

(2002) 07 GAU CK 0003
In the Gauhati High Court
Case No : WP (C) No. 3352 of 1999

Abhimaya Basumatary

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 16-07-2002

Acts Referred:

Border Security Force Act, 1968 — Section 117
Border Security Force Rules, 1969 — Rule 151
Constitution of India, 1950 — Article 226, 227

Citation : (2003) 1 GLR 671 : (2002) 3 GLT 604

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : M.U. Mahmud and P.K. Tajukdar, for the Appellant; P.M. Choudhury, Addl. CGSC, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—Challenging not only the punishment of dismissal from service imposed by Summary Security Force Court (hereinafter referred to as "the SSFC"), but also rejection of his appeal made against the penalty aforementioned, the petitioner, namely, Shri Abhimanya Basumatary, has filed this Writ application seeking issuance of appropriate directions to the respondents.

2, In a nutshell, petitioner's case, runs as follows :

(i) The petitioner was initially appointed as B.S.F. G.D. Constable/ He was promoted as Lans Naik in 1996 and in 1997, he was posted as Head Constable at Baishnab Nagar. Till the time of his dismissal from service, petitioner remained posted at Baishnab Nagar. On 8th February, 1999, the petitioner along with two other constables, namely, No. 90171510 Constable Ghanashyam and No. 910077288 Constable Surjit Singh was deployed for "Naka" (i.e., patrolling) duty. On 10.12.1999, the petitioner was served with a notice issued by respondent No. 3. In this notice, it was alleged that on 9.2.1999, during the

night, when the said patrolling party, headed by the petitioner, was on Naka/ Patrolling duty near pillar No. 197, a large number of animals like bulls, cows and buffallows were smuggled to Bangladesh from India and out of the animal so smuggled, 18 bull and 12 buffallows were caught during special drive near pillar No. 197, though the road for passing of animals is located near the said "Naka" point. By this notice, the petitioner was asked to submit his explanation by 11.2.1999.

(ii) The petitioner submitted his written reply, on 11.2.1999, wherein he asserted that he had conducted "Naka" duty along with the constables aforementioned as usual and that on 9.2.1999 at 9.30 P.M., they went to Pillar No. 197-4S and, on hearing sound of firing from near the said pillar and on noticing that some bullocks and cows were proceeding towards village of Bangladesh from Indian side, the petitioner/his party caught hold of the said animals, but minutes thereafter, the Company Commander came there along with QRT party and some cows. The petitioner too produced ten bullocks before the Company Commander. The petitioner, therefore, submitted that he and his party had discharged their assigned duties without negligence.

(iii) On 13.2.1999, the Respondent No. 3, while placing the petitioner under suspension, served him with a charge-sheet and directed that Record of Evidence (ROE) as provided under Rule 48 of the B.S.F, Rules be prepared and Sri T.K. Khajuria, Asstt. Commandant of 143 Bn BSF, was ordered to record the ROE. The charge sheet, served on the petitioner, read as under :-

"The accused No. 84855072 HC A Basumatary, No. 90171510 Cosnt. Ghan Shyam and No. 91007288 CT Surjit Singh of "C" Coy 143 BN BSF Charged with.

BSF ACT AN ACT PREJUDICIAL TO GOOD Section-40 ORDER AND DISCIPLINE OF THE FORCE In that they together at BOP Kanchantar, on 8.2.1999, while on Naka duty in the area of BP No. 197 MP, having connived with smugglers, improperly and without authority, gave safe passage to smugglers to cross huge numbers of Cattle heads from India to Bangladesh."

(iv) The ROE ordered by the Respondent No. 3 was completed on 20.2.1999. In this enquiry, as many as 8 witnesses were examined by the Appointed Officer and thereafter, the petitioner and the said other two members of the patrolling party were asked to cross-examine the witnesses, but the petitioner and his party could not cross-examine any of the witnesses, because they had no guidance from any Advocate or friend. Thereafter, statements of the petitioners and of the two constables of his patrolling party were recorded.

(v) After completion of the ROE (Which stands on the same footing as statements recorded under Sections 161 Cr.PC), the petitioner was asked, vide letter, dated 7.5.1999, of the respondent No. 3 to nominate one officer/friend for SSFC trial and, on the request made by the petitioner, Shri Surjan Singh, AC (IRLA No. 6993) was appointed as friend of the accused-petitioner by order, dated 11.5.1999. The trial concluded, on 13.5.1999, with the conviction of the

petitioner u/s 40 of the BSF Act and the petitioner was sentenced to dismissal from service.

(vi) While the petitioner was severally punished, the two Constables, accompanying him on the "Naka" duty, were acquitted. Though he went from Kokrajhar to Baishnab Nagar to meet the respondent No. 3 on 25.5.1999 and file his appeal against the said order of dismissal, he was not allowed to submit his appeal, but after this writ application was filed, the petitioner submitted his appeal, which was rejected without assigning any reason therefor, which is in contravention of Section 117(1) of the BSF Act.

(vii) The petitioner contends in his writ application that on the night of the occurrence, the petitioner had merely gone touring to other side of his patrolling post and during this period, the incident had taken place and when he came to know of the same, he immediately rushed to the spot and recovered cows without any negligence. The petitioner also contends that such incident may occur even during maximum alert time. According to the petitioner, the punishment imposed on the petitioner is not only excessive, but also discriminatory and this injustice has adversely affected petitioner's family, which consists of his 63 year old father, his Wife, three unmarried sisters and five unemployed brothers. While imposing such punishment, the authority concerned had, according to the petitioner, completely ignored the Services that the petitioner had rendered to his force with all honesty, sincerity and without any adverse remark.

3. The respondents have resisted the prayers of the petitioner by filing an affidavit and thereafter, in response to a counter affidavit filed by the petitioner, respondents have filed a rejoinder, the case of the respondents, as reflected from their affidavits, may, in brief, stated as under :-

(i) The Petitioner was enrolled in 85 Bn. BSF as Constable on 29th November, 1984. He was posted to 143 Bn BSF on 25th October, 1989. The Petitioner was promoted to the rank of Lance Naik with effect from 23rd December, 1991, and then, promoted to the rank of Naik with effect from 12th November, 1996.

(ii) Since the time of his enrolment, on 29.11.1984, as a Constable in 86 Bn BSF, the petitioner, till his dismissal from service, was already awarded following four punishments :-

(a) BSF Act, 1968, u/s 40 : on 23rd October, 1989, while the petitioner was on the strength of 72 Bn BSF, he was found attempting to pass materials to examinees of BSF 1st Class examination and was awarded 7 days R.I. by the Commandant, 72 Bn BSF.

(b) BSF Act, 1968, u/s 19(a) : On 13th April, 1998 for absenting himself without leave, petitioner was awarded severe reprimand by the Commandant, 143 Bn BSF.

(c) BSF Act, 1968, u/s 21(2) : On 28th August, 1998, for disobeying a lawful

command given by his superior officer, petition was awarded severe reprimand by the Commandant, 143 Bn BSF.

(d) BSF Act, 1968, u/s 21(1) : On 20th October, 1998, for disobeying in such a manner as to show a wilful defiance of authority to a lawful command given personally by his superior officer in the execution of his office, petitioner was awarded severe reprimand by the officiating Commandant, 143, Bn BSF.

(iii) As regards the occurrence, in question, respondents' case is that on the intervening night of 8-9th February, 1999, petitioner with two others, namely, No. 90171510 Const Ghanashyam and No. 91007288 Const Surjit Singh, were detailed for Naka duty near Border Pillar (i.e., BP) No. 197M under jurisdiction of BOP Kanchantar of 143 Bn BSF and on that day, Company Commander Sh Rai Singh, AC, received information for "G" Source that huge number of cattle-heads were to be smuggled to Bangladesh between 2300 hrs to 0100 hrs from near B.P. No. 197M aforementioned. On that day, i.e., on 8-9th February, 1999, the Company Commander along with Inspector (G) R. S. Mina and 10 others proceeded towards BP No. 197. They laid two Special Naka keeping themselves at visible distance from the Naka party of HC A. Basumatary, (i.e., the petitioner) by NVG. At about 23hrs., Company Commander heard some people speaking in Bengali language from the Naka point (i.e., the place where Naka had been laid by the petitioner), but due to distance, the Company Commander could not understand what they were talking. After about half-an-hour of such talking. Company-Commander observed, with the help of NVG, some catties crossing International Border from near BP No 197. Company Commander, immediately, challenged the carriers of catties. Both the said special Naka parties, led by the Company Commander, illuminated the area with search lights and they saw huge number of catties coming from Naka hut side of the petitioner. They also saw that about 15 to 20 catties had already crossed the international border and about 50-60 Bangladeshi criminals were also standing near the International Border in Bangladesh. The Bangladeshi criminals fired bullets towards the Naka party by their country-made weapon. Both the Naka parties of the Company Commander were engaged to catch and close the catties. In the meantime. Inspector (G) R.S. Mina and Constable. Anil Kumar asked the Naka party of the petitioner/in loud voice, to extend help and catch catties, but there was no response and no action was taken by the Naka party of the petitioner. On hearing the noise and sound of firing, P. C. Kanchantar, with Motor cycle and patrol party of BOP Alipur, also reached the spot for extending help. After closing the catties, Company Commander reached the Naka hut and asked petitioner's Naka party as to why they had not taken any action to seize the catties. In reply Constable Ghanashyam and Constable Surjit told them that after closing the Naka, both were sent for rest inside Naka hut by the petitioner and the petitioner remained on duty alone. They woke up on hearing the noise and firing. Company Commander, again, asked them as to why they had not illuminated the area with their searchlight. In reply, Constable Ghanashyam stated that HHSL was in the hands of the petitioner and though he had tried to take the HHSL, the petitioner

did not hand over the same. During this incident, the petitioner was on duty and the other two constables were on rest. The catties crossed over to Bangladesh just touching the said Naka hut (which the petitioner was guarding) and distance between the two can, at best, be 1 to 5 yards. Based on the report of Company Commander, the petitioner and two others, namely, Ghanashyam and Surjit were served with charge sheet u/s 40 of BSF Act, 1968, for having committed offence and ROE was ordered against the petitioner and two others. After ROE was recorded, the petitioner was tried by SSFC (Summary Security Force Court) u/s 40 of BSF Act by the Commandant 143. When the trial commenced, the petitioner pleaded guilty to the charge on 13.5.1999 and his plea was recorded. The petitioner was held guilty of the charge framed against him, he was convicted accordingly and awarded the sentence of dismissal from service on 13.5.1999, The order dismissing the petitioner from service was handed over to the petitioner at 143 Bn at Baishnab Nagar, Malda (West Bengal) on 13.5.1999 vide letter No. 0523/Estt/143 Bn/An/AB/99/2252-2363 dated 13th May, 1999. As per the applicable procedure, a copy of the said letter was sent to his home address on the same day. The petitioner never came to the Commandant, on 25.5.1999, to file any appeal. The petitioner was awarded orders of dismissal from service by the SSFC on 13.5.1999. This sentence was based on the gravity of the offence as well as circumstantial evidence brought forth in the R.O.E and also petitioner's previous service record, which shows that the petitioner was awarded as many as 4(four) punishments earlier. Before the sentence was awarded by the competent authority (i.e., Respondent No. 3), the total service of the accused-petitioner were looked into thoroughly, but the same was found not at all satisfactory. The Respondent No. 3 awarded to the other-co-accused constables minor punishments based on the circumstantial evidence governing their case.

4. It may be mentioned that the petitioner filed an additional affidavit, wherein he contended that the provisions of Section 115 of the BSF Act had not been complied with inasmuch as the proceedings of the SSFC is required to be forwarded to the officer not below the rank of DIG, within whose command the trial was held, but the proceeding was not so forwarded to the competent authority. It was also contended by the petitioner in his additional affidavit that he, as per direction given by this Court, on 2.7.1999, submitted a representation before the Commandant 43 BN, BSF, Baishnab Nagar, praying for setting aside the order of his dismissal, but the DIG rejected the representation without assigning any reason therefor, which is in contravention of Section 117(1) of the BSF Act.

5. The respondents too have filed a reply to the petitioner's additional affidavit, wherein they contended, inter alia, that the relevant provisions of the BSF Acts and the Rules were duly complied with inasmuch as the DIG, under Rule 161 of the BSF Rules, is required to countersign the proceeding and return the same to the unit concerned. The sentence of the SSFC is not required to be confirmed, but it is to be carried out forthwith under the provisions laid down in Section 114

of the Act The petitioner's representation was rejected after due application of mind. The other two constables, accompanying the respondents, were summarily tried and they were punished as per the gravity of offence committed by them. The petitioner, on the other hand, was sentenced to dismissal from service and this punishment is commensurate with the gravity of offence committed by him.

6. I have carefully perused the entire record of the case. I have heard Mr. M.U. Mahmood, learned counsel for the petitioner, and Mr. P.N. Chudhury, learned Additional CGSC.

7. It has been submitted before me, on behalf of the petitioner, that the findings and sentence imposed by SSFC are subject to judicial review by writ courts and that if the punishment imposed on a person by any disciplinary authority is so excessive that it shakes the conscience of the Court, such punishment may be interfered with. Reliance in support of this submission is placed by Mr. Mahmood on *Ranjit Thakur v. Union of India*, reported in (1987) 4 SCG 611. It is also submitted by Mr. Mahmood that though the case of the petitioner and of the other two constables stood on the same footing yet the authorities concerned, while letting off the other constables, chose to impose on the petitioners severe most punishment of dismissal from service. The sentence imposed is, contends Mr. Mahmood, so glaringly discriminatory and harsh that it shakes conscience of any prudent man and such a sentence may not be maintained.

8. Mr. Mahmood has also submitted that the petitioner ought to have been provided with assistance from a friend of his choice at the time of ROE, but no such thing was done and the ROE is, therefore, illegal and of no consequence.

9. It is further submitted by Mr. Mahmood that while confirming, u/s 115 of the BSF Act, the conviction and sentence, in question and/or while rejecting representation of the appellant against his conviction and sentence, u/s 117 of the BSF Act, there was non-compliance of the mandatory provisions of Sections 115 and 117 of the BSF Act by the office concerned inasmuch as no reasons for confirming the proceeding or for declining to interfere with the order of dismissal from service has been assigned by the officer concerned and, hence, the order rejecting appeal of the petitioner deserves to be set aside.

10. Controverting the above submissions made on behalf of the petitioner learned Addl. CGSC has submitted that in the face of the materials available in the service record of the petitioner, his services cannot be termed at all as satisfactory.

11. From the Records of Evidence (ROE), it clearly emerges, points out learned Addl. CGSC, that two special Nakas were laid for the night by way of abundant caution, which were kept concealed within hearing distance of the petitioner's Naka party. The Naka party, headed by the Company Commander, heard sound of talks in Bengali language with civilians for half-an hour or so, whereupon with the help of NVG (Night Vision Goggles), a number of cattle-heads were seen crossing the international boundary through the petitioner's Naka point. It also

emerges from the ROE, submits learned Addl. CGSC, that during the seizure of cattle-heads by the Company Commander and his party, who were fired upon by the Bangladeshi criminals, the petitioner was found to have taken no action at all even to capture or catch anybody or anything at crucial moments. The said ROE further revealed, contends learned Addl. CGSC, that the other two constables of Naka party had helped the special Naka party in capturing and seizing the catties.

12. Coming to the submissions made by Mr. Mahmood that the petitioner ought to have been provided with assistance of a friend of his choice at the time of ROE, learned Addl. CGSC submits that under the BSF Act & Rules, no provision or procedure exists for providing any friend of the accused during Recording of Evidence (ROE). In the ROE, points out learned Addl. CGSC, the petitioner declined to make any statement, whereas the other two co-accused gave statements, which were reduced into writing, and though all the abused were asked to produce defence witnesses, they all declined to adduce evidence.

13. As regard the submissions, made on behalf of the petitioner, that while imposing sentence, the petitioner has been discriminated against, learned Additional CGSC has submitted that the cases of the constables, as the materials on record reveal, do not stand on the same footing as that of the petitioner inasmuch as the petitioner was found to have acted not only negligently in performing his duties but also deliberately helped the Bangladeshi criminals in Smuggling cattle-heads on the fateful night of 8-9th February, 1999. That apart, points out learned Additional CGSC, the past conduct of the petitioner coupled with the findings of the SSFC made the petitioner wholly undesirable and unfit for being retained in a force, which stands entrusted with security of the State and that a compassionate or lenient approach in such a serious case may have far reaching consequences/implications threatening the very sense of security of the State. Looked at from this angle, submits learned Additional CGSC, the sentence awarded against the petitioner neither suffers from discrimination nor is it excessive.

14. Before entering into the merit of the case, it is apposite to bear in mind that the power of judicial review, in a case such as the present one, does exist with a Court exercising writ jurisdiction, but such powers are not unlimited and can be exercised cautiously and only in absolutely deserving cases.

15. Shorn off all the legal rhetorics and immaterial lengthy details, what surfaces from a combined reading of the materials on record including the records of the SSFC is that the petitioner has, nowhere, impugned the findings of guilt arrived at by the SSFC as incorrect, perverse, illegal or unjustified. In fact, his only grievance is against the quantum of punishment imposed on him. To a pointed query made by this Court, even Mr. Mahmood, learned counsel for the petitioner, has candidly conceded that the writ petitioner has not challenged the correctness of the findings of the SSFC.

16. Situated thus, the limited question that this Court is required to answer is

whether punishment awarded against the petitioner is discriminatory and/or legal, just and proper. The other questions, which arise are as to whether the provisions of Sections 115 and/or 117 of the BSF Act have been complied with, while approving the SSFC proceeding or while dealing with petitioner's appeal, and, further, whether there was any infraction of the BSF Act and Rules, at the stage of ROE or SSFC trial, which made the conviction of the petitioner by the SSFC illegal.

17. To put the record straight, it needs to be emphasized that a scrutiny of the record of the SSFC reveals that the petitioner had, indeed, pleaded, guilty to the charge framed against him, though the petitioner has, for some explained reasons, nowhere, disclosed this fact in his writ petition. Even while making a representation in the form of an appeal u/s 117 of the BSF Act, the petitioner, nowhere, contended that the proceeding of the SSFC was not held in accordance with law and 7 or that he did not plead guilty to the charge and/or, that he pleaded guilty to the charge under some misconception and/or without understanding full implications thereof. This apart, the SSFC record reveals that in terms of the provisions of the Rule 142 of the BSF Rules, the SSFC had explained to the petitioner what implications could follow if the petitioner pleaded guilty to the charge.

18. What follows from the above discussion is that the fact that the petitioner pleaded guilty in accordance with law has not been under challenge not is it under challenge that sufficient materials were, indeed, available in the ROE (record of evidence) to sustain the finding of the guilt vis-a-vis the charge framed against him. It is for this reason that the petitioner has, it appears, nowhere impugned the findings of the SSFC.

19. Before proceeding any further, it is appropriate to summerise the relevant provisions of the BSF Act and BSF Rules, which govern the present case of the petitioner.

20. There is no dispute before me that the accused could have been tried by SSFC for allegedly committing offence u/s 40 of the BSF Act nor is it contended that the SSFC held was without jurisdiction.

21. It may also be noted that under the BSF Act and Rules, same as in the case of Army Act and Rules, there are two stages in which charge against the accused is heard. The charge is initially Heard by the Commandant at the stage of investigation of the case. This hearing is merely a tentative hearing and it is at the nascent stage of investigation. The other hearing of the charge is at the level of the trial by SSFC or by any other Court constituted under the Act and the Rules.

22. Rule 45 of the BSF Rules deals with the hearing of the charge at the stage of investigation. Rule 45 shows that after hearing of the charge, Commandant has five different courses open to him, namely, (i) he may award punishment, which he is empowered to award, or (ii) he may dismiss the charge or (iii) remand the

accused to the custody with direction to prepare either a Record of Evidence (ROE) or Abstract of Evidence against the accused or (iv) remand the accused for trial by SSFC.

23. In the case at hand, it appears that on 13.2.1999, after hearing of the charge, the Commandant, on 13.2.1999 itself, directed, under Rule 45, that ROE be prepared and he appointed Shri T.L. Khajuria, Asstt. Commandant, to prepare the ROE against the petitioner.

24. What is extremely important to note is that at the stage of preparing ROE, there is no provision for providing the accused with assistance from any friend or legal practitioner. It is only at the stage of the trial that Rule 157 provides for appointment of friend of the accused and this is required to be mentioned in the very order by which the Court is constituted. (There is no dispute before me that for the SSFC, the petitioner was provided with the assistance of a friend of his own choice).

25. Section 51 deals, inter alia, with disposal of cases after the ROE has been prepared. According to Rule 51, ROE shall be forwarded to the Commandant, who may, after going through the ROE, dismiss the charge or rehear the charge or award one of the summary punishments or try the accused by SSFC if he is empowered to do so and, if he is not so empowered, to apply to competent officer or authority to convene a SSFC or appropriate Court for the trial of the accused.

26. In the case at hand, writ petitioner seeks to get notice/order, dated 10.2.1999, directing the writ petitioner to show cause against the allegations of dereliction of duty quashed. For convenience, this notice is quoted below :

"On 9.2.1999, during night, you were deputed on Naka/ Patrolling duty near pillar No. 197. During night time, at 090030 hours, a large numbers of animals like bulls, cows and buffellos were smuggled to Bangladesh from India. Out of which, 18 Bulls and 12 Buffellos have been caught during special drive near pillar No. 197, whereas the road to pass animals is situated near the "Naka" point.

From 081900 to 082300, your party has not performed patrolling duty with responsibility and have neglected to do the assigned duty.

So, you are hereby asked to submit cause on 11th at 1400 hours. Otherwise, necessary action will be taken against you for committing violation of BSF Rules."

27. Since the writ petitioner has not challenged the jurisdiction or power of the Commandant to ask for explanation for the alleged dereliction of duty on the part of the petitioner, question of setting aside this notice/order does not arise at all, particularly, when, on the basis of this notice or order alone, the writ petitioner has not been, admittedly, convicted and/or sentenced to dismissal from service.

28. The writ petitioner also seeks to get set aside and quashed the order, dated 13.2.1999, passed by the Commandant directing Shri T.L. Khajuria, Assistant

Commandant, to prepare ROE in respect of the allegations levelled against the petitioner. Suffice is to say in this regard that the only grievance of the petitioner against the recording of the ROE is that he was not provided with assistance from any friends. Apart from the fact that the BSF Act and Rules do not, as indicated in paragraph 24 above, provide for appointment of any friend at the stage of ROE, I have already indicated above that since the ROE is prepared at the stage of investigation to find out as to whether incriminating stage. This apart, the Commandant may, upon examination of ROE, dismiss the charge under Rule 51. I see, therefore, no reason to set aside the direction given to prepare ROE, particularly when except expressing grievance that he was not provided with the assistance of any friend (which he is not legally entitled to), the petitioner has made no allegation against the fairness of the ROE inasmuch as there is no allegation that the statements of the witnesses were not truthfully recorded and particularly, when he himself not only declined to cross-examine the witnesses, but also to make any statement in his defence at the stage of ROE.

29. Surprisingly enough, while the petitioner has challenged, as indicated above, the service of notice/order, dated 10.2.1999, on him to offer his explanation against his behaviour on the night of 9th February, 1999, and while the petitioner has also challenged the holding of the enquiry to prepare ROE, he has made not even a whisper of allegation against the conduct of the SSFC or its proceeding. It, therefore, logically follows that the petitioner has no complain against the procedure followed by the SSFC or its fairness in finding him guilty of the charge. This apart, the record reveals that when the accused pleaded guilty to the charge, the implications of such pleading of guilty was explained to him and thereafter, the Court, after following the prescribed procedure, held the petitioner guilty of the charge, This finding of the SSFC, which was arrived at under Rule 149, has not been challenged by the petitioner and cannot, therefore, be interfered with. This apart, when the legality of convening of the SSFC, its jurisdiction to try the petitioner is not challenged nor is the composition or proceedings of the SSFC are under challenge, it not necessary for a Writ Court to scrutinize of pre-trial investigation was proper inasmuch as requirement of adequate and proper investigation is not jurisdictional and every violation thereof does not invalidate court proceeding, when the accused is not shown to have been violated. Looked at from this angle too, the proceedings of the SSFC or conviction of the petitioner by the SSFC for the charge framed against him cannot be interfered with. I am guided to adopted this view from the law laid down in Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), wherein it has been laid down as follows :--

"If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands.

When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre trial investigation was adequate or not. Requirement of proper

and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated." (Emphasis is supplied)

30. The only grievance of the petitioner, which is, now, left to be considered is his grievance against the punishment of his dismissal from service.

31. Now, therefore, the question, which stares itself for consideration by this Court is as to whether in the face of the materials on record, the petitioner was justifiably awarded the sentence of dismissal from service.

32. It is worth pointing out that it is Rule 151, which lays down how the SSFC shall decide the quantum of punishment. According to Rule 151, the Court may either, on its own knowledge or by taking evidence from any record, note down general character, age, service, rank, and any recognized acts of gallantry, or distinguished conduct of the accused, and previous convictions of the accused either by a Security Force Court, or a Criminal Court, any previous punishment awarded to him by an officer exercising authority u/s 53, the length of time he has been in arrest or in confinement on any previous sentence, and any decoration, or reward, or to which he may be in possession or to which he may be entitled. Coupled with this. Rule 152 lays down that the Court shall award one sentence in respect of all the offences of which the accused is found guilty. (Emphasis is added)

33. Thus, according to Rule 151, the entire past conduct of the accused including his previous convictions, if any, are to be taken into consideration by the Court before deciding the quantum of sentence to be passed against him.

34. In the case at hand, the past conduct of the writ petitioner, as surfaces from the above discussion, is that he had been awarded 4 (four) number of punishments, which not only included defiance of authority, but also included punishment awarded to him for making attempt to pass materials to the examinees of BSF First Class Examination and he had not only suffered punishments of reprimand and severe reprimand on some occasions, but has also undergone 7 days of imprisonment. Even in the present case, he was not only found to have not maintained proper vigil at the place of his duty, but he was also shown to have tacitly helped the smugglers in their partially successful attempt to take away catties to Bangladesh and made no endeavours to catch the catties and/or smugglers ; rather, the petitioner tried to sabotage the move to apprehend the culprits.

35. In the context of the above facts revealed from the record, we have to, now, determine if the sentence passed against the petitioner was justified.

36. It is worth noticing that Mr. Mahmood has laid great stress on the case of Ranjit Thakur (supra) to contend that if the punishment is so disproportionate to the offence as to shock conscious of the Court, the sentence needs to be interfered with.

37. For appreciating above submission of Mr. Mahmood, it is necessary to refer to a decision of the Apex Court in Civil Appeal Nos. 7052-7053 of 2001 (Union of India and Ors. v. R.K. Sharma). This is a case in which the Apex Court considered Ranjit Thakur's case (supra), which Mr. Mahmood case (supra), which arose out of order, dated 14.10.1999, passed by learned Single Judge of this Court setting aside the dismissal order of the writ petitioner, R.K. Sharma, and remanding the matter to the General Court Martial for awarding him any lesser punishment, a Division Bench of this Court had upheld the order so passed.

38. On considering the question as to whether the Courts were justified in interfering with the punishment, while maintaining the conviction, the Apex Court lays down as follows :-

"The Division Bench has, in the impugned order, relied upon the authority of this Court in the case of Bhagat Ram Vs. State of Himachal Pradesh and Others, for proposition that the penalty must be commensurate with the gravity of misconduct and that any penalty disproportionate to the gravity of misconduct would be violative of Article 14 of the Constitution. To be noted that this case was not under the Army Act but in respect of a civil servant.

The Division Bench also relied upon the following observations in the case of Ranjit Thakur Vs. Union of India (UOI) and Others,

"Judicial review generally speaking is not directed against a decision, but is directed against the "decision making process". The question of choice and quantum of punishment is within the jurisdiction and discretion of the Court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of Bias. The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect, which is, otherwise, within the exclusive province of the Court martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction, Irrationality are perversity and recognized grounds of judicial review.".....

The law on the subject is aptly set out in the case of Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), This was a case where a Major had been court-martialed and dismissed from service The High Court quashed the Court Martial and the sentence on the ground that the delinquent had been denied a reasonable opportunity to defend himself. This Court, after considering various Army Orders, Rules and Provisions of the Army Act, concluded that the Court Martial had been properly held. It was then held as follows :

"23. Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its

composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law. It has been rightly said that court-martial remains, to a significant degree, a specialized part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a persons subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre trial investigation was adequate or not, Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentenced of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment."

As stated above, both the single Judge as well as the Division Bench have held that the four charges set out have been proved and that the Respondent was guilty of those charges. Having so held it was not open to the Court to have interfered in the sentence. The awarding of sentence is within the powers of the Court Martial. These are not matters in which Court should interfere.

In our view, the observation in Ranjit Thakur's case (supra) extracted above have been misunderstood. In that case the facts were such that they disclosed a bias on the part of the Commanding Officer. In that case the Appellant Ranjit Thakur had failed out of favour of the Commanding Officer because he had complained against the Commanding Officer.....

The above observations are not to be taken to mean that a Court can, while exercising powers under Article 226 or 227 and/or under Article 32, interfere with the punishment because it considers the punishment to be disproportionate. It is only in extreme cases which on their face show perversity or irrationality that there can be judicial review. Merely on compassionate grounds a Court should not interfere.

Even otherwise, in our view, both, the Courts below have erred in coming to the

conclusion that the sentence awarded was too harsh considering the nature and degree of the offence established. The first charge, as set out hereinabove, indicates that the Respondent, who was the Commanding Officer of "A" Company 11 Assam Rifles, had received a signal to visit the forward post, check alertness and report all OK. It is not denied that the signal had been received, It has been proved that the Respondent did not visit the forward post, The Respondent improperly detailed a JCO of the Company to visit the forward post. This was a very serious charge. If a Commanding Officer breaches orders received from the Head Quarters how can discipline be maintained in the Army." (Emphasis is supplied)

39. The ratio, which has, thus, been laid down by the Apex Court in R.K. Sharma's case (supra) is that while exercising powers under Article 226 or 227, the Courts are not to interfere with punishment, because it considers the punishment to be disproportionate and it is only in extreme cases which, on their face, show perversity or irrationality that there can be judicial interference. It is also clearly held in this case that merely on compassionate ground, a Court should not interfere with the sentence awarded.

40. I may point out, at this stage, that the reason why I have laid emphasis on the fact that the petitioner had pleaded guilty to the charge framed against him in the SSFC is that when an accused pleads guilty to the charge at his trial in the SSFC, he may be convicted on the basis of his such plea. The utility of the ROE is that the ROE is read out in the open Court. The ROE stands on the same footing as stands the previous statements of witnesses recorded u/s 161 Cr.PC. These statements are read out to enable the Court to ascertain if the materials available in the ROE were sufficient to warrant conviction of the accused on the basis of his plea. The other purpose, which the ROE serves, is to enable the Court to determine the gravity of the offence committed so that sentence commensurate with the gravity the gravity of the offence committed so that sentence ? commensurate with the gravity of the offence may be passed.

41. In the case at hand, if the past conduct of the petitioner is taken into consideration, as has been taken into consideration by the SSFC, couple with the gravity of the charge (in the context in which the charge has been framed) clearly shows that the writ petitioner was not fit to be retained any longer in service in a force, which has to ensure security of the State. Any leniency or compassion shown in such cases may have far-reaching consequences adversely affecting national security. Viewed from this angle, I am fully satisfied that the sentence of dismissal from service requires no interference.

42. The Apex Court has also observed in R.K. Sharma's case (supra) that for the offences proved, which are serious in nature, the GCM could have awarded sentence of imprisonment, but the GCM was lenient inasmuch as it merely dismissed the petitioner from service. In the present case too, since the petitioner was charged u/s 40 of the BSF Act and the charge stood proved, he could have been awarded punishment as severe as 7 years of imprisonment.

Looked at from this angle, the petitioner cannot be said to have been harshly dealt with.

43. The contention of the petitioner that his punishment is disproportionate to the punishment awarded to the two constables, who had accompanied him on the night of the occurrence, is completely misconceived inasmuch as the record reveals that the writ petitioner had sent these two constables to take rest and it was the petitioner, who alone took the responsibility of guarding the post and while, he was supposed to be so guarding the post, a few feet away from him, cattle were made to pass and despite noises, which had been heard, the petitioner did not make any attempt to interfere or wake up the other two constables exhorting them to take action. Furthermore, the petitioner did not even hand over the torch light, when the constables wanted to use the same for focussing the light on the smugglers and on the catties passing way.

44. Let me, now, come to, and deal with, the last leg of Mr. Mahmood's submission that since the officers concerned at the time of determining the correctness or legality of the SSFC proceeding u/s 115 of the BSF Act as well as at the time of acting as an appellate authority u/s 117 of the BSF Act, when he dealt with petitioner's appeal against his conviction and sentence, omitted to assign reasons for rejecting the appeal, the orders are bad in law. Support for this submission is sought to be drawn by the Mahmood from the case of Nirmal Chandra Das v. Union of India and Ors. (1987) 1 GLR 336, wherein a Division Bench of this Court laid down as follows:

"It is true that there is no general rule of law that reasons must be given for all administrative decisions. In appropriate situation, however, there is an implied duty to state the reasons or grounds for a decision. A person charged with an offence must be adequately informed of the case he is to meet. Reasonable opportunity must be given to defend himself. If a right of representation or appeal is provided, he has to be allowed to exercise the right of appeal. The appellate authority has to act in accordance with law and reasons given must not disclose any error of law and the reasons are to be given intelligibly and adequately to meet substance of the arguments advanced before it. Of course, failure to give reasons or to give adequate reasons is not in itself an error of law entitling the Court to set the decision aside, and if good and bad reasons for a decision are given, the decision should stand provided that the reasons are independent and severable. But where no reasons are given it is not possible for the Court to ascertain the Jurisdiction of the order, or even to see whether it is arbitrary, perverse or otherwise invalid. Where the statute itself prescribes the procedure and the points to be considered, failure to do so renders the order liable to be set aside." (Emphasis is added by me)

45. Further, while setting aside ,the orders passed under Sections 115 and 117(1), the Division Bench laid down as follows :-

"There is no indication in the impugned orders of the Deputy Inspector General

and the Director General rejecting the petition against the order of dismissal that the Deputy Inspector General was satisfied as to the correctness, legality or propriety of the order of dismissal or as to the regularity of the proceeding to which the order related. Same is the case with the order of the Director General rejecting the petition."

46. Before answering the question whether reasons are to be assigned, while disposing of the record of SSFC received by a DIG u/s 115, it is essential to note that Section 115 is worded as follows :-

"115. Transmission of proceeding of Summary Security Force Courts.--The proceedings of every Summary Security Force Courts shall, without delay, be forwarded to the officer not below the rank of Deputy Inspector General within in whose command the trial was held, or to the prescribed officer, and such officer, of the Director General or any officer empowered by him in this behalf may, for reasons based on the merits of the Case, but not on merely technical grounds, set aside the proceedings, or reduce the sentence to any other sentence which the court might have passed." (Emphasis is added)

47. Let me also quote hereinbelow Section 162 of the Army Act ;-

"The proceedings of every summary court-martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held, on to the prescribed officer, and such officer, or the Chief of the Army Staff, or any officer empowered in this behalf by the Chief of the Army Staff, may for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed."

48. From a bare reading of Section 115 of BSF Act and Section 162 of the Army Act, it is clear that both these sections are similarly worded.

49. Apart from the fact that in Nirmal Chandra Das's case (supra), there is no clear indication that while passing an order u/s 115/117(1), adequate reasons must be assigned, it is necessary to mention here that the findings of SSFC, unlike the proceedings of General Security Force Court, are not required to be conformed and u/s 115, the person to whom (i.e., the DIG in this case) the proceedings are forwarded may, for reasons based on the merits of the case, but not on mere technical grounds, set aside the proceedings or reduce the sentence. In other words, it is only when the authority concerned has to set aside the proceedings or reduce the sentence that reasons are to be assigned and not when the proceedings as well as sentence passed are maintained. I am guided to adopt this view from the Apex Court's decision in S.N. Mukherjee Vs. Union of India, wherein while interpreting the ambit of Section 162 of the Army Act (which is, as indicated above, similarly worded as Section 115 of the BSF Act, it has been laid down as follows :-

"Moreover we find that in Section 162 an express provision has been made for

recording of reasons based on merits of the case in relation to the proceedings of the summary court-martial in cases where the said proceedings are set aside or the sentence is reduced and no other requirement for recording of reasons is laid down either in the Act or in the Rules in respect of proceedings for confirmation. The only inference that can be drawn from Section 162 is that reasons have to be recorded only in cases where the proceedings of a summary court-martial are set aside or the sentence is reduced and not when the findings and sentence are conformed. Section 162 thus, negatives a requirement to give reasons on the part of the confirming authority while confirming the findings and sentence of a court-martial and it must be held that the confirming authority is not required to record reasons while confirming the findings and sentence of the court-martial." [Emphasis is supplied]

50. Now, reverting to Mr. Mahmood's contention that omission on the part of the officer concerned to assign reasons, while disposing of appeal of the petitioner, is enough to set the order rejecting petitioner's appeal, it is of utmost importance to bear in mind that Sections 117 of the BSF Act is similarly worded as Section 164 of the Army Act. Answering the question whether reasons are required to be assigned, while disposing of the appeal, the Apex Court in *Som Datt Datta Vs. Union of India (UOI) and Others*, laid down as follows :-

"In the present case, it is manifest that there is no express obligation imposed by Section 164 or by Section 165 of the Army Act on the confirming authority or upon the Central Government to give reasons in Support of its decision to confirm the proceedings of the Court Martial. Mr. Dutta has been unable to point out any other section of the Act or any other rule made therein from which necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. Apart from any requirement imposed by the statute or statutory rule expressly or by necessary implication, we are unable to accept the contention of Mr. Dutta that there is any general principle or any rule of natural Justice that a statutory tribunal should always and in every case give reasons in support of its decision

As already stated, there is no express obligation imposed in the present case either by Section 164 or by Section 165 of the Indian Army Act on the confirming authority or on the Central Government to give reasons for its decision. We have also not been shown any other section of the Army Act or any other statutory rule from which the necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. We therefore, reject the argument of the petitioner that the order of the Chief of the Army staff dated 26th May, 1967 confirming the finding of the Court-martial u/s 164 of the Army Act or the order of the Central Government dismissing the appeal u/s 165 of the Army Act are in any way defective in law." [Emphasis of supplied]

51. In *S.N. Mukherjee (supra)*, answering the question whether reasons are required to be assigned by the authority concerned, while dealing with pre-confirmation or post-confirmation appeal, the Apex Court, while following its

decision in *Som Datt Dutta* (supra), laid down as follows:

"In so far as the findings and sentence of a court-martial and the proceedings for confirmation of such findings and sentence are concerned it has been found that the scheme of the Act and the Rules are such that reasons are not required to be recorded for the same. Has the Legislature made a departure from the said scheme in respect of post-confirmation proceedings ? There is nothing in the language of Sub-section (2) of Section 164 which may lend support to such an intention. Nor is there anything in the nature of post-confirmation proceedings which may require recording of reasons for an order passed on the post-confirmation petition even though reasons are not required to be recorded at the stage of recording of findings and sentence by a court-martial, and at the stage of confirmation of the findings and sentence of the Court-martial by the confirming authority. With regard to recording of reasons the considerations which apply at the stage of recording of findings and sentence by the Court-martial and at the stage of confirmation, of findings and sentence of the court-martial by the confirming authority are equally applicable at the stage of consideration of the post-confirmation petition. Since reasons are not required to be recorded at the first two stages referred to above, the said requirement cannot, in our opinion, be insisted upon at the stage of consideration of post-confirmation petition u/s 164(2) of the Act."

For the reasons aforesaid it must be held that reasons are not required to be recorded for an order passed by the confirming authority confirming the findings and sentence recorded by the court-martial as well as for the order passed by the Central Government dismissing the post-confirmation petition. Since we have arrived at the same conclusion as in *Som Datt Datta Vs. Union of India (UOI) and Others*, the submission of *Shri Ganguli* that the said decision needs reconsideration cannot be accepted and is, therefore, rejected." [Emphasis is supplied]

52. The views taken in *Som Datt Datta* (supra) and *S.N. Mukherjee* (supra) have been followed in *T. Syam Sunder Vs. General Court Martial and Others*,

53. In view of what has been observed above, it logically follows that mere omission to state reasons by the officer concerned, while dismissing the petitioner's representation u/s 117 of the BSF Act does not call for interference by this Court in exercise of its writ jurisdiction.

54. In the result and for the reasons discussed above, I find the present Writ application wholly without merit and the same is accordingly dismissed.

55. No order as to Costs.