
(2009) 05 GAU CK 0059
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 31 of 2006

B. Chhawnkima

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 05-05-2009

Acts Referred:

Constitution of India, 1950 — Article 311(2)
Penal Code, 1860 (IPC) — Section 279, 302, 304
Police Act, 1861 — Section 7

Citation : (2009) 2 GLD 1 : (2009) 3 GLT 648 : (2010) 1 SLR 50

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : George Raju, Ricky Gurung, Zochhuana, F. Lalengliana, Francis Vanlalzuala and Hranleminghana Ratte, for the Appellant; Addl. AG/AGA, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Musahary, J.—Heard Mr. Zochhuana learned Counsel for the petitioner and Mr. N. Sailo, learned Additional Advocate General, Mizoram, for the State respondents.

2. The material facts, necessary for disposal of this writ petition, are that the petitioner was appointed as a constable in 1st Mizoram Armed Police Battalion ("MAP Bn.", in short), on 28.2.1990 and his service was confirmed on 2.5.1994. He was thereafter transferred and posted to 2nd MAP Bn. at Lunglei. While he was working in the 2nd MAP Bn., a criminal prosecution was launched against him by Lunglei police on alleged charge of assaulting and causing death to one Havildar Driver Neihlaia in the night of 23.3.1996 and the petitioner on being charged u/s 302 of IPC in Lunglei Police Station Case No. 27/96 was tried by the Court of ADM(J), Lunglei District, Lunglei. While the investigation and trial of the aforesaid criminal case was in progress, the petitioner was placed under suspension w.e.f. 23.3.1996 and a departmental proceeding was initiated against

him by serving show-cause notice to him on 21.7.1997 on the same charge of assaulting and causing death to his colleague Havildar Driver Neihlaia. The petitioner, thereafter, submitted written-statement denying the charge of murder and he took the plea of self-defence. The Disciplinary Authority not being satisfied with the defence taken by the petitioner decided to proceed with the enquiry by appointing one Mr. M. Lalthanhaulail Sailo, Deputy Commandant, of the said Battalion as Enquiry Officer who conducted the inquiry and submitted a report holding that the petitioner was guilty of the charge framed against him and recommended for taking stern disciplinary action against him u/s 7 of the Indian Police Act read with Rule 66 of the Assam Police Manual, Part-III. On the basis of the aforesaid report, the Disciplinary Authority served a 2nd show- cause notice to the petitioner on 3.9.2003 stating that he has agreed with the finding of the Enquiry Officer and proposed to inflict the punishment of removal from service. The petitioner was accordingly directed to make representation, if any, within a period of 15 days,. against the proposed penalty of removal from service. The petitioner submitted reply to the aforesaid show-cause notice within the stipulated time taking the stand that the action was taken by him against the Havildar Driver Neihlaia in self-defence only and that the said Driver was under the influence of liquor and had become wild and violent at the relevant time. The Disciplinary Authority was not satisfied with the plea taken by the petitioner and passed order dated 3.11.2004 removing the petitioner from service with immediate effect and treating the period of his suspension w.e.f. 23.3.1996 till passing of the removal order dated 3.11.2004 as not spent in duty.

In the meantime, the criminal trial pending against the petitioner in the Court of ADM (J), Lunglei, came to an end with the pronouncement of judgment dated 13.8.2003 acquitting the petitioner from the charge u/s 302, IPC on the ground that he caused death to the Havildar Driver in private defence. After acquittal by the criminal Court, the petitioner preferred a statutory appeal under Rule 66 of the Assam Police Manual, Part-III, on 22.6.2006, to the Deputy Inspector General of Police (Range), Mizoram, (herein respondent No. 3). The said appeal having not been disposed of during the period of about 6 (six) months, the petitioner had to file a writ-petition being WP(C) 137/2005 on 7.12.2005 and the said writ-petition was disposed of vide Order dated 9.12.2005, directing the respondent authorities, particularly, Deputy Inspector General of Police (Range), respondent No. 3, Mizoram, to condone the delay of 16 days in filing the departmental appeal and dispose of the same on merit within a period of 3 (three) months with a liberty granted to the petitioner to approach the Court again if aggrieved by any order that may be passed by the appellate authority.

In compliance to the aforesaid order of this Court, the appellate authority considered the departmental appeal of the writ- petitioner and rejected the same vide order dated 3.3.2006, upholding the order dated 3.11.2004 passed by the Disciplinary Authority removing the petitioner from service. The petitioner, being aggrieved by the order dated 3.11.2004 passed by the Disciplinary Authority and the order dated 3.3.2006 passed by the appellate authority rejecting the

departmental appeal, has approached this Court for quashing and setting aside the aforesaid impugned orders and also for re-instatement in service with full back wages and other consequential benefits.

3. Mr. Zochuana learned Counsel for the petitioner, broadly urges upon the following points:

(1) The petitioner, as soon as he was acquitted by the Criminal Court, is entitled to reinstatement forthwith with full back wages, no matter whether the departmental proceedings initiated against him, ended with the establishment of charges of misconduct and award of punishment.

(2) Since the petitioner has been acquitted by the Criminal Court, the departmental proceeding cannot proceed further and the punishment order passed would not be effective.

(3) There is a clear violation of the principle of natural justice in conducting the departmental inquiry inasmuch as the disciplinary authority did not afford the petitioner with any chance of engaging a defence assistant.

(4) The punishment of removal from service is disproportionate to the offence alleged, which was not proved, rather acquitted by the Criminal Court.

4. Mr. Zochuana learned Counsel for the petitioner, bases his submissions on a decision of this Court in Nagen Baruah Vs. Assam State Transport Corpn. and Others, It was a case where the petitioner was a driver and while he was driving the Corporation's bus, the conductor had to get down to disperse the cows which blocked the road but after sometime, he could detect that the Conductor was not inside the bus. He, therefore, drove back the vehicle and found the conductor lying on the road with some injuries. The driver was first placed under suspension and a departmental proceeding was initiated against him. Simultaneously, a criminal case was also registered u/s 279/304 of IPC. In the departmental proceeding, he was found guilty of rash and negligent driving and he was removed from service. In the said criminal case, the petitioner was acquitted by judgment and order dated 30.5.2001 as the charge of rash and negligent driving could not be established by the prosecution. Even after acquittal, the departmental proceedings against the petitioner continued and the disciplinary authority passed the removal order on 17.1.2002. A Single Bench of this Court found that the departmental proceeding and the criminal proceeding were founded on the same set of charges and after the petitioner was honourably acquitted in the criminal case, the order removing the petitioner from service is liable to be set aside. It also ordered his reinstatement in service with 50% back wages. According to Mr. Zochuana learned Counsel, in the present case also, the charges both in the departmental and criminal proceedings are same and the petitioner was honourably acquitted by the Criminal Court and he is entitled to immediate reinstatement in service with full back wages. Next, Mr. Zochhuana learned Counsel for the petitioner, submits that the departmental proceedings appointed an Officer of the rank of Deputy Commandant of the

Battalion as Inquiry Officer to inquire into the alleged misconduct against a lowest ranked employee like constable, who is not at all aware of the procedure of departmental proceedings, who, as such, made a request for providing him with a Defence Assistant which was denied to him. According to learned Counsel, a statute may be silent about providing Defence Assistant to the delinquent, yet such opportunity should be given as contemplated under Article 311(2) of the Constitution of India to a delinquent who is unable to defend himself due to illiteracy, ignorance or low status in the hierarchy of government servant.

5. Mr. Sailo, learned Additional Advocate General, countering the submissions of Mr. Zochhuana learned Counsel for the petitioner, submits that the petitioner, although acquitted by the Criminal Court, would not be entitled to reinstate automatically taking into consideration the seriousness of the allegation/charge like murder of his colleague by taking the plea of self-defence. The learned Trial Court failed to appreciate the evidence on record that the petitioner could have avoided dealing a fatal strike by a sharp dao on the deceased and there was no case of taking the view that the said strike was dealt in his private defence. However, he admits that the State did not file any appeal against the acquittal order but it would not stand on the way of the disciplinary authority to inquire into the alleged misconduct of the delinquent and award appropriate punishment on him, after all, the deceased was killed under suspicious circumstances and the petitioner admitted the killing his fellow policeman, although in self-defence.

6. Mr. Sailo, learned Additional Advocate General, refers to some portion of the said judgment of the Criminal Court, particularly, evidence of Medical Officer who conducted the post-mortem examination and deposed that in his opinion "the cause of death was neurogic shock due to brain injury and severe haemorrhage from multiple injuries and the weapon used was sharp and heavy one like dao and that even if immediate medical treatment was given at the spot, there was no chance to survival."

7. In the said judgment, the Trial Court quoted the confessional statement of the accused/petitioner and the learned Additional Advocate General urges upon this Court to peruse the same, particularly, the following portion:

...I picked up the dao only for self-defence as Neilhaia was chasing me with the knife. I tried to run home to his house. There was only, one main road leading to my house So, in order to went home, I have to reach the main road. There is the usual approach road to the main road from the quarter, but I avoided the approach road so as to escape from Neilhaia who is running after me. So, I took the narrow path amongst the bushes behind the quarter, below the pig sty of Pu Rosanga (PW-9).

I reached the main road and on tip toe followed the wall of the road. Then on the junction where the road from the quarter joint the main road, I saw Neilhaia jumping to me from above, so I struck with my dao at his person. I know his hand was struck off. Then, Neilhaia caught at my neck with his right hand and

stuck his left hand inside my T. shirt, we wrestled and fallen on the ground together. With my left hand I wrestled with him stuck between our bodies, while drawing out the dao, the dao makes a cut at the chin on Neilhaia. then I stuck with the dao at his back.

Then we separated our hold at each other. He was in kneeling position and put his head on my knee. Then I tried to struck at his head with my dao, but the handle of the dao get off from the dao and the dao struck at his head. I then ran off towards my house. On my way, I met Nk. Lalramhluna who came with me to my house. I took a bath at my house and proceeded towards Quarter guard. I was pushed into the Quarter Guard by Marama who informed the incident to the guard commander...

8. Argument has been advanced for the State-respondents that this may be a case where the prosecution failed to adduced sufficient evidence to establish its cause that the petitioner in fact struck the dao blow not in his self-defence but with intention to kill the deceased. This Court need not go into this aspect. It is only to see whether the petitioner behaved or conducted himself in a manner expected from a policeman. This is the reason, why, even after acquittal in criminal proceeding,; the departmental proceeding should continue. In this regard, Mr. Sailo, relies on a decision rendered by the Apex Court in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, wherein, it is held, amongst other, that the departmental proceedings and criminal proceedings can proceed simultaneously though separately.

9. After hearing the parties, I deem it proper and expedient to decide, first of all, whether a departmental inquiry initiated on the same set of charges in the criminal case, should proceed even after the end of the criminal proceeding in acquittal. This point has already been decided by the Apex Court, in the case of Corporation of the City of Nagpur, Civil Lines, Nagpur and another Vs. Ramchandra and others, The principle has been laid down in paragraph-6 of the said judgment which is quoted below:

6. The other question that remains is if the respondents are acquitted in the criminal case whether or not the departmental inquiry pending against the respondents would have to continue. This is a matter which is to be decided by the department after considering the nature of the findings given by the Criminal Court. Normally, where the accused is acquitted honourably and completely exonerated of the charges it would not be expedient to continue a departmental inquiry on the same charges or grounds or evidence, but the fact remain, however, that merely because the accused is acquitted, the power of the authority concerned to continue the departmental inquiry is not taken away nor is its direction (discretion) in any way fettered. However, as quite sometime has elapsed since the departmental inquiry had started the authority concerned will take into consideration this factor in coming to the conclusion if it is really worthwhile to continue the departmental inquiry in the event of the acquittal of the respondents. If, however, the authority feels that there is sufficient evidence

and good grounds to proceed with inquiry, it can certainly do so....

In the subsequent case of *Nelson Motis Vs. Union of India* and another, , the Apex Court also took the similar view and held that irrespective of the acquittal of the delinquent official, the disciplinary proceedings could be continued.

10. The purport of the aforesaid decisions of the Supreme Court is that the disciplinary authority is not bound to close the departmental proceeding already initiated even after the closure of the criminal proceeding with acquittal of the delinquent in criminal case. It follows that the disciplinary authority, independent of the order of acquittal of the delinquent official by the Criminal Court, may award punishment if the Inquiry Officer completes the inquiry and submits a report with findings that the charges of misconduct against the delinquent have been established. There is no universally accepted rule that in each and every case, where the delinquent has been acquitted by the Criminal Court, is not liable to be punished although the charge of misconduct has been established and he should be taken back in service as a matter of right. In my considered view, whether a particular delinquent official should be reinstated after being acquitted by the Criminal Court, would depend upon the nature of charges or misconduct alleged against him and the discretionary power for awarding punishment or exoneration, cannot be taken away by an order of acquittal of the Criminal Court. This is because of the difference in the purpose of initiating the departmental proceeding and criminal proceeding and also different standard of proof required in the said proceedings. It is always to be remembered that a proceeding in the criminal case and departmental proceeding operate in distinct and different jurisdictional areas. The issue in the disciplinary proceeding is whether the employee is guilty of charges of misconduct as a public servant under the service rules on which action is proposed against him; whereas in the criminal proceeding, the question is whether the employee is guilty of any crime/offence which is against the State under the penal Code. The criminal charge is always treated as more serious and grave offence than the charge of misconduct. For this reason, the criminal charge, as per the universally accepted principle, should be proved beyond all reasonable doubts and it must be established that the accused has committed the crime. In the departmental proceeding, the standard of proof is one of preponderance of probabilities which is to be established against the delinquent.

11. Although learned Additional Advocate General, attempts to show that the Trial Court in the aforesaid criminal case failed to appreciate the evidence on record and erroneously ordered acquittal of the petitioner, I would refrain from entering into this aspect of the matter, more so, due to the admitted fact that the State did not prefer any appeal against the said order of acquittal. It is enough if it can be shown from the record that the disciplinary authority conducted the departmental proceeding in accordance with the existing rules and established procedures and awarded the punishment.

12. Except the ground of non-affording the chance of engaging a Defence

Assistant, there is no other allegation of violation of any rules or procedure in conducting the departmental proceedings concerned.

13. I have perused the records as produced at the time of hearing. From the records, it is not found that the petitioner, except the claim made by his counsel at the time of hearing before this Court, ever made any request or representation before the disciplinary authority or the Inquiry Officer for affording him with a chance to engage a Defence Assistant to defend him properly in the proceedings. The law relating to right of the delinquent to defend himself through a Defence Assistant has been settled already and the same is restated in a recent case of D.G. Railway Protection Force and Others Vs. K. Raghuram Babu, wherein it is held that the. department/domestic inquiry is not a civil suit or a trial and an employee accused of misconduct has to conduct his own case. It is also held that there is no vested right to claim assistance of a counsel or any other person and the rules may permit only restricted or controlled assistance, infraction of which would not violate natural justice. It would be apposite to quote paragraphs-9, 10 and 11 of the aforesaid judgment, as under:

(9). It is well settled thatnarily in a domestic/department inquiry, the person accused of misconduct has to conduct his case vide N. Kalindi v. Tata Locomotive and Engineering Ltd. Such an inquiry is not a suit or criminal trial where a party has a right to be represented by a lawyer. It is only if there is some rule which permits the accused to be represented by someone else, that he can claim to be so represented in an inquiry, vide Brookebond India (P. Ltd.) v. Subba Raman.

(10) Similarly, in Sipla Ltd. v. Repu Daman Bhanot, it was held by this Court that representation could not be claimed as of right. This decision followed the earlier decision Bharat Petroleum Corporation Ltd. v. Maharashtra General Kamgar Union in which the whole case law has been reviewed by this Court.

(11) Following the above decision, it is to be held that there is no vested or absolute right in any charge-sheeted employee to representation either through a counsel or through any other person unless the Statute or rules/standing orders provide for such a right. Moreover, a right to representation through someone, even if granted by the rules, can be granted as a restricted or controlled right. Refusal to grant representation through an agent does not violate the principles of natural justice.

14. It is now required to find out from the Indian Police Act and Assam Police Manual, Part-III, whether any provision has been laid down in regard to affording chance to the delinquent for being represented by or taking any assistance by engaging the Defence Assistant. On scrutiny of the Act and the Manual, I fail to find out any such provision therein. The petitioner has not been able to furnish provision of such law or any government circular/notification providing for engagement of Defence Assistant by the delinquent for his defence in the departmental proceeding. In absence of such provision, the petitioner could not

have any right to claim for representation through Defence Assistant and therefore, the submission of the learned Counsel cannot be accepted, more particularly, in view of the clear position of law laid down by the Apex Court in the above cited case.

15. The other point to be examined is whether the punishment of removal is disproportionate to the charge/allegation made against the petitioner. It must be kept in mind that the petitioner belongs to a police battalion which is considered to be a disciplined force and is expected to maintain discipline and good conduct. The force is also expected to protect the life and properties of thenary citizens and they should restrain themselves from committing any crime. In case, any crime is committed by a member or such disciplined force, he is liable to be dealt with seriously, to be precise, more stringent action is to be taken against him and they should not be dealt with in the manner in whichnary civilian citizens are dealt with. This is the reason why there is a separate set of Act and Rules for dealing with the misconduct of the police personnel. In this case, the petitioner, has, no doubt, been acquitted by the Criminal Court but the admitted factual position is that the petitioner was having drinks (liquor) while taking the dinner in the evening and there was a quarrel between him and the deceased and during the quarrel, the petitioner chased the deceased colleague constable and happened to deal a strike on his hand and back by a dao and the deceased succumbed, on the spot, to serious multiple injuries he received. Whatever may be the reason, striking at the hands and the back with a sharp dao by the accused causing serious injuries and ultimately death, is a serious misconduct on the part of the petitioner. This Court, cannot find fault in the finding of the Inquiry Officer and the decision taken by the Disciplinary Authority for awarding a particular punishment like removal from service which was also upheld by the Appellate authority. The Disciplinary Authority, as could be seen from the impugned order dated 3.11.2004, has given the reasoning for awarding the punishment of removal from service and so did by the appellate Court in upholding the same. The writ Court has no jurisdiction to review the order of punishment in the name of exercising the power of judicial review unless, it is established that the procedural requirements have been violated and if the petitioner fails to do so, the writ Court, would not interfere with the quantum of punishment imposed upon by the delinquent. The Court is not bound to interfere with the findings and award of punishment on the basis of sympathy or sentiment. The Apex Court had the occasion to discuss and lay down the principles in Chairman and MD V.S.P. and Others Vs. Goparaju Sri Prabhakara Hari Babu, wherein, it has been held that the jurisdiction of the High Court in this regard, is rather limited and its power to interfere with the disciplinary matters is circumscribed by well-known factors. The High Court cannot set aside a well reasoned order of the departmental authority and disturb the penalty so imposed on the basis of sympathy or sentiment. Further, it is held therein that once it is found that all the procedural requirements have been complied with, the Courts would notnarily interfere with the quantum of punishment imposed upon the

delinquent and if a decision of an employer is found to be within the legal parameters, the jurisdiction would not be invoked when the misconduct stands proved. The present case is a case of a proved misconduct of a person employed in a disciplined force like the police battalion and it cannot be placed at the same footing with the civilian employee of the government, and as such, I fail to find any reasonable ground for taking a liberal view and interfere with the impugned punishment order dated 3.11.2004 and give any direction to the respondent authorities to impose any other punishment lesser than removal from service.

16. It is redundant to discuss on the point of payment of back wages claimed by the petitioner.

17. As a result of the aforesaid discussions and in view of the law laid down by the Apex Court in the cases referred to, no interference with the impugned orders is called for, rather, the instant writ-petition is found devoid of any merit and liable to be dismissed and the same is, accordingly, dismissed. However, there shall be no order as to cost.