

GAHC010105662019



2025:GAU-AS:1538

THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
(PRINCIPAL SEAT AT GUWAHATI)
WP(Crl.) No. 4/2019

Tupe Subhash, son of Namdev,
Aged about 48 years,
Resident of Banpuri, Satara, Maharashtra.

.....Petitioner.

-Versus-

1. The Union of India,
Through the Secretary, Ministry of Home Affairs,
New Delhi-1.
2. The Director General, Border Security Force,
Block No. 10, CGO Complex, Lodhi Road,
New Delhi- 110003.
3. The Special Director General of Border Security
Force, (Eastern Command) 20/1, Gursaday Road,
Kolkata-19.

4. Inspector General, Border Security Force,
M & C Frontier, Masimpur, Silchar,
Cachar, PIN- 788014.

5. Commandant, 111 Battalion,
Border Security Force, Satakha,
Nagaland.

.....Respondents.

Advocates for the appellant: Mr M Phukan,

Advocate for the respondent: Ms B Sarma.

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 10.12.2024.

Date of judgment : 14.02.2025

JUDGEMENT AND ORDER (CAV)

(Susmita Phukan Khaund, J.)

Petitioner's case:

1. This writ petition has been filed under Article 226 of the Constitution of India for issuance of a writ in the nature of certiorari or mandamus or any other appropriate writ, order or direction of like nature, to set aside and

quash the impugned order of sentence dated 03.10.2013, passed by the General Security Forces Court (GSFC, for short), in connection with the "Trial of No. 900039263CT Tupe Subhash of 111 Battalion, BSF", convicting the petitioner under Section 302 of the Indian Penal Code, 1860 (IPC, for short) and sentencing him to undergo imprisonment for life and also the order dated 15.09.2024, passed by the respondent No. 3, confirming the findings of GSFC and other orders passed to the detriment of the petitioner.

2. Tupe Subhash (hereinafter referred to as the petitioner) has arrayed the Union of India, the Director General, Border Security Force-New Delhi, the Special Director General of Border Security Force-Kolkata, the Inspector General, Border Security Force- Silchar, Cachar and the Commandant of 111 Battalion, Border Security Force, Satakha, Nagaland, as respondent Nos. 1, 2, 3, 4 and 5 respectively. Through the impugned order, the petitioner was also dismissed from his services as a Constable of the Border Security Force (BSF, for short). The petitioner had joined the BSF on 15.11.1990 as a constable and during his tenure of service, the petitioner was posted at Nagaland and attached to 111 Battalion (Bn, for short) BSF at Nagaland. As soon as he joined the new Battalion at Nagaland, the petitioner requested for voluntary retirement from the forces and he was interviewed by the concerned Board

on 03.08.2012 and his prayer for voluntary retirement was allowed w.e.f. 31.12.2012, as the date of retirement from the force.

3. At Satakha, Nagaland, the petitioner was sharing his barrack with one Sagir Alam (hereinafter also referred to as the deceased). The petitioner got acquainted with the deceased Sagir Alam from 11.06.2012 and he had a friendly and cordial relation with the deceased Sagir Alam and in fact, he gifted a pair of running shoes to Sagir Alam, just after completion of their training. When the deceased learnt that the petitioner was addicted to alcohol and used to wet his bed and snore while sleeping, Sagir Alam started calling names ridiculing the petitioner. Sagir Alam also used to taunt that the petitioner had contracted HIV AIDS to the annoyance of the petitioner and when the petitioner used to detest such sarcasm, Sagir Alam used to ignore the petitioner. When the petitioner used to express his disapproval Sagir Alam used to ignore him. On 14.08.2012, at 1600 hours, when the petitioner was standing outside his barrack Sagir Alam suddenly started abusing the petitioner, uttering obscene words and accused him of suffering from HIV AIDS. Annoyed by his behaviour, the petitioner immediately called his wife and informed her that he is being harassed by Sagir Alam and this may lead to disaster. The petitioner also informed another constable of the same

battalion, namely, Jitendra Patil (PW-10) that he was being harassed by Sagir Alam. These facts were brought on record by way of evidence, but the evidence was ignored by the GSFC.

4. Thereafter, on the same day, i.e., on 14.08.2012, as the petitioner was detailed as Guard Commander at Tentage Stores at BN HQ for night duty, the petitioner at around 1730 hours, went to the Quarter Guard to collect his weapon for night duty and he was issued an Insas Rifle with Butt No. 81. After collecting his weapon, the petitioner went to the Magazine to collect the ammunition and collected 40 rounds of 5.56 mm Insas bullets. The petitioner loaded his weapon with 20 (twenty) 5.56mm bullets and kept the remaining in his pouch for emergency. Meanwhile, the petitioner realized that he forgot his umbrella and the magazine and went back to bring the same. At that moment, when the petitioner returned to collect his umbrella Sagir Alam again started making fun of the petitioner and jeered at him. Sagir Alam passed lewd remarks about his wife and verbally abused the petitioner with obscene language, which infuriated the petitioner. In a fit of rage, the petitioner fired at Sagir Alam, which resulted in the death of Sagir Alam and another constable, named Varadagiri Chinna Raydu. The petitioner claims that he was not aware that the other person was also injured in the same

incident. The petitioner sustained bullet injuries on his chest and he recovered in the hospital.

4.1 An FIR was lodged by the Deputy Commandant of 111 Bn BSF, under Section 302 IPC, read with Section 25 (1) A of the Arms Act. The petitioner was taken into custody on "Closed Arrest", under Rule 33 (A) of the BSF Rules, 1969 and "Staff Court of Inquiry (SCOI)" was taken up vide order dated 16.08.2012.

5. On the findings and opinion of the SCOI on 28.08.2012, appropriate disciplinary proceeding was recommended against the petitioner for being responsible for the death of Sagir Alam and Constable Varadigiri Chinna Rayudu.

6. Vide order dated 31.08.2013, the Inspector General, FTR HQ BSF, convened a General Security Force Court, for trying the offence committed by the petitioner on 14.08.2012, wherein the members of the GSFC were appointed and detailed. On 18.09.2013, charges under Section 302 IPC were framed, read over and explained to the petitioner. Evidence was recorded. The petitioner submitted his written statement before the GSFC. In his written statement under the BSF Rules, the petitioner has stated that his act

of shooting Sagir Alam was a result of sudden and extreme provocation as he flew into a fit of rage on the remarks made by the deceased Sagir Alam about his wife. The petitioner has expressed his remorse and repentance for his act. At the conclusion of trial, the petitioner was held guilty on all the three counts, i.e., for

- i) Committing offence of murder under Section 302 IPC, of Sagir Alam,
- ii) Committing the offence of murder under Section 302 IPC, of Varadigiri Chinna Rayudu
- iii) Attempting to commit suicide.

7. It is submitted on behalf of the petitioner that the closing argument of the prosecution side was taken into consideration by the GSFC, while the argument on behalf of the petitioner was totally ignored by the Court. The confessional statement of the petitioner was also relied upon.

8. It is argued on behalf of the petitioner that the Court passed the order of sentence without following the principles of jurisprudence and failed to appreciate and collate the provisions of the IPC to the facts of the case. The

defending officer on behalf of the petitioner argued before the GSFC that the petitioner in a fit of rage and under grave and sudden provocation committed the offence. He ought to have been held guilty under the Exception I of Section 300 of the IPC and he ought to have been convicted under Section 304 of the IPC, instead of Section 302 of the IPC. It is submitted that despite the credible arguments on behalf of the petitioner, learned Court ignored the aspect of law and has erroneously held the petitioner guilty of offence under Section 302 IPC. Moreover, it is submitted that he learned Court went a step further and without any jurisdiction, passed the sentence of Imprisonment for Life and dismissal from service. An employee can be dismissed from service by the appointing authority and not by a Court dealing with cases under Section 302 IPC.

9. The petitioner prayed for commutation of his sentence and for passing an order for shifting him to the Central Jail, which is near his home, which was rejected vide order dated 15.09.2014, by the Inspector General, BSF. It is further submitted that the petitioner, as per the provisions of BSF Act and Rules, preferred pre-confirmation petition dated 05.10.2014, which was attended to, by the Inspector General, BSF.

10. It is further contended that while passing the aforementioned order, the respondent authorities once again re-appreciated the evidence led before the GSFC and it was affirmed that the petitioner had intentionally committed the murder of Sagir Alam and the erroneous findings of the GSFC was thus, upheld. Thereafter, on 14.10.2014, the GSFC promulgated the findings and sentence passed against the petitioner and confirmed the sentence. Since then, the petitioner has been lodged in the Central Jail at Dimapur, to carry out his sentence for imprisonment for life and since then, he has been languishing in the jail.

11. It is further submitted that the petitioner approached the respondent No. 2 with a petition and prayed earnestly that the post-confirmation petition be taken on record and the respondent authorities may be pleased to decide the merits of the case as stated in the petition filed before the respondent No. 2. The petitioner has also prayed that the order dated 15.09.2014, passed by the IG, BSF, dismissing the pre-confirmation petition, be set aside and quashed, as he committed the offence basically on grave and sudden provocation and no *mens rea* could be attributed to him.

12. It is submitted that the respondent authorities are yet to pass any

order on the post-confirmation petition filed by the petitioner. The petitioner forwarded the post-confirmation petition (dated NIL), through his friend, who has assured him that the petition has been dispatched to the appropriate authority.

13. It is submitted that the petitioner had an unblemished career and the behaviour of Sagir Alam towards him precipitated in such an untoward incident. In fact, Late Sagir Alam had earlier made fun and jeered at the petitioner to his annoyance. On the fateful day, i.e., on 14.08.2012, the deceased ridiculed the petitioner to such an extent, which was beyond his tolerance and which resulted in the untoward incident.

14. It is further submitted on behalf of the petitioner that the opinion of the GSFC was that the words used by Late Sagir Alam were not so grave to provoke the petitioner to such an extent and the petitioner intentionally caused the death of Sagir Alam and Varadagiri Chinna Raydu without any grave or sudden provocation.

15. It is submitted that the Court has erroneously held the petitioner guilty, as the petitioner deserves a lesser sentence for a lesser offence. The Court has totally ignored the abuses hurled by his fellowmate Sagir Alam

continuously and this act on 14.08.2012, was the last straw that broke the camel's back. The Court has totally ignored that all along the petitioner had maintained a friendly relation with Sagir Alam and the other unfortunate individual, Varadagiri Chinna Raydu was not at all in the scene.

16. It is further emphasized that to commit an offence, two elements must be in existence, i.e., *mens rea* and *actus reus*. It is further argued that in fact, the prosecution has proved beyond a reasonable doubt that one of the deceased hurled abuses at the petitioner not once, but on several occasions and on the relevant day, the deceased went to the extent of hurling abuses twice on the same day.

17. It is further submitted that the petitioner is the sole bread winner of his family with a minor son to be nurtured.

18. It is further submitted that the petitioner's wife is ailing and this is a fit case where the petitioner's unblemished conduct in service can be taken into consideration. The petitioner has contributed 20 years of his life in service to the BSF without a blemish and he deserves that his grievance is taken into consideration.

19. It is further submitted that the petitioner is not praying for exoneration,

but for an appropriate sentence, in accordance with law.

Case of the Respondents:

20. All the respondents have jointly filed the affidavit-in-opposition. It is admitted that the petitioner has served as a constable in the BSF for 21 years and he joined 111 Bn, BSF, at Satakha in Nagaland, on 25.05.2012. At 13th Bn, BSF, he was performing general duties in 'A' Coy since his posting and he underwent Coy collective training from 11.06.2012 upto 21.07.2012. On 14.08.2013, at about 17:45 hours, the petitioner turned up at the gate of unit magazine with his personal weapon, i.e., 5.56 mm Insas Rifle, Butt No. 81, Body No. 16624393, issued to him from Kote at 1730 hours for night guard duty at FWC (old tenth guard) and indiscriminately fired at 101325310 CT Sagir Alam and 111876114 CT Varadagiri Chinna Raydu, who were at that time filling their personal Insas Rifles with magazines in the verandah of the unit magazine for performing their night guard duties. It is further alleged that the petitioner was earlier issued 40 rounds of 5.56 mm Insas Rifle from unit magazine at 1720 hours, for night guard duty.

21. On hearing the commotion, Offg 21C, QM and Adjutant, who were in the office and the other troops rushed towards the place of occurrence and

found Sagir Alam and Varadagiri Chinna Raydu critically injured. They were immediately evacuated to the District Hospital, Zunheboto in unit ambulance after being provided with first aid by nurse. Meanwhile, the petitioner was overpowered by the other BSF personnel and taken to unit Quarter Guard, but injuries were detected on the petitioner below his left arm pit and he too was immediately evacuated to the District Hospital in another vehicle after being provided with necessary first aid. The place of occurrence was searched and 80 rounds, i.e., 40 rounds each of 5.56 mm Insas ammunition issued to Sagir Alam and Varadagiri Chinna Raydu, along with 4 magazines were recovered. 13 EFCs (Empty Fire Cases) and 26 live rounds of 5.56 mm Insas rifle, along with two magazines issued to the petitioner were recovered from the ground in front of the unit magazine. The Medical Officer of the District Hospital, Zunheboto declared both Sagir Alam and Varadagiri Chinna Raydu, as brought dead, whereas the petitioner was provided treatment and his condition was found to be stable. An FIR regarding this incident was lodged with the Police Station at Satakha vide L/No. Estt/Disc/111/2012/14942, dated 14th August, 2012. Spot investigation was carried out by the Civil Police of Satakha Police Station, immediately. As per advice of the Medical Officer, the petitioner was evacuated to Army Base

Hospital at Dimapur on 15.08.2012, by an army helicopter for further treatment and he was discharged on 22.08.2012. The petitioner was placed under suspension vide unit order dated 08.09.2012, which was reviewed and further extended vide order dated 05.12.2012 and the suspension order was revoked vide unit order dated 06.03.2013.

22. A Staff Court of Inquiry (SCOI) was ordered by Ftr HQ vide order dated 16.08.2012, to investigate into the circumstances under which the incident took place. The SCOI was conducted by Sh. U L Subramani, DIG, SHQ BSF, Aizawl. On the basis of the remarks of IG, Ftr HQ, on the SCOI proceedings, application was submitted before the District and Sessions Judge, Zunheboto, Nagaland, (dated 30.11.2012), to transfer the criminal case bearing No. 05/2012, under Section 302 IPC, read with Section 25 (1) of the Arms Act, for trial by the GSFC under the BSF Act and Rules.

23. The District Court, Zunheboto transferred the criminal case to BSF vide order dated 20.02.2013 and thereafter, charges were framed and as has been mentioned in the petition, the trial was concluded. Through this objection, the respondents have reiterated the details of the proceedings in the GSFC, till the conclusion of trial and the sentence passed by the Court. The

petitioner was held guilty of all the charges of indiscriminately firing at Sagir Alam and Varadagiri Chinna Raydu, i.e.,

- i) firing indiscriminately at Sagir Alam,
- ii) firing at Varadagiri Chinna Raydu, and
- iii) an attempt to commit suicide by self inflicting a bullet wound from the same 5.56 mm Insas Rifle.

24. It is apt to mention at this juncture that the petitioner submitted a pre-confirmation petition dated 05.10.2013, addressed to the DG, BSF. Though the petitioner had addressed the aforementioned pre-confirmation petition dated 05.10.2013, but in view of the provision of Section 117(1) of the BSF Act, 1968, read with Rule 167 (1) of the BSF Rules, 1969, one petition before confirmation can be submitted to the confirming authority. The Special DG (Eastern Command), BSF has been empowered by the Central Government as confirming authority to confirm trials by GSFC. Thus, the pre-confirmation petition was examined by the Offg Spl. DG, BSF EC in detail and it was observed that in view of the evidence brought at the trial and all other attending facts and circumstances of the case, the petitioner was sentenced to the minimum prescribed punishment for committing

murder and the pre-confirmation petition was rejected vide order dated 15.09.2014. The request of the petitioner for shifting him to a Central Jail near to his home town was taken into consideration and it was suggested through the order that the petitioner may be committed to civil prison. As such, he may submit a request in this regard to the jail authorities as per the provisions of law.

25. A copy of the letter was handed over to the petitioner on 14.10.2014 with proper receipt.

26. It is also pertinent to mention that the pre-confirmation petition was rejected on the same grounds, stating that the petition is devoid of merits. The petitioner was then handed over to the Superintendent of Civil Prison, Zunheboto, on 14.10.2014 to undergo the sentence awarded by the GSFC.

27. On 27.01.2017, an application of the petitioner dated 23.01.2017, was received by the unit, through which the petitioner requested to provide copies of the documents to file an appeal in the Court of law and the documents were provided to the petitioner, vide unit letter dated 31.03.2017, on 07.04.2017, on proper receipt. Thereafter the petitioner has filed this writ petition to set aside and quash the order passed by the Court on 03.10.2013

and also the order dated 15.09.2014, of the confirming authority and for directing the respondent authorities to restore the service benefits to the petitioner as available in law.

28. It is contended by the respondents that the UOI through Home, has been erroneously arrayed as respondent as the Home Secretary, MHA, is nowhere involved in the matter. It is also emphasized that the petitioner was tried by duly constituted GSFC, as per provisions stipulated under the BSF Act and Rules and appropriately sentenced to imprisonment for life and to be dismissed from service.

29. It is admitted by the respondents that the petitioner had applied for voluntary retirement on 31.12.2012, owing to domestic problems and his prayer for voluntary retirement was accepted by the Commandant of 111 Bn, BSF, w.e.f. 31.12.2012, with all the pensionary benefits to be endowed to the petitioner.

30. It is also averred that the petitioner never made any complaint to senior officials, either verbally or in writing against Sagir Alam's aggressive and delinquent attitude, despite the fact that the BSF, a disciplined armed force of the Union has a well-established grievance redressal mechanism in

conformation with the Rules and Act of the BSF SCORFORMATION. It has emerged for the first time when the confessional statement of the petitioner was recorded by the ADC (First Class Magistrate) that Sagir Alam used to taunt the petitioner and indulge in name calling to the annoyance of the petitioner.

31. It is averred that the petitioner has indiscriminately opened fire, endangering the life of not only Sagir Alam, but the other BSF personnel, which also resulted in the loss of life of one more person, i.e., Varadagiri Chinna Raydu.

32. It is alleged that it is not justified that the petitioner went amok with his service weapon and indiscriminately opened fire causing death of not one but two important individuals at one go. Now, the petitioner cannot take the cover of Exception under Section 300 IPC.

33. It is submitted that a meticulous investigation was carried out and the SCOI was presided over by none other than the DG. It is submitted that it is not a case under Section 304 Part-I or Part-II of the IPC, but this a fit case and the petitioner was properly convicted under Section 302 of the IPC and this is the reason that the findings of the Court were confirmed by the Special

DG, BSF EC on 15.09.2014.

Discussions and decision:

34. Heard Mr. M. Phukan, learned counsel appearing on behalf of the petitioner as well as Ms. B. Sharma, learned CGC for the respondents.

35. The arguments submitted by both the sides reiterates the petition and the written reply.

36. Learned counsel for the petitioner has submitted that the trial was not conducted by the proper forum. This Court is of the opinion that trial was conducted as per Section 80 of the Border Security Force Act, 1968, read with Rule 41 of the Border Security Force Rules, 1969. The order of the learned Sessions Judge, Zunheboto dated 20.02.2013, marked as Annexure-A of the petition, clearly reflects that the prayer of the applicant to refer the case to BSF, to try the case under BSF Rules was allowed. Both the parties were heard and the learned Additional Public Prosecutor (prosecution) had no objection for referring the case to BSF for trial under the BSF Act and Rules. The case was thereby allowed to be tried by the BSF Court under the order of the learned Sessions Judge, Zunheboto, Nagaland, with a direction to intimate the outcome of the trial.

37. The argument of the learned counsel for the petitioner that the GSFC has no jurisdiction to try this case, holds no water. Proper procedure was followed and the trial was conducted by the GSFC.

38. It apparent that the petitioner was accorded a fair trial. He was duly represented by his learned counsel. 18 witnesses were examined by the GSFC. The petitioner was also afforded an opportunity to submit his written statement. The defending officer was Sri Lima Tenjen, though not legally qualified. The petitioner, however, did not engage any civil counsel though he was informed that he had every right to defend himself. The evidence put forth by the examination of all the witnesses is not discussed in detail to avoid prolixity. For the sake of brevity, the relevant part of the evidence is discussed in a nutshell. The following witnesses were examined after the petitioner pleaded not guilty on all the three charges framed against him-

PW-1- No. 891328894 Subhash Chander of 111 Bn BSF.

PW-2- No. 850052925 ASI Prem Chand of 111 Bn BSF.

PW-3- No. Recruit Constable Sanjay Malviya of Batch No. 330-
Madhya Pradesh Police.

PW-4- No. 954030432 Constable Baljinder Singh of 111 Bn BSF.

PW-5- Dr Kanato T.

PW-6- IRLA No. 19770536- Sunil Saibam, DC (OPS) FHQ.

PW-7- Sri T Nungasang (EAC).

PW-8- Madhu Sarma-Scientific Assistant.

PW-9- No. 93633621 ASI GD Ugan Singh of 111 Bn BSF.

PW-10- No. 99003783 Constable Jitendra Patil of 13th Bn BSF.

PW-11- No. 101110019 ASI/Pharmacist Smarjit Pradhan of 111 Bn BSF.

PW-12- No. 08254052 Constable Rajender Singh of 111 Bn BSF.

PW-13- IRLA No. 1097754 Thephuvizo Mere of 111 Bn BSF.

PW-14- Dr S Manyau.

PW-15- No. 880090481-ASI Mahipal, 'F' Coy of 111 Bn BSF.

PW-16- No. 1098 UB (Unarmed) SIL Kughzhae Yeptho-OC, Satakha PS.

PW-17- No. 031002057 Constable/Armourer Partha Sarathi Ghosh of 57

Bn BSF.

PW-18- No. 02401447HC/Nursing Assistant Md Mojahid.

39. It could be deduced from the evidence of the witnesses that-

PW-1 reached the place of occurrence immediately after the incident.

PW-2 issued 40 rounds of 5.56 mm Insas ammunition to the petitioner for performing night duty at 07:20 pm. The issue register has been proved by this witness as Exhibit-N. PW-2 also heard the firing and he later saw the petitioner sitting in the verandah of the unit magazine and the rifle belonging to the petitioner was lying on the ground. PW-2 immediately raised alarm and he along with the help of Constable Baljinder Singh, PW-3 and Constable Sanjay Malviya, PW-4, disarmed the petitioner.

PW-3 also heard the fired shots and heard someone (PW-2) shouting- 'bachao, bachao'. He also saw PW-2 snatching the rifle from the petitioner and disarming him.

PW-4 witnessed the entire incident.

PW-6 heard the firing sound emanating from the unit magazine side and he rushed towards the spot. He saw some jawans evacuating two injured constables to the unit ambulance.

PW-9 also heard firing of gun shots emanating from the unit magazine side and he rushed to the spot and witnessed the disaster.

PW-12 witnessed the incident. He deposed that at about 17:45 hours, he heard the sound of a single shot fired and when he peeped outside, he saw a heavily built jawan firing at two constables, who were filling their magazines in the unit magazine verandah. Thereafter, the heavily built jawan (petitioner) again fired 2/3 rounds on the jawans. Then he heard Prem Chand (PW-2) shouting-'bachao, bachao'. He then went out of the Guard Room and saw constable Baljinder Singh and constable Sanjay Malviya holding the petitioner and Prem Chand (PW-2) was holding the Insas Rifle. Then, he saw the injured jawans lying in a pool of blood.

PW-13 heard the shots and by the time he reached the place of occurrence he saw the two injured constables being evacuated from the spot.

PW-18 also heard the sound of firing and somebody crying out- 'bachao, bachao'. He saw ASI/Pharmacist and HC/Nursing Assistant coming out from the unit room with first aid box and stretcher. He then picked up the oxygen cylinder and followed them.

40. The evidence of all the witnesses, PWs-1, 2, 3, 4, 6, 9, 12, 13, 18 and some more prosecution witnesses reveal that the witnesses saw two constables lying in a pool of blood in an injured condition. It could be deduced from the evidence that as the petitioner fired indiscriminately, the constables Sagir Alam and Varadagiri Chinna Raydu sustained the fatal injuries. They were helped into the ambulance by all the BSF personnel, They were carrying the stretchers to the ambulance. Meanwhile, the petitioner was confined by the BSF personnel present at the spot. His hands were tied up and he was confined.

41. It is also apt to mention at this juncture that the evidence of the witnesses also reveal that the petitioner sustained injuries on his chest and he too was taken for treatment. Now, it will be apt for this Court to narrow down to the point raised by the petitioner that he was provoked by the deceased Sagir Alam to act in the way he did. The petitioner has not denied

that he caused the death of Sagir and Varadagiri.

42. It is not denied by the petitioner that he fired at the deceased Sagir and Varadargiri. There are eye witnesses to this effect and PW-4 and PW-12 witnessed the incident.

43. PW-10 Jitendra Patil is the petitioner's friend. He deposed that on 14.08.2012 at around 17:15 hours, the petitioner called him on his mobile phone. He has been acquainted with the petitioner for the last four years and when their unit was deployed to Cooch Bihar, he learnt that the petitioner is from Maharashtra. As he (PW-10) is also from Maharashtra, they became good friends. The Unit moved to Koirengei in the month of May, 2012. Tupe Subash was posted at 111 Bn. BSF. On 14.08.2012, the petitioner, Tupe Subhash made 3-4 calls on his mobile phone. He received the calls made by the petitioner who asked him about his wellbeing. When he asked about the petitioner's wellbeing, the petitioner informed him that he was distressed as some jawans were harassing him. He (PW-10) then asked the petitioner whether he reported the matter to CHM, Coy. Comdr. or any senior officials and the petitioner informed him that he did not apprise anybody about such harassment. The petitioner also did not give the names of the jawans who

have been harassing him. The petitioner informed him that he had some altercation with the jawans and they might assault him. Then he (PW-10) advised the petitioner to meet Constable Vidhyadhar Kulkarni, who was also posted at 111 Bn. from 13th Bn. BSF or to report the matter to any other officer of the Unit. The petitioner repeatedly sought his (PW-10's) advice how to deal with the jawans who were harassing him and who may also assault him. The petitioner also informed him that some jawans were referring to him as 'AIDS patient'. He (PW-10) then advised the petitioner to go the doctor for a thorough checkup and thereafter, show the medical certificate of the doctor to the jawans to prove that he is not an AIDS patient. Then, the petitioner stated that "*Main hee kuch karta hoon.*" He (PW-10) then advised the petitioner not to get into trouble. The petitioner then asked him (PW-10) to inform his family members about his altercation with the jawans. He (PW-10) then informed the petitioner that he did not have their mobile numbers. The petitioner then informed him that he would himself inform his family members and disconnected the phone.

44. PW-10 further deposed that on the next day, Sri Amitab Panwar, 21C of his Unit called him and informed him that the petitioner shot dead two constables of 111 Bn., and the petitioner also sustained bullet injuries. He

informed Panwar about the entire conversation between him and the petitioner.

45. Highlighting the evidence of PW-10 and PW-13, learned counsel for the petitioner laid stress in his argument that the exchanges between the petitioner and the deceased Sagir, thus, led to the unfortunate incident. The evidence is loud and clear that the simmering situation provoked the petitioner to act in the way he reacted. The Jawan, who according to PW-10, was harassing the petitioner, was none other than Sagir Alam. This has been admitted by the petitioner in his written statement and in his statement as per Rule 93 and 93(2) of the Border Security Force Rules, 1969.

46. PW-13 Thephu Vizo Merrey, an Assistant Commandant has deposed that at the time of the incident, he heard the thud of two shots fired at that time. He reached the place of occurrence, i.e. the Unit magazine and saw some jawans holding a person and when confronted, they replied that the person fired at two constables. He noticed a pool of blood on the verandah, and some magazines and live rounds were lying scattered near the pool of blood. He asked for a rope and tied the hands of the person who fired the shots and took him to the quarter guard. He noticed a tiny hole on the left

chest of the injured jawan between the nipple and the sternum and blood was oozing out from the tiny wound but he could not figure out if it was a gunshot injury. When he asked the jawan, i.e. the petitioner, he noticed a comparatively larger wound below the left armpit of the jawan and blood was oozing out from the wound. Then he could ascertain that it was a gunshot injury. The jawan/petitioner was forcibly taken to MI room where the Pharmacist was present and first-aid was provided to the petitioner, who was referred to the District Hospital at Zunheboto.

47. PW-5 and PW-14 are the doctors and PW-15 and PW-11 are the Pharmacists. PW-16 is the Investigating Officer and PW-17 is the Armourer. Proper treatment was provided to the injured petitioner, who finally recovered from the injuries.

48. As per Section 134 of the Indian Evidence Act, the evidence of a single witness, if found reliable will suffice. In this case, we have the evidence of PW-10, who was aware of the harassment endured by the petitioner. Although PW-10 has not named the person tormenting the petitioner, the evidence of PW-10 and the statement of the petitioner leads us to believe that Sagir Alam was the tormentor.

49. It is further submitted that when several questions were asked to the petitioner on the evidence projected against him by the prosecution and when his statement was recorded, he had categorically stated in his answers to Question No. 3 that the deceased Sagir Alam used to taunt him for his snoring disorder. To Question No. 4, the petitioner has categorically replied that on 14.08.2012, he was ridiculed by Sagir Alam, for suffering from AIDS. He has categorically denied in his answers to Question No. 6 and stated that he had no intention to shoot him or any other person. This statement corroborates the evidence of PW-10.

50. Through his written statement, the petitioner has stated that he was enraged as Sagir Alam made fun of him for his weight and for having AIDS and for his snoring disorder. On the date of the incident, when Sagir Alam made fun of him, it was the last straw that broke the camel's back and he flew into a rage, which resulted in the disastrous incident. The written statements also depict that he was remorseful and he tried to take his own life after the unfortunate incident. Although the petitioner did not adduce any evidence in his defence, he submitted a written statement. He has also admitted in his answer to Question No. 24 that he had a conversation with Jintendra Patil- PW-10 and he informed him about the harassment he was

subjected to, by Sagir Alam and he informed Jitendra Patil about the harassment he was subjected to, by the deceased Sagir Alam and he admitted that he told PW-10, Jitendra Patil that as he was being harassed-"Main hi kuch karta hu" and immediately thereafter, the incident took place. Thus, it has surfaced through the evidence and the statements of the petitioner that prior to the incident, he was taunted by some Jawans and this provoked him to open fire at Sagir Alam, who was the Jawan, the petitioner was complaining about to PW-10.

51. I have scrutinized the impugned findings dated 03.10.2013, passed by the GSFC, along with the order dated 15.09.2024, confirming the sentence and the findings of the Force Court. It is not disputed that the petitioner is responsible for the death of Sagir Alam and Constable Varadagiri Chinna Raydu. The following has been elaborately discussed by the Court-

".....On reaching the Magazine morcha he saw Ct Sagir Alam and Ct Varadigari Chennarayudu were seen sitting close to each other and filling their magazines on the verandah of the Magazine. While he was searching for his umbrella, Ct Sagir Alam who was filling the magazine mockingly said the following words to the accused, "He makra Mottu major tum aur Das major chhutti ke douran apni aurat se sex nahi karta hoga aur hi koi karta hoga" and after saying this he spit at the accused. These words by Ct Sagir Alam, who was more than 20 years junior, involving purely personal matters between the accused and

his wife was so insulting and difficult to digest that the accused felt humiliated and hurt. His self-respect was at stake. It suddenly provoked him up to such an extent that he lost self-control of his senses which led him to immediately cock his rifle then and opened fire on Ct Sagir Alam.

As this issue is not under dispute and the accused admitted the issue hence, in the light of available evidence, the Court takes this issue that the death of No. 101325310 Constable Sagir Alam of 111 Bn BSF was caused by the accused by firing shots from 5.56 INSAS Rifle Butt No 81 Body No 16624393, at about 1745 hrs, on 14th Aug 2012 at Bn HQ, Satakha Nagaland as "proved".

52. It was held by the Court that there was sudden provocation due to which the accused (petitioner) fired on Constable Sagir Alam, but the Court did not believe the version that the accused passed some lewd remarks against his wife and these sentences were an afterthought. It was also held by the court that statements of PWs-7, 10 and 13, depict that there was provocation from the deceased, but the provocation was not to such an extent or not so grave that the petitioner deserves the benefit of Exception-1 of Section 300 IPC. It was held by the Court that the act of the petitioner falls under Clause-1 of Section 300 IPC.

53. It is also apt to mention that while discussing the issue on second charge, the learned Court has elaborately discussed that the petitioner made

a confessional statement before Sri T Nanseng Sangtam, PW-7, on 16.01.2013, at about 1430 hours, that on 14.08.2012, after collecting the Insas weapon, he was insulted by Sagir Alam with abusive words and on the very spot, he intentionally fired 14 rounds at Sagir Alam, but unfortunately another jawan constable, Varadagiri Chinna Raydu, who was alongside with Sagir Alam, was also shot by him.

54. The learned counsel for the petitioner has submitted that the Court has misconstrued that this intentional firing of 14 rounds at Sagir Alam, as murder being committed by the petitioner as death was caused intentionally, whilst what the petitioner meant was that he had fired 14 rounds, on being insulted by the deceased Sagir Alam. Thus, the sudden provocation by the deceased was evident and this has been ignored by the learned Force Court.

55. We find substance in the argument of the learned counsel for the petitioner.

56. The evidence of the witnesses clearly depicts that the petitioner had no intention at all to cause the death of Varadagiri Chinna Raydu, but unfortunately, Varadagiri also sustained fatal wounds, at the same time.

57. We agree with the findings of the learned trial Court that after firing 14

rounds at Sagir Alam and after causing the injuries on Sagir Alam and Varadigiri, the petitioner pointed the gun towards himself and opened fire. The petitioner also had to be taken for treatment. The evidence of Assistant Commandant, PW-13, Thephuvizo Mere, was relied upon by the Court to arrive at a decision that the petitioner tried to commit suicide. The learned Court relied on the evidence of PW-13, who stated that the petitioner who was taken on 14.08.2012, to the Zunheboto hospital for treatment was aggressive and he uttered words like-"leave me, I want to kill myself, I want to die." "Give me dah, I want to die, shoot me, I want to die." The learned Court although acknowledging that the petitioner confided before PW-13 that Sagir Alam insulted him and then he fired at him, but accidentally, Constable Varadigiri also succumbed to the injuries, was not considered to be a situation, where the petitioner was provoked by Sagir Alam to act in the way he did. It was held by the Court that the petitioner cannot be given the benefit of the Exception-1 of Section 300 IPC. It was held by the Court that the conduct of the victim Sagir Alam and the words uttered by him were not to such an extent as to cause sudden provocation and cause the death of the person, who gave the provocation. The Court, however, relied on the same set of evidence and held that the petitioner had no intention to kill Varadagiri

Chinna Raydu.

58. This Court agrees with the decision of the Force Court that the petitioner had no intention to kill Varadagiri Chinna Raydu. However, in the wake of the foregoing discussions, it is held that there was indeed grave and sudden provocation, which induced the petitioner to fire at the deceased Sagir Alam.

59. The petitioner has relied on the decision of Hon'ble the Supreme Court in Criminal Appeal No. 2232 of 2023, arising out of SLP CrI. No. 9777/2022, wherein vide order dated 01.08.2023, it has been observed that-

“12. It is not in dispute that the relations between the deceased on one hand, and the other members of the family consisting of the appellant, wife of the deceased, his son, the original accused, and Priyanka (PW-1) daughter of the deceased, on the other hand, were not cordial. If the testimony of PW-1 is read as a whole, it would reveal that her father and mother often quarreled. PW-1, in her evidence, has stated that the deceased Mast Ram fractured the leg of her mother during one of such quarrels, and a criminal case was also pending against him for the said offence. Her testimony would show that her father was residing separately in the old house whereas the three other members were residing separately. It is stated that, on the date of the incident, she got up at about 07.00 o'clock in the morning and asked her father to give Rs.500/- as she wanted to take part in the NCC Camp. Her father refused to provide the said amount. PW-1 narrated the said incident to her mother. Her mother asked her father to give the said amount to her. Even then, the father did not provide the said amount. Thereafter, a quarrel started between her father and mother. Her mother gave blows with a stick on the head and legs of her father. Her father sustained injuries, which led to his death.

13. It is to be noted that the weapon used in the crime is a stick which was lying in the house, and which, by no means, can be called a deadly weapon. Therefore, the possibility of the appellant causing the death of the deceased while being deprived of the power of self-control, due to the provocation on account of the deceased not agreeing to pay Rs.500/- to PW-1, cannot be ruled out.”

60. In the instant case too, the evidence of PWs-7, 10 and 13, clearly reveal that the petitioner on earlier occasion was also taunted by Sagir Alam and on the day of the incident, the victim passed such lewd remarks, which infuriated the petitioner and he flew into a rage and being deprived of the power of self-control, he fired indiscriminately and thus, caused the death of not one but two persons, at the same time. It is true that the offence is deplorable as two lives were lost at the same time, due to the act of the petitioner. The evidence also reveals that the petitioner was taunted on earlier occasions by Sagir Alam. On the fateful day, after calling names, Sagir Alam also spat at the petitioner.

61. The evidence of PW-13 also depicts the conduct of the petitioner after the incident, as per Section 8 of the Indian Evidence Act, 1872. It is apparent

that the petitioner was remorseful and he wanted to die after the incident and went to the extent of committing suicide. The petitioner was not successful in his attempt to commit suicide. However, his subsequent conduct reveals his state of mind. The facts and circumstances of this case clearly depicts that the incident cannot be termed as a cold-blooded murder, although two persons have died due to the unfortunate incident. Although the petitioner aimed and fired at Sagir Alam indiscriminately, unfortunately, Varadagiri Chinna Raydu came within the line of fire and sustained the fatal injuries, despite the fact that the bullets were not meant for him.

62. It is manifestly clear that the petitioner was provoked to act in an aggressive manner, on being provoked by Sagir Alam. Thus, the *mens rea* or intention to commit murder cannot be attributed to the petitioner. The sequel of events leads us to believe that this case was within Exception-1 to Section 300 of the IPC, which reads:-

Exception 1.—When culpable homicide is not murder.—
Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by

mistake or accident.

The above exception is subject to the following provisos:

—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

63. In view of the foregoing discussions, the conviction of the petitioner is scaled down to Section 304 Part-I of the IPC and he is sentenced to Rigorous Imprisonment for 10 years and a fine of Rs. 1,000/- and in default of

payment of fine, to undergo Rigorous Imprisonment of one month. The judgment and order dated 03.10.2013, in connection with the "Trial of No. 900039263CT Tupe Subhash of 111 Battalion, BSF", convicting the petitioner under Section 302 IPC and sentencing him to undergo Rigorous Imprisonment for Life, is hereby set aside. The period of detention already undergone by the appellant is set off with the period of custodial sentence.

64. In terms of the above observations, this writ petition stands disposed of.

65. Send back the LCR.

JUDGE

JUDGE

Comparing Assistantc