kamboj inspected the revolver of the petitioner. At about 10.00 P.M. he and Anil Kamboj met Subedar Amrik Singh who informed them that today i.e. December 06, 1981 he was beaten by the petitioner on two occasions. Thereafter he and Anil Kamboj went to the tent

where the petitioner was lying on a cot and Anil Kamboj repeatedly ordered him to come out of the tent but the petitioner flatly refused to obey his orders. Thereafter they left the tent for Kadamtala. After sometime he returned to tent and shifted the belongings of the petitioner from the tent to a nearby canteen as per the instructions of Anil Kamboj. After sometime it was learnt that the petitioner has run away. He started to look for the petitioner and managed to apprehend him with the help of Subedar U.P. Rai. Even after being apprehended the petitioner was creating ruckus by shouting at the top of his voice. When Anil Kamboj admonished him for creating a nuisance the petitioner rudely asked him to shut up and made aggressive gestures towards him. On the next day i.e. December 07, 1981 he participated in the seizure of the personal belongings of the petitioner. Amongst other articles the personal articles of the petitioner included live/fired ammunitions.

15. Deputy Commandant S.S. Chahar PW-12, deposed that in the month of December, 1981 he was detailed to prepare Record of Evidence in respect of the petitioner.

16. The petitioner submitted an application under Rule 92 of the BSF Rules, 1969 to the GFSC stating that prosecution has failed to establish a prima-facie case for him to answer anything and thus he should not be called upon to make his defence for the charges framed against him.

17. In response to the aforesaid application submitted by the petitioner the prosecution submitted a reply, the relevant portion whereof reads as under:-

8. The allegation of the Defence Counsel that Shri Anil Kamboj, PW-10 did not investigated about the incident nor did he enquired from the accused after 6 DEC 81 is baseless and unfounded. In fact he had investigated about the incident on 7 DEC 81 from concerned persons including the accused and had submitted the report to the Commandant, STC regarding the happenings. The investigation into the incident of the night of 6 DEC 81 revealed that the accused had indulged in indiscipline and therefore, the matter was referred to the higher Hqrs by the Commandant, STC. Since the accused was in the processes of attachment to 87 Bn BSF no action could be initiated as per Rule 44 of BSF Rules nor was he tried/punished for the aforesaid offences. However, the provisions of BSF Rules 44 and 45 were complied with when the accused was attached with 87 Bn BSF for disciplinary purposes.

...

10. Your Honour, the learned Defence Counsel instead of appreciating the attachment of the accused with 87 Bn BSF for fair play and justice had harped on delay in charge sheeting the accused which is bound to take place owing to procedural formalities.

(Emphasis Supplied)

18. The Court rejected the application under Rule 92 of the BSF Rules, 1969

submitted by the petitioner and proceeded to record the evidence of witnesses of defence.

19. The petitioner did not lead any evidence in support of his defence and submitted his written statement in wherein he pleaded innocence and denied all incriminating circumstances appearing against him.

20. Briefly noted, the petitioner stated that in the month of December, 1981 he was undergoing Junior Leader's Course at STC Ranidanga. On December 06, 1981 he took out his revolver .38 calibre from Kote to clean the same. In the evening he went to Kote to deposit his revolver but could not do so inasmuch as Kote under officer was not available because it was a holiday on December 06. On said day i.e. December 06 some officers from his Battalion i.e. 84 Battalion had come to Kadamtala. He sought permission from Senior Course Student Inspector Amrik Singh to go to Kadamtala as he wanted to request the officers who had come from his Battalion that they should allow him to accompany them to 84 Battalion if they are leaving from Kadamtala after two-three days inasmuch as his course was finishing on December 9, 1981. Thereafter he went to Kadamtala and met the officers from his Battalion who allowed him to accompany them to 84 Battalion. He sat down with said officers and shared three-four bottles of rum with them. Sometime thereafter he and the officers of his Battalion went to the tent where he was staying at STC Ranidanga. At that time Inspector Amrik Singh was present in the tent but he did not tell him anything about his absence from roll call. After bidding goodbye to officers from his Battalion he went to Kote to deposit his revolver but Kote under officer was not present there. He went to the washer man's shop to collect his uniform and thereafter had dinner in the mess of STC. After having dinner he returned to his tent and started cleaning his revolver. Inspector Amrik Singh took his revolver from him by saying that he would clean and deposit it in the Kote and went out of the tent with his revolver. Ten fifteen minutes thereafter Inspector Amrik Singh returned to the tent and informed him that he has not deposited his revolver in the Kote but handed over the same to HC Tanu Babu. He chided Inspector Amrik Singh for not having deposited his revolver in Kote and instead handing over the same HC Tanu Babu. He told Inspector Amrik Singh that in case HC Tanu Babu would commit any wrong act with his revolver he would be blamed for it as the revolver was licensed in his name. He asked Amrik Singh to go with him to HC Tanu Babu for collecting his revolver but he refused to do so and said that he has committed no mistake by handing his revolver to HC Tanu Babu. When he i.e. petitioner kept insisting that he should go with him to HC Tanu Babu Amrik Singh pushed him and said that he should go to sleep and he has done no mistake in handing his revolver to HC Tanu Babu. In the meantime SI Harbans Singh and SI Ajit Kumar came there and three of them (Amrik Singh, Harbans Singh and Ajit Kumar) started beating him. He received bruises on his face on account of being beaten by the said three persons. He never misbehaved with Assistant Commandant Anil Kamboj or any other person on December 06, 1981. Amrik Singh, 4 SI Harbans Singh, SI Ajit Kumar, HC Ramat Subba, Assistant

Commandant Anil Kamboj, HC B.B. Chhetri and Subedar U.P. Rai have falsely implicated in the present case.

21. After considering the evidence led by the prosecution and written statement submitted by the petitioner, the opening and closing address of the prosecutor and the defending officer and summing up of the law officer, vide order dated August 9, 1982 the GFSC held that the petitioner is guilty of second, third and fourth charges framed against him. With respect to first charge, the GFSC held that the petitioner is not guilty of offence of attempt to commit murder punishable u/s 307 IPC but guilty of offence of attempt to commit culpable homicide punishable u/s 308 IPC. The GFSC awarded a sentence of dismissal from service to the petitioner.

22. The record of the case was forwarded to the Inspector General BSF, West Bengal in terms of Section 108 of the BSF Act, 1968 and the same were confirmed vide order dated May 4, 1983.

23. Aggrieved by the finding and sentence awarded by the GFSC which stood confirmed by the Inspector General, the petitioner filed a writ petition under Article 226 of the Constitution of India before High Court of Calcutta. Vide order dated April 5, 1983 the High Court dismissed aforesaid petition on the ground that he has not exhausted alternative remedy available to him u/s 117(2) of the BSF Act, 1968 to assail the legality of finding and sentence of GFSC before invoking the jurisdiction of High Court under Article 226 of Constitution of India. However, liberty was granted to the petitioner to file petition u/s 117(2) of the BSF Act, 1968 to the confirming authority.

24. Thereafter the petitioner preferred petition u/s 117(2) of the Border Security Force Act, 1969 to the Director General, BSF, Ministry of Home Affairs, Govt. of India, which petition was rejected vide order dated July 1, 1992.

25. Aggrieved by the aforesaid, the petitioner has filed the present petition under Article 226 of the Constitution of India.

26. Vide order dated July 16, 1992 this Court dismissed the aforesaid petition on the ground that on an earlier occasion the petitioner had approached the High Court of Calcutta to assail the finding and sentence of the GFSC. Such being the position, it was incumbent upon the petitioner to have approached the High Court of Calcutta only once his petition u/s 117(2) stood rejected by the department.

27. The petitioner challenged the order dated July 16, 1992 passed by this Court by way of filing a SLP before the Supreme Court. Vide order dated August 3, 1993 the Supreme Court set aside the order dated July 16, 1992 passed by this Court and directed this Court to dispose of the matter on merits.

28. On January 02, 2014, arguments were heard in the matter and same was reserved for judgment. Written submissions filed by the petitioner were taken on record.

29. The submissions advanced by the petitioner can be broadly categorized into following two heads:-

A The trial of the petitioner is vitiated because procedural irregularities were committed by the department at the "pre-trial stage".

B Findings returned by the GFSC that on December 06, 1981 the petitioner had fired a shot at HC Rahmat Subba; manhandled HC Rahmat Subba and Subedar Amrik Singh and was found in a state of intoxication on said day are perverse, in that, no prudent person would have ever reached said conclusion.

30. Under the first head (procedural irregularities committed by the department), the petitioner advanced following submissions:-

I Rule 40 of the BSF Rules, 1969 prescribes that a person who is placed under arrest shall be given, in writing, the particulars of the charges against him by the officers effecting the arrest, at the time of being placed under arrest. In the instant case, the department has violated Rule 40 inasmuch as particulars of charges were not given to the petitioner in writing at the time when he was placed under arrest at about 09.00 P.M. on December 06, 1981.

II Rule 16(6) of the BSF Rules, 1969 prescribes that when a BSF personnel is doing detachment duty, including attendance at a course of instruction the Commandant of the battalion, unit or centre or establishment with which he is doing such duty shall have all the disciplinary power of a Commandant. Such being the position, the Commandant of STC Ranidanga had the disciplinary powers of Commandant of petitioner on the date of incident(s) i.e. December 06, 1981 inasmuch as the petitioner was undergoing a course at STC Ranidanga on said day. Further, Rule 45 prescribes that a charge leveled against an accused shall be heard by his Commandant. In the instant case, Rule 45 when read with Rule 16(6) requires that the charge(s) leveled against the petitioner should have been heard by the Commandant of STC Ranidanga. However, Rule 45 was violated in the instant case inasmuch as admittedly charge against the petitioner was not heard by the Commandant, STC Ranidanga but by Commandant, 87 Battalion.

III Rule 46 of the BSF Rules, 1969 prescribes that the Commandant shall not deal with any case where:- (i) offence with which the accused is charged is against the Commandant himself; or (ii) Commandant is himself a witness in the case against the accused; or (iii) Commandant is otherwise personally interested in the case. In such a case, the accused shall be attached to another battalion or unit for disposal of the case against him. In the instant case, the petitioner was attached to STC Ranidanga on the date of incident on December 06, 1981. Even though the Commandant, STC Ranidanga was not disqualified to hear the case of the petitioner in terms of Rule 46 the petitioner was attached to another unit/ battalion i.e. 87 Battalion for the purposes of present case.

IV Rule 49 of the BSF Rules, 1969 requires that copy of abstract of evidence be

handed over to an accused before he is called upon to make a statement at the time of preparation of Record of Evidence. In the instant case, the petitioner was not handed over the copy of Abstract of Evidence before he was called upon to make his statement at the time of preparation of Record of Evidence, which greatly prejudiced the petitioner while making his statement in the Record of Evidence.

V Rule 60(iii) of the BSF Rules, 1969 disqualifies a person who had taken part in the investigation of the case from serving on the Court. In the instant case, S.S. Chahar who prepared the Record of Evidence in case of petitioner served as prosecutor in the GSFC.

VI Section 58 of the BSF Act, 1968 prescribes that no person should be detained in custody for more than 48 hours without the charge in respect whereof he was arrested being investigated. In the instant case, the petitioner was arrested on December 06, 1981 and admittedly the hearing of charge under Rule 45 of the BSF Rules, 1969 in the case of the petitioner was conducted only on December 19, 1981.

VII The Convening Officer amended one of the charges framed against the petitioner in complete violation of Rule 62 of the BSF Rules, 1969.

31. Under the second head (perversity of the finding(s) of the GFSC), following submissions were advanced by the petitioner:-

(i) It is settled legal position that the evidence of a complainant is akin to that of an accomplice and thus has to be scrutinized with great care. The instant case is based upon the sole testimony of Rahmat Subba PW-1, the complainant. Rahmat Subba is an interested witness. He has direct interest in seeing that the accused person is somehow or other convicted. His evidence has to be approached with great caution. In the absence of any corroborating evidence, the testimony of Rahmat Subba PW-1, needs to be discarded, more particularly when no spent bullet has been recovered from the place of occurrence. Furthermore, HC Rahmat Subba PW-1, deposed that he did not raise any alarm or hue or cry when he was being beaten by the petitioner or when the petitioner fired a shot at him. The conduct of HC Rahmat Subba of remaining silent at the time of the incident and not making a cry for help is most unnatural and raises a big question mark on the veracity of said witness. Lastly, various contradictions were pointed out in the deposition of HC Rahmat Subba PW-1, in order to demonstrate that HC Rahmat Subba PW-1, is not a reliable witness.

(ii) The testimony of Doctor Md. Azimuddin PW-9, that there were multiple bruises on the face of the petitioner and one bruise on his left thigh when he was medically examined by him in the night of December 06, 1981 probables the defence taken by the petitioner that it was petitioner who was beaten by Subedar Amrik Singh, SI Ajit Kumar and SI Harbans Singh on December 06, 1981. This most crucial aspect of the matter has been completely lost sight by the GFSC and the confirming authority.

(iii) SI Ajit Kumar PW-6, admitted in his statement before the GFSC that he had stated before the Recording Officer that Subedar Amrik Singh had taken the revolver of the petitioner from him on the pretext of cleaning the same. It was argued that aforesaid statement made by Ajit Kumar before the Recording Officer establishes the defence of the petitioner that Subedar Amrik Singh had taken the revolver from the petitioner on the pretext of cleaning and depositing the same in Kote. Instead of depositing it in Kote Subedar Amrik Singh handed over the revolver of the petitioner to HC Tanu Babu. When petitioner chided Subedar Amrik Singh for handing over his revolver to HC Tanu Babu he fought with him.

(iv) The alleged manhandling of Subedar Amrik Singh by the petitioner happened in the tent pitched in STC Ranidanga where the officers undergoing Junior Leader's Course were staying. Meaning thereby, many other students/officers must have been present in the tent when the petitioner allegedly manhandled the petitioner. Despite thereto, besides Subedar Amrik Singh, SI Harbans Singh and SI Ajit Lal (who had all participated in the incident) no other student/officer from the tent was examined by the prosecution. An adverse inference needs to be drawn against the prosecution in said regard, in that had any student/officer from the tent (besides Subedar Amrik Singh, SI Harbans Singh and SI Ajit Lal) been examined by the prosecution he would not have supported the case prosecution.

32. We first deal with the submissions advanced by the petitioner under the first head i.e. procedural irregularities committed by the department.

33. It has been argued by the petitioner that as many as seven procedural irregularities have been committed by the department in various stages in the present case. Significantly, all procedural irregularities pointed out by the petitioner relate to "pre-trial" stage.

34. We need not go into the aspect as to whether procedural irregularities pointed out by the petitioner were committed by the department or not for the reason it is settled legal position that the irregularities committed by the department at a stage anterior to the trial of an accused by the Security Force Court which do not cause any prejudice to the accused do not vitiate the trial of the accused. In said regard, it is relevant to note following observations made by a Division Bench of this Court in the decision reported as Union of India and Others Vs. Ex Constable Mohinder Singh (deceased now represented through LRs. Smt. Kiran Devi and two others),

Indeed an infraction of the Rule or an irregularity in complying with the Rule 45, which does not cause any prejudice to the accused, will not vitiate the subsequent proceedings conducted at the stage of pre or post convening of the court and trial of the accused by Summary Security Force Court. The reason is that the procedure prescribed by Rule 45 or 48, 49 and 51 are at a stage anterior to the trial by the Summary Security Force Court. It is the order of the Summary Security Force Court which results in conviction and punishment of the accused

which is material and not inconsequential infraction and irregularity in the procedure prescribed in the Rules at pre-trial stage. Similar view has been taken by the two Division Benches of this Court in the case of ex-Const. Ashok Kumar (supra) and Union of India v. O.P. Bishnoi (supra). This view is also fortified by the law laid down by the Hon'ble Supreme Court in Lt. Col. Prithipal Singh (supra) and Major G.S. Sodhi (supra)...

(Emphasis Supplied)

35. A similar view was taken by another Division Bench of this Court in Writ Petition No. 2029/1998 Const. Narender Kumar v. Union of India & Ors. decided on August 08, 2011.

36. In the instant case, petitioner has not averred/shown that any prejudice has been caused to him on account of afore-noted seven procedural irregularities (allegedly) committed by the department at the pre-trial stage. In that view of the matter, even if we assume that aforesaid seven procedural irregularities were committed by the department at pre-trial stage the same would not result in vitiating the trial of the petitioner or finding/sentence of the GFSC when the petitioner has not even averred, much less shown, the prejudice caused to him on account of such procedural irregularities.

37. It is settled law that while examining the correctness of finding and sentence of the Court Martial/Security Force Courts in exercise of its power under Article 226 of the Constitution of India the jurisdiction of the High Court is limited to finding out whether there exists an error of jurisdiction or is it a case of total lack of evidence. It is not open to the High Court to re-evaluate the evidence on record or whether the evidence on record is sufficient to sustain the finding of the Court Martial/Security Force Court or to substitute its opinion for that of the Court Martial/Security Force Court. (See the decision of this Court in W.P. (Crl.) No. 93/1980 R.S. Ghalawat v. Union of India & Ors decided on June 04, 1981).

38. We have extensively noted the testimonies of the witnesses of the prosecution in the foregoing paras. The events which unfold on the day of incident i.e. December 06, 1981 as evident from the testimonies of the witnesses of the prosecution are as follows: - In the month of December, 1981 the petitioner, Subedar Amrik Singh, SI Ajit Lal and SI Harbans Singh were undergoing Junior Leader's Course in STC Ranidanga and staying in a tent pitched in STC premises. On December 06, 1981, the petitioner was absent from the roll call of persons attending Junior Leader's Course held at 05.30 P.M. Being Senior Course Student, Subedar Amrik Singh reported the absence of the petitioner from roll call to HC Tanu Babu, Senior Course Instructor. At about 08.00 P.M. HC Rahmat Subba PW-1, learnt that petitioner is sitting in a washer man's shop and carrying a revolver in his hand whereupon HC Rahmat Subba went to the said shop. On reaching there, he saw that the petitioner was sitting in a room adjacent to said shop with a revolver in his hand. The petitioner was under the influence of liquor at that time. Thereafter the petitioner and HC

Rahmat Subba started proceeding towards the tent at STC premises. On their way, the petitioner got angry with HC Rahmat Subba for his asking him to hand over his revolver to him. The petitioner assaulted HC Rahmat Subba and few seconds thereafter fired a shot at HC Rahmat Subba. At that stage Subedar Amrik Singh, SI Harbans Singh and SI Ajit Lal, who have deposed to have heard the sound of firing of a shot intervened in the incident. They all saw the petitioner enter the tent with a revolver in his hand. The petitioner gives his revolver to Subedar Amrik Singh who deposits the same in Kote. On learning that Subedar Amrik Singh has deposited his revolver in Kote the petitioner got angry and assaulted Subedar Amrik Singh, which assault was witnessed by SI Harbans Singh and SI Ajit Lal. After sometime the petitioner again assaulted Subedar Amrik Singh in the presence of SI Harbans Lal and SI Ajit Lal. Subedar Amrik Singh then complained to Assistant Commandant Anil Kamboj. The petitioner misbehaved with Assistant Commandant Anil Kamboj. The belongings of the petitioner were removed from the tent. The petitioner tried to flee from STC premises but was apprehended.

39. The witnesses of the prosecution have been extensively cross-examined by the petitioner but nothing tangible could be extracted therefrom. The witnesses have withstood the test of cross-examination and corroborated each other in material particulars. As per the petitioner, save and except Deputy Commandant S.S. Chehar PW-11, the Recording Officer, all other ten witnesses of the prosecution are lying and have colluded with each other to falsely implicate the petitioner. It is difficult to believe that as many as ten persons have ganged up against the petitioner, particularly when except Subedar Amrik Singh the petitioner has not alleged animus against any other witness of the prosecution. Furthermore, the incident relating to manhandling of Subedar Amrik Singh by the petitioner happened in the tent where as many as 20 persons undergoing Junior Leader's Course were staying. Meaning thereby, many persons would have witnessed the happening of incident in question. But no one from the tent came out in favour of the petitioner. Two persons from the tent viz. SI Harbans Singh and SI Ajit Lal spoke in favor of Subedar Amrik Singh. This shows that in all probability it is Subedar Amrik Singh who was speaking the truth.

40. Furthermore, a chink has appeared in the defence taken by the petitioner. Whereas the petitioner has stated in the written statement submitted by him to GSFC that he did not attend evening roll-call on December 06, 1981 as he had gone to Kadamtala to meet the officers from his Battalion he has cross-examined SI Harbans Singh PW-7 to the effect that he did not attend evening roll-call on December 06, 1981 as he was unwell. Not only this, the written statement of the petitioner also brings out that the petitioner had consumed liquor in the evening of December 06, 1981 for he has stated in his statement that he had shared two-three bottles of rum with the officers from his Battalion in the evening of December 06, 1981.

41. The submissions advanced by the petitioner under second head requires this

court to re-evaluate the evidence led by the prosecution. As already noted by us above, it is not open to High Court to re-evaluate evidence in exercise of its power under Article 226 of Constitution of India.

42. In view of facts that the witnesses of prosecution has withstood the test of cross-examination and corroborated each other in material particulars; the petitioner has not led any evidence in defence despite the fact that incident relating to manhandling of Subedar Amrik Singh had happened in presence of many persons and a chink has appeared in the defence of the petitioner; the finding(s) of the GFSC cannot be faulted. Considering the seriousness of the charges proved against the petitioner, the GFSC was justified in awarding the sentence of dismissal from service to the petitioner. In view of above discussion, the present petition is hereby dismissed but without any orders as to costs.