

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 30th August, 2011
Judgment Pronounced on: 13th September, 2011

+ W.P.(C) 5878/2011

EX.CONST./GD RANA PRATAP SINGH Petitioner
Through: Ms.Rekha Palli, Ms.Punam Singh
and Ms.Amrita Prakash, Advocates.

versus

UNION OF INDIA & ORS. ...Respondents
Through: Mr.Ankur Chhibber, Advocate and
Dy.Comdt.Bhupinder Sharma, BSF.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SUNIL GAUR

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. Shorn of unnecessary details, the facts leading to filing of the present petition are that the petitioner was enrolled as a Constable under Border Security Force and was attached with the 23rd Battalion and on 16.11.2008 was performing duties in the D Coy on Indo-Bangladesh border at BOPs Soldighi and Nayabari.

2. The petitioner and Ct.B.Kapmilian PW-2, were detailed to perform patrolling duty at Ambush Point No.3 from 05.30 PM on 16.03.2008 till 08.00 AM on 17.03.2008. The area comprising Ambush Point No.3 extended from BFL Poles No.8 to 22. Ct.B.Kapmilian PW-2 and the petitioner decided amongst themselves that the petitioner would patrol between BFL Poles No.8 to 14 and Ct.B.Kapmilian would patrol between BFL Poles No.15 to 22.

3. When Ct.B.Kapmilian PW-2, was patrolling in his area, at about 09.40 PM, he heard the sound of gun fire from towards Bangladesh side, whereupon he went to the area where the petitioner was patrolling but could not see him and thus he went to the Coy Headquarters and informed petitioner being missing. As per the respondents, on receiving said information, the Coy Commander Subedar Sunder Singh PW-3, and a few other officers searched the petitioner and in the meantime, at about 10.30 PM, DIG R.Chandra Mohan PW-3 received a telephone call from Col.Mohd. Aftabul Islam, Sector Commander, Bangladesh Rifles (hereinafter referred to as the 'BDR') that a BSF personnel had entered into village Moyanagri in Bangladesh and fired indiscriminately at the residents of the village, causing death and serious injuries to several villagers and that the villagers had overpowered and beaten the said BSF jawan who was rescued by the jawans of BDR and admitted for medical treatment at the local hospital in Bangladesh.

4. It transpired that one Mohd.Mustafa, a woman Mst.Majeedia Begum and her 8 month old son Mamoon had died as a result of firearm injuries, and Mohd.Shahidul Islam, husband of Mst.Majeedia Begum, was grievously injured. Petitioner was overpowered by the villagers, beaten, but rescued by BDR persons and admitted at the local hospital. DIG R.Chandra Mohan PW-3 and Deputy Commandant Binnar Paul PW-6, persuaded the officials of BDR to hand over the custody of the petitioner to them as also the various objects seized by them from the place of occurrence, which included one 5.56 mm INSAS rifle bearing butt No.328, body No.16914015, 3 empty cartridges, 5 live rounds, 1 pair of jungle boots, 1 pair of anklets, 1 cap and 3 magazines of 5.56 mm INSAS rifle. Thereafter Dr.Tarkeshwar Prasad PW-9 and Dr.Hemanta Chetia from the BSF Hospital went to Rangpur Medical College Hospital where petitioner was admitted in Bangladesh and upon finding him fit, brought him to India in safe custody.

5. Holding a staff court of inquiry and in view of the prima facie finding therein, a decision was taken to initiate action against the petitioner and complying with Rule 45 of the BSF Rules i.e. conducting proceedings pertaining to hearing of the charge, the Commandant framed following 6 charges against the petitioner:-

**“FIRST CHARGE
U/S 46, BSF ACT
1968**

**COMMITTING A CIVIL OFFENCE THAT IS
SAY MURDER PUNISHABLE U/S 302 IPC**

In that he,

On the intervening night of 16th and 17th of November 2008, at Moynaguri within PS Tetulia, Distt-Panchgarh, Bangladesh, by firing shot from his personal INSAS rifle butt No.328, Regd No.169014015, committed murder by intentionally causing the death of Mohd. Gulam Mustafa aged about 55 years, S/O late Jamshed Ali, resident of village Moynaguri, PS Tetulia, Distt – Panchgarh, Bangladesh and thereby committed an offence punishable under Section 302 of IPC.

SECOND CHARGE
U/S 46, BSF ACT
1968

COMMITTING A CIVIL OFFENCE THAT IS
SAY MURDER PUNISHABLE U/S 302 IPC

In that he,

On the intervening night of 16th and 17th of November 2008, at Moynaguri within PS Tetulia, Distt-Panchgarh, Bangladesh, by firing shot from his personal INSAS rifle butt No.328, Regd No.169014015, committed murder by intentionally causing the death of Majeeda Begum aged about 28 years, W/O Shahidul Islam, resident of village Moynaguri, PS Tetulia, Distt – Panchgarh, Bangladesh and thereby committed an offence punishable under Section 302 of IPC.

THIRD CHARGE
U/S 46, BSF ACT
1968

COMMITTING A CIVIL OFFENCE THAT IS
SAY MURDER PUNISHABLE U/S 302 IPC

In that he,

On the intervening night of 16th and 17th of November 2008, at Moynaguri within PS Tetulia, Distt-Panchgarh, Bangladesh, by firing shot from his personal INSAS rifle butt No.328, Regd No.169014015, committed murder by intentionally causing the death of Mohd Mamunur Rashid Alias Mamun aged about 8 months, S/O Shahidul Islam, resident of village Moynaguri, PS Tetulia, Distt – Panchgarh, Bangladesh and thereby

committed an offence punishable under Section 302 of IPC.

FOURTH CHARGE
U/S 46, BSF ACT
1968

COMMITTING A CIVIL OFFENCE THAT IS
TO SAY ATTEMPT TO MURDER
PUNISHABLE U/S 307 IPC

In that he,

On the intervening night of 16th and 17th of November 2008, at Moynaguri within PS Tetulia, Distt-Panchgarh, Bangladesh, by firing shot from his personal INSAS rifle butt No.328, Regd No.169014015, with intent to kill Mohd. Shahidul Islam (aged about 35 years) S/O late Hussain Ali, resident of village Moynaguri, PS Tetulia, Distt – Panchgarh, Bangladesh, caused injury to said Bangladeshi National, and thereby committed an offence punishable under Section 307 of IPC.

FIFTH CHARGE
U/S 16(d) BSF
1968

WITHOUT ORDERS FROM HIS SUPERIOR
OFFICER LEAVES HIS PICKET

In that he,

While performing ambush duty (an active duty), at ACP No.3 Ex-BOP Nayabari from 1730 hrs to 2200 hrs on the intervening night of 16th and 17th Nov 2008, left the place of duty (picket) without order from his superior officer.

SIXTH CHARGE
U/S 40, BSF ACT
1968

AN ACT PREJUDICIAL TO GOOD ORDER
DISCIPLINE OF THE FORCE

In that he,

While performing ambush duty Ex-BOP Nayabari from 1730 hrs to 2200 hrs on 16th November 2008 improperly and without authority, crossed over to Bangladesh.”

6. After hearing the petitioner on the charge, the Commandant directed that Record of Evidence be prepared.

7. At the Record of Evidence proceedings, several witnesses were examined by the department. Thereafter, as per the requirement of Rule 48(3) of the BSF Rules, the petitioner made a statement in which he stated that while patrolling he saw 6 persons trying to cross over the fence from Bangladesh and as he challenged them, they hid in the bushes. A stone was thrown at him, followed by verbal abuses and one person taunted him by showing his private parts. To scare them, he cocked his rifle thinking that they would run away. They didn't. He got angry and decided to pursue them and overcome by emotion, he jumped over gate No.44 of the border fence. In the past, Bangladeshis used to abuse BSF jawans and due to this he had developed hatred towards them. As he was in the culvert, somebody hit him on the head and tried to snatch his rifle and as he resisted, shots got fired. His rifle was snatched and somebody else fired indiscriminately. He lost consciousness and when he regained consciousness he found himself in a hospital.

8. The matter was placed before the IG BSF, North Bengal Frontier, who considered the Record of Evidence and directed petitioner's trial at a General Security Force Court; and at the trial the prosecution examined 25 witnesses.

9. Ct.P.Joga Rao PW-1 and Ct.A.Chidambaram PW-12, deposed that on 16.11.2008 they were performing patrolling duty at Ambush Point No.4 when at about 09.25 PM they heard sounds of gun fire from towards Bangladesh side and that they learnt that the petitioner was found missing from his duty

around that time. On being questioned about crossing the fencing by the force personnel, the witness (PW-1) stated: (Quote) *'During my service record I have never crossed the fence during night duty. There are instructions that no one will cross the fence either during day or night except with prior permission and after following the laid down procedure.....Briefing was done by the Coy Comdr at the time of departure of ACP parties and oftenly he told not to cross fencing and in event of suspicious movement having been observed by the ACP party immediate intimation be given to the Coy Comdr for action.'*

10. Ct.B.Kapmilian PW-2, deposed that during patrolling duty the petitioner was found missing. On being questioned about crossing the fence by the force personnel he said: (Quote) *'During ACP duties our area of responsibility extends upto IB. However, there are instructions that we could not go across the fencing alone during night time....There were directions of Coy Comdr that troops performing duty in ACP during night time were not permitted to go across Border fencing.'*

11. Sunder Lal PW-3, deposed of petitioner being reported missing and information received from BDR of petitioner being in their custody and his being brought back to India from Bangladesh. On being questioned about crossing the fence by the force personnel he stated: (Quote) *'I used to pass all the instructions of Higher HQs during roll-call like the instructions that no one will go across the fencing except for zero line patrolling, Special patrolling duties and that too, during day*

time. No one was allowed to go across the fence for any purpose during night duty, unless directed by Bn HQ or in special situation and only in presence of Officer/Coy Comdr....There were instructions that no person would go across the Border Fencing without prior permission, either during day or night time. There were instructions that no single person would go across the fence during day or nighttime. If personnel had to go across the fence for duty, Gate drill had to be followed by the party.... The crossing of gate or fence by BSF personnel without getting the gate opened was strictly prohibited.

12. Dr.R.Chandra Mohan PW-5, DIG BSF Northern Frontier and Binnar Paul PW-6 Deputy Commandant and Diwakar Kumar (2-IC) PW-10, deposed of petitioner being brought back from Bangladesh to India and all of them deposed that on 17.11.2008 when they visited the place of the incident they saw bullet marks on the trees and CGI sheets wall of the houses situated near the place of occurrence. On being questioned about crossing the fence by the force personnel, Dr.R.Chandra Mohan PW-5, stated: (Quote) *'There were clear instructions that no BSF person on duty should cross the fence during night or day time on his own without following the proper procedure.'* On being questioned about force personnel crossing the fence 2-IC Diwakar Kumar PW-10, stated: (Quote) *'If during ACP duty the ACP party observed any suspicious happening between fencing and IB concerning his AOR then he is supposed to immediately inform about this to his Coy/Post Comdr, and they are not supposed to go ahead of fence on*

their own under any circumstances.' On the subject of the circumstance under which the petitioner was brought back from Bangladesh to India, since an argument was raised, we note that DIG R.Chandra Mohan PW-5 stated during his testimony as under:-

“After assurance to initiate strict disciplinary action against Ct R P Singh as per the law of land, BDR allowed to first send two doctors of BSF to RMCH for examining the condition of the accused, as to whether he was in a position to be taken to India or otherwise. BDR officials agreed to hand over the accused, provided strict disciplinary action was taken against him.”

13. HC Balbir Singh PW-7, deposed that on 16.11.2008 an INSAS 5.56 mm rifle bearing Butt No.328 and Body No.1694015 along with 50 rounds and 3 magazines was issued to the petitioner.

14. Dr.Tarkeshwar Prasad PW-9, deposed that on 17.11.2008 he had gone to Rangpur Medical College Hospital, Bangladesh and on finding the petitioner conscious with some injuries on the non-vital parts of his body, he brought the petitioner to India in an ambulance.

15. Dr.A.Sen Gupta PW-11, Senior Scientific Officer, Forensic Science Laboratory, Kolkata deposed that he examined 5.56 mm INSAS rifle bearing butt No.328, body No.16914015, and 3 empty cartridges recovered from the place of occurrence. As per his opinion the 3 empty cartridges recovered from the place of occurrence were fired from 5.56 mm INSAS rifle bearing butt No.328, body No.16914015.

16. Mohd.Shahidul Islam PW-15, deposed that on 16.11.2008 he was sleeping in his house when his wife Majeeda Begum woke him and told him that she had heard sound of firing from outside their house. He and his wife thought that somebody was bursting crackers and thus they did not pay heed, but when they again heard the firing sound from near their house he asked his wife to get up and make enquiries. At that time, few bullets hit the wall of his house whereupon his wife picked up their younger son Mamoon and he picked up their elder child and rushed out of their house. When he opened the door of his house, he saw a BSF jawan standing there. He tried to close the door but the jawan fired several rounds and one bullet hit his left hand and another bullet hit him in the abdomen. He fell on the ground and the jawan entered his house. His wife who was holding their son in her lap ran to save her life but the jawan fired several rounds at her due to which she fell on the ground. His son who was held by his wife in her lap also sustained bullet injuries. His wife and son died due to the bullet injuries caused to them. On hearing the firing sound his relatives came to his house and removed him to a hospital.

17. Relevant would it be to note that no suggestions were given to the witness that he was present at the culvert at the Indo-Bangladesh Border and had received injuries at the culvert or that his wife and son received injuries at the culvert.

18. Md.Abdus Saleem PW-13, deposed that on 16.11.2008 he had organized a party in his house. The party started at around

09.00 P.M. and ended 20-30 minutes thereafter. His brother Gulam Mustafa had also come to his house to attend the party and left for his residence when the party was over. At around 09.30 P.M. accompanied by his cousin brother Safiquil Islam, he had gone to his brother's house to bring his daughter when he heard a sound of fire. After about 5 minutes he again heard sound of firing whereupon his brother Gulam Mustafa also came out of his house. While he and his brother were standing in front of his brother's house he saw a person coming from the southern side of the house of his brother whereupon he flashed his torch at him. The said person told them that he is a BDR personnel. When he again flashed his torch at the said person he saw that the uniform worn by the person resembled the uniform of BSF personnel. He again made enquiries from the said person upon which the person hurled abuses at him in Hindi. Since said person abused him in Hindi he was sure that the said person was a BSF personnel and not a BDR personnel. He immediately ran from there and hid himself near a pond. At that time the said person opened fire towards his direction. With great difficulty he managed to escape from there and went to his neighbour's house and told him to remove his brother Gulam Mustafa to the hospital who was hit by the bullets fired by the person. He went to the BDR post and reported the incident and on return saw his brother being removed to the hospital; where he died. He stated that the person who fired looked like the petitioner.

19. Relevant would it be to note that no suggestions were given to the witness that he was present at the culvert at the

Indo-Bangladesh Border and that firing took place at the culvert. Further relevant would it be to note that on being questioned about his passport and visa, he stated: (Quote) '*do not have passport and visa for coming to India today but I have my I-card issued by the Bangladesh Govt. and I have been permitted by my country to visit India and depose before the Court about the firing incident.*'

20. Mohd.Hanif Miya PW-16, deposed that on 16.11.2008 at about 08.00 P.M. he was sleeping when his mother woke him up and told him that she had heard sound of fire from the eastern side of their house. He got up and was lighting the lamp when he again heard sound of firing coming from the eastern side of his house. He and his wife went out of the house to look into the matter. Thereafter he went to the rear side of his house for urination when he saw the petitioner enter his house and he heard the screams of his children whereupon he immediately ran inside his house and saw the petitioner pointing his rifle towards his children. He caught hold of the barrel of the rifle and pushed it in the upper direction. He grappled with the petitioner to snatch the rifle and with the assistance of his wife he managed to snatch the rifle. Thereafter the petitioner ran out of his house and he chased him. On hearing his screams, his brother Mohd.Hamidul, who was sleeping in his house came out of the house and caught hold of the petitioner. They tied the petitioner with a rope and after sometime handed over the petitioner and his rifle to BDR. It is relevant to note the following portion of the cross-examination of the witness, which reads as under:-

“.....I do not have valid Visa and Passport for coming here to depose my statement before the Court.....It is correct to say that my hand suffered little burn when I pushed the barrel in upper direction. However, I do not have any document to show that I took treatment of that injury as I did not take any formal treatment.....It is incorrect to suggest that I go for fishing in Bhutijhari nullah flowing across the border and in that process I cross towards India. The villagers of Moynakuri do not go for fishing in Bhutijhari nullah. It is incorrect to suggest that while some villagers were fishing in nullah on India side and were objected by accused then some villagers caught hold of the accused, beat him and in that process took him in their custody....” (*Emphasis Supplied*)

21. Mohd.Mintu PW-17, deposed that on 16.11.2008 at about 09.45 P.M. he heard sound of indiscriminate firing and as the firing stopped he saw his brother Shahidul Islam crawling and screaming saying that he had suffered a bullet injury and that his wife Majeeda Begum and son Mamoon were dead. He removed his brother to the hospital but had no knowledge of the identity of the person who fired. On being questioned about his Passport and Visa he stated: (Quote) *‘I do not have Visa and Passport for coming to India and depose my statement before the Court.’*

22. Subedar Nipen Chandra Das PW-18, Havildar Turab Ali PW-19, officials of BDR, and Sub Inspector Mohd.Abdul Latif Miah PW-20, official of Bangladesh Police, deposed the seizures effected by them and handed over to BSF personnel.

23. Dr.Bahram Ali PW-21, deposed that he conducted the post-mortem on the dead body of Gulam Mustafa, Mazeeda Begum and Mamoon and that the cause of death of the said persons was the bullet injuries.

24. Dr.Mohd.Abdul Quayum PW-22, deposed that on 17.11.2008 at about 07.00 A.M. the petitioner was brought to the surgical ward of Rangpur Medical College Hospital with history of assault and multiple cut injuries over right shoulder, scalp and right shin. He examined the petitioner at about 09.00 A.M. and the condition of the petitioner was stable at that time.

25. Vipin Kumar Yadav PW-23, Deputy Commandant, BSF, and Captain Ashraf Parvez PW-24 proved the correspondences exchanged between the BSF, BDR and the Ministries of Home Affairs and External Affairs regarding the production of Bangladeshi nationals before the General Security Force Court for the purposes of recording their testimony in the present case.

26. 2-IC Rajesh Kumar Sahay PW-25, deposed that he prepared the Record of Evidence and the statement Ex.BB made by the petitioner was recorded by him. Be it noted here that no suggestion was given to the witness that the statement was incorrectly recorded by him.

27. After prosecution evidence was led, the petitioner made a statement under Rule 93 of the BSF Rules wherein he stated that on 16.11.2008 along with Ct.Kapmilian he was detailed to

perform patrolling duty at Ambush Point No.3. He and Ct B.Kapmilian PW-2, decided amongst themselves that he would perform patrol duty between BFL Poles Nos.8 to 15 and that Ct. B.Kapmilain would perform patrol duty between BFL Poles Nos.15 to 22. There was a culvert in the area between BFL Poles Nos.8 and 9 under which there was a Hume pipe through which water flowed from India to Bangladesh. At about 09.00 P.M. he was performing patrolling duty on his bicycle in the area around BFL Pole No.8 when he heard a noise as if someone was walking in the water. Thereafter he saw about 6 persons running here and there, some of whom came towards the culvert and hid themselves in bushes. After a while he thought of reporting the matter to Ct.Kapmilian and called out his name 2-3 times but he did not receive any response. There were strict instructions from Coy Commander and CHM that nobody should be allowed to enter Indian territory from Bangladesh. After sometime someone threw a stone which hit the border fencing. In order to scare said persons he took out the magazine from his rifle and cocked his rifle once or twice but the said persons did not run away. He saw said persons change their hiding place. He saw one intruder run towards Bangladesh side. While running, the intruder provoked him by using abusive language against him and also showed his private parts to him. Since it appeared to him that the said intruders were planning to enter into Indian Territory, he crossed over to the other side of the border fence from gate No.44 to chase or catch said intruders. While he was in the process of chasing the intruders he fell on the ground. By the

time he got up the said intruders had reached on a high ground in Bangladesh Territory. Thereafter he saw some people catching fish in the river. While he paused to regain breath in a kneeling position, suddenly he felt as if someone hit him in his back and he fell on the ground. At that time some persons put net on him and covered his face with bamboo basket and tried to snatch his rifle. Even though he was in acute pain he held on to his rifle but was dragged through the water and taken in Bangladesh territory. Someone hit him on the right side of his temple and legs with a sharp edged weapon and he became unconscious and thus had no knowledge as to what happened thereafter, till he regained consciousness and found himself surrounded by BDR personnel who were torturing him.

28. The petitioner was cross-examined and relevant part of his cross-examination reads as under:-

“While on duty on that night I was not agitated despite they shouted BSF dog and showed their private parts. The prosecutor draws the attention of the accused to a portion of his statement given at the time of ROE wherein he had stated “I was very very annoyed with all this and was thinking whether should catch him and beat him. The relevant portion is underlined in red ink and signed by the Law Officer. On being asked about the correctness of the statement the accused states that he did not say so during ROE.

The accused is also shown portion of his statement at Page No.46 wherein he stated “I had developed a hatred towards them. Hence, that night I was determined to catch one of them and beat them”. On

being asked if he had stated so the accused declined to have stated so.”

29. The petitioner did not lead any evidence in defence.

30. After the evidence was recorded, the Law Officer addressed the Court on the law relating to culpable homicide amounting to murder as also the law relating to appreciation of evidence. The law officer formulating the facts in issue to be considered with respect to the charges. The 3 facts in issue to be considered by the Court were stated as under:-

“FIRST ISSUE OF FIRST/SECOND/THIRD CHARGE

That death of Mohd. Gulam Mustafa/Majeeda Begum/Mohd Mamunur Rashid..... took place on the intervening night of 16th and 17th Nov 2008.

SECOND ISSUE OF FIRST/SECOND/THIRD CHARGE

That the accused caused the death of Mohd Gulam Mustafa/Majeeda Begum/Mohd Mamunur Rashid by firing shot at him/her from his personal weapon INSAS Rifle Butt No.328, Regn No.16910415.

THIRD ISSUE OF FIRST/SECOND/THIRD CHARGE

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

31. On 28.10.2009, the Court returned a finding of guilt against the Petitioner and inflicted the punishment to undergo imprisonment for life and dismissal from service upon the petitioner.

32. While summing up the evidence on the third fact in issue, which was the only issue which required a consideration; inasmuch as the petitioner never disputed the first two facts in issue, in that, he never disputed the death of Mohd.Gulam Mustafa, Majeeda Begum and Mamoon as alleged and the 3 dying as a result of receiving gun shot wounds from the rifle issued to him. The law officer summed up the evidence pertaining to petitioner's intention or knowledge as under:-

"THIRD ISSUE

That the accused did act with requisite intention/knowledge as envisaged in Section 300 IPC.

As regards the intention and knowledge is concerned, these are mental attitude which are not capable of positive proof. However, it can be inferred from the facts and circumstances of the case. The accused by unauthorisedly crossing over the Fence by scaling the gate, went in the Bangladesh village Moynaguri alongwith his personal weapon i.e. INSAS rifle and 50 rds. In the said village when PW-13 Abdus Salem asked the accused about his identity, then he (accused) firstly said "Ami BDR log" but subsequently abused in 'Hindi' and opened fire as a result of which Gulam Mustafa, Majeeda Begum and Mamun sustained bullet injuries and died. The accused, as per PW-15 Shahidul Islam, had fired from vary close range and injured him and after entering inside the room fired at his wife and son and killed them. The accused had opened burst fire, indiscriminately, and besides causing bullet injuries to all four victims, evidence of firing in form of bullets hitting the CGI sheets wall of houses and trees were seen by PW-5, PW-6 and PW-10 who visited the place of incident during the

Flag Meeting with BDR. While the accused has taken a plea that he had gone across the fence to deter the intruders and catch hold of them, but the manner in which he crossed over the Fence violating all norms, SOPs and instructions, his plea is not sustainable, and the act of the accused were intentional. Hence the Court take this issue as well as charges as proved.”

33. That sentence and findings of the Security Force Court was confirmed by the confirming authority on 12.2.2010 and petitioner’s petition under Section 117 of the BSF Act being rejected by the DG (BSF) on 28.6.2011 the instant petition has been filed by the petitioner under Article 226 of the Constitution of India.

34. During hearing of the writ petition, following 4 submissions were advanced by the learned counsel for the petitioner:-

A. The hearing of the charge as per Rule 45 was vitiated for the reason the Commandant of the Unit to which the petitioner was attached considered the opinion of the IG BSF to the effect that disciplinary action be initiated against the petitioner. It was urged that if the superior officer has so opined, it was but obvious that the Commandant had no option but to direct Record of Evidence to be prepared. It was urged that the petitioner lost the chance to explain to the Commandant that matter be dropped hence the trial is vitiated.

B. That the testimony of DIG R.Chandra Mohan PW-6 evidences an assurance given to Bangladesh rifle personnel that petitioner would be tried and thus it was urged that the prosecution had acted with a pre-determined and a motivated mind.

C. That PW-13, PW-15, PW-16 and PW-17, all Bangladesh Nationals were brought illegally to India to depose against the petitioner and proof of they being illegally brought to depose against the petitioner was the fact that they neither had a passport nor a visa authorizing them to enter the territory of India.

D. At best, the offence committed by the petitioner was culpable homicide not amounting to murder inasmuch as petitioner's cross examination showed that the prosecution suggested to him that he got provoked by Bangladesh Nationals who used to, in the past, abuse BSF jawans and taunt them by exposing their private parts at BSF jawans.

35. Before dealing with the submissions advanced by the learned counsel for the petitioner, we remind ourselves of our jurisdiction to be exercised with respect to Security Force Court Trials when petitions are brought under Article 226 of the Constitution of India. Deciding W.P.(Crl.) No. 93/1980 R.S. Ghalwat v. UOI & Ors. on 4.6.1981, a Division Bench of this Court laid down the parameters of the jurisdiction of the High Court while examining the correctness of the finding and

sentence at Court Martial while exercising power under Article 226 of the Constitution of India in the following terms:

"16. Effort was then made to go through the record of court martial (and we did go into it) and persuade us to hold that the finding of court martial was vitiated because of various alleged illegalities in the matter of confession, admissibility of evidence and other irregularities. Now if the writ petition was to be treated as a Habeas Corpus petition the only jurisdiction the court has would be to see whether the return shows that the detenu is held lawfully. Once it is shown, as in the present case that court martial, properly convened and constituted has passed an order in pursuance of which the Petitioner is being held no relief would be possible as this Court cannot go into the question of sufficiency of evidence, and the conviction by competent court would be a sufficient answer to the petition under Section 491, Criminal P.C. AIR 1946 Lah 103: 47 Cri LJ 1022, Kartar Singh v. Emperor. The court is entitled to go into the regularity of steps taken by the court martial in the course of trial or by the confirming authority in the finding and the sentence which do not go to their jurisdiction and confirming. Interference is possible only where the irregularity or illegality affects the jurisdiction of the court martial or the confirming authority'

17. We, however, do not propose to dispose of this matter on this short point and heard the matter on the footing that the writ Petitioner was also asking a writ of certiorari, against the finding of a statutory tribunal, i.e. General Court Martial constituted under the Act. But even then the jurisdiction of this Court is limited to only finding out whether there is error of jurisdiction or it is a case of total lack of evidence. We do not sit as a court of appeal. If there was legal evidence available on which a finding could be given, the sufficiency or otherwise

is for the authority to decide and this Court cannot substitute its opinion for that of Court martial.

19. Thus where the court martial acts within jurisdiction, habeas corpus would not issue to interfere with its decision on the ground of mere insufficiency of evidence or irregularity of procedure except where there has been no hearing at all or the rules of natural justice have not been followed. In the Canadian case of *Ex parte Forgan*, it was recognized that, where a court martial has acted within its jurisdiction neither the merits of the conviction nor the propriety of the sentence could be reviewed by the Supreme Court upon an application for either certiorari or habeas corpus. (See *Military Law in India* by Sharma P. 202, Notes 68 and 69).

20 Where a quasi judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact.... A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e. had jurisdiction) to determine.

See AIR 1962 SC 1621 *Ujjam Bai v. State of Uttar Pradesh*. A writ of certiorari under Article 226 of the Constitution can be issued for the purpose of examining the record and proceedings of a court^amartial if the complaint is that the court-martial was not duly constituted, that it had no jurisdiction over the person or over the subject matter of the charge or that there is an error of law apparent on the face of the record or that the principles of natural justice were violated so as to result in miscarriage of justice. Where a court martial has acted within its jurisdiction neither the merits of the conviction nor the propriety of the

sentence can be reviewed by this Court, upon an application for certiorari. The courts-martial are in fact a specialised form of administrative courts and the scope of review traditionally afforded by the civil courts over their judgments has been very limited. This is evident from the fact that Article 136 of the Constitution expressly excluded the power of judicial review in respect of any judgment, determination sentence order passed or made by any court or tribunal constituted by or under any law relating to the armed forces though the jurisdiction of the Supreme Court and High Courts under Article 32 and Article 226 of the Constitution respectively to issue writs to any person or authority has been preserved. See (2nd (1976) 2 Del 691, Ram Murti Wadhwa v. Union of India. It is true that general power to issue writs of Habeas Corpus and certiorari given to this Court under Article 226 does not make the finding of the court-martial totally immune from scrutiny by this Court. But as said by (1952) 346 US 137: 97 L Ed 1508, Burns v. Wilson "the statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the Military Courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil court. But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. Thus the law which governs a civil in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis*; it must be so, because of the peculiar relationship between the civil and military law. Military law, like State law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. We have held before that this does not displace the civil courts' jurisdiction over an application of habeas corpus from the military prisoner. But these provisions do mean that when a

military decision had dealt fully and fairly with an allegation raised in the application it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence...” (Emphasis Supplied)

36. From the aforesaid observations, it is clear 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 only 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.

37. The first submission advanced and as noted in para 34 (A) above is based upon an incorrect reading of the opinion of the IG North Bengal Frontier which was penned by him after considering the staff court of inquiry. The opinion penned is that disciplinary action needs to be initiated. He never opined that the petitioner is guilty. Now, we all understand that staff court of inquiry is akin to a preliminary inquiry and the object is to find out whether there is prima facie material to initiate formal legal proceedings. These opinions are always tentative and being not final we see no scope that the Commandant of the unit got so overwhelmed by the remark of the superior officer that he lost objectivity.

38. The second plea premised on the testimony of DIG R.Chandra Mohan PW-6 who admitted having given assurance to Bangladesh rifle personnel that petitioner would be tried in India does not mean that the witness admitted that the assurance given was that come what may, the petitioner would be convicted and punished. It has to be remembered that the petitioner had admittedly, even as per his defence statement, crossed over the border fence and entered Bangladesh territory. Now, if the case of the prosecution is correct, it is apparent that when he was overpowered, after he had killed 3 Bangladesh citizens and had grievously injured 1 more, the crowd would be rooting for petitioner's blood and there would be immense local pressure on Bangladesh Rifle personnel and the local police, to try the petitioner as per laws in Bangladesh since the offence was committed in the territory of Bangladesh. It was to the benefit of the petitioner that he was brought to India for trial. Now, to sooth the frayed temper, an assurance had to be given that the petitioner would be tried in India. Surely, the authorities in Bangladesh would not have permitted the petitioner to be brought back to India without an assurance of his being subjected to the legal process. Said assurance only means that the BSF personnel assured that petitioner would be tried as per law and not that the assurance was that come what may, the petitioner would be convicted.

39. The third plea that PW-13, PW-15, PW-16 and PW-17 entered India without a passport is a plea which is neither here nor there for the reason the testimony of PW-23 and PW-24 proves that special permission was given to let said persons

enter the territory of India and deposed at the trial of the petitioner.

40. On the last plea, it would be incorrect to urge that no particular intention of the petitioner has surfaced. The testimony of PW-13, PW-15, PW-16 and PW-17 brings out that the petitioner fired indiscriminately and the weapon used was an INSAS rifle; capable of rapid firing and indeed the petitioner fired a complete magazine. He may not have desired to kill any person specifically, but the desire was to kill Bangladesh Nationals and the motive is obvious. Bangladesh citizens used to taunt BSF jawans. The petitioner was seething in rage. The indiscriminate firing by a rapid fire assault rifle is akin to the situation as per illustration (d) to Section 300 IPC i.e.: '*A without any excuse fires a loaded canon into a crowd of persons and killed one of them. A is guilty of murder although he may not have had a premeditated design to kill any particular individual.*'

41. The testimony establishes that the petitioner had crossed over the fence, which he was not supposed to do. He obviously did so as some actions or acts of Bangladesh citizens had provoked him. He chased them to teach them a lesson. The statement Ex.BB recorded during Record of Evidence, from which he resiled at the trial, and in respect whereof we find that the petitioner never challenged the testimony of 2-IC Rajesh Kumar Sahai who stated that he recorded the said statement correctly, made by the petitioner brings out the truth and the same is that the petitioner chased the citizens of

Bangladesh and it was anger which propelled him to so do. The alternative submission urged with respect to the act of the petitioner attracting Exception 1 to Section 300 IPC, suffice would it be to state that the Exception applies when self control is lost by a provocation which is grave and sudden. As per the statement made by the petitioner, in the past, there were instances of Bangladesh Nationals taunting BSF jawans. Petitioner claims to have been taunted in the past. Thus, we see no scope for the provocation to be sudden. We do not find the provocation to be grave. An illiterate villager, and we presume that Bangladesh citizens who live in a village in a border area would be so, if taunts a BSF jawan, would not invite the retribution of being shot or the BSF jawan being overcome by a grave provocation. It is not provocation but the intense past hatred which triggered the action from the petitioner.

42. Though no serious attempt was made during argument that the defence of the petitioner was wrongly rejected, we may only highlight that the manner in which the petitioner claims to be hit on his head and thereby losing consciousness and he not knowing how his rifle was used, is not believable for the reason he never cross-examined the eye witnesses by putting his version as aforesaid. Further, his cross-examining PW-16 by suggesting that it was correct that his hand suffered a little burn when he pushed, in the upper direction, the barrel of the rifle of the petitioner shows that the petitioner admitted to the version of firing as disclosed by PW-16. The evidence of Dr.Mohd.Abdul Quayum PW-22 brings out that the petitioner

was conscious when he was brought to the hospital in Bangladesh, which deposition has not even been challenged, and thus belies the claim of the petitioner that when some Bangladeshi citizen hit him on his head he lost consciousness. There is tell-tale evidence against the petitioner and we need not discuss the same, save and except highlight as aforesaid for the reason we are not sitting in appeal. As regards the injuries suffered by the petitioner, which no doubt was serious, inasmuch as he was hit with a blunt object on his head, suffice would it be to state that when he was disarmed, the angry crowd or someone within the crowd hit him on the head and by that time the petitioner had executed his gruesome acts.

43. Finding no merit in the writ petition we dismiss the same, but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(SUNIL GAUR)
JUDGE

September 13, 2011
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