

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: 28th February, 2011
Judgment Delivered on: 7th March, 2011

+ **W.P.(C) 12609/2004**

MAHIPAL SINGH RAGHAV Petitioner
Through: Mr.Bishram Singh, Advocate.

versus

UOI & ORS. Respondents
Through: Asstt.Commandant Bhupinder Sharma,
B.S.F. for respondents.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J.

1. The petitioner Mahipal Singh Raghav was enrolled as a Constable with BSF in the year 1988. In the year 2002 he was attached with the 67th Bn.BSF which was deployed at BOP Natwartola at Indo-Bangladesh border. While on duty with Late Ct.L.Balakrishnan, the petitioner admittedly shot Late Ct.Balakrishnan who died.

2. The matter needed an investigation. Complying with the provisions of the BSF Act 1968, Commandant Ajaib Singh ordered Record of Evidence to be prepared on 4.5.2002. He further ordered an Additional Record of Evidence to be prepared 14.06.2002. On the

scrutiny of the Record of Evidence and Additional Record of Evidence he framed a charge under Section 46 of the BSF Act against the petitioner as under:-

“BSF ACT SEC-46

COMMITTING A CIVIL OFFENCE THAT IS
TO SAY CAUSING DEATH BY A RASH
OR NEGLIGENT ACT NOT AMOUNTING
TO CULPABALE HOMICIDE
PUNISHABLE U/S 304A IPC

In that he,

Near OP point No.1 of BOP Natwartola on 29th April 2002 at about 1900 hrs by rashly or negligently firing from 7.62 mm SLR Butt No.289 Body No.DH-6819 caused the death of No. 92009255 Const.M.Balakrishnan of the same unit.

3. With respect to the charge the petitioner was tried at a General Security Force Court. When the Court assembled, the petitioner pleaded ‘Not Guilty’.

4. 13 prosecution witnesses and 1 defence witness was examined at the trial.

5. Before noting the testimonies of the witnesses, we find it relevant to note the statement of the petitioner made by him after the prosecution led evidence. The reason is that the statement brings out the issue which needs to be considered by us. Petitioner’s statement reads as under:-

“WRITTEN STATEMENT OF THE ACCUSED NO.8825425
CONSTABLE MAHIPAL SINGH, 67 BN BSF

“I No. 8825425 Const.Mahipal Singh joined BSF on 16th Feb, 1988. After completion of Basic Training I joined 67 BN BSF on permanent posting. I was further posted to ‘D’ Coy and since then I am performing GD duties in D Coy of 67 BN BSF. During April 2002 my coy was deployed in Barabbilla sub-sector having its

BOP at Chaklagarh, Natwartola and coy headquarter at Barabilla. I was posted at Natwartola BOP.

On 29th April 2002 I was detailed for OP duty at OP point No.1 along with No.92009255 Late Const.M.Balakrishnan. On 29th April, 2002 at about 11:30 hrs, we both left BOP Natwartola along with our personal arms/amm and we reached at IBB fence gate No.5 at about 29-11:50 hrs. As per the practice, OP parties were performing duties ahead of the IBB fence. Both the OP parties of BOP Natwartola that is OP party No.1 consisting of myself and Late Const.M.Balakrishnan and OP party No.2 consisting of L/Nk A.A. Mandal and Const.Mangat Singh went ahead of IBB fence gate through IBB fence gate No. 5 opened by H.C.Vijoy Ram Sharma post commander Natwartola for OP duty in our respective area. As per the order and practice we gathered near IBB fence gate No.5 at 1810 hrs to come out after completion of OP duty. H.C.Vijoy Ram Sharma, Post Commander opened the gate and we came out and moved towards OP point no.1 where usually OP party was being relieved by Naka Party and proper handing/taking over of W/set, spl equipment if any and area or responsibility in between OP Party and Naka Party were done. I along with Late Const.M.Balakrishnan was moving tactically in between IBB road and IBB fence keeping observation in the area. When we reached near IBB fence picket No.125 near BP No.381 MP we observed suspicious movement of miscreants in own territory at about 300 yards from IBB road who were approaching towards IBB fence.

It was cloudy and dark, visibility was very poor. We had taken position therein in between IBB fence and IBB road covering possible route miscreants. By that time neither Naka No.1 had reached there to relieve us nor Post Commander told anything regarding Naka No.1. Late Const.M.Balakrishnan was about 15 yards to 20 yards left to me. In the meantime I observed a shadowy figure which was approaching to IBB road from down ground to upwards. I was under

the bonafide belief that moving object seen was miscreants. So after taking due care and caution I fired from my personal SLR which was issued to me for duty on moving shadowy object. Thereafter I heard sound 'ARE MAAR DIYA' having heard such sound I moved towards that object. On reaching near to the object I found this was Const.M.Balakrishnan who had received bullet injury. Having seen this unexpected incident I lost my mental balance and I fell under unbearable mental strain and in this process I also forget to take out my finger from my trigger of SLR which caused me to fire few more rounds. I could not find out the right way what to do. Finding no way I sat on the ground and picked head of Const.M.Balakrishna on my lap and started weeping loudly and cried for help after a few minutes a para illuminating bomb was fired, Naka Party and Officiating Coy Commander Insp. Ramesh Chandra with vehicle and some Coy Personnel came there. Late Const.M Balakrishnan was evacuated to Coy Headquarter first thereafter to Islampur Civil Hospital where the Doctor on Duty declared him dead. I was also with him. Thereafter I come back to post. The Commandant 67 BN BSF and DIG BSF KNJ came there about 2300 hrs on 29.4.2002 for spot verification. I and Post Commander H.C.Vijoy Ram Sharma were called at PO. I was questioned by the DIG BSF KNJ. After sometime they went away.

Sir, the whole incident was happened during the execution of Bonafide duty with due care and caution. It was misfortune and I had no reason to think that how Late Const.M.Balakrishnan had arrived there whereas he had taken position in my left side at the distance of 15 yards-20 yards. He even did not inform me about his movement.

I pray to almighty God that the soul of Late M.Balakrishnan may have in peace and usher enough strength to his family to bear with such irreparable loss of the family member.

It is humbly prayed that your honour would be graciously kind and be pleased to accept my statement as true version of the facts that happened on 29.4.2002 and I may kindly be exonerated from the charge leveled against me and for this act of kindness, I shall be grateful to your honour.”

6. On a plain reading of the statement of defence made by the petitioner it is clear that as per him on 29.04.2002 i.e. on the day of the incident, he was detailed for OP duty at OP Point No.1 along with deceased Ct.M.Balakrishnan and he had accidentally shot him. The circumstance under which he fired the accidental shot has been explained by the petitioner as when both of them were moving tactically between IBB road and IBB fence and they observed suspicious movement of miscreants at about 300 yards from IBB road who were approaching towards IBB fence. As per the petitioner both of them took their position and the deceased was 15-20 yards left to him. He observed a shadowy figure approaching to IBB road and under bona-fide belief that the shadowy figure was a miscreant and after taking due care and caution he fired from his personal SLR issued to him for duty. Thereafter he heard a cry of ‘ARE MAAR DIA’, and he moved towards the sound. When he reached there he found his colleague Ct.M.Balakrishnan being shot at. Petitioner claims to have lost his mental balance and forgot to take off his finger from the trigger of SLR which caused him to fire a few more rounds which hit the deceased. He did not know what do, so he started crying loudly and sat down on the ground with the head of his injured colleague on his lap.

7. Thus, in the context of his aforesaid defence taken, we need to note the evidence relevant to the defence to find out whether the petitioner had caused the death of his colleague due to a rash or a negligent act.

8. Relevant would it be to note that there are no eye-witnesses to the incident.

9. As per the petitioner he and the deceased were OP Party No.1 and OP Party No.2 consisted of L/Nk A.A.Mandal and Ct.Mangat Ram and both OP parties returned to fence gate No.5 after patrolling on the other side of the IBB fence. HC Vijoy Ram Sharma, Post Commander opened the gate and all four moved towards OP point No.1. As per the petitioner he has not made it clear as to when L/Nk A.A.Mandal and Ct.Mangat Singh parted company for the reason after stating that all four reached gate No.5 and started moving towards OP point No.1, he states that he and Late Ct.M.Balakrishnan were moving tactically in between IBB road and IBB fence. This suggests that the other two had left.

10. Indeed, the testimony of Ct.Mangat Singh who appeared as PW-1 and that of Ct.A.A.Mandal who appeared as PW-2 brings out that when all four reached gate No.5 after completing duties at about 18:00 hours. Whereas Ct.Mangat Singh and Ct.A.A.Mandal were relieved by the relieving party, petitioner and Ct.M.Balakrishnan had to wait because their relieving party had yet to arrive. This has been corroborated by HC Vijoy Ram Sharma PW-3 who has further deposed that there was lightning and he saw the Para Illuminating Bomb fired near OP No.1 and due to bad weather and high speed wind he didn't hear any gunshot and that he was informed after some time that Ct.M.Balakrishnan had received a gun-shot injury.

11. As per Ct.Lalit Kumar Sharma PW-4, on hearing a gunshot he had fired a para illumination bomb and he reached at the spot few minutes after hearing the gunshot and saw Ct.M.Balakrishnan bleeding profusely in the lap of the petitioner. He enquired from the petitioner as to what had happened, to which petitioner replied "MERE SE GOL I LAG GAYI APNE AADMI KO". That he collected five EFC's from the ground and handed over the same to Sub.Ramesh Chander Officiating Coy Commander (PW-6) who also reached there within few minutes. Relevant would it be to

note that during cross-examination he admitted that Ct.M.Balakrishnan was in camouflage uniform on that day.

12. L/Nk Dalpat Singh and Sub.Ramesh Chander as also Ct.Kuldeep Singh appeared as PW-5, PW-6 and PW-8 respectively and suffice would it be to state deposed to have reached the spot on receiving information of the incident and have corroborated Ct.Lalit Kumar Sharma qua 5 EFCs recovered from the spot.

13. Dr.Saibal Gupta PW-12 who had conducted the post mortem on the dead body of the deceased detailed the injuries sustained by the deceased as under:-

“i) No.1 Injury: Fire arm wound of entry detected on right side midline abdomen. 1/4th inch in diameter, Pangenpially near umbilicus directed downwards backwards and left to cross the pelvic cavity, then rupture femoral vessels and came out as fire arm wound of exit over the left thigh.

ii) No.2 Injury: Fire arm wound of entry over right arm 4 inches below the right shoulder, 1/4th inch in diameter and surrounded by a zone of contusion and came out as wound of exit at the back of right arm two inches below the entry.

iii) No.3 Injury: Fire arm wound of entry over back of right thigh near glutal region directed front and upwards 1/4th inch in diameter at entry and came out as fire of wound of exit over front of right thigh 6 inches above the right knee joint.”

14. It is not the case of the department that the petitioner intentionally fired at his colleague. As per the department, the petitioner acted negligently. Per contra, the petitioner claims to have killed his colleague accidentally.

15. Now, not only does the petitioner claim, but even HC Vijoy Ram Sharma PW-3 stated that the weather was inclement and there was high wind speed. We have no reason to doubt the claim of the petitioner that he and Ct.M.Balakrishnan saw suspicious movement of miscreants about 300 yards and therefore both

started moving tactically with Ct.M.Balakrishnan about 15-20 yards towards his left.

16. But this is obviously incorrect for the reason the deceased received one firearm injury in the abdomen, one over right arm, 4" below the right shoulder and the third over back of right thigh near gluteal region. As per the petitioner he fired when he observed a shadowy figure approaching to IBB Road from down-ground to upwards. Injury No.1 i.e. on the abdomen shows that the bullet travelled downwards and backwards in the left direction and crossed the pelvic cavity. It is apparent that Ct.M.Balakrishnan had come in the front and was at the downward slope. How he reached said position, only God knows.

17. It is apparent that the movement was tense. It was past 6:00 PM. The region is the eastern part of India and in the month of April, by 6:00 PM darkness sets in. It is dusk time. It was cloudy, windy and there was lightning. A recipe for a horror movie. The petitioner and Ct.M.Balakrishnan saw a suspicious movement 300 yards away. They rightly started moving in a tactical position. We highlight that the petitioner has himself said that he along with Ct.M.Balakrishnan was moving tactically.

18. Now, what did he mean?

19. As explained to us moving tactically means to take up positions, may be in a straight line or in an arrow formation. But when only 2 jawans are there, the tactical position they can take is to be one in the front and one behind or to be side by side. No third position is possible. As per the petitioner, the tactical position they took was to be side by side; with Ct.M.Balakrishnan being 15-20 yards towards his left.

20. It assumes importance that the suspicious movement noted by the two was about 300 yards away. This is of importance for the reason as per the petitioner when he fired a shot he heard 'ARE MAAR DIYA' i.e. the petitioner was at a hearing distance away from Ct.M.Balakrishnan and this means that the two were not

separated by a distance in excess of 20-25 yards. This would be the audible distance for the cry of an injured who utters 'Are Maar Diya' to be heard by somebody.

21. The petitioner is a trained jawan. We are told that as a part of training to BSF jawans, they are told to challenge an intruder before firing. The intruder is challenged by uttering 'THUM. KAUN HAI' If there is no response and the intruder does not reveal himself with hands up, the jawan would be permitted to shoot. The petitioner has not claimed that he uttered the cry of challenge when he saw a suspicious movement close by.

22. What has happened is obvious. Petitioner and Ct.M.Balakrishnan were separated by 15-20 yards and were moving tactically as they had seen suspicious movement 300 yards away. The situation was tense. Something overcame the petitioner, it could be fear, it could be anxiety, it could be over exuberance; it is difficult to say what. Without taking the precaution of uttering the cry of challenge: 'THUM. KAUN HAI', the petitioner fired and caused the unfortunate death of Ct.M.Balakrishnan. Had the petitioner raised the cry of challenge, Late Ct.M.Balakrishnan would have responded and the incident would not have happened.

23. It need hardly be emphasized that the degree of care which a man is required to use in a particular situation in order to avoid the imputation of negligence rises with the obviousness of the risk and the danger. While determining an issue of negligence vis-à-vis an error of judgment or an accident, regards must be had to all the attendant circumstances out of which the charge arises.

24. Summing up, the petitioner knew that his colleague Ct.M.Balakrishnan was around and the enemy i.e. the suspicious movement was 300 yards away. The terrain was bushy and as a trained jawan, petitioner could have reasonably foreseen that his colleague would be around, moving tactically, hiding behind bushes and approaching the place where suspicious movement was noted. A sudden movement nearby the petitioner was expected to be

foreseen by the petitioner as that of his colleague and in any case the duty of reasonable care enjoined upon the petitioner was to raise the cry of challenge: 'THUM. KAUN HAI' before firing and that too after a pause of the challenge; the pause being the requisite time for the person challenged to surrender. Had petitioner followed the rules of training imparted to him, his suspicion would have rested by Ct.M.Balakrishnan responding to the cry of challenge 'THUM. KAUN HAI' by responding 'MAIN HUN'. We may highlight that the subsequent conduct of the petitioner after he fired the first shot, spoken through his own mouth, shows the panic in the mind of the petitioner when the unfortunate incident took place. As per the petitioner, after he fired the shot and heard the cry of his colleague: 'ARE MAAR DIYA', he immediately moved to the place where Ct.M.Balakrishnan was lying injured and on seeing him, lost his mental balance and forgot to take off his hand from the trigger of the SLR and caused more shots to be fired at the deceased. It brings out the petitioner not being a man of steel, a prerequisite for a jawan. It highlights the fear which had overcome the petitioner and seen in the context of the fact that the petitioner forgot his basic training i.e. to challenge an intruder, would bring out negligence on the part of the petitioner. It may be arguable that the negligence was a result of being overwhelmed and overcome by fear. But we cannot lose sight of the fact that being a trained member of an Armed Force, petitioner had to train his mind and impulses to be brave.

25. We need not discuss much further for the reason we are not to sit as a Court of Appeal over findings returned at the General Security Force Court proceedings which are akin to General Court Martial proceedings conducted against army officers. Our job is to see whether the trial was conducted fairly and whether there is a material on which a reasonable trial of facts would return the verdict under challenge. We bring the curtains down by highlighting that no submissions were urged on the point that any Rule was breached or

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the trial was vitiated due to any procedural irregularity. The only point which was urged was that it was a case of sheer accident, a plea which may be plausible but stands small in the weight of the evidence to the contrary and thus we dismiss the writ petition but refrain from imposing costs.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

MARCH 07, 2011
dk