

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve : 19.03.2010

Date of Decision : 22.03.2010

+ Crl.M.C. 2344/2004

BRIJ BHUSHAN

..... Petitioner

Through: Mr. PP Malhotra, ASG with
Mr.Satish Aggarwala and Ms.Pooja
Bhaskar, Advcates

VERSUS

STATE AND ANR.

..... Respondents

Through:Mr. Navin Sharma, APP for State
with Inspector Puran Chand, P.S.
Shalimar Bagh
Mr.Ankur Goel, Advocate for R-2

WITH

Crl.M.C. 354/2005

VIKAS THUKRAL @ VICKY & ORS.

..... Petitioners

Through: Mr. Ankur Goel, Adv.

VERSUS

STATE & ANR.

..... Respondents

Through: Mr. Navin Sharma, APP for State
with Inspector Puran Chand, P.S.
Shalimar Bagh
Mr. PP Malhotra, ASG with
Mr.Satish Aggarwala and Ms.Pooja
Bhaskar, Advcates for R-2

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **MOOL CHAND GARG, J.**

1. This common order shall dispose of the aforesaid two petitions filed under Section 482 Cr.P.C. read with Article 226 of the Constitution of

India registered as CrI.M.C.No. 2344/2004 and CrI.M.C.No.354/2005 respectively, both arising out of the same incident which occurred around the midnight of 31.8.2000 /01.09.2000, seeking quashing of:

- (i) FIR bearing No. 628/2000 under Section 302/307 IPC registered at P.S. Shalimar Bagh against Shri Brij Bhushan the petitioner in CrI.M.C. No. 2344/2004 (hereinafter referred to as the Custom Officer) and
- (ii) FIR bearing No. 295/2000 under Sections 186/353/332/364/365/506/34 IPC read with Section 27 of the Arms Act registered at P.S. Karol Bagh New Delhi against Shri Vikas Thukral and others (hereinafter referred to as Thukrals) petitioners in CrI.M.C. No. 354/2005 at the instance of the Custom Officer as well as the proceedings arising therefrom respectively.

2. Brief facts, giving rise to filing of FIR No. 628/2000 registered at the instance of Shri Vikas Thukral are:

- (i) That on 31.08.2000 at about 9.30 – 10.00 PM, Vikas Thukral was getting a truck unloaded consisting of plastic wheel covers with valid invoices and challans when the Custom Officer posing himself an Inspector (Customs) approached him and stated that he had the information that the containers mounted on the truck were containing smuggled goods. Despite Vikas Thukral informing the Custom Officer that the goods being unloaded were plastic wheel covers, showing invoices and challans in respect thereof and at his instance having also opened about 20 boxes in random which

contained plastic wheel covers, the Custom Officer kept on intervening and asked Vikas Thukral to call his father and some other elder person from his house. At this Shri Vikas called his father who came along with other persons who are petitioners in Crl.M.C. No. 354/2005 as also along with Subhash Rana (the deceased) at the go-down. They also talked to the Custom Officer who expressed displeasure with intent to extract some illegal gratification at which some altercation took place between them.

- (ii) That at this Thukrals got suspicious and asked for the correct identity of the Custom Officer who disclosed his identity as a Custom Officer and also stated that his residence was in Pitampura and asked Thukrals to accompany him for settling the matter. At this Thukrals along with Custom Officer boarded in two vehicles as custom officer was not having any vehicle. On the way to Pitampura the Custom Officer is stated to have asked Thukrals to stop the car on the pretext of urination and after going ahead a little, he took out a pistol from pocket of his pant and fired number of shots. One of the bullet hit Mr. Subhash Rana whereas the others saved themselves by hiding. The custom officer also took away Maruti Zen Car No. DL 3CA 3096 of Vikas Thukral and fled from the spot. That immediately after the incident Vikas Thukral informed the PCR on No. 100 & narrated the story that the Custom Officer had attacked by firing with his service pistol and seriously injured Mr. Subhash Rana (now deceased) who was then taken to Sarvodaya Hospital Pitampura. The PCR then informed the police

post Pitampura where DD No. 7A was recorded at 1.30 AM about the firing of shots near H.No. 219, SU Block, Pitampura and the assailant had fled after snatching the car. SI Raj Pal Singh reached Sarvodaya Hospital and collected MLC No. 308 of Subhash Rana who was declared unfit for statement. SI after doing the preliminary investigation sent a rukka to the police station and recommended registration of a case. Accordingly, FIR No. 628/2000 under Section 307 was registered against custom officer at PS Shalimar Bagh (subject matter of Cr.M.C. 2344/2004), cross case. The injured Subhash Rana was then referred to RML where he succumbed to his injuries and thereafter on receiving the information of his death Section 302 was added.

3. Therafter, after completion of investigation challan was filed against the Custom Officer alleging commission of offences under Section 302/307 IPC. The Magistrate took cognizance and issued summons to the Custom Officer. The custom officer without appearing before the Magistrate in person filed a petition under Section 245(2) Cr.P.C. which was entertained but was dismissed later. He filed a petition before this court which was disposed of by Justice J.D.Kapoor (Retd.) by remanding the matter for fresh decision on the application. The said application was also dismissed vide impugned order. It may be observed here that till now the petitioner has not appeared before the Metropolitan Magistrate concerned personally despite issuance of non bailable warrants against him, which was later on recalled after the arrest of the custom officer, which was stayed by this court.

4. On the other hand, in FIR No. 295/2000 registered at the instance of custom officer it has been submitted:

- (a) That the complainant was posted as inspector in Customs Preventive branch, Delhi at the relevant time and was engaged in surveillance duty in the area of Pusa Road. On the night of 31.08.2000, when he was coming back from his office he detected some suspicious goods being unloaded from two trucks. He then immediately informed his senior officer who asked him to keep the surveillance of the same. The petitioner then met one Vicky Thukral author of FIR No. 628/2000. He also disclosed his identity and asked for the documents pertaining to the goods in question. Then Vicky Thukral stated to him that he will call his father who would only explain about the papers/documents pertaining to the goods. Then Ashok Thukral along with his musclemen reached at the spot and some altercations took between them relating to goods. Thukrals were armed with deadly weapons.
- (b) That thereafter Thukrals started beating him mercilessly and huddled him in the car at gun point. It is also submitted that even after beating him they took him along and snatched all his **personal belongings**. He then was taken in the car which at one point of time was stopped near the Ring Road Punjab Kesari and was then further taken to Pitampura where he requested them for urination and due to light frisking of petitioner they could not trace his German Pistol and on seeing nobody around to save his life he fired and due to which they all ran away and custom officer

managed to escape.

(c) It has been alleged that in this manner Thukrals committed offences under Section 186 IPC by obstructing the Custom officer in discharge of his duties and it is on these facts FIR No. 295/2000 was lodged by the Customs Officer against Thukrals. After the challan was filed, necessary sanction under Section 195 Cr.P.C. was also obtained. The Ld. Magistrate took the cognizance of the matter against the accused persons and the trial has already started. It is also the case of the custom officer that later it was revealed that Ashok Kumar Thukral, Vicky Thukral and Subash Rana are all history sheeters as per the record of the Police.

(d) After summons were issued to Thukrals they have approached this Court and proceedings have been stayed in CrI.M.C. No. 354/2005 vide orders dated 27.09.2004 which is common in both the cases.

5. At this juncture, it will also be appropriate to take note of the allegations made in the FIR by both the parties. In FIR No. 628/2000 Vikas Thukral who is the author of the FIR has stated:

“that I live at the above address with my parents. And at Arya Samaj road, Karol Bagh My father runs a shop of car accessories and myself also work with my father. We have a godown at 5, Pusa Road. Yesterday on dated 31.08.2001 I was getting unloaded the goods at about 11.00 O'clock. A person came to godown and asked that I am Brij Bhushan, Custom Inspector. I have an information that the truck have wrong goods, get it checked when I got it checked then asked that call some responsible person. I telephoned my uncle, so my father Ashok Kumar Thukral and Subhash Chopra and Subhash Rana who both are my uncles and work at Jagdish Thukral my uncle's garment shop at Gandhi Nagar and my uncle Jagdish Thukral who lives in SU-219, Pitampura all of them came to the godown

and talked to the Brij Bhushan, Custom Inspector and we all had beaten him. After beating some time we asked Brij Bhushan that where do you live: He said I live in Pitampura. My uncle from there only went to Pitampura in any other's vehicle. My father, Subhash Chopra and Subhash Rana made sit Brij Bhushan into their vehicle. Custom officer did not had vehicle. I also followed them along with my two servants in my vehicle when we reached to the Punjab Kesri, Ringh Road then Subhash Rana stopped the vehicle there. So from my vehicle my servants Anil Kumar, Sanjay Kumar got down and sat in the left and right side of Custom Inspector Brij Bhushan and then we proceeded for Pitampura, when the time was about 1.00 AM night reached at AP Block, Pitampura. Custom Inspector Brij Bhushan got stopped the vehicle for urinating and went a little far from the vehicle and pulled out pistol from his pant's pocket and fired a few shots on us and one bullet hit in Subhash Rana's belli. We all hide ourselves and Brij Bhushan, Custom Inspector took my Maruti Zen car No. DL3C A 3096 and fled from the spot. I telephoned on 100 No. that Custom Inspector Brij Bhushan have done a life taking assault on us and have hit the bullet in Subhash Rana's belli so we have admitted Subhash Rana in Sarvodaya Hospital, Pitampura. Legal action be taken. "

6. From the aforesaid, it is apparent that Thukrals admits that the custom officer showed his identity card, thereafter they gave him beatings and made him to sit in the car in which they took him to Pitampura where the incident of firing has taken place.
7. The custom officer in his FIR No. 295/2000 has made the following allegations:

"that yesterday, at about 11.45 PM dated 31.08.2000 when I left my office from New Customs House, IGI Airport for going home. At about 12.15 at night I reached to Pusa Road and turned towards Satbhrawan School than on the right side of the road I saw two trucks unloading the goods. On suspicion I stopped and observed from the packing that the goods seems to be imported. Regarding this I immediately informed my Superintendent (Preventive) Shri Nand Lal on his Mobile No. 9810184229 from my mobile No. 9810279614 and apprised him about situation by calling, who directed me to keep on the surveillance of goods and godown when I went near to the trucks to see the goods then a boy present there who was told Vicky, asked me, who are you and what do you want?

Then I told him that I am a Custom Officer and I asked him about the documents pertaining to the goods. On this, he told that I am calling my father who will tell you about them. So at about half an hour later four persons came and one out of them told his name Ashok Thukral and asked me who are you? I showed him my I. Card and introduced and asked about the documents pertaining to the goods then they started abusing and Ashok told me, you do not know me well, I will show you the documents right now. Thereafter, these people started beating me with kicks and punches and have beaten me brutally so I sat on foot path. After they started talking together. Then a person out of them to whom Vicky was calling Jagdish Uncle came to me and caught my collar by showing a revolver told me that you stand up and sit up in the car quietly and he and a second person who had worn a white coloured pathani suit caught and thrust me in their vehicle. Under coercion I sat in their vehicle and they kept on threatening me that if you will not obey us then we will shoot you with bullet. They kept me in vehicle and proceeded through Anand Parbat, Keshav Puram via Ring Road reached to Pitampura. During this time the fourth man who had beard of 'JAT' style kept me threatening by showing second pistol and the pathani suit person was driving the vehicle and they were talking of killing me. So they were calling to the pathani suit man by the name of Subhash Chopra. After this, in the same vehicle they carried me ahead of Pitampura, T.V. Tower. I asked them to urinate. On this, Ashok Thukral who was sitting to the side seat of driver threatening me and asked to keep sitting and mouth shut. Thereafter, at a short distance they stopped the vehicle at a secluded place and got down me and started talking together that this place is fit for. So, Subhash Chopra who had the revolver in his hand asked me to put off my shirt and under coercion I put off my shirt and then they asked me to bend down so I felt that they will shot me dead. Therefore, to save my life and to make them frightened I fired two shots and ran towards the vehicle and while running fired shots from my service pistol which is issued to me from my Department and started their Zen car and ran away from there. So via Shalimar Bag, Azadpur, Model Town and turned towards Mukherjee Nagar where you intercepted me and I told you the whole story.

You brought me to hospital. So all these people have collectively deter me to discharge my Government duty, beaten me and abducted me on gun point, confined me in vehicle, threatened me to kill. Against all these the legal action be taken. Heard the statement and it is correct."

8. A bare reading of that FIR goes to show that the allegation made by the petitioner that his personal belongings were snatched does not find

mention in the FIR. There is also no mention that his pant also had blood stains. There is no explanation as to wherefrom his car reached at Pitampura which has been taken into possession by the Police officials of Shalimar Bagh on 01.09.2000 itself. There is no explanation as to why the FIR bearing No. 295/2000 has been registered by the Police around 7.30 AM on 01.09.2000 whereas the incident took place at about 1.00 AM in the morning of 01.09.2000. It is also a matter of record that petitioner, despite issuance of NBWs and rejection of his anticipatory bail application, has not surrendered before the Court and has been approaching this Court by filing one petition or the other to evade his arrest.

9. Both the sides have sought quashing of the FIR instituted against both of them for different reasons.
10. According to Thukrals the FIR bearing No. 295/2000 registered against them is liable to be quashed, inter alia, on the following amongst other grounds.
 - I. The FIR has been registered at 7:30 a.m. and is an afterthought. No offence whatsoever has been made out against Thukrals in view of the fact that neither they obstructed nor deterred the Custom Officer from discharging his lawful duty nor he was kidnapped or abducted nor he was threatened to be killed by Thukrals. It is stated that the aforesaid FIR was got registered after the deliberations and concoction after 6 to 7 hours of the incident.
 - II. The Custom Officer did not show his current identity card to Thukrals in spite of the request made by them to him and the identity card showed by the custom officer was not a valid card as on 31.08.2000. The act of custom officer in not showing his valid identity card to Vikas Thukral created a doubt in the minds of Thukrals as to whether the custom officer was actually a Customs Officer or not, as he was neither in the uniform nor

was carrying a valid identity card and moreover was heavily drunk. In spite of all this, Thukrals accompanied him to Pitampura for the settlement which custom officer wanted.

- III. The bona fides of Thukrals becomes clear from the fact that without verifying the fact as to whether the custom officer was armed with any weapons or not they just took him along with them in another car.
- IV. The pistol and revolver shown to have recovered by the police, from the residence of Jagdish Thukral is nothing but a concocted story. However, it is pertinent to mention here that the Subhash Chopra is in possession of a legal and valid licence.
- V. The custom officer was sitting at the rear seat with Mr. Subhash Rana and Subhash Chopra was sitting at the front seat and the car was being driven by Ashok Thukral. The custom officer, if wanted, could have jumped out of the car any time anywhere at the crossing. Thukrals even stopped the car on the request of the custom officer and the custom officer was allowed to go and urinate without suspecting him.
- VI. The act of the custom officer in murdering Subhash Rana was voluntarily and intentional on his part and was not in any circumstances a part of self defence as alleged. The custom officer was neither kidnapped nor he was abducted by Thukrals as alleged.
- VII. Had there been a case of kidnapping by Thukrals, along with deceased Subhash Rana they would have never allowed custom officer to keep his revolver with him which he used on the way and killed Subhash Rana.
- VIII. From the FIR which was got registered by custom officer, it is clear that the custom officer never stated that Thukrals ever told him that they would murder him and that had the victim i.e. the deceased or Thukrals really kidnapped custom officer, the custom officer should have fired shot in the vehicle itself as he was sitting in the rear seat. On the other hand, it is admitted that the custom officer fired shots only from outside the vehicle and that too at a point blank distance knowing fully well that his act may even kill some other person and thereafter he would escape in the darkness.
- IX. As per the written submission of the custom officer his personal belongings were taken away when he

was taken to Pitampura. If that had been so, there is no reason for Thukals to leave the pistol with the custom officer. This itself shows falacy in the story of the custom officer as alleged. It is also an admitted case that even after the first shot fired by custom officer, Thukrals did not retaliate nor fired at the custom officer as they were not in the possession of any weapon.

- X. It is further admitted fact that inspite of no retaliation from Thukrals, the custom officer did not stop but fired these shots from his revolver.
- XI. The integrity of the custom officer again became doubtful, due to the fact that even as per instructions of the senior officials he did not keep a watch on the articles being unloaded from the truck but he himself without any provocation went to the spot and told the Vikas Thukral as to where were the documents and articles. In fact the custom officer should have waited for his senior officials to come to the spot.
- XII. The story of custom officer that he was made to sit in the vehicle and on the way on the pretext of urinating he got down and then fired is also not believable.
- XIII. He should have lodged a FIR or complaint at an earliest possible time at the nearest police Station, instead, his act of running from the spot and stopping his car at Mukherjee Nagar where he hit the car at the picket and was caught by the Police speaks volumes about the conduct of custom officer and further strengthens the fact that the FIR No. 295/2000 lodged by the custom officer was lodged only with a view to escape from the law and to create a false evidence as the FIR was lodged belatedly after due consultation from his seniors and in connivance with Police Officials.
- XIV. The custom officer did not care either to report to the local Police or his senior official before commencing his journey from Karol Bagh to Pitampura, which appears to be friendly and he even did not make any efforts before commencing his journey from Karol Bagh by informing the local Police that the goods could be ceased by them so that he could be in a position to register a case against Thukrals, if the good were found to be smuggled or contrabands. For the best reasons known to the custom officer, he kept quiet and accompanied Thukrals to Pitampura with a view to confirm their house so that he could receive bribe from them.

11. In so far as the Custom Officer is concerned, he seeks quashing of FIR No. 628/2000, on the following grounds:

- I. No offence whatsoever is made out against the custom officer in view of the facts of the case result of investigation and report submitted by the police in case FIR No. 295/2000 stating therein which goes to show that the FIR lodged by him was supported by unimpeachable evidence which the police had accepted. In the said investigation report the Police also give a finding that FIR No. 628/2000 lodged by Vijay Kumar Thukral was false and did not make out any offence.
- II. The Magistrate could not have taken cognizance of the offence allegedly committed by him without there being a sanction obtained u/s 197 Cr.P.C. which not only is applicable to the acts committed by the public servant but also to such acts which are committed by the public servant **while purporting to** act in discharge of his official duty which may be even beyond it but must have nexus with his public duty and colour of office.
- III. This is despite the fact that Thukrals also admit that at the relevant time the custom officer was discharging his official duties.
- IV. Sec. 155 of the Customs Act, 1962 also provides an embargo for initiating of any proceedings against the Customs Inspector like the petitioner unless the procedure prescribed in sub-sec.2 of Sec. 155 is followed strictly. It has also not been done or appreciated by the Id. Magistrate.
- V. Two cases arise out of the same incident and the findings in the case against the custom officer were in his favour and the case lodged by the custom officer vide FIR No. 295/2000 had been found to be made out and on this basis of this complaint, sanction under Section 195 Cr.P.C. was obtained from the Superior competent authority of the custom officer and charge sheet filed on which cognizance had been taken and same has not been challenged. The Police was obliged to take a definite stand as to version of which party in cross cases was correct, which it did. Both the versions could not be correct and as such the cognizance of the offence against the custom officer and continuance of his prosecution was wholly illegal and impermissible in law and on facts especially in view of positive findings of the investigating agency that the custom officer acted in exercise of

his right of private defence to save his life and liberty which was in imminent danger and he had no chance or opportunity to have access to public authority for averting danger to his life as his captors and abductors were not only determined to carry the custom officer to an unknown place and ultimately liquidate and dispose of his body but had not reported the matter to local police and instead had given bearing and were armed with firearms and had carried him forcibly in their own car flanked by their musclemen. There could not be a better case of exercise of private defence.

12. The Custom Officer has also relied upon the following judgments to support his pleas. The judgments cited by him on various points are:

On Section 155(1), Customs Act, 1962

- i. Costao Fernandes Vs. State 1996 CrL.L.J. 1723 (SC)
- ii. Bhappa Singh Vs. Rampal Singh and others 1982 CrL.L.J. 627 (SC Full Bench)
- iii. Devender Dutt and others Vs. The State 1990 CrL.L.J. 177 (Delhi High Court)

On Section 197, Code of Criminal Procedure

- i. Goondla Venkateswarlu Vs. State of A.P. and Anr. (2008) 9 SCC 613, MANU/SC/7973/2008
- ii. Sankaran Moitra Vs. Sadhna Das and Anr. AIR 2006 SC 1599
- iii. Centre for public Interest Litigation and Anr. Vs. Union of India (UOI) and Anr. AIR 2005 SC 4413

On Section 100, Indian Penal Code

- i. Hanumantappa Bhimappa Dalavai and Anr. Vs. State of Karnataka 2009 CrL.L.J. 3045
- ii. Raj Pal & Ors. Vs. The State of Haryana 2006 (9) SCC 678

13. Both the parties have filed written submissions. Thukrals have not referred to any judgment. I have heard the arguments from both the sides and gone through the written submissions filed by them.
14. To appreciate the real controversy, it may be relevant to take note of some list of dates and events :

Date & Time	Events
31.08.2000 (11. 15pm) (11.45pm)	The custom officer left his office. Brij Bhushan saw suspicious activities of off loading of imported goods at Pusa Road.
11.50 pm	Brij Bhushan informed the Suptdt. Mr. Nand Lal on which he was directed to keep surveillance.
11.56 pm	Brij Bhushan again telephonically informed his superior again who again given the same direction.
01.09.2000 (12.21 am)	Vikas Thukral noticed the presence of Brij Bhushan and asked him about his identity and his reason for roaming there. Brij Bhushan disclosed his identity as the custom officer and asked about the papers and documents of the said goods and subsequently vikas called his father.
12.38 am	For Persons came there namely Ashok Thukral, Jagdish Thukral, Subhash Chopra and Subhash Rana. On being informed by Brij Bhushan that he was inspector for customs, some altercations started between them.
01.30 am	D.D.Entry No. 7 was made at P.S.Pitampura on the call of vikas thukral about the incident.
01.35 am	MLC of Subhash Rana prepared by Sarvodaya Hospital Pitampura showing bullet injuries.
02.30 am	Brij Bhushan reached at P.S.Mukherjee Nagar and intercepted where he narrated the incident and surrendered his service pistol, two magazines, 7 live cartridges.
03.30 am	Police referred Brij Bhushan to Bara Hindu Rao for medical examination and statement was recorded by P.S.Mukherjee Nagar.
Around 3.30am	FIR No.628/2000 was registered at P.S.Shalimar Bagh u/s.307/302 IPC against the custom officer.
5.45am	D.D.No.5A was made at P.S.Karol Bagh.
6.00am	Police officials from P.S.Karol Bagh reached at Bara Hindu Rao and collected the MLC/Revolver alongwith liscense.
7.30am	FIR No. 295/2000 was registered at P.S. Karol Bagh u/s.186/353/332/364/375/56/34 IPC r/w S. 27 of Arms Act against Ashok thukral and others.

15. From the aforesaid, it apparent that firing took place around 1 am in the morning of 1.9.2000. The DD was registered at the instance of Vikas Thukral at about 1.30 am at Police Station Pitampura. The injured namely

Subhash Rana having bullet injury was taken to the Sarvodaya Hospital (Pitampura) and was admitted at 1.35 am and thereafter referred to RML Hospital for further management at 2.45 AM.. Ultimately, the FIR with respect to this incident was registered at 3.30 am. However, so far as Customs officer is concerned, his complaint for the first time was registered at 5.45 am at Police Station Karol Bagh vide DD No. 5A. It is not understood as to why the custom official has not gone to the nearest Police Station even if his version is to be admitted.

16. Admittedly, the Custom officer had a mobile number 9810279614 (airtel connection). The last call made by him to his superior was at about 11.56 pm at mobile 9810184229 which is the telephone number of Nand Lal, the Superintendent of Customs. However, what happened to that mobile subsequently and as to why telephone calls could not be made by the custom officer to his superior regarding the firing incident is not explained. Even though there is mention of incoming and outgoing calls on mobile of the custom officer bearing No. 9810279614 of which no record/details has been produced by the Police. The custom officer has also not explained as to whom these calls were made. It may be observed here that Shri Nand Lal, Superintendent Customs, who has been examined as a witness in case FIR No. 295/2000, has stated that he received a call from Shri Brij Bhushan only at 4 AM regarding his treatment at Bara Hindu Rao Hospital. This call has been received by him after 11.56 pm. It is also surprising that there is no record available as to what action has been taken by the Custom Department with regard to seizure of goods which were allegedly smuggled by the Thukrals. In fact,

even if any entry was made in the records of the custom department about this incident the same has also not been placed on record. There is also nothing on record to show as to whether there is any show cause notice was issued to the Thukhrals with respect to this incident. There is also no mention of the truck number which was involved in this case. There is also no explanation by the custom officer as to why he had gone to Pitam Pura after the incident had taken place at Karol Bagh and as to how his car reached at Pitampura which has been later on seized by Police Official of P.S. Shalimar Bagh vide seizure memo dated 1.9.2000 in case FIR No.628/2000 which has been registered against the custom official. This give some credence to the version of Thukhrals that some scuffle also took place on account of demand of bribe which ultimately resulted in the firing incident.

17. In these circumstances, the following questions arise for consideration i.e.
 - a. Whether the Custom officer (petitioner in Crl. M.C. 2344/04) was discharging his official duties at the relevant time?
 - b. Whether Thukrals caused any interference in the official duties of the Custom Officer and beat him?
 - c. Whether there was any reasonable apprehension in the mind of the custom officer regarding his personal safety and that he can be eliminated by Thukrals which led to the firing incident which resulted in causing fatal injury to Subhash Rana?
 - d. Whether there was any demand of bribe by the custom officer due to which altercation took place between him and the accused persons?
 - e. Whether the custom officer was justified in firing shots

from service revolver causing death of Subhash Rana, if so, whether he has not exceeded the right of self defence?

- f. Whether firing of bullets from his service pistol by the custom officer were in self defence and during the course of discharging official duties?
- g. Whether in this case prosecution of the custom officer could not have been taken without sanction granted under Section 197 Cr.P.C. and under Section 155 of the Customs Act as alleged?

18. Insofar as the first question is concerned, even from the written submission and the FIR lodged by the Thurkrals it stands established that the Custom Officer had gone to check the truck from where goods were being off loaded in discharge of his official duties. This fact is also verified by Shri Nand Lal, the Superintendent Customs who has been examined under Section 161 Cr.P.C. The factum of the custom officer being a custom inspector and on duty also stands corroborated by record of his mobile calls which he made to Nand Lal.
19. The second question relates to the applicability of bar under Section 197 Cr.P.C. read with Section 155 of the Customs Act, 1962. It is the case of the Custom Officer that being a public servant he is protected by the aforesaid provisions, hence cannot be prosecuted without prior sanction from his department. To answer the aforesaid question, it may be appropriate here to take note of Section 197 Cr.P.C. and Section 155 of the Customs Act, 1962 which reads as under:

Section 197. 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 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, of 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:

¹[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression “State Government” occurring therein, the expression “Central Government” were substituted.]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression “Central Government” occurring therein, the expression “State Government” were substituted.

²[(3-A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3-B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the

court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

Section 155 of the Customs Act. Protection of action taken under the Act.—(1) No suit, prosecution or other legal proceeding shall lie against the Central Government or any officer of the Government or a local authority for anything which is done or intended to be done in good faith, in pursuance of this Act or the rules or regulations.

(2) No proceeding other than a suit shall be commenced against the Central Government or any officer of the Government or a local authority for anything purporting to be done in pursuance of this Act without giving the Central Government or such officer a month's previous notice in writing of the intended proceeding and of the cause thereof, or after the expiration of three months from the accrual of such cause.

20. The custom officer has relied upon number of judgments as referred to above. I have gone through the judgments and find that the facts in those judgments are entirely different and do not apply to the facts of this case. Even with respect to the legal position it can be inferred that the law with regard to necessitating of sanction under Section 197 Cr.P.C. is circumscribed with the rider that if the act committed by the public officer has no nexus, reasonable connection or relevance to the official act or duty of such public servant and is otherwise illegal, unlawful or in the nature of an offence, he cannot get shelter under Section 197 of the Code. In other words, protection afforded by the said section is qualified and conditional. Reference can be made to *Shankaran Moitra Vs. Sadhna Das and Anr.* AIR 2006 SC 1599.
21. The issue of sanction has also been dealt by the Apex Court under similar factual position in the case of *Bakshish Singh Brar Vs. Gurmej Kaur & Anr.* (1987) 4 SCC 663, wherein it was held:

6. In the instant case, it is alleged that grievous injuries were inflicted upon the complainant and as a result of injuries one of the alleged accused had died. The question is while investigating and performing his duties as a police officer was it necessary for the petitioner to conduct himself in such a manner which would result in such consequences. It is necessary to protect the public servants in the discharge of their duties. They must be made immune from being harassed in criminal proceedings and prosecution, that is the rationale behind Section 196 and Section 197 of the CrPC. But it is equally important to emphasise that rights of the citizens should be protected and no excesses should be permitted. "Encounter death" has become too common. In the facts and circumstance of each case protection of public officers and public servants functioning in discharge of official duties and protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit. It is true that Section 196 states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of the official duties then the trial may have to be stayed unless sanction is obtained. **But at the same time it has to be emphasised that criminal trials should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence**

7. In that view of the matter we are of the opinion that the order passed by the learned Additional Sessions Judge, Kapurthala, in the facts of this case, was proper and the High Court was right in not interfering with the same. We, therefore, dismiss this petition.

8. We, however, direct that the trial should proceed as expeditiously as possible. We further record that if necessary the question of sanction under Section 197 of the CrPC may be agitated after some evidence have been noted by the learned Additional Sessions Judge.

22. Similarly, the Apex Court in its later judgment delivered in the case of R.K. Pradhan Vs. State of Sikkim (2001) 6 SCC 704 held that the question of sanction under Section 197 of the Code can be raised any time after the

cognizance, may be immediately after the cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases, where it may not be possible to decide question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. Therefore, the question should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial.

23. In the facts of this case, as noted above, there are many contradictions in the story of the custom officer and the fact of firing four bullets by him makes his role suspicious. The question whether the act of the custom officer was in discharge of the official duty and under the apprehension of death or done by him while exercising his right of private defence will only be answered during the course of trial and therefore, the issue of sanction cannot be decided without recording evidence.
24. Insofar as the question of private defence of the custom officer is concerned, the question as to whether such defence permits the officer even to cause death of another by indiscriminate fire would again be a question of appreciating the evidence to find as to whether the action of custom officer is covered by any of the defences mentioned under Section 100 of the IPC. It may be observed here that in the case of *Virsa Singh Vs. State of Punjab*, AIR 1958 SC 465 while dealing with the similar situation it has been held by Hon'ble Supreme Court that even if anybody causes any injury which is likely to cause death even without intention to cause death but if the death is caused then assailant would be guilty of committing murder.

25. In the case of *Raj Pal and Ors. Vs. The State of Haryana* 2006 (9) SCC 678

relied upon by the custom officer, the Hon'ble Supreme Court has held:-

A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject-matter of right of private defence. The plea of right of private defence comprises the body or property (i) of the person exercising the right, or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101 IPC define the limit and extent of right of private defence.

Thus, the question as to whether the custom officer was justified in firing bullets which resulted in the death of Subhash Rana in the facts of this case would be a question to be gone into after the evidence is recorded.

26. As far as Section 155 of the Customs Act is concerned, it only speaks about the protection of action taken under the Act. The learned MM while passing order dated 08.04.2003 has referred to the aforesaid Section and observed that:

10.“On bare perusal of the Section it is clear that the word ANYTHING WHICH IS DONE OR INTENDED TO BE DONE AND THAT TOO IN PERSUANCE OF THIS ACT. Should be done in good faith. The Sub Clause (2) of Section 155 of Custom Act also be read as ejusdem-generis with sub clause (1) as the word good faith has not been mentioned in sub clause 2 of the Customs Act. Therefore, in both sub clauses of Section 155 of the act in

order to bring the case within the preview of the thing should have been done in pursuance of this Act and that too in good faith. Ld. Counsel for the complainant has clearly stated that no proceedings under the Customs Act have been initiated against the complainant and at this stage it is not clear as to whether the thing as referred to in Section 155 was done in pursuance of this Act or not.”

27. The Learned MM has also discussed the law referred to on behalf of the Custom Officer and has been further pleased to observe that:

19. From the aforesaid judgment which discussed on the point of sanction under Section 197 Cr.P.C. corollary also follows Section for 155 of Customs Act that the question of sanction should be left upon to be decided in the main judgment which may be delivered upon conclusion of the trial. In the present matter the trial is yet to proceed and the Trial Court is a Court of Sessions. Hence, the plea of Ld. Counsel for the accused that the sanction under Section 197 Cr.P.C. or under Section 155 of Customs Act was not obtained is not tenable at this stage.

28. It may be also appropriate to take note of the earlier orders dated 14.07.2003 and 30.07.2003 passed by Ld. MM while taking cognizance and disposing off the recall application which has been impugned by the Custom Officer . The relevant observation made by Ld. MM in order dated 14.07.2003 reads as under:

The accused after he fled away from the spot after taking the vehicle of the complainant also lodged a report before PS Karol Bagh on which the FIR No. 295/2000 was also registered.

As per the charge sheet the accused has not yet been arrested and his arrest has been deferred as the accused was on duty and as per the accused he fired in self defence. It was verified by the Police that accused was on duty on that day.

This is the stage of cognizance and stage is too mature to reach to the conclusion as to whether the accused fired in self defence or firing was intentional one. It is only on the ground that the accused has not been arrested by the Police. To me the fact as to whether the accused was acting in private defence or as to whether any offence made out or not will be made seen by Ld. Sessions Court which is competent to try the case under Section 302/307 IPC.

29. The observation made by Ld. MM while passing order dated 30.07.2003, disposing of the recall application reads as under:

10. The Hon'ble High Court in that case held that even if these facts are true, the case cannot proceed for want to sanction under Section 197 Cr.P.C. But the Hon'ble Supreme Court held as under:-

The question whether these acts were committed and/ or whether 1st respondent acted in discharge of his duties could not have been decided in this summary fashion. This is the type of case where the prosecution must be given an opportunity to establish its case by evidence and an opportunity given to the defence to establish that he had been acting in the official course of performance of duties and/ or whether examined during the course of trial. In our view, in this case the question or sanction should be in this case the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of trial. (Para 11 of 2002 Cr.L.J. 3780)

11. Hence, in view of the observation cited above it is too early stage to consider the point of sanction and since the NBW has already been issued, I do not want to cancel the same as no ground made out. Application, is therefore, stands rejected.

30. Thus, after going through all the three orders passed by Ld. MM which has been impugned by the Custom Officer, I do not find any infirmity in the orders which has been passed after due application of mind and does not require interference by this Court at this stage even when the charges has not been framed by the Trial Court. The question with regard to sanction, if any, can be looked into by the concerned Sessions Judge who will try the matter.

31. It is well settled that where the right of private defence is pleaded, the defence given must be reasonable and probable satisfying the cast that harm caused by the accused was a necessary one. The burden of establishing the plea of self-defence is on accused and has to be

discharged by him. In the facts of the present case where the Custom Officer has fired the shots in self-defence needs explanation inasmuch as the plea raised by him that there was apprehension of death needs to be proved. In the present case, it is an admitted fact that the Custom Officer fired the shots towards the accused persons in (FIR No. 295/2000) more than once and resulted in death of the deceased Subhash Rana. The case of Custom Officer that accused persons were also carrying fire arms does not seem to be true but on the other hand the story of the accused persons that they never retaliate nor fired at the Custom Officer, as they were not in possession of any weapon seems to be true. However the veracity of two witnesses cited by prosecution in FIR No. 295/2000, can be looked into a later stage during the time of trial. In this case, the weapon which has been recovered from the house of Thukrals is not the same of which a reference has been made by the witness. Moreover, the weapon which has been recovered from the house of Jagdish Thukral was a licensed revolver.

32. The last question which needs to be answered is in relation to FIR No.628/2000 which has been filed against the Custom Officer but has been taken as a shield of defence by complainants, who are accused in FIR No. 295/2000. The defence raised by the Thukrals, petitioners in Crl.M.C.354/2005, is that the altercation started between them and Custom Officer was due to demand of bribe. It may be observed here that even if it is presumed that the Custom Officer was demanding the bribe, this does not give them any right to beat him which fact has been admitted by the petitioners in FIR No. 628/2000 lodged by them. The

burden to prove that Custom Officer was demanding bribe is upon the Thukrals. Therefore, the act of beating a public servant is definitely an offence punishable under the code and petitioners cannot escape from their guilt by narrating a concocted story.

33. Counsel appearing for the Government of NCT of Delhi has informed this Court that they are not withdrawing the prosecution but has also not granted sanction for prosecution. He submits that this may be decided by the concerned Court as to whether there is a need for sanction or not.
34. Thus, in the facts and circumstances of the two petitions, I am of the considered view that at this stage it would not be appropriate for this Court to quash either of the proceedings. The question of sanction with regard to acts of the custom officer can be gone into by the concerned court after recording of evidence of the parties if the court feels that it is not a case of exceeding self defence and the firing was done by the custom officer so as to save himself and was necessary in discharge of his duties the court can certainly make an observation in this regard and call upon the State to answer the query as to whether they would like to consider granting sanction or not. If such a query is raised and State decides to grant sanction then appropriate orders can be passed by the court concerned. However, if State decides not to grant sanction then consequences will follow. However, if the court comes to the conclusion that no sanction is required then court can pass appropriate orders.
35. In view of the aforesaid, both the petitions i.e. the petition filed by Brij Bhushan, Custom Officer, and the petition filed by Thukrals viz. Vikas Thukral and Others are dismissed with the following directions:-

- (i) The Custom Officer, Brij Bhushan, will appear in the Court of MM concerned on 8.4.2010, which is the date already fixed in the matter, in a case arising out of FIR No. 628/2000.
- (ii) The Customs Officer, however, will be released on bail at the time of his arrest on furnishing a bail bond in the sum of Rs. 25,000/- (rupees twenty five thousand only) with one surety in the like amount in the peculiar facts of the case.
- (iii) The Magistrate concerned will immediately refer the matter arising out of FIR No. 628/2000 for transfer to the Principal District and Sessions Judge, Tis Hazari on the same day. The learned Principal District and Sessions Judge, Tis Hazari will transfer this matter to the same Sessions Court where the case arising out of FIR No. 295/2000 is pending hearing.
- (iv) The question as to whether sanction is required to be obtained or not for prosecuting the Custom Officer, Brij Bhushan, under Section 197 Cr.P.C. or under Section 155 of the Customs Act shall be decided by the Trial court i.e. the Court of Sessions after concluding the evidence of the prosecution as well as the defence in terms of the observation made by me in paragraph 34.
- (v) Both the cases arising out of FIR No. 628/2000 and FIR No. 295/2000 shall be decided by the same Sessions Judge. A copy of this judgment be sent to the concerned Courts for information and compliance.
- (vi) The petitioners in a case arising out of FIR No. 295/2000 shall appear before the concerned Sessions Court on 8.4.2010 itself when the court will proceed with the case from the stage it is pending before the said court in accordance with law after awaiting transfer of the case arising out of FIR No. 628/2000 in terms of the directions given above and will try both the cases together.
- (vii) Nothing stated herein shall cast any aspersion on the merits of the case during the course of trial.

MOOL CHAND GARG, J.

MARCH 22, 2010/nm-ag