
(1998) 07 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : S.W.P. No. 397/96

Dharinder Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-07-1998

Acts Referred:

Border Security Force Act, 1968 — Section 20, 40

Citation : (1999) KashLJ 107 : (1999) 1 SCT 751 : (1998) SriLJ 412

Hon'ble Judges : O.P.Sharma, J

Bench : Single Bench

Judgement

1. The petitioner was a constable in Border Security Force. By order dated 120595, impugned in the writ petition, he was dismissed from service

on being found guilty of an act which was prejudicial to good order and discipline of the force punishable under Section 40 of the BSF Act.

2. He challenges his conviction under Section 40 and the order of dismissal inter alia on the grounds that he was neither informed of the nature of

charge levelled against him nor made to understand the same before being tried on the said charge. It is also averred that he never pleaded guilty to

the charge and the same has been wrongly attributed to him.

3. Mr. Dutta, appearing for the petitioner, argued that the provisions of Rule 142 of the BSF Rules 1969 have not been followed which have

vitiating the trial and consequently the order of dismissal is liable to be quashed. He also argued that the charge sheet dated 28091994 indicates

that the petitioner was charged under Section 20B of the BSF Act whereas he has been punished under Section 40 of the Act, without framing the

charge under the said section. This, according to him, vitiates the trial. The plea of guilt attributed to the petitioner, according to Mr. Dutta, is a

concoction because he was never explained the charge nor the consequence of the plea of guilty, before the same was recorded.

4. Mr. Salathia, appearing for the respondents, on the other hand, submitted that the charge sheet dated 28091994 is in fact the offence report

because it contains the nature of allegations against the petitioner. A regular charge sheet was however, framed on 18041995, where after he was

tried for the same. Moreover, it is the act attributed to the petitioner which constitutes the offence. In case the ingredients of section 40 are made

out from the act alleged to have been committed by the petitioner, reference to Section 20, according to Mr. Salathia, will be inconsequential.

5. The petitioner at the time of commission of offence was posted at Kupwara. The offence report dated 27.08.1994 reads as under:

BSF Act 1968 SEC. 20 (b) USING THREATENING LANGUAGE TO HIS SUPERIOR OFFICER.

In that he, at 23.30 hrs. on 27.08.199 was found with his rifle cocked going towards OTHERS line in a drunken state saying that, ""MAIN BHM

KO GOLI MARUNGA"" and words to that effect.

This is reproduced in the charge sheet dated 28091994 which also mentions the offence punishable under Section 20(b) of the BSF Act.

Subsequently, he was however, tried by the Summary Security Force Court under Section 40 of the B.S.F. Act. The charge and the allegations

against him remaining the same. In the counter, it is specifically pleaded that the petitioner pleaded guilty to the charge after the consequence was

explained to him. His plea of guilt was recorded only after the court was satisfied that he understood the charge and the effect of the plea of guilt.

6. The first contention of Mr. Dutta is that the nature of allegations remaining the same the petitioner could not have been convicted under Section

40 when the act attributed to him is specifically covered by Section 20 of the Act.

7. The first question is whether the allegations made in the offence report constitute offence punishable under Section 20 or Section 40 of the Act.

Section 20 of the Act reads:

20. Any person subject to this Act who commits any of the following offences, that is to say

a) uses criminal force to or assaults his superior officer; or

b) uses threatening language to such officer;

c) uses insubordinate language to such officer, shall, on conviction by a security Force Court.

8. But use of force and use of threatening or insubordinate language under this Section is possible only in presence of the officer who is threatened

and not in his absence. Admittedly, the occurrence did not take place in presence of BHM Darya Singh though petitioner was found rushing towards his location.

9. The next question is whether the act is covered under Section 40 of the Act which reads:

Any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and

discipline of the force shall, on conviction by a security force court, be liable to suffer imprisonment for a term which may extend to seven years or

such less punishment as is in this Act mentioned.

10. It is an omnibus provision under which a person subject to the Act who is guilty of any act or omission which, though not specified in the Act is

prejudicial to good order and discipline of the force has been made punishable. The act of the petitioner could fall under Section 20 only, if it was

accompanied by use of criminal force or assault which is not the case. Similarly use of threatening language or use of insubordinate language to

attract application of subsection (b) and (c) of Section 20 must be in the presence of the superior officer. Since he was only found going towards

Officers line armed with rifle cocked and using threatening language against the superior officer in his absence, it does not fall under Section 20 of

the Act but is specifically covered by Section 40 of the Act because it is an act prejudicial to good order and discipline of the force. He was thus

rightly charged under Section 40 before the trial commenced. More over under R140 of the BSF Rules, charge could be amended at any stage of

the so charge sheet dt. 28.09.96 was based on offence report dated 27.08.1994. Subsequent alteration on the charge from section 20(b) to

Section 40 of the Act is perfectly legal and in accordance with the provisions of the Act and the Rules framed there under. In the counter, it is

specifically pleaded that the petitioner was charged, ""under Section 40 of the BSF Act for the act prejudicial to the good order and discipline of

the Force and not for the intoxication which falls under section 26 of the BSF

Act". So the charge of intoxication has been dropped but it cannot be said that the act attributed to the petitioner is not covered by Section 40 of the Act. Therefore, this contention of Mr. Dutta does not hold good and, as such, is rejected.

11. The second limb of his argument that the plea of guilt was not properly recorded. For this he placed reliance on a Division Bench decision of this court in Union of India and Others. Vs. ExHavildar Clerk Prithpal Singh and others (1991 KLJ 513). The Division Bench had however, reiterated the earlier decision by observing as under:

The Division Bench of this Court in case Bhagwan Singh Versus Union of India, 1984 SLJ 90, while dealing with rule 52(2) of the Army Rules, in similar circumstances has held as under:

The document does not show as to whether or not the charges were explained to the petitioner, who is not at all conversant with English, the

language in which they were framed. It also does not show as to whether or not the Judge Advocate had satisfied himself that the petitioner had

understood the charges before pleading guilty to them. It does not show that he had informed the petitioner that he could be convicted on the basis

of his plea of guilty without recording any other evidence. Nor does it transpire from the said document that he had gone through the summary of

evidence to arrive a conclusion as to whether or not the petitioner required to be advised to withdraw his confession. On the other hand, the

certificate appended to the aforesaid confession reveals that the Judge Advocate assumed automatic compliance of Rule 52(2), on the petitioner's

pleading guilty to the charges. He, in our opinion, clearly slipped into an error. Rule 52 enjoins upon him a compliance with its mandatory

provisions, not only in letter, but also in spirit and this compliance ought to have been reflected in the document itself, or elsewhere in the recorded

proceedings of the G.C.M. Incidentally, it is reflected nowhere, except to some extent in the reply affidavit of the respondents, which admittedly

has neither been sworn by the concerned Judge Advocate nor concerned G.C.M. and nor, for that matter, by any of its members. The conclusion

is, therefore, inevitable that since there has been no compliance with Rule 52, the trial of the petitioner stands vitiated

Rule 52 applies to cases being held by court Martial whereas Rule 115 pertains to

summary court martial. Rule 52(2) is parametric to rule 115(2).

The aforesaid view taken earlier by the Division Bench is the same as being taken by us in this case.

12. Rule 142 of the BSF Rules, being almost in pari materia with Rule 115 of the Army Rules, the ratio will apply provided the procedure has not

been followed. However, on facts it is clear that both the aforesaid decisions rest on particular facts of the case where the Court Martial did not

follow the mandate of the Rules as is evident from the following conclusion of the judgment in Prithpal Singh's case (Supra) which reads""The other

point which has been made basis for quashing the sentence awarded to respondentaccused relates to clause (2) of Rule 115. Under this mandatory

provision, the court is required to ascertain, before it records plea of guilt of the accused, as to whether 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 charge to which he

has pleaded guilty. The court is further required under this provision of law to advise the accused to withdraw that plea if it appears from summary

of evidence or otherwise that the accused ought to plead not guilty. How to follow this procedure is the main crux of the question involved in this

cases. Rule 125 provides that the court shall date and sign the sentence and such signatures shall authenticate whole of the proceedings it comes

out from this rule that the signing of the proceedings by the court will amount to authentication of the same. We may take it that the signatures of the

accused are not required even after recording plea of guilt but as a matter of caution same should be taken. But in order to come to a finding as to

whether compliance of subrule (2) of rule 125 has been made, there should have been some certificate of the court. To that effect or at least some

minutes pointing out the fulfilment of the procedure. Nothing is coming out from record to this effect. It is certainly a violation of the aforesaid rule.

13. However, the facts of this case are entirely different as is evident from the following record of the proceedings:

The charge sheet is read (translated) and explained to the accused, marked B2 signed by the court and attached to the proceedings

Now say you No. 01004763, Constable, Name Dharintar Singh, are you guilty or not guilty of the first charge/charges.

GUILTY

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

ascertain 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 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, accents and records the same. The provisions of Rule 142(2) are complied with.

14. Such record was missing both in Bhagwan Singh's case as well as in Prithpal Singh's case. Moreover in Bhagwan Singh's case only evidence

relied by the summary court Martial was his plea of guilty, whereas in the present case it is admitted by the petitioner that summary Force Court

examined Path Ram, Hira Lal, Shiv Charan and Satveer Singh as witnesses. Their evidence he has not challenged. His only grievance is that the

court should have also examined BHM Draya Singh who was allegedly threatened by him and also the Doctor with regard to his state of

drunkenness. However, BHM Draya Singh was not a material witness as he was not present on spot while the charge of drunkenness having been

dropped, doctor was not a necessary witness. Moreover petitioner having pleaded guilty to the charge which has been supported by other

evidence, the decision not to examine other evidence can neither be said to be arbitrary nor in violation of any rules of procedure. So the

respondents having acted strictly in accordance with the provisions of the Act and Rules, the order impugned does not suffer from any illegality

whatsoever. The petition is therefore dismissed without any order as to costs