AFR
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
(CIRCUIT BENCH AT NAINITAL)

TRANSFERRED APPLICATION NO. 59 OF 2011

Monday this the 13th day of August, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Hayat Singh Bankoti
JC-402108 K Nb/Sub
12, Rastriya Rifles,
(Presently lodged in Central Jail, Udhampur Jammu & Kashmir)

..... **Petitioner/Convict**

Learned Counsel for the Applicant - **Shri Lalit Kumar, Advocate**

Versus

1. Union of India, Through its Secretary,
Ministry of Defence,
South Block,
New Delhi.

2. Chief of the Army Staff,
Army Headquarters, South Block,
New Delhi.

..... **Respondents.**

Learned Counsel For the Respondents - **Shri R.C. Shukla**
Central Govt Counsel
Assited by Capt Priyank Malviya,
OIC Legal Cell

ORDER

"Per Hon. Mr. Justice S.V.S.Rathore, Member (J)"

1. By means of this Transferred Application, the petitioner Hayat Singh Bankoti has challenged his punishment order dated 16.03.1997 awarded to him by the General Court Martial (in short 'GCM'), whereby he was punished with a sentence of imprisonment for life in civil prison and also with dismissal from service for the offence under Sections 69 of the Army Act read with Section 302 of Indian Penal Code.

2. The facts giving rise to the instant O.A. may be summarised as under :

In the incident of this case, one L/NK Laxman Prasad sustained rifle injuries and ultimately he succumbed to the injuries. The rifle by which the deceased sustained injuries was held by the petitioner. This incident is alleged to have taken place on 23rd February 1995 at Jung Post. On the date of incident, Major Prabhat Chandra, who was performing the duty of Company Commander of the said Jung Post, reached the said Jung Post at about 1200 hrs to find out whether his platoon had any problem. He was received by Platoon Commander Nb/Sub Hayat Singh Bankoti (Petitioner) outside the house. The deceased L/NK Laxman Prasad offered him a glass of water. Since he wanted to go for area familiarisation, he asked Nb Sub Hayat Singh Bankoti to get a platoon ready including him. Nb/Sub Hayat Singh Bankoti went inside the house where the platoon was staying to get ready and also passed instructions through L/NK Laxman Prasad for other OR's to get ready to go with him for area familiarisation. At about 12:15hrs, Major Prabhat Chandra heard the firing which was like a burst fire of an automatic weapon. He initially

thought that it was a militant attack but when he got information that firing has taken place inside the house, then he immediately went inside the house and found that the petitioner was sitting on the floor and L/NK Laxman Prasad was lying on the floor crying in pain. Major Prabhat Chandra also saw that one rifle AK 56 was also lying on the ground and its fired empty cartridges were also scattered all around. Immediate steps were taken to take both of them with the help of other OR's from the corridor. Information was given to the higher authorities that an accidental firing had taken place at the Jung Post. L/NK Laxman Prasad and petitioner were given first aid and were taken to the ADS. Major Prabhat Chandra accompanied both the injured. They reached at ADS at about 2020 hrs, where Doctor declared that L/NK Laxman Prasad is dead.

A Court of Inquiry in this respect was held and during Court of Inquiry, five witnesses were examined and the finding of the Court of Inquiry was that it is a case of accidental firing and nobody is to be blamed for it. Thereafter under orders of the competent authority, the summary of evidence was recorded. Initially five witnesses, who were examined during the Court of Inquiry, were examined, but thereafter additional witnesses were also examined and already examined witnesses were also recalled. The petitioner also got his statement recorded voluntarily. The summary of evidence was recorded on the tentative charge of accidental death. In this case, the petitioner himself has also sustained rifle shot injuries on his both feet. Tentative charge sheet was as under :

TENTATIVE CHARGE SHEET

JC-402108K Nb Sub Hayat Singh Bankoti,
12 Rashtriya Rifles (Parent Unit 13 GUARDS)

is charged with

ARMY ACT *COMMITTING A CIVIL OFFENCE, THAT*

SECTION 69 *IS TO SAY, CAUSING DEATH BY A RASH OR NEGLIGENT ACT NOT AMOUNTING TO CULPABLE HOMICIDE CONTRARY TO SECTION 304-A OF THE RANBIR PENAL CODE,*

In that he,

At Field on 23 Feb 95, by rashly or negligently handling rifle AF 56, Registration No M 3765, to fire, when the safety catch was at auto, caused the death of No 13684173X LNK Laxman Prasad Yadav of the same bn.

Sd/- x x x x x
(Ajeet Singhvi)
Colonel
Commanding Officer
12 Rashtriya Rifles

Place : Field

Date : 15 Feb 96

However, after Summary of Evidence, the charge sheet was prepared, which reads as under :

Appendix

CHARGE SHEET

The accused, JC-402108K Naib Subedar Hayat Singh Bankoti 12th Battalion The Rashtriya Rifles, is

ARMY ACT SECTION-69 *COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, MURDER, CONTRARY TO SECTION 302 OF THE RANBIR PENAL CODE*

in that he,

at Field, on 23 Feb 95, by intentionally causing the death of No 13684173X Lance Naik Laxman Prasad Yadav of the same unit, committed murder.

Sd/- x x x x x
(Ajeet Singhvi)
Colonel
Commanding Officer
12 Rashtriya Rifles

Place : Field

Date : 01 Jan 97

3. In this case, FIR was lodged. However, copy of the same is not on record of GCM. Thereafter, the police proceeded with the inquest and sent the dead body for post mortem. The post mortem examination of L/NK Laxman Prasad was conducted on 26th February 1995 by PW 6 Dr Ramesh Chandra Gupta

and the following injuries were found on the body of the deceased : However, original post mortem report is also not on record.

Post Mortem Examination/Observation

External injuries.

a) A lacerated wound of entry (1" x ½ " x 5" in length, breadth and depth respectively) with regged irregular inverted margins on the anterior aspect of left chest with smoke halo around the wound i.e. within 3 feet range.

b) A lacerated wound of entry (1"x ½"x 5" in size) with ragged, irregular, inverted margins on the anterior aspect of left chest with smoke halo around the wound i.e. within 3 feet range.

c) A lacerated wound of entry (1" x ½" x 3" in size) with regard, irregular and inverted margins with smoke halo around the wound i.e. within the range of 3 feet. This wound was 5 inches below the left elbow joint on the anterior aspect and defensive in nature.

d) A Lacerated wound of exit (2" x 2" x 3" in size) with regged irregular margins which were averted 5 inches below the left elbow joint on the posterior aspect of the wound of entrance.

e) A lacerated wound (4" x 2" x 4" in size) on the 4th and 5th lumbar vertebrae with ragged, irregular and everted margins.

The opinion of the doctor as stated in his statement during GCM was as under :

There was no other external injury apart from those mentioned above on the body of the deceased.

Smoke halo is an expression of the burning or singeing of the hairs as well superficial tissues implicated therein.

In my opinion all the external injuries sustained by the deceased could have been caused from a close range of about 3 feet. Smoke halo does not occur on wound of exit.

In my opinion, all the injuries sustained by the deceased were gun shot wounds and were sufficient in ordinary course to culminate in death of the deceased.

The injuries sustained by the deceased showed that he had sustained three bullet injuries. From the nature of the injuries observed, I opine that the deceased could have survived for sometime after sustaining the injuries."

4. During GCM, 24 witnesses were examined. The defence of the petitioner was that it was an accidental firing. During Court of Inquiry and summary of evidence, there was no eye witness of this incident. However, during GCM, the prosecution has examined PW 23 Hav Satpal Singh as an eye witness. After appreciation of evidence, the GCM recorded its findings as under :

FINDINGS

1. It is proved from the evidence of Maj Prabhat Chandra (PW-1) and Dr. Ramesh Chandra Gupta (PW-6) that Sep. Laxman Prasad Yadav died on 23 Feb. 95 as a result of gun shot wounds in the chest.

2. There is sufficient evidence, direct and circumstantial, to establish that the accused had fired at L/Nk Laxman Prasd Yadav (the deceased) with intention to kill him.

3. The evidence of PS2. 11, 13, 22 and 23 reveals that at Jang post, on 23 Feb. 95, the accused had fired two bursts. The first longer burst was fired in front at the deceased. The second burst was shorter which the accused had deliberately fired on his feet to shield his offence. The position of bullet marks in the corridor, door frame and the wall of cook house cum living room, scattered fired cartridge cases in the corridor as well as inside the cook house cum living room total number of bullets fired (13) and the rifle (ME-1) resting against the wall corroborate the evidence of the above witnesses.

4. The evidence of Hav. Satpal Singh (PW-23) vividly depicts that the accused had fired first burst at the deceased with his AK-56 rifle (ME-1) from a close range of 2 ½ to 3 feet.

5. The relations between the accused and the deceased had become strained due to complaints of improper disposal of kerosene oil and ghee tin, irregular issue of payment rum, cutting of Rs. 5/- for condiments and visits of the accused to Jang village alone after sending peripheral patrol around the village along the ridge. Line (Evidence of PW2 17,11,12,13,14,16 and 18 refers).

6. The evidence of PWs 2,3,4,5,7 and 8 reveals that the accused used to roam around in the village all alone and trouble the womenfolk due to which some villagers went to Gundoh and complained to PE-9 against him.

7. When PW-1 visited the Jang post on 23 Feb, 95 to investigate the complaints against the accused, the fear of being exposed by the deceased on account of all such irregularities' and improprieties as mentioned in paras 5 and 6 above, served as motive for the accused to get rid off the deceased.

8. The evidence of Spr C. Manjunath (PW-24) reveals that on 23 Feb. 95, the deceased had informed him about the visit of PW-1 to the post about half an hour to one hour before his arrival on the post. Possibly the accused also knew about the visit of PW-1 and due to fear of being exposed was seen in serious mood by PW-10 and 12, as corroborated by PWs 22 and 23 Thus the accursed had enough time and opportunity to cock his rifle to execute his intention to kill the deceased.

9. Besides the evidence of motive, the following evidence proves the intention of the accused to kill the deceased :-

a) Immediately after the firing the deceased while falling down, was heard shouting, MAAR DIYA SAHAB, KYA KAR DIYA SAHAB (Evidence of PWs 10,11,12,13,14,16,22 & 23 refers). Variations in the evidence of prosecution witnesses as to the words spoken by the deceased may be due to innocent fallacies of human memory.*

b) While being given first aid at the Jang post, PW-12 heard the deceased saying, HAYAT SAHAB NE HAMARE UPAR FIRE KIYA HAI."

c) The nature, extent and location of the injures sustained by the deceased and the nature of weapon (AK-56 rifles) used

for commission of the offences lead to definite inference of intention to kill or to cause such bodily injury as was sufficient in ordinarily course of nature to cause death. The evidence of PWs 6 and 19 shows that the deceased was facing the weapon of offence and was fired upon from a close range of 3 feet. The location of wounds of entry on the chest which were at higher level than the wound of exit on the back implies, as opined by PW-19, that the barrel of the rifle was pointing downwards towards the chest of the deceased and precludes the theory of accident advanced by the defence. PW-9 has also deposed that 13 bullets cannot be fired accidentally from AF-56 rifle.

10. The court is convinced that the snow boots (ME-35) are not the same which the accused was a wearing at the time of the incident. The prosecution should have taken the due care not to produce such fake evidence nevertheless, the court is of the view that even if the actual snow boots worn by the accused were produced, it would not have made any difference to the case and is further of the view that evidence of fake snow boots (ME-5) alone does not demolish the credibility of other prosecution evidence, which is reliable and trustworthy.

11. The evidence of PW-23 is a natural and probable catalogue of events and finds corroboration from the evidence of PWs 6 and 19. The Court has duly considered various discrepancies and inconsistencies in the evidence of various Army witnesses from their previous statements and feels that for some reasons, these witnesses had concealed the truth earlier but while deposing before the court, they have given out true facts.

12. Keeping in view all the circumstances and evidence, the court is satisfied that the charge against the accused stands proved beyond reasonable doubt. The accused is accordingly found guilty of the charge under Section 302 of Ranbir Penal Code."

5. The finding of the GCM and punishment awarded were confirmed. Feeling aggrieved by the said punishment order, the petitioner preferred pre confirmation appeal which was

rejected and thereafter Writ Petition No.4193 (Civil) of 1998 before the Hon'ble High Court of Delhi and after its transfer to this Tribunal, it was renumbered as T.A.No.59 of 2011 and the amended prayer of the petitioner were as under:

> *"(i) to quash/set aside the order dated 16.1997 passed by the General Court Martial (GCM) against the petitioner and confirmed by the confirming authority.*
> *(ii) to issue order/direction to the respondents to treat the petitioner as having continued in service without any break and entitled to receive all consequential benefits such as salary, allowances, promotions etc.*
> *(iii) to issue order/direction to the respondents to grant the service pension to the petitioner from the likely date of his superannuation/retirement in the rank that he would have been promoted to but for his conviction by the GCM.*
> *(iv) to award exemplary/adequate compensation to the petitioner as against the respondents for the precious 13 years of his life, which the petitioner had to spend in Jail and to suffer the social ignominy along with his family members, due to his illegal conviction by the said GCM.*
> *(v) to award of the cost of this petition.*
> *(vi) And to grant any other relief which the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."*

6. The submission of the learned counsel for the petitioner is that Section 15 of the Armed Forces Tribunal Act, 2007 is quite different from the general provisions which deals with the powers of the appellate court given under the Code of Criminal Procedure. He has also argued that in this case, initially the finding of the Court of Inquiry that it is an accidental firing case and no one can be blamed for it, accordingly, tentative charge sheet was framed against the petitioner. Initially five witnesses were examined, who corroborated the initial version of the incident as emerged during the Court of Inquiry, but thereafter the prosecution has taken a somersault and has made all out efforts to project this

accidental case into a cold blooded murder. Several public witnesses were also examined to malign the character of the petitioner to infer that the petitioner had motive to commit this offence as he was apprehending some enquiry against him, in which L/NK Laxman Prasad may appear as a witness. The prosecution did not stop even at this stage and in the GCM, one witness PW 23 Hav Satpal Singh of 12 Rashtriya Rifles has been examined as an eye witness. However, he did not appear either in Court of Inquiry or in Summary of Evidence in support of the case of the prosecution. After a long period of about two years, for the first time during GCM, he appeared as witness. He was neither examined as a witness in the Court of Inquiry nor during the summary of evidence, but only at the fag end of the GCM, a direct evidence was created by the prosecution, which has no credibility.

7. The submission of the learned counsel for the petitioner is also that the eye witness account on which the prosecution placed reliance and which has been relied upon by the GCM, was not the least reliable. Learned counsel for the petitioner has taken us through the Court of Inquiry, summary of evidence and thereafter the evidence recorded during GCM and has argued on the basis of the evidence that from the point when the additional witnesses were called during the summary of evidence, the prosecution made a plan to turn the accidental case into a case of murder and has accordingly created this false evidence. He has also argued that the petitioner himself had sustained two bullet injuries in both his feet. At that time, he was putting on snow boots, but the prosecution did not produce these boots and produced another shoes in the GCM as material evidence, but the GCM has rightly discarded the said piece of evidence holding it as fabricated evidence.

8. On behalf of the respondents, it has been argued that in this case it is admitted case of the petitioner that accidental firing took place from the rifle of the petitioner due to which, deceased L/NK Laxman Prasad sustained injuries and died. It is submitted that the case of the accused is that it was a case of accidental firing, while according to the evidence, he had a motive to commit this offence as he had enmity with the deceased due to complaints of shortage of ration and also with regard to complaint of the petitioner regarding the unauthorised visit to the nearby village and the allegation of attempt to outrage the modesty of the ladies of the said village. He has also argued that there is direct evidence of this incident and the GCM has rightly held the petitioner guilty and has rightly convicted the petitioner for the offence of murder.

9. Before proceeding further, we would like to give brief statement of the evidence recorded during the GCM.

10. PW 1 is Major Prabhat Chandra, the Company Commander. He was also examined during the Court of Inquiry and summary of evidence, wherein he has not given any evidence regarding any enquiry against the petitioner, but in the GCM he has stated that he had gone to carry out some enquiry against Hayat Singh Bankoti under the telephonic direction of Major VC Muthai, the Adjutant of the Unit, who had given him the name of some civilians. This witness has produced the rifle AK 56 in sealed condition and has stated that at the time he took the rifle in his possession, the safety catch was on auto position. He has also stated that none was tensed or worried before firing. The deceased did not blame the accused till he was in senses. This witness has also admitted that whatever he has stated during Court of Inquiry and summary of evidence is true. The rile was sent to ballistic

expert. He has given a statement that snow boots which the petitioner was putting at the time of incident, were found unserviceable and condemned by Board. Thus, this witness is not an eye witness.

11. PW 2 Shri Brij Lal, PW 3 Smt Godhi Devi, PW 4 Smt Santosh Devi, PW 5 Shri Nand Lal, PW 7 Shri Banshi Lal and PW 8 Shri Ram Kishan are civilian witnesses, who have deposed regarding the attempt of the petitioner to outrage the modesty of the ladies of the villages and have stated that they have made a complaint to the higher authorities. However, several contradictions were found in their statements. Thus, the evidence of these witnesses is only with regard to character of the petitioner and not with regard to the manner in which the incident took place.

12. PW 6 Dr Ramesh Chandra Gupta, has conducted the post mortem examination, the details of which has been given in the earlier part of the judgment.

13. PW 9 is Major VC Muthai, who has stated that civilians made complaints to him. After his investigation on 06.03.1995 and 09.03.1995, he found that it was a cold blooded murder. He has also stated about his findings of investigation. He has also stated that AK 56 rifle cannot fire even if the safety catch is in auto position unless it is cocked. He has also stated about the SOP which lays down the precautions to be observed while handling fire arms.

14. The fact that there was a SOP to this effect regarding the precautions to be observed in handling the weapons, has not been challenged during cross examination on behalf of the petitioner.

15. PW 11 Gdr Pradeep Kumar of 12 Rashtriya Rifles has stated that there were two bursts, first burst was of approximately of 7 to 8 bullets and the second burst was of 4 to 5 bullets. He heard the noise of the bursts. He is also not an eye witness. There was gap of about one second in the two bursts.

16. PW 12 is Sep Satya Swrup Singh of 12 Rashtriya Rifles. He has stated that there was one burst of fire. He has also stated that the deceased said what are you doing sir. He has also stated that Major Prabhat Chandra asked the accused as to how it happened, then he said "SAHAB MERE SE HUA". He has also stated that the relationship between the deceased and the petitioner was strained. However, on this point, he has given contradictory statement in the Court of Inquiry and summary of evidence. He has also stated that the accused used to threaten him and to kill him. There was also contradiction on the point of utterance made by the deceased. He has also stated that during Court of Inquiry, he has told the officer that the accused had threatened him, but it does not find support from the record.

17. PW 13 is Sep Mahinder Singh of 12 Rashtriya Rifles. He has produced two snow boots which the petitioner was putting out at the time of the incident. However, the GCM has recorded a specific finding that these snow boots are fabricated piece of evidence.

18. PW 14 Sep Dhol Singh of 12 Rashtriya Rifles has stated about the continuous burst of AK 56. He has also stated that AK 56 rifles was issued only to the petitioner and not to any other person in the Platoon. He has also stated that the accused did not threaten him after the incident and he was not aware of any complaint against any accused or any post personnel by

anyone prior to the incident. He has also stated that he did not hear deceased L/NK Laxman Prasad making any utterance. He has specifically stated that it is incorrect to say that L/NK Laxman Prasad said "SAHAB NE MAAR DIYA". He has also stated that to his information, there was no complaint against any shortage of ration or any complaint made against the petitioner by any person.

19. PW 15 is Hav Ram Phal of 12 Rashtriya Rifles, who has stated that he had issued one AK-56 rifle on 15.11.1994 to the petitioner and the same was deposited back in the Kote on 27.02.1995. 140 live rounds of AK-56 were issued to the petitioner and on 27.02.1995, 13 fired cartridge cases and 127 live cartridges were deposited.

20. PW 16 Sep Narendar Kumar of 12 Rashtriya Rifles has also stated that he heard the noise of burst of fire. He has stated about the complaints made against the petitioner. Regarding the contradiction in the Court of Inquiry, this witness has stated that the accused had asked him to give correct statement, otherwise he will get him implicated. He has also stated that he cannot say that there was a tension between the accused and the deceased and they used to talk normally.

21. PW 17 Sub Kamal Singh of 13 Grenadiers has stated that Major Prabhat Chandra spoke to him on radio set and asked him about any such activity.

22. PW 18 Sepoy Sahabuddin of 12 Rashtriya Rifles has also stated about the earlier complaint and that he heard the burst of firing.

23. PW 19 is Capt PM Bhatt of 17 Para Field Regiment, who has given the first aid to the deceased. He has also stated about the injuries found on the body of the deceased and also on the body of the petitioner, which we would like to reproduce at this stage :

> *"I noticed the following injuries on the person of L/Nk Laxman Prasad Yadav :-*
>
> *a)* ***Forearm***.
>
> *i) One wound of entry on the left forearm on flexer aspect approximately 10 cm below the elbow joint 1 x 1 cm in size, inverted edges surrounded b blackish soot stains.*
>
> *ii) One wound of exit on the dorsum of forearm about 10 cm. below the left elbow joint 1.5. x 1.5 cm size. Bleeding was present at the entry and exit points both.*
>
> *b)* ***Chest***.
>
> *i) One wound of entry about 1 x 1 cm circular, inverted edges with black soot stains between the 5^{th} and 6^{th} lower ribs in mid clavicular line, with fresh bleeding.*
>
> *ii) One wound of entry 1 x 1 cm, inverted edges with soot stains over the subcostal margin at the level of 9^{th} rib with fresh bleeding.*
>
> *iii) One wound of exit 1.5 cm x 1.5 on the upper lumber region about 1 to 2 cm let of mid line, everted margins with bleeding.*
>
> *When I reached the post, L/Nk Laxman Prasad Yadav was already in hemorrhagic shock. He was groaning in pain while lying inside the house. He was not responding to my querries. Thereafter, I gave him necessary treatment. While treatment was on he became unconscious. I told Maj Prabhat Chandra to have him evacuated immediately to the road head where the ambulance was waiting.*
>
> *Then I attended to the second casualty i.e. Nb Sub Hayat Singh whom I identify as the accused present before the Court. He was lying on his bed in a separate room. I noticed the following injuries on his body :-*
>
> *a)* ***Left foot***.

i) Single entry wound on the dorsal (Upper) aspect at the base of Ist metatarsal about 1 x 1 cm inverted edges.

ii) Exist wound on the planter aspect 1 x 1 cm, everted edges, corresponding to the wound of entry. Fresh bleeding from both the entry and exit wounds.

b) ***Right foot****.*

i) Single entry wound at the base of right first matersal on thedorsal aspect, 1 cm x 1cm inverted edges.

ii) Exit wound on the planter aspect 1 cm x 1 cm everted edges corresponding to wound of entry.

iii) Gun shot wound on the lateral aspect of the right foot at about the same horizental level. It was about 1 cm deep from the surface cutting through the right edge of his foot. There was no separate wound of exit or entry in respect of this injury.

The general condition of the accused was stable. He could respond to my quarries. I asked him how it had happened. He replied, SAHAB GOLI LAGI HAI (Sir, I have sustained bullet injuries). When I asked him from which weapon he sustained the injuries, he replied that he sustained injuries from AK-56 rifle. At that time I made no further querry with him and gave necessary medical treatment. Thereafter, he was also evacuated to the road head and sent to ADS Doda by road in the ambulance. In Jan 96, when he came to me for remedical categorization, I asked him how he had sustained the bullet injuries on his feet, to which he replied that it was due to accidental fire.

From the nature of injuries on the body of L/Nk Laxman Prasad Yadav, I am of the following opinion :-

a) Since the wound of entries on the chest and forearm were on the front and the exit wounds were on the back side, it implies that the bullets had been fired from the front i.e. L/Nk Laxman Prasad was facing the weapon of the offence.

b) As regards the nature of the weapon, the injuries, could have been caused through a fire arm such as AK-56 rifle, as also confirmed by the accused.

c) The nature of the wounds i.e. presence of block soot and size of the wounds, suggests that the injured could from the muzzle of the weapon.

iii) Since the wound of entire were at higher level than the wound of exit on the chest, it suggests that the barrel of the gun of the assailant was pointing downwards towards the chest of L/Nk Laxman Prasad Yadav. It implies that the injuries sustained by L/Nk. Laxman Prasad Yadav were homicidal and not accidential."

24. PW 20 Major K Rajagopalan of 502 AD Group (SP) has stated that 3 to 5 days prior to the incident, Maj VC Muthai, the Adjutant, has informed him about the complaints. Admittedly, this witness was not present on the spot.

25. PW 21 is Sub Rambir of 12 Rashtriya Rifles, who has stated that in the summary of evidence, the statement of the accused was recorded by Maj MK Joshi. During summary of evidence, the accused was duly warned that he is at liberty to make any statement voluntarily. The accused said that he desires to make statement, so his statement was recorded on 19.04.1996 and the said statement has been produced by the said witness, which was marked as exhibit.

26. PW 22 is Hav Bhim Sen of 12 Rashtriya Rifles. This witness has stated about two bursts of fire. This witness came to Jung Post alongwith Major Prabhat Chandra during his visit to Jung Post.

27. PW 23 is Hav Satpal Singh of 12 Rashtriya Rifles. He has, for the first time from the date of incident, has given an eye witness account of the incident. This witness has also gone to Jung Post alongwith Major Prabhat Chandra, where the incident had taken place.

28. PW 24 is Spr C Manjunath of 12 Rashtriya Rifles, who has stated that there was an argument between the accused and the deceased prior to the incident. However, no other witness at any stage has given such a statement.

29. The accused in his statement, after conclusion of the prosecution witnesses, has stated that he had not cocked the rifle and he does not know who cocked his rifle which was lying in his room.

30. Regarding the probability of PW 23 having seen the incident, we would like to quote certain part of the evidence of PW 9 Major VC Muthai, who had made an investigation in this case and has given his finding in his evidence during GCM. His first finding was as under:

> *"The following emerged out of my investigation from the post personnel:-*
>
> *a) No one had seen the alleged accidental firing."*

31. Thus, according to the finding of PW 9 Major VC Muthai, who had made the investigation at the place of incident, no one had seen the incident, but even after this statement of Major VC Muthai, the prosecution has examined PW 23 Hav Satpal Singh of 12 Rashtriya Rifles as an eye witness. This witness had accompanied Major Prabhat Chandra. He has remained silent for a very very long period of two years and thereafter he has been produced to depose in the GCM. He did not disclose this version to PW 1 Major Prabhat Chandra. On this point, we would like to consider the legal position. Hon'ble Apex Court in the case of **State of Orissa vs Brahmanand Nanda** (1976 STPL (LE) 8525 (SC) has considered this aspect and has rejected the testimony of a

witness, who remained silent only for about two days after the incident.

32. Findings of the GCM shows that it has placed reliance on the direct evidence of PW 23 and also on circumstantial evidence. This witness came with PW 1 Major Prabhat Chandra. PW 1 in his evidence has nowhere said that PW 23 has seen the incident. Apart from it, PW 9 VC Muthai has concluded after investigating the site on two occasions that no one has seen the incident. In this background, reliance on the evidence of PW 23 as eye witness account ought not to have been placed. Evidence of PW 23 has absolutely no substance of truth, he was not the least reliable.

33. Once we excludes the direct evidence of PW 23, then there remains only the circumstantial evidence as no one has seen the incident. We find substance in the submission of the learned counsel for the petitioner that initially during the Court of Inquiry it was found that it was a case of accidental firing and accordingly, FIR was lodged. We are surprised to note after perusal of the original record that the said FIR and also post mortem report are not on record, but as per the circumstances emerging by perusal of the evidence the said FIR was lodged under Section 304A RPC, because thereafter the tentative charge sheet was also framed against the petitioner under Section 69 of the Army Act read with Section 304A RPC. After framing of the tentative charge sheet till the five witnesses, who were examined during the Court of Inquiry, the prosecution version remained the same, but thereafter additional summary of evidence was recorded, wherein the statement of several civilians were recorded and the witnesses already recorded, were also examined. From this very point i.e. recording the additional evidence the

prosecution story took a somersault and an effort was made to convert initial case of accidental firing into a cold blooded murder by bring on record the evidence of bad character of the petitioner on certain complaints against the petitioner and by making an effort to show that he had strained relationship with the deceased.

34. So far as the evidence on the point of strained relationship between the deceased and the petitioner is concerned, a careful perusal of the evidence shows that the witnesses have given a contradictory evidence on this point. So we do not consider it safe to place reliance on this evidence. Apart from it, there is evidence of several witnesses that after the incident, there was some utterance by the deceased. However, no one has stated that the deceased told any one that he had any enmity with the petitioner and he has deliberately aimed fire on him. Thus, the prosecution evidence on the point of strained relationship between the deceased and the petitioner also does not inspire confidence.

35. Admittedly, in this case, it has come in the evidence of PW 1 Major Prabhat Chandra that snow boots which the petitioner was wearing at the time of the incident, became unserviceable and the same were condemned. However, PW 13 Sep Mahinder Singh has produced the said snow boots during GCM and the same was marked as material Exhibit. At this state, we would like to again quote Para 10 the findings of the GCM, which is as under:

> *"10. The court is convinced that the snow boots (ME-35) are not the same which the accused was a wearing at the time of the incident. The prosecution should have taken the due care not to produce such fake evidence nevertheless, the court is of the view that even if the actual snow boots worn by the*

accused were produced, it would not have made any difference to the case and is further of the view that evidence of fake snow boots (ME-5) alone does not demolish the credibility of other prosecution evidence, which is reliable and trustworthy."

36. The above finding of the GCM gives rise to an inference that some one was interested in the conviction of the petitioner and to prove that it was a cold blooded murder. Therefore, not only the direct eye witness account was prepared, but the snow boots which the petitioner was putting at the time of incident, were also fabricated. That apart evidence of some altercation between the deceased and the petitioner was also introduced by PW 24 while no other witness has stated so.

37. Learned counsel for the petitioner has submitted that once the court has given an opinion that the material evidence i.e. snow boots were fabricated, then there was no occasion for the GCM to convict the petitioner. We do not find any substance in this submission of the learned counsel for the petitioner, because it was not an issue to be proved that the petitioner sustained injuries in both his feet. It was admitted by the petitioner that he received injuries in the feet. Apart from it, the word "material evidence" used by the learned counsel for the petitioner with reference to the material Exhibit (ME) was misleading. It was only an observation made by the GCM that material Exhibits in the form of snow boots, was a fabricated evidence, therefore, it was absolutely open to the GCM to appreciate the remaining evidence ignoring the said piece of evidence in the form of material exhibit. Law is settled on the point that it is only the oral evidence of the witnesses which is substantial evidence. Once we find that the evidence of eye witness account given by PW 23 is unreliable, then legal point

is whether in such a condition, can the case be decided on the basis of the circumstantial evidence.

38. Law is settled on the point that where the prosecution intends to prove its case by direct evidence and it fails to prove the case by direct evidence and the circumstances appearing in the prosecution evidence are sufficient to establish the guilt of the accused, then it would be absolutely lawful for the court to proceed with the finding on the basis of such circumstantial evidence. At this juncture, we would like to refer the standard which are required to be proved in a case on the basis of circumstantial evidence. Hon'ble Apex court in the case of **Geejaganda Somaiah vs State of Karnataka** (2007) 9 SCC 315. Relevant Paras 11, 12, 13 and 14 are quoted below:

> *"11. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan, AIR (1977) SC 1063, Eradu v. State of Hyderabad, AIR (1956) SC 316, Earabhadrappa v. State of Karnataka, AIR (1983) SC 446, State of U.P. v. Sukhbasi, AIR (1985) SC 1224, Balwinder Singh v. State of Punjab, AIR (1987) SC 350, and Ashok Kumar Chatterjee v. State of M.P. ,AIR (1989) SC 1890. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab AIR (1954)SC 621 it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.*
>
> *12. We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P., (1996) 10 SCC 193, wherein it has been observed thus:*
>
> > *"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature.*

> *Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."*

13. In Padala Veera Reddy v. State of A.P. AIR (1990) SC 79, it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

> *(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
>
> *(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
>
> *(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*
>
> *(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

14. In State of U.P. v. Ashok Kumar Srivastava (1992) Crl. LJ 1104, it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt."

39. Keeping in view the aforesaid guidelines, when we examine the evidence on record, then we find that following circumstances are established beyond doubt (1) that petitioner being a Platoon Commander, was the only person to whom AK-56 rifle was issued, (2) the incident has taken place within a closed area where no other person was present, (3), the firing took place from the rifle of the petitioner and in such firing, he has also sustained injuries, (4) the defence of the petitioner is that his rifle fired accidently, (5) in his pre

confirmation appeal of the GCM, he has taken a ground that the case was only under Section 304A of RPC and not under Section 302 RPC, (6) petitioner made extra judicial confession before the person present there that "MERE SE HUYA" and (7) the petitioner was the only the person present there and the firing has taken place from his rifle, hence in view of Section 106 of the Indian Evidence Act, it was for the petitioner to explain as to how and under what circumstances, his rifle fired. Section 106 of Indian Evidence Act reads as under :

> *"106. Burden of proving fact especially within knowledge.— When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations."*

40. Hon'ble Apex Court in the case of **Sucha Singh vs. State of Punjab** (2001) 4 SCC 375) has considered the scope of Section 106 of Evidence Act in Para 19 as under :

> *"19. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference."*

When we examine the evidence on this point, then it is clear that the petitioner has admitted that the firing had taken place from his rifle accidently. Safety lock was on auto position, but he had denied that he has not cocked his rifle. Who cocked his rifle, he does not know. But it also reflects his negligence in handling weapons as he left it at a place where it was accessible to any one.

41. Admittedly, in this case, the circumstances appearing in evidence unerringly points towards the fact that the rifle of the petitioner accidentally fired due to two reasons i.e. (i) the safety cock was in auto position and (ii) the rifle was cocked. to which L/NK Laxman Prasad sustained bullet injuries and the petitioner also sustained injuries in his both feet. As we have discussed in the earlier part of the judgment, there are circumstances which justifies that an effort was made to convert the case into an intentional murder. Therefore, the rule of caution burdens us to scrutinise the evidence with utmost care and caution.

42. A perusal of the finding of the GCM shows that the GCM has placed reliance on the evidence of PW 12 Sep Satya Swrup Singh, who in his statement has stated that the deceased uttered "HAYAT SAHAB NE MERE UPAR FIRE KIYA". We have carefully examined the statement of PW 12 Satya Swarup Singh. In his examination-in-chief, he has stated that at the time the first aid was being given to the deceased, he heard that "HAYAT SAHAB NE MERE UPAR FIRE KIYA", but PW 1 Major Prabhat Chandra, who has continuously accompanied the deceased till his evacuation to the ADS, has specifically stated that the deceased did not name the accused till he was in senses. Apart from it, PW 19 Capt PM Bhatt, who has provided the first aid to the deceased, has stated in his examination-in-chief that when I reached the post, L/Nk Laxman Prasad Yadav was already in hemorrhagic shock. He was groaning in pain while lying inside the house. He was not responding to my queries. Thereafter, I gave him necessary treatment. This witness has also stated that he was given information by Major Prabhat Chandra, who was already there. Thus, according to this witness, who has provided first aid to L/NK Laxman Prasad, he was not in a position to speak and

was not replying to the queries of the doctor. Apart from it, Major Prabhat Chandra, who admittedly remained continuously there, has given a specific statement that deceased did not name the accused. We are really surprised that ignoring these two important piece of evidence of responsible officers, how the GCM placed reliance on the statement of PW 12 Sep Satya Swrup Singh that L/NK Laxman Prasad said "HAYAT SAHAB NE MERE UPAR FIRE KIYA". This witness has stated that he heard these words at the time of the first aid while the doctor giving first aid says that he was not replying to his queries. In the back ground of this case, when the efforts were being made to convert a case of accidental fire into a cold blooded murder, this statement of witness appears to be a blatant lie, on which no reliance can be placed. No other personnel of the Platoon, who was present there, has stated that such statement was given by L/NK Laxman Prasad.

43. In this case, as we have already enumerated several circumstances, which stand established by the evidence on record coupled with the extra judicial confession of the petitioner before several witnesses. During evidence, several witnesses have deposed that the accused stated that MERE SE HUYA. The petitioner was not in custody at that time and it is nowhere the case of the petitioner that he made such a statement under any pressure, coercion or threat, therefore it was a voluntary extra judicial confession made by the petitioner. An extra judicial confession is an evidence, if found voluntarily can be relied on. Hon'ble Apex Court in the case of **Baldev Raj vs State of Haryana** [1991 (Supp) 1 SCC 14] has held in Para 9 as under :

> *"9. An extra-judicial confession, if voluntary, can be relied upon by the court along with other evidence in con- victing*

the accused. The value of the evidence as to the confession depends upon the veracity of the witnesses to whom it is made. It is true that the court requires the witness to give the actual words used by the accused as nearly as possible but it is not an invariable rule that the court should not accept the evidence, if not the actual words but the substance were given. It is for the court having regard to the credibility of the witness to accept the evidence or not. When the court believes the witness before whom the confession is made and it is satisfied that the confession was voluntary, conviction can be rounded on such evidence."

44. Learned counsel for the petitioner has vehemently argued that under Section 15 of the Armed Forces Tribunal Act, 2007, certain conditions have been specified whereby it has been made mandatory for the Tribunal to allow the appeal. He has drawn our attention towards sub-section (4) of Section 15 of the Armed Forces Tribunal Act, 2007, which reads as under :

"15 (4) The Tribunal shall allow an appeal against conviction by a court-martial where—

(a) the finding of the court-martial is legally not sustainable due to any reason whatsoever; or

(b) the finding involves wrong decision on a question of law; or

(c) there was a material irregularity in the course of the trial resulting in miscarriage of justice, but, in any other case, may dismiss the appeal where the Tribunal considers that no miscarriage of justice is likely to be caused or has actually resulted to the appellant:

Provided that no order dismissing the appeal by the Tribunal shall be passed unless such order is made after recording reasons therefor in writing."

45. So far as sub-clause (a) of the above quoted section is concerned, the Tribunal has held the petitioner guilty, whether the offence falls within the purview of Section 302 or 304A RPC, it was not considered by the GCM.

46. We have given our anxious consideration to the aforesaid provisions and find that the finding of the Tribunal was that the petitioner was guilty. There is no finding of the GCM on any question of law, which can be said to be wrong nor there is any material irregularity in the trial resulting into miscarriage of justice. Therefore, the mandate of Section 15(4) of the Armed Forces Tribunal Act, 2007 will not apply in the facts of the instant case.

47. Earlier the dictum was that no innocent person should be punished, however hundred guilty may escape, but by the change of time, this dictum has changed and now the dictum is that no innocent person should be punished, but letting the guilty escape is also not doing justice according to law. A criminal offence is considered as a wrong against the State and society in particular, even though it is committed against an individual. A Division Bench of Allahabad High Court in the case of **State of U.P. vs Babu** (2007) 9 ADJ 107 has held as under:

> *"The duty of the Court of law is heavy in the sense that it should ensure that no innocent should be punished but simultaneously it is also under an obligation to see that no guilty person should escape from the clutches of law by taking advantage of co-called technicalities as this will not only lead to further serious threats to the entire society but may also shake the confidence of public at large in the system of dispensation of justice. Our experience has shown that exonerating a guilty person due to any reason whatsoever has caused more damage to the society since it has multiplied the occurrence of crime as well as has also produced more criminals attracting them to commit crime since easy acquittal has resulted in encouraging them to break law with impunity".*

48. A point that emerges for our consideration is whether the offence of the petitioner was of such nature, which would bring the case within the purview of Section 304 RPC or Section 304A RPC. At best it may be held to be a case of accidental firing. On the contrary, it is argued that the petitioner belongs to 12 Rashtriya Rifles and in the 12 Rashtriya Rifles, the best of Army personnel are deployed and they are required to observe the SOP while handing the fire arms. It is argued that to keep the safety catch on auto position, when not on duty and inside a shelf and protected room was a serious negligence on the part of the petitioner, specially so when the weapon was kept inside the resting place of Jung Post which was guarded by other personnel on duty.

49. Per contra, the submission of the learned counsel for the petitioner was that the area in which the Jung Post was situated was vulnerable to militant attack and there always existed a danger of militant attack at the Jung Post. So if in these circumstances, the petitioner has kept the safety catch in auto position, then his negligence cannot be termed to be of very grave as to bring this case within the purview of Section 304 RPC. It is pertinent to mention that by mere perusal of the rifle, it cannot be ascertained whether it is cocked or not.

50. We have examined this aspect in the light of the evidence on record.

51. So far as the submission of the learned counsel for the petitioner regarding the apprehension of the militant attack on the Jung Post is concerned, this apprehension stands substantiated to a large extent by the evidence of PW1 Major Prabhat Chandra, who has stated during GCM that hearing the noise of burst of fire, he thought that the militants have

attacked the Jung Post and accordingly, he made an enquiry from the guard of the Sentry post, who informed him that there was no such militant attack. Thereafter, PW 1 got an information that the noise of burst fire has come from within the house. It is also true that the petitioner's gun was kept inside the house and, therefore, he was supposed to keep its safety latch in lock position. It has nowhere come in evidence that at the time when the petitioner met PW 1 Major Prabhat Kumar outside the house and he was directed to prepare for the patrol duty for area familiarisation at the time he was not armed with his rifle. So the submission of the petitioner that there was always risk of militant attack, so he kept his rifle in auto position, does not inspire confidence, because had there been any apprehension of a sudden attack of militants, then the petitioner must have carried his rifle alongwith him, but while outside the house, when he met Major Prabhat Chandra, he was bare handed. So keeping the rifle inside the room on auto position, was definitely a gross negligence on the part of the petitioner. Admittedly despite being a Naib Subedar with more than 20 years service and vast experience, it is surprising that the petitioner had the ammunition loaded in the rifle when not on duty, failed to notice that the safety catch is not in safe position and did not make an effort to ensure that the rifle is not cocked and loaded. It is also clear that basics of weapon handling is taught to all soldiers indicates that the weapon should not point towards any friendly person or unintended target, therefore, the totality of the act of the petitioner in terms of keeping his rifle loaded when not on duty, not knowing that the rifle is cocked and not knowing that the safety catch is not in a safe position and handling the weapon in such a manner that the unintentional firing has resulted in hitting the chest of the person and killing him point to a high degree of negligence on the part of the petitioner amounting to criminal negligence

and professional incompetency as a soldier not expected from the rank of a person with over 20 years service and a Naib Subedar holding the position of Platoon Commander of a post.

52. It is established by the evidence that the Company Commander directed the petitioner, who was Platoon Commander to get ready within 5 minutes to go on patrol duty alongwith other persons. Thus, it is clear that the petitioner was in hurry to comply with the direction. So in these circumstances, a negligent act has been committed by the petitioner and this act of the petitioner cannot be said to have been done with any intention or knowledge. At this juncture, we consider it appropriate to compare with the provisions of Section 304 RPC and 304A RPC. Hon'ble High Court of Rajasthan at Jaipur in the case of **Abdul Kalam Musalman & ors vs. State of Rajasthan** (2010 SCC OnLine Raj 4354) has held as under :

> *"6. A bare perusal of these two provisions clearly reveals that they deal with the mental state or mens rea of the accused-person. While Section 304 RPC requires the existence of intention or knowledge, Section 304A RPC requires the existence of rashness or negligence. Therefore, it is imperative to understand the ambit and extent of the words intention, knowledge, rashness and negligence.*
>
> *7. Intention is doing of an act with the aim of achieving a particular purpose, or end, or consequence. Knowledge is the awareness of the consequences when an act is done in a particular manner. The words intention and knowledge have been an integral part of criminal statutes. However, the words negligence and rashness have been transplanted into the criminal arena from the law of Torts. According to the law of Torts, every person owes a duty towards his neighbor or towards his immediate surrounding to ensure that no harm or damage is done to the neighbor or the surrounding. When this duty is breeched by an act, of which the doer is unaware of the consequences, he said to have committed a negligent act.*
>
> *8. Halsbury's Laws of England (4th Edition) Volume 34 paragraph 1 (para 3) defines the words what constitutes negligence as under :*
>
> > *"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which*

ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence, where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger, the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two".

9. Though the term negligence has not been defined in the Indian Penal Code, it may be stated that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a reasonable and prudent man would not do.

10. In the case of Jacob Mathew Vs. State of Punjab & Anr. [(2005) 6 SCC 1], the Hon'ble Supreme Court distinguishes between the concept of negligence in civil and criminal law. It observed as under :

What may be negligence in civil law may not necessarily be negligence in criminal law. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law i.e. gross of of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

While negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. A clear distinction exists between simple lack of care incurring civil liability and very high degree of negligence which is required in criminal cases.

11. Rashness, on the other hand, consists of doing an act where the doer knows the consequences of his act, but hopes that the consequences would not follow. The word rashness has also not been defined inthe Indian Penal Code. However, in the case of Empress Vs. Idu Beg [(1881) ILR 3 All 776, Straight, J. made the following observation with regard to criminal rashness. His Lordship observed as under :

> *Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.*

These observations have recently been approved by the Hon'ble Supreme Court in the case of Mahadev Prasad Kaushik Vs. State of U.P. & Anr. [AIR 2009 SC 125].

12. Thus, the distinction between the rashness and negligence is that while in the former, the doer knows about the consequences, but in the latter, the doer is unaware of the consequences.

13. Undoubtedly, rashness does contain an element of knowledge. But a distinction has to be made between Section 304 RPC, requiring knowledge, with regard to the consequences of the act and Section 304A RPC, rashness, having an element of knowledge about the consequences, but with the hope that the consequences would not follow. In the case of Prabhakaran Vs. State of Kerala [JT 2007 (9) SC 346], the Apex Court had analysed the ingredients of Section 304A RPC as under :

> *5. Section 304A speaks of causing death by negligence. This section applies to rash and negligence acts and does not apply to cases where death has been voluntarily caused. This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash and negligent act. A negligent act is an act done without doing something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genes, (sic) of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately that the mischievous or illegal consequences may fall, but with a hope that they will not. Lord Atkin in Andrews v. Director of Public Prosecutions observed as under:*

> *"Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'recklessness' most nearly covers the case. It is difficult to visualize a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter; but it is probably not all embracing, for 'recklessness' suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction."*

53. Section 304-A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 RPC. The provision applies only to such acts which are rash and negligent and are directly cause of death of another person. Negligence and rashness are essential elements under Section 304-A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factors. A question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient considering all the circumstances of the case. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused.”

54. Keeping in view the aforementioned legal position, when we examine the facts of this case on the touchstone of the aforementioned legal principles, then the only conclusion that can be arrived at is that the petitioner has committed an offence which comes within the purview of Section 304A RPC. Section 304A RPC provides maximum punishment of two years or with fine or with both.

55. Keeping in view the facts of this case, we consider it appropriate that sentence of two years R.I. would meet the ends of justice.

56. So far as the other prayer of the petitioner is concerned, since the petitioner being a Platoon Commander, was highly negligent in holding the weapons and he has also been found grossly negligent which resulted into death of another Army personnel, therefore, we do not find any substance in the submission of the learned counsel for the petitioner that he should be notionally reinstated in service and should be granted benefit of pension.

57. It is to be noted here that the respondents can not be held responsible for the long custody of the petitioner. A wrong decision by a competent authority does not, by itself, entitle the petitioner for compensation. In this case bail application of the petitioner was rejected twice by Hon'ble High Court. It is only when the case was transferred to Armed Forces Tribunal, the bail was granted.

58. Accordingly, this T.A. deserves to be partly allowed and is hereby **partly allowed.** The conviction and sentence of the petitioner under Section 69 of the Army Act read with Section 302 RPC is hereby modified to Section 69 of the Army Act read with Section 304A RPC and the conviction and sentence

of imprisonment for life is hereby converted into conviction and sentence of two years' R.I.

Since the petitioner has already remained in custody, as stated by the petitioner for a period of about 13 years, therefore, he shall not be taken into custody to serve out his sentence.

The order of dismissal from service is hereby confirmed. However, the petitioner is not entitled to any other benefits.

No order as to costs.

(Air Marshal B.B.P. Sinha)
Member (A)

(Justice S.V.S.Rathore)
Member (J)

Dated: August , 2018.
PKG