A.F.R.

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

RESERVED.
(Court No. 2)

Transferred Application No. 395 of 2010

Monday the 25th day of January, 2016

"Hon'ble Mr. Justice Abdul Mateen, Member (J)
Hon'ble Lt. Gen. A.M. Verma, Member (A)"

No. 8034517-H Pioneer(G.D.) Jitendra Kumar Yadav son of Gauri Shankar Yadav Ex.1815 Pioneer Coy (Army) Earlier lodged in Central Jail in Varanasi, R/O Vill.-Sahhwalia (Khukhundu), P.O.-Majhwalia, District – Deoria (U.P.).

..... Petitioner

By Shri R. N. Singh & Shri Rakesh Johri, counsel for the applicant.

Versus

1. Chief of Army Staff New Delhi.

2. Director General Border Roads Kashmir House, DHQ PO, New Delhi – 110 011.

3. Union of India through Secretary Ministry of Defence New Delhi.

4. Commandant-cum-CRO, Pioneer Corps Centre and Records, Bangalore.

..... Respondents

By Shri Yogesh Kesarwani, learned counsel for the respondents, along with Capt. Soma John, Departmental Representative.

ORDER

1. Civil Misc. Writ Petition No. 49528 of 2004 was filed by the petitioner before the Hon'ble Allahabad High Court and on being formation

of the this Tribunal this writ petition was transferred to this Tribunal, vide order of the High Court dated 5.5.2010, and registered as Transferred Application No. 395 of 2010.

2. In this writ petition the petitioner seeks the relief of being treated as having continued in colour service with all the consequential benefits redeeming his honour as a soldier, to quash the impugned GCM proceedings and the impugned orders dated 8.1.2003 & 17.7.2004 with all the consequential benefits including compensation.

3. The facts of the case, in brief, are that the petitioner was enrolled in the Indian Army on 27.4.1996 and was posted to 1815 Pioneer Company on 7.10.2009. The petitioner was thereafter sent on temporary duty to Bhutan on 2.3.2001, from where he returned on 11.7.2001. The Unit, i.e. 1815 Pioneer Company, was in Dimapur, which is an insurgency infested area. On return on 11.7.2001, the petitioner was detailed on Guard duty the same day. Being in counter insurgency area the Guard Commander, late Nk Raja Ram Yadav briefed all the *Sentries* and asked them to remain alert. The petitioner was on duty from 2155 hours onwards. At about 2210 hours, the petitioner noticed a person moving in the Quarter Guard corridor. In the darkness he could not identify the person and assumed that some intruder was approaching the Guard Room. The petitioner challenged the person twice, who neither stopped nor replied. As the intruder approached near the Guard Room, the petitioner fired a shot, which hit him in his neck and as a result of which the person fell down and subsequently died. On hearing the

shot the other *Sentries* of the Guard, who were sleeping in the room nearby rushed to the spot and found that the person who had been hit by the bullet was their Guard Commander Nk Raja Ram Yadav, who was wearing only shorts and no vests.

4. The case was investigated and the petitioner was tried by GCM from 9.9.2002 to 20.9.2002 on the following charge :

> "*Army Act Section 69* *COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, MURDER, CONTRARY TO SECTION 302 OF THE INDIAN PENAL CODE*
>
> *In that he,*
>
> *At Field, on 11 Jul 2001, by intentionally causing the death of No 8032241L Naik (General Duty) Raja Ram Yadav of the same unit, committed murder."*

5. The punishments awarded in GCM were dismissal from service and to suffer R.I. for 7 years.

6. During Court Martial 12 prosecution witnesses were examined. Based on the evidence brought forth before the GCM the court did not find him guilty of murder under Section 302 IPC, but found him guilty of culpable homicide not amounting to murder under Section 304 IPC.

7. After the pronouncement of sentence in GCM the petitioner filed pre-confirmation petition dated 10.4.2003 under Section 164 of the Army Act. He, however, on not receiving any response, filed Civil Misc. Writ Petition No. 55394 of 2003 before the Hon'ble Allahabad High Court and the High Court, vide order dated 18.12.2003, directed respondent no. 1, i.e. COAS, to decide the post-confirmation petition under Section 164(2) of the Army Act within three months. Even after the order of the Hon'ble High Court

when the petitioner did not receive any response to his post-confirmation petition, he filed Contempt Petition No. 1468 of 2004 before the High Court on 12.5.2004, on which a direction was issued on 1.5.2004. The COAS thereafter, vide his order dated 17.7.2004, decided the post-confirmation petition of the petitioner holding the dismissal of the petitioner from service to be valid but remitted the balance sentence awarded to the petitioner in view of the fact that the incident had occurred in counter insurgency area. The petitioner was thereafter released from Central Jail, Varanasi, on 25.8.2004.

8. The case of the petitioner was represented by S/Shri R.N. Singh and Rakesh Johri.

9. While arguing the case learned counsel for the petitioner highlighted several infirmities in the investigation process, the trial and the post-trial of the case. At the investigation stage, the petitioner claimed that the provisions of Army Rules 22 and 34 were violated since the charge against the petitioner was not heard under the provisions of Army Rule 22 and copies of the Summary of Evidence and charge-sheet were not handed over to the petitioner 96 hours in advance. It was further argued that during the trial the provisions of Army Rule 58 were not complied with properly, causing grave prejudice to the petitioner. Citing several examples of questions by the court, the petitioner claimed that the court had shown strong bias and grave prejudice to the petitioner. The petitioner claimed that

while questioning the court committed 10 violations since the reasoning given in the Court Martial generally supported the innocence of the petitioner. However, the court still found him guilty of culpable homicide not amounting to murder. The further argument was that at the post-trial stage the post-confirmation petition under Section 164(2) of the Act Act, 1950 was not dealt with fairly with speaking and reasoned order.

10. The case of the respondents was represented by Shri Yogesh Kesarwani along with Capt. Soma John, Departmental Representative.

11. The respondents confirmed the date of enrolment of the petitioner and his place of posting at the time of incident. The respondents stated that the petitioner had violated the challenging procedure given in para 11 of the Standing Orders of the court and Magazine of 1815 Pioneer Company which states that no *Sentry* will open fire unless ordered to do so by the Guard Commander except in self defence. According to the respondents, the petitioner did not sound alarm. On hearing of charge under Army Rule 22, the respondents explained the process of hearing of a charge under Army Rule 22 without stating as to on what date this charge under Army Rule 22 was heard by the Commanding Officer. The respondents state that the petitioner had a right to object to the charge under Army Rule 49, which he did not do. The respondents admitted that the petitioner had filed Civil Misc. Writ Petition No. 55394 of 2003 followed by another petition to decide the post-confirmation petition. The respondents state that the

statutory petitions dated 10.4.2003 and 27.10.2003 were considered by the COAS and a detailed reasoned order was passed him on 17.7.2004 and he remitted the remaining part of sentence of the petitioner on humanitarian ground while upholding the order of dismissal from service. The respondents state that the FIR was correctly lodged against the petitioner. It has further been stated that the petitioner did not follow the SOP correctly and even he did not wish to stop the intruder since he was fully aware of the dangerous nature of the weapon in his possession while aiming at the neck of the deceased instead of aiming the lower part of the body. The respondents state that rather than opening fire on the deceased he could have fired in the air and asked the guards to remain alert saying "the guards *Hoshiyar".* As regards not being informed well in advance about his trial by GCM, the respondents state that the petitioner was informed well in advance about his trial by GCM and charge-sheet was duly served on him. He was also asked to give the particulars of any civil Lawyer and in the event he did not do so the convening authority would provide the services of Miss Nazima Seikh. The petitioner accepted the services of Advocate Miss Nazima Seikh. The court's observation, however, is that in the GCM proceedings Advocate Nazima Seikh is a prosecution counsel while the defence counsel were Shri B. Debnath and Shri P.D. Paul. The respondents state that the court did not find the petitioner guilty of charge under Section 302 IPC but did find him guilty of culpable homicide not amounting to murder under Section 304 IPC and accordingly the punishment was

awarded. The respondents state that all the provisions of law were adequately followed and there are no infirmities in the proceedings.

12. Heard both the sides and carefully examined the documents.

13. The narrative that emerges, after going through the testimonies of the witnesses, is that the petitioner was posted in 1815 Pioneer Company at the time of incident. He was sent to HQ Project Dantak on 2.3.2001 from where he returned on 11.7.2001. The same day he was detailed as *Sentry* on Quarter Guard duty and his duty time was from 2200 hours to mid-night. The petitioner was woken up by Pioneer Suresh Kumar at 2155 hours. After the petitioner resumed his duty, Pioneer Suresh Kumar retired to his bed and went to sleep. At about 2215 hours Pioneers S.K. Singh and Suresh Kumar heard the accused calling *"Thum!"* twice. There being a brief gap between the two *"Thums!"* and thereafter sound of rifle fire heard. On hearing the sound of rifle fire these two Pioneers, viz. S.K. Singh and Suresh Kumar came out of the Guard Room and found the accused standing outside the verandah, about 20 feet away from the Guard Room door. There was no light in the verandah. The petitioner indicated that he had fired towards the verandah. Both the persons, viz. S.K. Singh and Suresh Kumar, found Nk Raja Ram Yadav lying unconscious. They lit a lamp, kept on the table near the Guard Room, and identified the person lying in a pool of blood, who was wearing only shorts. Suresh Kumar asked the petitioner as to why did he fired. The petitioner replied that the

verandah light had gone off and it was dark. He saw someone coming from the K*ote* side towards the Guard Room. He challenged that man to stop but when that man did not stop, he fired upon him. The injured man was taken to MI Room from where he was evacuated to 165 Military Hospital, where he was declared 'brought dead'.

14. The respondents in the counter affidavit and the COAS in his order have not stated the date on which the charge under the Army Rule 22 was heard by the Commanding Officer. Also, they have not stated on what date copies of the charge-sheet and Summary of Evidence were handed over to the petitioner, as required by Army Rule 34(1). Learned counsel for the petitioner had very emphatically stated that these two provisions of the Army Rules, i.e. Rules 22 and 34, had been violated. The respondents have also not produced the receipt which would have been obtained by them after handing over copies of charge-sheet and Summary of Evidence as also proceedings of Army Order 24 of 1994. The respondents, however, have indicated in their response that these two provisions had been complied with. We are of the view that since this is a case of GCM the respondents would have complied with by the provisions of Army Rules 22 and 34, even though they have not produced the requisite documents to establish the same. Therefore, we are not laboring on this point any further.

15. During hearing of the case the respondents have stated categorically that there was no animosity between the petitioner and the deceased. It has

also been stated by the petitioner that 11.7.2001 was the first time the petitioner had met the deceased. The case, therefore, revolves around the fact whether or not the act committed by the petitioner was culpable homicide not amounting to murder or it was an act which was performed during performance of his duty and deserves to be condoned in the eyes of law.

16. There are two documents which have been referred to by the respondents as well as the petitioner. They are of relevance. The first one is the challenging procedure and the second is para 11 of the SOP for *Kote* and magazine. These two are reproduced below:-

"*CHALLENGING PROCEDURE : UNIT QG SENTRY.*

1. While sentry on duty at unit QG, the following challenging procedure will be followed:-

Individual approaching the QG complex is challenged by the sentry well before he comes near the gate " Thum Kaun aata hai'.

Individual stop and says, "Dost".

Sentry "Pahchan ke liye aage bar".

Individual moves forward to proves his identity.

Sentry " Aaj ki pehli pukar".

Individual says the challenge part of the Pass Word.

Sentry says the counter challenge part of the Pass Word.

2. This completes the identification procedure of the person wishing to visit the qr guard complex.

3. If the above procedure is not followed by an individual trying to come into qr guard, sentry will follow the procedure as laid down in para 11 (Orders for opening fire) of the unit standing orders for Kot and Mag.

Sd/-xxxxxxxxxxxxx

BS Sambyal
Lt Col
Officer Commanding
1815 Pioneer Company

<u>Orders for opening fire.</u>

11. (a) No sentry will open fire unless ordered to do so by the Gd Cdr, except in case of self defence.

(b) If any suspected miscreant is advancing towards kot complex he will be warned to stop and his antecedents verified.

(c) If the suspected miscreant(s) does not halt and keeps advancing towards kot complex, the sentry will sound alarm and warn him second time that fire will be opened if he does not halt.

(d) By now the gd cdr would have arrived at the scene and will take control of the situation.

(e) During the day if the miscreant appears to be unarmed, he will be over powered physically and OC will be informed. Subsequently action will be taken for handing over the miscreant to the police.

(f) During the ni if the miscreant does not heed to the second warning, it will be assumed that he is armed and Gd Cdr will order the sentry to open fire.

(g) The Gd Cdr shall endeavour to inform the OC/2IC at the earliest possible opportunity".

17. Brief analysis of the challenging procedure and the SOP for opening fire is called for. The challenging procedure lists the actions to be taken by the *Sentry* and in the event the other person does not respond to the challenge required to take which is to follow the SOP on opening fire. This challenging procedure presupposes that the individual, who is being challenged, knows the procedure and needs to respond with the word *'Dost'.* This procedure works very well with the own Unit members, who are aware of the challenging procedure, but this procedure does not cater adequately for an eventuality when the person responds with an answer other than *Dost;* for instance if the person says do not fire or I am not aware of the pass word or something other than *Dost* how does the *Sentry* react has not been indicated in the challenging procedure. Now moving on to Para 11 of the SOP, it very specifically lays down that no *Sentry* will open fire except on the orders of the Guard Commander or in self defence. This SOP assumes that the Guard Commander would have arrived at the scene and will take control of the situation. The SOP does not cater for an eventuality when the Guard Commander does not arrive for any reason. Also, this SOP does not lay down the procedure to be followed by other *Sentries*. In the instant case the Guard Commander himself was mistaken to be an intruder and, therefore, there was no question of the Guard Commander assuming control. Also, in the instant case two fellow *Sentries,*

viz. prosecution witness no. 7 S.K. Singh and prosecution witness no. 8 Suresh Kumar heard the petitioner calling out *thum!* Twice, yet they did not respond until they heard the shot being fired. In what manner the *Sentries* are to react after hearing the call of *thum* has not been mentioned in the SOP. Also the aspect of self defence has not been clarified in the SOP.

18. In all units, in addition to the SOP on opening fire and challenging procedure there is a SOP on duties of the Guard Commander and the *Sentries*. We are not aware if such an SOP existed in the Unit. However, if such an SOP did exist that could have been called for by the GCM. Thus, it is apparent that there were some gaps in the challenging procedure and the SOP.

19. Immediately after the incident occurred, an FIR was lodged with the Police Station West, District Dimapur (Nagaland). This FIR was signed by the O.C. Lt. Col. U.S. Sambyal and it reads as under :-

> "*Sir,*
> *1. This is to inform you that at about 2210 hrs on 11 July 2001 No. 8034571H Pnr(GD) Jitendra Kumar Yadav of this Unit while performing the duties of sentry in the quarter guard challenged No. 0032241L Nk(GD) Raja Ram Yadav who was the guard commander in the quarter guard to stop and identify himself while he was entering the guard room. When No. 0032241L Nk(GD) Raja Ram Yadav did not stop and identified himself, No. 0034571 Pnr(GD) Jitendra Kumar Yadav asked him again to stop and prove his identity. On failing to answer and establish his identify No. 8034571 H Pnr (GD) Jitendra Kumar Yadav fired at him resulting in fatal gun*

shot wound. No. 8032241L nk (GD) Raja Ram Yadav was rushed to the Central MI Room where he was attended by Medical Oficer. Seeing that condition of Nk Raja Ram Yadav was deteriating, he was rushed to 165 MH Rungapahar where he was declared dead.

2. You are requested to carry out court of inquest and post mortum at the earliest.

Yours faithfully,

Sd/- x x x x x

(U.S. Sambyal)
Lt Col
Officer Commanding"

20. In this FIR it has been stated that the petitioner, who was the *Sentry* at that time, challenged the intruder to stop to identify him, but the intruder did not do so, following which the petitioner fired at him.

21. Here it will be worthwhile to recount the prosecution and defence cases as they were presented before the GCM. The bullet fired by the petitioner had hit the neck of the deceased, which caused the death. The prosecution laid evidence to show that the Quarter Guard area is well protected and there was no easy accessibility to it. The prosecution also stated that the petitioner did not follow the proper challenging procedure and did not bother to take prior permission of the Guard Commander before opening fire. The fact that the petitioner fired from a close quarter showed his intention that he wanted to kill the deceased.

22. The defence on the other hand stated that the lights had gone off and due to nil visibility the petitioner shot somebody approaching even after

asking him to stop twice. The further argument was that since it was insurgency infested area and there was danger to the lives of other *Sentries,* his own life as also danger to the Government property, the petitioner in exercise of his right to defence fired upon the deceased to stop him. The defence argued that the death of the deceased was merely an accidental and unfortunate but was caused without any criminal intention while performing a lawful act in a lawful manner for lawful needs with care and caution. The defence argued that firing by the petitioner was done in good faith and in good intention of saving the lives and property to which he was responsible to guard while performing the duties of a *Sentry* and that he performed his duty well as required by an alert *Sentry.*

23. The petitioner has stated that AR 58 had been violated. The evidence on record does not show that such was the case. However, there are questions put to the petitioner by the court which give an indication that the court may have been biased against the petitioner. These questions are reproduced hereunder :-

"Q. *7. It has come in the deposition of PW-7 and 8 and various other prosecution witnesses that the deceased was wearing only under pant and there was no clothe on the upper portion of his he body. He had no arms with him. They have also stated that you had fired upon the deceased from a distance of about 20 to 25 feet while standing outside verandah of the quarter guard. 'This shows that you did not try to ascertain the*

antecedents of the victim by going near to him. Before you fired upon the deceased. What have you to say about it?

Q. 9. It has come in the statement of PW-8 that he had switched off the guard room light at around 2205 hrs and at that time the verandah light was on. It has also come in the evidence of various prosecution witnesses that the accused had fired upon the deceased at about 2215 hrs, which shows that you were fresh on the duty at 2215 hrs. It was quite obvious that you would have noticed the guard commander going out from the guard room. Therefore, there was no justification for presuming that it was not the guard commander but some terrorist who was coming in. What have you to say about it?

Q. 10. It is there in the evidence of PW-7 & PW-8 that the verandah light was switched off during your tenure of duty but you did not do anything to get the lights on. What have you to say about it?

Q. 12. While having a view of the quarter guard and surrounding area the Court had observed that there were four layers of fencing/boundary walls around the quarter guard which was enough to make it very difficult for any intruder/terrorist to come inside and the area was not dangerous as to give an apprehension to the sentry that any person could come from any side and cause harm. What have you to say about it?

Q. 14. As per the evidence of PW 7 and 8 they had heard only one sound of fire. You had fired upon the deceased directly without scaring him first by firing in the air. What have you to say about it?

Q. 16. It has come to the evidence of PW-8 that after firing. You were not shaking, shivering or crying which are the general symptoms of a person under shock. You were cool and composed even after knowing that you had fired upon a person who was your guard commander. What have you to say about it?

24. Now, with this backdrop, let us turn to the findings in GCM, which read as follows :-

"BRIEF REASONS FOR THE FINDING

The Court have considered all the ingredients of the offence of murder as provided in Sec 300 of the IPC.

The circumstances under which the accused was detailed on the quarter guard duty, after returning to unit after a gap of more than four months from a peaceful atmosphere at Bhutan to a counter insurgency environment.

The accused was briefed by the guard commander in the evening of 11 July 2001 that the area where he was going to be perform duty is infested with terrorists and there is always a possibility of any intruder coming in the quarter guard for creating any mischief. Therefore, it was necessary for each sentry to be highly alert while performing his duty. The accused was performing such duty after a substantial gap of time. The quarter guard

area was not properly lit nor there was adequate arrangement for lighting the area in the event of electricity going off. Although the Court have no doubt that late Nk Rajaram Yadav had died because of the injury sustained by the bullet fired by the accused but the ***Court is of the view that the accused did not kill him with an intention to cause death****. The evidence laid by the prosecution shows that he was the only guard detailed to look after the entire quarter guard area during his tenure of duty. As such the possibility of his having not noticed the guard commander while the guard commander moved out of his bed from the guard room cannot be ruled out. Also, since it became totally dark due to only electricity bulb providing light in the verandah of the quarter guard, having gone fused it cannot be totally rulled out that the visibility had gone further down. In such situation, the accused saw someone moving in the verandah of the quarter guard towards the guard room.* ***It is established beyond doubt that the accused had challenged at least twice by calling "Thum" however, there is no evidence to show that the deceased had made any reply in response to his challenge. In this situation the accused should have tried to go closure to that man and ascertain his identity before opening the fire****. It is also established beyond doubt that the deceased had no weapon with him nor he was wearing any such clothe which could have given any apprehension of his hiding any weapon under the same. Therefore, there was no reasonable ground for not ensuring the identity of the deceased before opening fire. However, considering the overall influence of the*

circumstances and the briefing given to him a couple of hours back had probably impelled him to think that the man who was advancing towards the guard room might be an intruder. Although the accused has not followed the proper procedure given for the challenging an intruder, it could not be established by the prosecution that he had fired with some ulterior motive. The probability of the accused having fired on the person who was advancing towards the guard room with the sole view of stopping him may not be ruled out. However, the injury caused to the upper portion of the body of the deceased shows that the accused had caused such injury which was likely to cause death. It, therefore, appears that the facts of the case fall in the third exception of Sec 300 of the IPC Sec 300, Exception 3 provides that a public servant when acting for the advancement of public justice, if exceeds the powers given to him by the law causes death by doing an act which he has done in good faith believing to be lawful and necessary for the discharge of his duties as public servant and without ill will towards the person whose death is caused such public servant will be liable of committing culpable homicide not amounting to murder. The ingredients of exception three in the instant case are fulfilled. The Court believe that the accused, probably, got extremely concerned about the safety of the personnel and property at the quarter guard which probably coupled with no response from the person who was coming towards the guard room impelled him to open fire, and therefore, he might have felt it necessary to stop him by firing. The sequence of events very categorically bring out that

the accused has exceeded the powers given to him by the law. Therefore, the Court under the provisions of Army Act Sec 139 (6) arrive at a special finding and find the accused guilty for committing culpable homicide not amounting to murder, punishable under Army Act Sec 69 contrary to Sec 304 of the IPC."

25. An analysis of the findings indicate that the court did accept that the Quarter Guard Area was not properly lit. Also the court accepts the fact that the petitioner did not kill the deceased with an intention to cause death. The court further accepts that the possibility of the petitioner not noticing the Guard Commander moving out of his bed in such a situation and the petitioner saw someone moving towards him in the dark. The court also accepts that the petitioner had challenged the intruder at least twice before firing a shot and that the deceased had made no reply. The court, however, strangely comes to the conclusion that in that situation the petitioner should have tried to go closer to the man to ascertain his identity before opening fire. The petitioner was a *Sentry* and he had to take immediate decision in order to ensure the safety of his own life and the lives of his fellow *Sentries* and also to take care of Government property. In such a situation it was not practically possible and also advisable for him to go closer to the man and identify him first before opening fire. This is particularly so since the corridor was dark and the *Sentry* wouldn't have been able to make out whether or not the intruder was carrying a weapon. As regards not following the challenging procedure, the infirmities in the challenging

procedure and the orders of opening fire have earlier been brought out. The two *Sentries*, who heard the shouting of *'thum!'* twice should have and could have reacted asking the Guard Commander to go out and take control or they themselves could have come out to see for themselves what was happening. The court believed that the petitioner was concerned about the safety of the person and property at the Quarter Guard which caused him to fire to stop the intruder. Based on these findings the court came to the conclusion that the offence committed by the petitioner was culpable homicide not amounting to murder contrary to Section 304 IPC. We are of the view that the findings by GCM lacked objectivity and the circumstances under which the petitioner opened fire were not examined holistically.

26. The condition that obtained at about 2215 hours on 11.7.2001 when this incident occurred was that the petitioner had just come back after temporary duty, the *Sentries* had been briefed by the Guard Commander that this is highly infested counter insurgency area. The light in the verandah of the Quarter Guard had gone out and the condition was of nearly total darkness, and in this condition he saw a person approaching him. The petitioner did not make any statement during the GCM except to answer the questions put to him, but during Summary of Evidence he gave a statement, the relevant part of which is extracted below :-

"(3) Pnr Suresh awakened me at about 2155 hrs on 11 July 2001. I came out of the guardroom and took over the duties at 2200 hours. The light went out after a short while and hence I came out of Verandah

towards the main gate of Quarter Guard. It was drizzling. When I turned back I saw a figure moving in the verandah. I challenged him with the words "Thum", the figure neither stopped not did he reveal his identity. I challenged the figure again twice in the same way however he did stop. He was approaching the guard room and I could not ring the alarm bell of he *Quarter Guard since the figures has arrived near it. When the* figure neither stopped nor did he real his identity. *I cocked by rifle and fired on him. On hearing the bullet sound, Pnr Santosh Kumar and Pnr Suresh came out of guardroom. It was dark in the verandah so Pnr Suesh Lit up a lamp. We then saw that it was our guard commander Late Nk NR Yadav, who had sustained bullet injury, and lying in the verandah. When I came to know that it was our guard commander, I became hysterical and started weeping. Then Pnr Suresh rang up the Guard Commander of supervisors gate, to inform unit Sub Major Sudama of the incident. Pnr Suresh also took my weapon i.e. 7.62mm SLR and kept it inside the Guardroom of Quarter Guard. Meanwhile, there was a telephone message from OC unit, which was attended by Pnr Suresh. I and Pnr Suresh lifted Late NK RR Yadav and bought him to some distance. The QRT vehicle also arrived and we put late NK RR Yadav into the Vehicle and went to the MI Room".*

27. The above statement adequately clarified the circumstances under which the petitioner opened fire. We are of the view that it was the duty of the petitioner to protect the lives of other *Sentries,* his own life and the Government property, entrusted to him for guarding. Keeping all these in

his mind he opened fire. Was it, therefore, justified or did it amount to culpable homicide not amounting to murder is the question that we need to answer.

28. Section 80 of the Indian Penal Code reads as under :-

"80. ***Accident in doing a lawful act.****- Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."*

29. Further Section 96 of the Indian Penal Code reads as under :-

"96. ***Things done in private defence. –*** *Nothing is an offence which is done in the exercise of the right of private defence.*

COMMENTS

Right of private defence*. – The section des not define the expression "right of private defence". It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down-* ***Ananta Deb Singha Mahapatra v State of West Bengal AIR 2007 SC 2524.*** *In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately*

exercised, it is open to the Court to consider such a plea. In a given case, the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record- ***Sekar v State of Rajasthan 2003 SCC(Cri)16:2003 Cr LJ 53.*** *The principles as to right of private defence of body are as follows:-(a) There is no right of private defence against an act which is not in itself an offence under the Code; (b) the right commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence. Although the offence may not have been committed, it is co-terminus with the duration of such apprehension; (c) it is defensive and not a punitive or retributive right. Therefore, in no case more harm than is necessary to inflict in defence is permissible (d) the right extends to killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the crimes enumerated in the six clauses of section 100 of the LP. Code –* ***Yogendra Morarji v Stae of Gujarat AIR 1980 SC 660 Cr LJ 459."***

30. **Section 81** of the **Indian Penal Code** reads as follows :-

*"**81. Act likely to cause harm, but done without criminal intent, and to prevent other harm.-** Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the* purpose of *preventing or avoiding other harm to person or property.*

Explanation. - *It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.*

31. Now the issue of private defence needs to be addressed. The Hon'ble Supreme Court in the case of ***Mahendra Pal Jelly v. State of Punjab*** reported in ***AIR 1979 SC 577*** as follows :-

"The onus is on the accused to establish he right or private defence of property or person and on the basis of the standard of proving it beyond doubt but on the theory of preponderance of probability he might or might not take this pleas explicitly or might or might not adduce any evidence in support of it but he can succeed in his plea if he is able to bring out materials in the records of the case on the basis of the evidence of the prosecution witnesses or on other pieces of evidence to show that the apparently criminal act which he committed was justified in exercise of his right of private defence of property or person or both. But he exercise of this right is subject to the limitations and exceptions provided in Section 99."

32. Further the Hon'ble Supreme Court in the case of ***Nizamuddin v. State of Madhya Pradesh*** reported in ***AIR 1994 (SC) 1041*** has held as under :-

"The accused need not prove his defence. It is enough if he can show by preponderance of the probability that the plea taken by him is plausible and refer a reasonable doubt. Then he is entitled to the benefit."

33. The Hon'ble Supreme Court in Criminal Appeal No. **1057 of 2002 (Darshan Singh v. State of Punjab)** addressed the issue of private defence in detail and thereafter summarized their findings as follows :-

58. The following principles emerge on scrutiny of the following judgments:

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, if is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if he accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

34. To sum up from the above provisions of law as enumerated in the Indian Penal Code and from the Hon'ble Supreme Court's order it comes out that a person has a right of private defence if he is suddenly confronted with the necessity of awarding an impending danger. It further emerges that

reasonable apprehension is enough to put the right of self defence into operation and it is unrealistic to accept a person under assault to modulate his defence step by step. The Hon'ble Supreme Court had held that the accused need not prove the existence of the right of private defence beyond reasonable doubt. In the backdrop of these judgments of the Hon'ble Supreme Court and the provisions of the IPC we are inclined to hold that the actions taken by the petitioner in the instant case were guided by his desire to ensure safety of his own life and lives of the fellow *Sentries* and any damage to the Government property entrusted to him for guarding and, therefore, no offence was committed by him by opening fire to stop the intruder who did not respond to the petitioner's call of *'thum'* twice. We are of the view that the GCM have erred in holding the petitioner guilty of culpable homicide not amounting to murder.

35. In view of above the petition stands allowed. The GCM proceedings held from 9.7.2002 to 20.7.2002 as also the rejection order of the COAS dated 17.7.2004 stand quashed. The petitioner will be deemed to be notionally in service from the date he was dismissed from service and sent to civil jail until he attains the age which entitles him to receive pensionery benefits. It is further observed that since in our view the petitioner performed his duties with utmost sincerity and devotion to his duties to protect his own life, lives of the fellow *Sentries* as also the Government property as also for the suffering from the date of dismissal and cost of the petition, he deserves commendation and compensation. It is, therefore,

ordered that a sum of Rs. 50,000/- be given to the petitioner by the respondents towards cost. It is further ordered that the respondents will ensure that this judgment be implemented within a period of three months from today.

(Lt. Gen. A.M. Verma)
Member(A)

(Justice Abdul Mateen)
Member (J)

PG.