
(2015) 03 DEL CK 0079
In the Delhi High Court
Case No : Writ Petition (C) 7826/2013

Deepak Roy

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 18-03-2015

Acts Referred:

Border Security Force Act, 1968 — Section 40

Citation : (2015) 03 DEL CK 0079

Hon'ble Judges : Pratibha Rani, J.;Pradeep Nandrajog, J.

Bench : Division Bench

Advocate : Rekha Palli, Garima Sachdeva and Shruti Munjal, for the Appellant;
Sarika Singh, Advocates for the Respondent

Judgement

Pradeep Nandrajog, J.—On February 06, 2010 an offence report was put up before Commandant Sumer Singh of the 65th Bn. BSF to which the petitioner was attached as a Head Constable. The offence listed in the offence report was for having acted in a manner which was prejudicial to good order and discipline of the force (an offence under Section 40 of the BSF Act, 1968). The factual content of the offence report was that while performing the duties in AOR of JCP Attari between 1st to 3rd February, 2010, the petitioner knowingly passed information to notorious smugglers about the smuggling routes and disclosed the BSF operational plan to them which may lead to imperil the success of the force and also passed operational information which would facilitate the smugglers to carry out the smuggling in the unit AOR across the border.

2. The seriousness of the offence report, as would be expected, led the Commandant to pass an order on the same day, after hearing the petitioner, that Record of Evidence be drawn up. 2-IC Sh.A.R. Rathore, was detailed to conduct the proceedings concerning Record of Evidence. As required by Rule 45 of the BSF Rules, 1969, the Commandant drew up the charge in respect where to the Record of Evidence had to be prepared, and we note that the charge drawn up was:-

"The accused NO.880067012 HC Dipak Roy "C" Coy of 65 Bn. BSF, Khasa Amritsar (PB) is charged with:-

3. 2-IC S.Rathore recorded statements of 8 witnesses and forwarded the Record of Evidence to the Commandant of the 65th Bn.

4. Since it transpired that one incriminating evidence against the petitioner was a stated confession made by him in the presence of 2-IC A.S. Rathore before the Commandant, a decision was rightly taken to attach the petitioner before the 41st Bn. BSF for purposes of disciplinary proceedings, since the 2-IC and the Commandant would be the witnesses of the department. Rule 46 of the BSF Rules, 1969 mandate that the Commandant of the Battalion shall not deal with a case where he himself is a witness or is otherwise personally interested in the case. The Record of Evidence Proceedings were thus treated as non-est.

5. Accordingly, the petitioner was attached with the 41st Bn. BSF, the Commandant whereof Sh.D.S. Sandha directed fresh Record of Evidence to be drawn up and we find that on April 21, 2010, he drew up a fresh charge-sheet in respect of which the Record of Evidence had to be prepared and deputed 2-IC S.S. Soodan to do the needful. The chargesheet drawn up on April 21, 2010, having three charges reads as under:-

"CHARGE-SHEET

The accused No. 880067012 HC Deepak Roy, 65 Bn. BSF attached with 41 Bn. BSF is charged with:-

6. 2-IC S.S. Soodan recorded the statements of seven witnesses and forwarded the record to the Commandant of the 41st Bn. Considering the same on July 18, 2010 the Commandant directed additional Record of Evidence to be drawn up, and for which he drew up the charge-sheet, which is identical with the charge-sheet drawn up on April 21, 2010. He recorded therein that statements of No. 89200914 Ct.Driver Bakhshish Singh of the 41st Bn. BSF (decoy smuggler) and civil witnesses Jogender Singh @ Chuha, Paramjit Singh @ Pamma should be recorded and if need be any other witness. Sh.Anil Sharma the Deputy Commandant of the Unit was detailed to prepare the additional Record of Evidence, who proceeded to examine three witnesses : Sh.Jogender Singh @ Chuha, Ct.Driver Bakhshish Singh and Paramjit Singh @ Pamma.

7. The matter was placed before the Commandant, who considered the Record of Evidence drawn up by 2-IC S.S. Soodan as also the additional Record of Evidence drawn up by Deputy Commandant Anil Sharma. He formed an opinion that case was made out to try the petitioner at a Security Force Court and thus he drew up a charge-sheet on December 10, 2010 which is identical, being a verbatim copy, of the charge-sheet drawn up by the Commandant on April 21, 2010. Thus, we are not noting the charge-sheet drawn up in respect of which the petitioner was sent for trial.

8. The arraignment took place on December 13, 2010, and as per the record the

petitioner pleaded guilty, and in respect of which plea of guilt we find that signatures of the petitioner were not taken. The record shows that the three charges were apparently read out and the petitioner pleaded guilty. The record would show that thereafter the Record of Evidence prepared by 2-IC S.S. Soodan was read out and marked "K" and explained to the petitioner followed by the additional Record of Evidence prepared by Dy.Commandant Anil Sharma being read out and marked "K-2". The Court was adjourned for the next day i.e. December 14, 2010, and as per the record the Court re-assembled at 10:30 hours on said day. The petitioner made a statement, beneath which we do not find signatures of the petitioner taken. The statement reads as under:-

"I pray to the Court that, my family is dependant on my BSF service. I have two daughters and an ailing wife. On their behalf, I beg to the Court that their future be kept in mind while deciding the case. Earlier also I have begged to be forgiven for these offences I have committed. I once again request to be forgiven. I will not repeat these mistakes/commit such offences in future. Henceforth, I will try to become a good border man and assure that I will become one. I request the Court, to afford me an opportunity to become a good person." 9. Before briefly recording the statements of the witnesses examined during Record of Evidence and additional Record of Evidence it would be relevant to note a fact, evidenced by the three charges for which the Record of Evidence and the additional Record of Evidence was to be prepared, that a trap had been laid and thus the most of the witnesses who were associated with the trap deposed *pari materia*.

10. Deputy Commandant Lakhvir Singh PW-1 deposed that Subeg Singh, a local contact of his gave him information regarding smuggling in the area. He i.e. Subeg Singh had been arrested by the local police and was in possession of 10 kg heroine. He had given the name of the petitioner. He learnt that on December 20, 2009 the petitioner contacted a courier to establish connections with smugglers and members of his team G got whiff of said fact. On February 01, 2010 the petitioner met Jogender Singh @ Chuha and gave him his address and phone number for verification so that the smugglers could be satisfied. On February 02, 2010, Ct.Bakshish Singh organizing a meeting between the petitioner and a smuggler namely Paramjit Singh @ Pamma near a temple at Kahangarh to know the intentions of the petitioner. During said meeting, petitioner disclosed secret of border guarding system and demanded a sum of Rs. 1,00,000/- for each transaction. The petitioner also admitted involvement of another BSF personnel in the smuggling activities and finalized a date and time for familiarization of the routes to be adopted for doing smuggling activities in the area falling under the responsibility of JCP Attari. He further stated that the recording of the said meeting is available. He stated that petitioner never informed him or Insp.(G) of the Unit regarding said meeting despite the fact that petitioner was directed to communicate with him daily after the conclusion of retreat ceremony about the daily happenings of the area. On February 03, 2010 at about 1:00 PM the petitioner again met Ct.Bakshish Singh and Paramjit Singh @ Pamma and familiarize himself with the area and finalized three likely routes

for conducting smuggling activities. During said meeting, the petitioner again disclosed secret of present border guarding system and told that place where his associate would be present will be disclosed by him at about 11.00 P.M. Thereafter the petitioner selected one point and told Ct.Bakshish Singh and Paramjit Singh @ Pamma to reach said point alongwith the smuggler at about 11.00 P.M. The petitioner further disclosed that he will reach said point after answering call of nature and guided them about the place where his associate would be present and the routes to be adopted by them. The petitioner never informed him (the witness) or Inspector (G) of the unit regarding (second) meeting. He stated that he informed about said second meeting to the headquarters and the recording of said meeting is also available. On February 05, 2010 all the head constables of 65th Bn. of BSF were called in his office for briefing of latest happenings in their respective areas. The petitioner was also called in said briefing and was asked by him in the presence of Insp.(G) Mohinder Singh and SI (G) G.S. Chauhan to give details regarding smuggling activities in his area but he i.e. the petitioner did not disclose anything about the above two meetings. Thereafter, the aforesaid details were shared with DIG (SHQ), Commandant (SHQ) and Commandant of the unit and final course of action was decided. The petitioner was called in the office of the Commandant and again asked to disclose regarding smuggling activities in his area but again he did not disclose anything about the above two meetings. After that, the audio recordings of the aforesaid two meetings and hand written slips were shown to the petitioner and he was informed about the trap laid against him. At this point, the petitioner accepted his involvement in smuggling activities and made a confessional statement before him and Commandant, 2-IC, Adjutant, Inspector (G), Head Clerk. In said confessional statement, the petitioner disclosed the name of one Ct.Onkar Singh as his associate at BOP Pul Moran. The petitioner also disclosed that he was not trapped by the smugglers but had himself approached them i.e. for carrying out the illegal activities.

11. Insp.(G) Mohinder Singh PW-2 and Insp.(Min) R.S. Pathania PW- 3 corroborates the meeting of February 5, 2010 where all the head constables of 65th Battalion of BSF were called to brief of the latest happenings in their respective areas. Insp.(Min) R.S. Pathania additionally produced a secret letter No.Spl/report/SHQ-ASR/G.10/05-07 dated February 05, 2010 addressed to DIG(G) Ftr HQ, BSF (Ex.B).

12. DC Praveen Kumar PW-4 deposed corroborating facts regarding the meeting which took on February 05, 2010 wherein the petitioner was called to give details regarding the activities of smugglers in his area, in which he later on admitted his guilt, taking the plea that he was at fault because he got greedy and was in need of money. He also confessed about his involvement in divulging the operational plan of the BSF to the civilians intending to smuggle heroin from Pakistan.

13. Ct.Onkar Singh PW-5 deposed that in the month of October, 2009 when he

was on duty at BOP Pul Moran the petitioner approached him for help in getting some consignment smuggled across the border, and thought that it was a joke.

14. 2-IC A.S. Rathore PW-6 of the 65th Bn. and DG (G) G.S. Chauhan of SHQ of BSF PW-7 deposed facts corroborating the testimony of PW-1 regarding events which took place on February 05, 2010 and February 02, 2010 as also February 03, 2010.

15. During additional Record of Evidence three more witnesses deposed before Dy.Commandant Anil Sharma, the recording officer. Joginder Singh @ Chuha PW-1 states that he along with Paramjit Singh @ Pamma met a CID person of BSF on February 2010. Paramjit Singh @ Pamma spoke to him and introduced him to that person of BSF. The BSF CID person told Pamma to introduce him to persons across the border to carry out some smuggling activities as he needed money and wanted to earn more. On that Pamma assured him that he would introduce some party to carry out the aforesaid act. During this meeting the CID person of BSF gave Pamma a piece of paper in the presence of PW-1 Joginder Singh @ Chuha. Joginder Singh recognized CID person of BSF as the petitioner stating that both person are the same when asked by the Recording officer. Paramjit Singh @ Pamma PW-2 deposed that he had been meeting the petitioner who had requested him for being introduced to smugglers. Ct.Driver Bakshish Singh PW-3 deposed facts regarding what took place on February 02, 2010.

16. What disturbs us is that the petitioner's signatures not being obtained when he allegedly pleaded guilty and when he allegedly stated, to be let off with mercy.

17. Sub-Rule 2 of Rule 142 of the BSF Rules reads as under:-

"(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the Court; but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or otherwise that the accused ought to plead not guilty." 18. In a decision pronounced a Division Bench of this Court on August 06, 2012 deciding WP(C) No. 2681/2012 Anil Kumar v. UOI and Ors., the Division Bench had considered the scope of sub-rule (2) of Rule 142 of the BSF Rules. The Court had opined as under:-

"30. An incisive reading of sub-rule 2 of Rule 142 would reveal that there are two distinct limbs thereof. As per the first limb, if the accused pleads guilty, it is the duty of the Court to ascertain whether the accused understands the nature of the charge and the general effect of the plea of guilt. The second limb is for the Court to read the Record of Evidence or the Abstract of Evidence, as the case may be, and if it appears from the record that the accused ought to plead not guilty, to record a plea of not guilty (despite the accused having pleaded guilty)

and proceed with the trial.

31. The record reveals that after recording the plea of Guilty, the Commandant has only recorded satisfaction of the first limb of sub-rule 2 of Rule 142 and not the second. It stands recorded as under:-

"The accused having pleaded guilty to the charge, the Court explains to the accused the meaning of charge(s) to which he has pleaded guilty and ascertains that the accused understands the nature of the charge(s) to which he has pleaded guilty. The Court also informs the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court having satisfied itself that the accused understands the charge(s) and the effect of his plea of guilty, accepts and records the same. The provisions of Rule 142(2) are complied with." 32. We are accordingly constrained to hold in favour of the petitioner and against the respondents. Two facts lean in favour of the view taken by us. The first is the Commandant falsifying the record pertaining to February 02, 1999, offence report proceedings and the second being that the petitioner had been projecting a defence, which was backed by his medical condition i.e. the petitioner's compulsion, being in seething pain due to testicle swelling, to abandon the duty post and rush to a doctor which would have removed the culpable mens rea with reference to the act of the petitioner, thereby leading towards a suggestion that the petitioner did not plead guilty at the trial; the Commandant who could falsify the offence report proceedings on February 02, 1999 could well have thereby falsified the trial proceedings as well. In any case, there is a complete dereliction of duty by the Commandant to ignore the second limb of sub-rule 2 of Rule 142 of the BSF Rules 1969."

19. The gravity and the seriousness of the charge in the instant case certainly required the Commandant to have instructed the petitioner to withdraw the plea of guilt and for which he ought to have recorded in the proceedings that he did so. If the petitioner still insisted that he would plead guilty, even at that stage of the proceedings, in the order sheet the signatures of the petitioner ought to have been obtained.

20. It is the case of the petitioner that belonging to the State of West Bengal the language in Punjab was alien to him and he was framed.

21. We cannot also overlook the fact that as per the BSF Act, at a Summary Security Force Court Trial the accused is not permitted to be defended by a civil lawyer; the limited right available is to consult a civil lawyer who may give advice to the accused, but at the trial the lawyer cannot defend the accused. Per force, the accused have to avail the services of a force personnel who act as the friend of the accused, this friend of the accused is an officer subordinate to the Commandant of the Battalion who presides over the Court and thus there is lurking danger of the friend of the accused not defending the accused fearlessly. In the instant case Dy.Commandant Vikas Singh Minhas acted as the friend of the accused and with regret we would be constrained to highlight that even he

did not understand the seriousness of the charge against the petitioner and permitted a plea of guilt to be recorded and even did not bother to ensure that the petitioner appends his signatures under the plea of guilt.

22. We dispose of the writ petition declaring the trial proceedings conducted on December 13, 2010 and December 14, 2010 as fundamentally flawed. Whether or not the petitioner pleaded guilty (not by any means belittling the requirement of obtaining signatures of an accused if the accused pleads guilty), the facts of the instant case certainly required the Commandant to treat it to be a case where the petitioner pleaded not guilty requiring evidence to be led at the trial and opportunity granted to the accused to cross-examine the witnesses.

23. The penalty imposed upon the petitioner is quashed. He is directed to be reinstated in service. The department is given liberty to try the petitioner afresh. The competent authority shall pass an order regarding the manner in which the period interregnum the petitioner being dismissed from service till reinstatement would be treated in the service record.

24. No costs.