
(2011) 07 DEL CK 0333
In the Delhi High Court
Case No : Writ Petition (C) 3577 of 1997

Bhushan Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 13-07-2011

Acts Referred:

Border Security Force Act, 1968 — Section 108, 113, 117(2)
Border Security Force Rules, 1969 — Rule 45, 45B, 51
Constitution of India, 1950 — Article 226, 227

Citation : (2011) 07 DEL CK 0333

Hon'ble Judges : Sunil Gaur, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : R.P. Sharma, for the Appellant; Bhupinder Sharma, Dy. Commandant, BSF, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Shorn of unnecessary details, the facts leading to filing of the present petition are that the Petitioners, employed as Constables with Border Security Force and attached to 55 Bn. were on duty at Bengal Border and deployed at BOP Ramnagar on 20.10.1992.

2. On 22.10.1992 Joy Dev Sarkar lodged a complaint with Coy Commander of 55 Bn. BSF and PS Hanskhali that his sister (hereinafter referred to as the prosecutrix), who is deaf and dumb, was raped by B.S.F. jawans on 20.10.1992 at about 09.30 P.M.

3. In view of the aforesaid serious allegations leveled by Joy Dev Sarkar, the Commandant ordered the convening of Court of Inquiry (hereinafter referred to as the "COI") to conduct a prima facie inquiry into the matter. Besides examining other persons the COI examined the prosecutrix and her brother Joy Dev Sarkar who stated that the prosecutrix was raped by the Petitioners on 20.10.1992 at about 09.30 P.M.

4. On 28.01.1993 the COI concluded its proceedings and opined that the allegations leveled by Joy Dev Sarkar are false and that the Petitioners were implicated in the present case at the behest of local smuggler Allauddin as they were taking strict action to curb smuggling activities. In coming to the said conclusion, the fact which heavily weighed with the COI was that the prosecutrix was not got medically examined on the date of the alleged incident of rape.

5. After sometime the COI reopened its proceedings and conducted the identification parade of the Petitioners where the prosecutrix was not able to correctly identify them as recorded in the additional statement of prosecutrix recorded by COI and the additional findings and opinion dated 27.03.1993 of the COI.

6. On 07.03.1996 charge sheet(s) were issued to the Petitioners for having committed rape upon the prosecutrix. Thereafter the Commandant proceeded to hear charge against the Petitioners under Rule 45-B of the BSF Rules, 1969 and detailed P.J. Rao, 2I/C to prepare the Record of Evidence. Besides examining other persons, the Recording Officer examined the prosecutrix and her brother who reiterated that the prosecutrix was raped by the Petitioners on 20.10.1992 at about 09.30 P.M.

7. After a consideration of the record of evidence, on 14.08.1996, Inspector General B.S.F. South Bengal Frontier Sh. R.N. Bhattacharya directed that a General Security Force Court (herein after referred to as the "GFSC") be convened to conduct a joint trial in respect of the charge framed against the Petitioners.

8. During trial, the prosecution examined 6 witnesses.

9. The prosecutrix PW-4, who was a deaf and dumb lady, deposed by means of gestures that she was raped by the Petitioners on 20.10.1992.

10. Joy Dev Sarkar PW-3, the brother of the prosecutrix, deposed that on 20.10.1992 four BSF personnel including the Petitioners visited the house of his neighbor Sanatan Biswas on 20.10.1992, at which time Kali Puja was being performed there. The prosecutrix left her residence to go the house of Sanatan Biswas but she did not reach there. When he did not find the prosecutrix at the residence of Sanatan Biswas he got worried and started looking for her. When he was looking for the prosecutrix he saw Petitioner Avtar Singh standing in front of the house of one Shankar Halder. After a while he heard a moaning sound coming from the direction of banana/turmeric grove situated near the house of Shankar Halder upon which he got suspicious and enquired from the Petitioner Avtar Singh about the whereabouts of other three BSF personnel. On his persistent questioning Petitioner Avtar Singh got annoyed and threatened him from asking further questions. Thereafter he brought a torch from the house of Shankar Halder and flashed the torch light in the direction of said banana/turmeric grove upon which he saw that the prosecutrix was standing near the grove in a miserable condition and her clothes were torn. Petitioner Avtar Singh

prevented him from going towards the prosecutrix by beating him and hurling abuses at him upon which he shouted for help and several persons including his father came there. Thereafter he took the prosecutrix to their house where she told him that said four BSF personnel had dragged her to banana/turmeric grove when she was coming from the house of Sanatan Biswas and two of those personnel committed rape upon her. He asked his father to immediately report the matter to the Pradhan of village but his father did not agree to do so as he was of the view that they cannot afford to have inimical relations with the BSF personnel as they are living in the border area. On the next day i.e. 21.10.1992 the matter was again discussed in his house and they decided to report the matter to the Pradhan of the village whereupon his mother and younger brother went to the house of the Pradhan of the village to apprise him about the incident in question. On 21.10.1992 he went to the market where the Petitioners quarreled with him in respect of the incident in question. On 22.10.1992 he lodged complaints Exhibit-M and Exhibit-N with the Coy Commander of 55 Bn and PS Hanskhali respectively regarding the incident of rape of the prosecutrix.

11. Kamla Sarkar PW-5, the mother of the prosecutrix, deposed that on 20.10.1992 at about 08.30 P.M. she had gone to the house of her neighbor to attend a religious function. When she returned to her house at about 10.00 P.M. she saw that the prosecutrix was weeping profusely. On making enquiries the prosecutrix informed her that four BSF personnel had committed rape upon her at banana/turmeric groove.

12. Haripada Sarkar PW-1, the Sarpanch of village Ramnagar, deposed that on 21.10.1992 (this date has been wrongly recorded as 20.10.1992 in the testimony of the witness) at about 03.00 P.M. the mother of the prosecutrix informed him that the prosecutrix was raped by four BSF personnel in the night of 20.10.1992 whereupon he went to BOP Ramnagar and informed HC Dinanath about the incident. While he was coming back from BOP Ramnagar he saw that Petitioner Bhushan Singh was having a quarrel with the brother of the prosecutrix Joy Dev Sarkar whereupon he went back to BOP Ramnagar and informed HC Dinanath about the factum of said quarrel however HC Dinanath did not take any action in the said matter. On 22.10.1992 the brother of the prosecutrix Joy Dev Sarkar lodged complaints Exhibit-M and Exhibit-N with the Coy Commander of 55 Bn and PS Hanskhali respectively regarding the incident of rape of the prosecutrix.

13. Prabhash Biswas PW-2, a resident of village Ramnagar, deposed that four BSF personnel including the Petitioners visited the house of his relative Sanatan Biswas on 20.10.1992, at which time Kali Puja was being performed there. Within 20-25 minutes of departure of the BSF personnel from the house of Sanatan Biswas he heard some loud voices from the direction where the BSF personnel had gone. When he went there he saw that the Petitioners were having a quarrel with the brother of the prosecutrix Joy Dev Sarkar. After sometime he observed the prosecutrix standing in a miserable at the place of the quarrel and that her clothes were torn.

14. HC Dinanath PW-6, Coy Commander of 55 Bn, deposed that on 22.10.1992 the Pradhan of village had lodged a complaint regarding the incident in question. On 20.10.1992 two Nakas were on duty. The first Naka was under the command of Naik Om Prakash and consisted of the Petitioners and Const. Siby Verghese.

15. In defence the Petitioner examined 2 witnesses.

16. HC Om Prakash DW-1, deposed that on 20.10.1992 he along with the Petitioners and Const. Siby Verghese were detailed for Naka duty in the area of village Behrampur. While the time they were on duty, they did not visit village Ramnagar.

17. Dr. Sukumar Nath Shaha DW-2, deposed that on 23.10.1992 he medically examined the prosecutrix. On examination he found that there were No. nail marks or marks of biting or any other marks of violence on the body of the prosecutrix. He did not find blood stains or seminal stains on the private parts of the prosecutrix. In his opinion No. rape was committed upon the prosecutrix. On being questioned about the interval of time between the date of rape and the date of medical examination of a victim of rape the witness stated (Quote):

It is a fact that if the medical examination is done after 72 hours, generally, the facts of the rape can not be ascertained.? On being questioned about the hymen of the prosecutrix the witness stated (Quote): "In case the lady is habitual of sex, hymen would not be intact. I examined the lady and found that her hymen was ruptured. I found that she was habitual of sex.

18. After the conclusion of the evidence the Petitioners submitted their written statements to the GFSC wherein they pleaded innocence and denied all the incriminating circumstances appearing against them.

19. After a consideration of the evidence led by the prosecution and the defence, the opening and closing address of the prosecutor and the defending officer and summing up of the law officer, vide order dated 04.09.1996 the GFSC convicted the Petitioners for the charge framed against them and awarded a sentence of rigorous imprisonment for three months to them.

20. The record of the case was forwarded to the Inspector General Border Security Force, South Bengal Frontier Sh. R.N. Bhattacharya for the purposes of the confirmation of the finding and sentence of the GFSC in terms of Section 108 of Act. Vide order dated 27.09.1996, in exercise of his power u/s 113 of the BSF Act the Inspector General directed the GFSC to consider enhancing the sentence awarded to the Petitioners as he opined that the same was not commensurate with the gravity of the offence committed by them. Vide order dated 10.10.1996 the GFSC revised the previous sentence awarded to the Petitioners and awarded a sentence to undergo rigorous imprisonment for 7 years and dismissal of service to the Petitioners. The record of the case was again forwarded to the Inspector General for the purposes of confirmation of the finding and sentence of the GFSC, which were confirmed by him vide order dated 13.02.1997.

21. Aggrieved by the finding and sentence awarded by the Security Force Court which stood confirmed by the Inspector General, the Petitioners preferred petition(s) u/s 117(2) of Border Security Force Act, 1969 to the Directorate General Border Security Force, Ministry of Home Affairs, Government of India, which petition(s) were rejected vide order dated 19.08.1997.

22. Aggrieved by the aforesaid, the Petitioners have filed the present petition under Articles 226 and 227 of Constitution of India.

23. During the course of the hearing of the present petitions, following nine submissions were advanced by the learned Counsel for the Petitioner:

A The first submission advanced by the learned Counsel for the Petitioner was that the COI concluded its proceedings on 27.03.1993. After a lapse of more than three years after the conclusion of the proceedings of the COI the Commandant issued a charge sheet to the Petitioner on 07.03.1996. It was contended by the counsel for the Petitioner that the time gap of three years between the conclusion of the proceedings of the COI and the issuance of the charge sheet to the Petitioners is a very strong pointer to the fact that R.N. Bhattacharya, Inspector General, Border Security Force, South Bengal Frontier who had played a major role in the trial of the Petitioners was determined to convict the Petitioners in a false case.

B The second submission advanced by the learned Counsel for the Petitioners was that Rule 45 of BSF Rules, 1969 envisages application of mind by the Commandant in coming to the conclusion whether a prima facie case is made out against the accused persons or not. It was urged that in the instant case, No. material whatsoever had surfaced against the Petitioner in the COI. It was urged that when there was No. material before the Commandant pointing towards the guilt of the Petitioners he was not justified in directing the preparation of the Record of Evidence and ought to have dismissed the charge framed against the Petitioner.

C The third submission advanced by the learned Counsel for the Petitioners was that Rule 51 of BSF Rules, 1969 envisages application of mind by the Commandant in coming to the conclusion whether a prima facie case is made out against the accused persons or not. In the instant case, No. material whatsoever had surfaced against the Petitioner in the Record of Evidence. When there was No. material before the Commandant pointing towards the guilt of the Petitioners he was not justified in applying for convening of GFSC to conduct the trial of the Petitioners and ought to have dismissed the charge framed against the Petitioner.

D The fourth submission advanced by the learned Counsel for the Petitioners was that the GFSC did not attach due importance to the fact that the COI had exonerated the Petitioners and thus committed a grave illegality in convicting the Petitioners.

E The fifth submission advanced by the learned Counsel for the Petitioners was

that the GFSC did not attach due importance to the fact that the prosecutrix did not correctly identify the Petitioners in the test identification parade and consequently committed a grave illegality in convicting the Petitioners.

F The sixth submission advanced by the learned Counsel for the Petitioners was that the medical evidence completely demolishes the claim of the prosecutrix that she was raped inasmuch as the doctor who conducted the medical examination of the prosecutrix ruled out the commission of rape upon the prosecutrix.

G The seventh submission advanced by the learned Counsel for the Petitioners was that the fact that No. injury marks or seminal stains were found on the person of the prosecutrix is a very strong pointer to the fact that No. rape was committed upon the prosecutrix.

H The eighth submission advanced by the learned Counsel for the Petitioners was that there was a delay on the part of the prosecutrix and her family in lodging a complaint in respect of the alleged incident of rape, which factum raises a serious question mark on the genuineness of the claim of the prosecutrix that she was raped by the Petitioners.

I The last submission advanced by the learned Counsel for the Petitioner was an extension of the first; that the circumstances on record establish that Inspector General Border Security Force, South Bengal Frontier was determined to convict the Petitioners in the present case. Learned Counsel drew attention of the Court to the fact that the presiding officer of the GFSC was junior to Sh. R.N. Bhattacharya. According to the counsel, in such circumstances, the possibility that the Presiding Officer of the GFSC being a subordinate to Sh. R.N. Bhattacharya, has convicted the Petitioners at the instance of Sh. R.N. Bhattacharya, cannot be ruled out and thus finding and sentence of GFSC is liable to be quashed on said count alone.

24. The first submission advanced by the learned Counsel for the Petitioners is speculative. Had Inspector General Border Security Force, South Bengal Frontier been determined to convict the Petitioners the things would have moved at a fast speed and not at a snail pace as had happened in the instant case. The prosecutrix was a handicapped lady of limited means. The case of the prosecutrix would have received meagre attention in the Border Security Force; and thus the delay in issuance of the charge sheet to the Petitioners. It is difficult to comprehend that Inspector General Border Security Force, South Bengal Frontier Sh. R.N. Bhattacharya would have been determined to convict the Petitioners when he had No. manifest animus against them.

25. Regarding the second and third submissions advanced by the learned Counsel for the Petitioners suffice would it be to state that the learned Counsel is not right in contending that No. material has surfaced against the Petitioner at the COI and Record of Evidence for the reason in both COI and ROE proceedings, the prosecutrix and her brother Joy Dev Sarkar had made categorical statements

to the effect that the prosecutrix was raped by the Petitioners on 20.10.1992.

26. The Court of Inquiry is a fact finding inquiry and much importance cannot be attached to the findings of the Court of Inquiry. In the instant case, the fact which swayed the COI in exonerating the Petitioner was that the prosecutrix was not got medically examined by her family soon after the incident. It was not within the hands of the family of the prosecutrix to get the prosecutrix medically examined. The pradhan of the village of the prosecutrix informed the Coy Commander about the incident on the next day after the incident but the Coy Commander did not take any action in said regards. The delay in conduct of the medical examination of the prosecutrix was due to the inaction of the Coy Commander and not because of the fault of the family of the prosecutrix. In such circumstances, nothing much turns on the fact that the Petitioners were exonerated by the Court of Inquiry.

27. What turns on the fact that the prosecutrix did not correctly identify the Petitioners in the identification parade?

28. It is settled legal position that identification of an accused by a witness in the identification parade do not constitute substantive evidence. Test identification parade belongs to the stage of investigation. They are primarily meant for the purpose of helping the investigating agency with the assurance that their progress with the investigation into an offence is proceeding on the right lines. When the evidence of the prosecutrix was cogent, trustworthy and corroborated from other sources the factum of incorrect identification of the Petitioner by the prosecutrix in the identification parade is of No. consequence. In any case, the possibility that the prosecutrix, being a deaf and dumb lady, could not express her correctly in the identification parade cannot be ruled out.

29. In the instant case, in view of the fact that the prosecutrix was examined two days after the incident of the rape the medical examination of the prosecutrix is meaningless. It is important to note that Dr. Sukumar Nath Saha DW-2, deposed that when a rape victim is examined 72 hours after the commission of the rape the facts of commission of rape cannot be ascertained. In any case, it was not within the province of Dr. Sukumar Nath Saha to give an opinion that the rape was not committed upon the prosecutrix for whether the rape occurred or not in a given case is a legal conclusion, and not a medical one. In said regards, it is important to note the following observations of the Supreme Court in the decision reported as Madan Gopal Kakkad Vs. Naval Dubey and Another,

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:

Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite

sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that No. rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

38. In Parikhs Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

...even slight penetration is sufficient and emission is unnecessary. Therefore, absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that No. rape has been committed.

(Emphasis Supplied)

30. In dealing with the submission that No. injury marks or seminal stains were found on the person of the prosecutrix suffice would it be to note the observations of the Supreme Court in Madan Gopal's case (supra) that absence of injury marks or seminal stains on the person of a prosecutrix does not ipso facto lead to an inference that No. rape has been committed upon her. To the similar effect, in the decision reported as B.C. Deva @ Dyava Vs. State of Karnataka, it was held by the Supreme Court that mere absence of injury marks on the person of the prosecutrix does not lead to an inference that No. rape was committed upon her.

31. The submission that there was delay on the part of the prosecutrix and her family in lodging a complaint in respect of the alleged incident of rape is devoid of any merit. The incident in question occurred in the night of 20.10.1992. The mother of the prosecutrix reported the matter to the Pradhan of the village on the very next day. In view of the social ramifications of the offence of rape and the fact that BSF personnel were involved in the incident the family of the prosecutrix would have deliberated among themselves before taking any action in the matter. In such circumstances, the act of the family of the prosecutrix of reporting the matter to the Pradhan of the village within one day of the happening of the incident can hardly be termed as delay.

32. It is settled legal position that while exercising jurisdiction under Article 226 of Constitution of India the High Court does not act as an appellate court and re-

appreciate the evidence. The findings of the Security Force Courts can only be interfered by the High Court when they suffer from a jurisdiction infirmity, procedural irregularity or are perverse. A finding is said to be perverse when it based on No. evidence or inadmissible evidence or is such that No. prudent person would have ever come to the said conclusion.

33. In the instant case, the testimony of the prosecutrix is cogent, reliable and trustworthy. The testimony of Joy Dev Sarkar PW-3, that Petitioner Avtar Singh was found near the banana/turmeric groove where the prosecutrix was raped; the prosecutrix was in miserable condition and her clothes were found torn at the time when he found her; Petitioner Avtar Singh prevented him from rescuing the prosecutrix duly corroborates the testimony of the prosecutrix. Furthermore, the deposition of Prabhash Saha PW-2 that he saw the Petitioners quarreling with the brother of the prosecutrix on the night of 20.10.1992 and that the prosecutrix was in a miserable condition and her clothes were torn at that time and the deposition of Haripada Sarkar PW-1, that he saw the Petitioners quarreling with the brother of the prosecutrix next day after the incident in question are strongly indicative of the guilt of the Petitioners.

34. In view of the aforesaid discussion, the above captioned petitions are dismissed. The bail bonds and surety bonds furnished by the Petitioners are cancelled. The Petitioners shall surrender forthwith to serve the remaining sentence.

35. We refrain from imposing any costs.