

(2003) 12 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : LPA (SW) No. 270 of 1998

Dharinter Singh

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 17-12-2003

Acts Referred:

Border Security Force Act, 1968 — Section 20(b), 40
Border Security Force Rules, 1969 — Rule 142

Citation : (2004) 3 RSJ 460 : (2004) 3 SCT 125

Hon'ble Judges : V.K.Jhanji, ACJ and S.Bashir-ud-Din, J

Bench : Division Bench

Advocate : Ajay Sharma, Surinder Kour, Advocates appearing for the Parties

Judgement

V.K. Jhanji, ACJ.

1. This Letters Patent Appeal is directed against judgment dated 9.7.1998 passed by the learned Single Judge in SWP No. 397/96, whereby the

learned Single Judge has upheld order dated 12.5.1995 passed by Commandant, 23 Bn., BSF, dismissing the appellant from service with effect

from 12.5.1995.

2. In brief the facts are that the appellant came to be recruited and appointed as Constable on 15.2.1991 in Border Security Force. On

27.8.1994, while the appellant was posted at Kupwara (Kashmir) and deployed in 23 Bn. BSF, he was found going towards ORS line in a

drunken state, with his rifle improperly cocked, saying ""Main BHM Ko Goli Mardoonga"" and other words to that effect. Action was initiated

against the appellant and the proceedings of Summary Security Force Court were held on 12.5.1995 at Kupwara. The Summary Security Force

Court found the appellant guilty of charges and sentenced him to dismissal from

service. Appellant, being aggrieved against conviction by Summary Security Force Court, preferred statutory petition before the Central Government and that too came to be dismissed. The order in this regard was conveyed to the appellant on March 15, 1996. Appellant challenged the conviction and sentence passed by the Summary Security Force Court in SWP 397/96. The learned Single Judge, after perusal of the record and hearing counsel for the parties, dismissed the writ petition. The present appeal is against the order of learned Single Judge dated 9.7.1998.

3. Before us, the only ground urged is as to the nonobservance of the principles of natural justice. Learned counsel for the appellant submitted that the respondents have not complied with the provisions of Rule 142 of BSF Rules, 1969 (hereinafter referred to as "the Rules"), in as much as neither the respondents obtained the signature of the appellant in token of plea of guilt nor any certificate of compliance was ever recorded in the minutes of the proceedings. Learned counsel further submitted that the appellant initially was charged under Section 20(b) of the Border Security Force Act, 1968 (hereinafter referred to as "the Act") but, later on, the charge was amended and the appellant was tried under Section 40 of the Act. According to her, before amending the charge, no notice was given to the appellant. The precise submission of the learned counsel for the appellant in this regard is that neither any notice was given to the appellant before amending the charge nor the appellant was made to understand the nature of charge and the consequences thereof.

4. On the other hand, Mr. Ajay Sharma, learned counsel appearing on behalf of the respondents submitted that there is no violation of Rule 142 or 140 of the Rules, in as much as not only the 'plea of guilt' was recorded in accordance with law, but the charge sheet served upon the appellant clearly mentioned that he is being charged under Section 40 of the Act.

5. Before appreciating the rival contentions of the parties, it is imperative to notice the following provisions of BSF Act :

Section 20. Striking or threatening superior officers.

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

(a) x x x x x x

(b) uses threatening language to such officer, or

(c) x x x x x x

shall on conviction by a Security Force Court,

(A) if such officer is at the time in the execution of his office or, if the offence is committed on active duty, be liable to suffer imprisonment for a

term which may extend to fourteen years or such less punishment as is in this Act mentioned; and

(B) in other cases, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned :

Provided that in the case of an offence specified in clause (c), the imprisonment shall not exceed five years.

Section 40. Violation of good order and discipline. 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.

Section 48. Punishments awardable by Security Force Courts. (1) Punishments may be inflicted in respect of offences committed by persons

subject to this Act and convicted by Security Force Courts according to the scale following, this is to say,

(a) x x x x x

(b) x x x x x

(c) dismissal from the service;

(d) (1) x x x x x

Section 64. Kind of Security Force Courts. For the purposes of this Act there shall be three kinds of Security Force Courts, that is to say,

(a) General Security Force Courts;

(b) Petty Security Force Courts; and

(c) Summary Security Force Courts.

Section 70. Summary Security Force Court. (1) A Summary Security Force Court may be held by the Commandant of any unit of the Force and

he alone shall constitute the Court.

(2) The proceedings shall be attended throughout by two other persons who shall officers or subordinate officers or one of either, and who shall not as such, be sworn or affirmed.

Section 74. Powers of a Summary Security Force Court. (1) Subject to the provisions of subsection (2), a Summary Security Force Court may try any offence punishable under this Act.

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a Petty Security Force Court for the trial of the alleged offender, an officer holding a Summary Security Force Court shall not try without such reference any offence punishable under any of the Sections 14, 17 and 46 of this Act, or any offence against the officer holding the court.

(3) A Summary Security Force Court may try any person subject to this Act and under the command of the officer holding the court, except an officer, or a subordinate officer.

(4) A Summary Security Force Court may pass any sentence which may be passed under this Act, except the sentence of death or of imprisonment for a term exceeding the limit specified in subsection (5).

(5) The limit referred to in subsection (4) shall be,

(a) One year, if the officer holding the Security Force Court has held either the post of Superintendent of Police or a post declared by the Central

Government by notification to be equivalent thereto, for a period of not less than three years or holds a post of higher rank than either of the said posts; and

(b) three months, if any other case.

Section 117. Remedy against order, finding or sentence of Security Force Court.

(1) Any person subject to this Act who considers himself

aggrieved by any order passed by any Security Force Court may present a petition to the officer or authority empowered to confirm any finding or

sentence of such Security Force Court, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the

correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding

or sentence of any Security Force Court which has been

confirmed, may present a petition to the Central Government, the DirectorGeneral, or any prescribed officer superior in command to the one who

confirmed such finding or sentence, and the Central Government, the DirectorGeneral, or the prescribed officer, as the case may be, may pass

such order thereon as it or he thinks fit.

6. The Central Government in exercise of its power under Section 141 has made Rules, known as Border Security Force Court Rules, 1969.

Some of the provisions relevant in this case are as under :

Rule 43. Offence Report. Where it is alleged that a person subject to the Act (other than an officer or a Subordinate Officer) has committed an

offence punishable thereunder the allegation shall be reduced in writing in the form set out in Appendix IV.

Rule 45. Hearing of the charge against an enrolled person. (1) The charge shall be heard by the Commandant of the accused

(a) the charge and statement of witnesses if recorded shall be read over to the accused. If written statements of witnesses are not available, he shall

hear as many witnesses as he may consider essential to enable him to determine the issue;

(b) the accused shall be given an opportunity to cross-examine the witnesses and make a statement in his defence.

(2) After hearing the charge under subrule (1), the Commandant may,

(i) award any of the punishments which he is empowered to award, or

(ii) dismiss the charge, or

(iii) remand the accused, for preparing a record of evidence or for preparation of an abstract of evidence against him, or

(iv) remand him for trial by a Summary Security Force Court :

Provided that, in cases where the Commandant awards more than 7 days' imprisonment or detention he shall record the substance of evidence and

the defence of the accused :

Provided further that, he shall dismiss the charge if in his opinion the charge is not proved or may dismiss it if he considers that because of the

previous character of the accused and the nature of the charge against him it is not advisable to proceed further with it :

Provided also that in case of all offences punishable with death a record of evidence shall be taken.

Rule 133. Proceedings. The officer holding the trial hereinafter in this Chapter called the Court, shall record, or cause to be recorded the transaction of every Summary Security Force Court.

Rule 134. Evidence when to be translated. (1) When any evidence is given in a language which the Court or the accused does not understand, that evidence shall be translated to the Court or accused as the case may be in a language which it or he does understand.

(2) The Court shall for this purpose either appoint an interpreter, or shall itself take the oath or affirmation prescribed for the interpreter at a Summary Security Force Court.

(3) When documents are produced for the purpose of formal proof, it shall be in the discretion of the Court to cause as much to be interpreted as appears necessary.

Rule 140. Amendment of charge. (1) At any time during the trial if it appears to the Court that there is mistake in the name or description of the accused in the chargesheet, it shall amend the chargesheet so as to correct that mistake.

(2) If on the trial of a charge it appears to the Court at any time before it has begun to examine the witnesses, that in the interests of justice any addition to, omission from or alteration in, the charge is required, it may amend such charge and may, after due notice to the accused, and with the sanction of the officer empowered to convene a Petty Security Force Court for the trial of the accused if the amended charge requires such sanction, proceed with the trial on such amended charge.

Rule 142. General plea of ""Guilty"" or ""Not Guilty"". (1) The accused person's plea of ""Guilty"" or ""Not Guilty"" (or if he refuses to plead or does not plead intelligibly either one or the other), a plea of ""Not Guilty"" shall be recorded on each charge.

(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.

(3) Where an accused person guilty to the first two or more charges laid in the alternative, the Court may after subrule (2) has been complied with

and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges as follow the charge to which

the accused has pleaded guilty without requiring the accused to plea thereto, and a record to that effect shall be made in the proceedings of the

Court.

Rule 143. Procedure after plea of "Guilty". (1) Upon the record of the plea of "Guilty", if there are other charges in the same chargesheet to which

the plea is "Not Guilty", the trial shall first proceed with respect to those other charges, and, after the finding on those charges, shall proceed with

the charges on which a plea of "Guilty" has been entered, but if there are alternative charges, the Court may either proceed with respect to all the

charges as if the accused has not pleaded "Guilty" to any charge, or may, instead of trying him, record a finding of "Guilty" upon any one of the

alternative charges to which he had pleaded "Guilty" and finding of "Not Guilty" upon all the other alternative charges which precede such charges.

(2)(a) After the record of the plea of "Guilty" on a charge (if the trial does not proceed on any other charges) the Court shall read the record or

abstract of evidence and annex it to the proceedings, or if there is no such record, or abstract shall take and record sufficient evidence to enable it

to determine the sentence, and the reviewing officer to know all the circumstances connected with the offence.

(b) The evidence shall be taken in like manner as is directed by these rules in the case of a plea of "Not guilty".

(3) The accused may, after such evidence has been taken or as, the case may be, the record of abstract of evidence has been read, address the

Court with reference to the charge and in mitigation of punishment and may call witnesses as to his character.

(4)(a) If from the statement of the accused, or from the record of evidence, or otherwise, it appears to the Court that the accused did not

understand the effect of his plea of "Guilty", the Court shall after (alter ?) the record and enter a plea of "Not guilty", and proceed with the trial accordingly.

(b) Any alternative charges withdrawn under subrule (1) shall be reinstated in the charge sheet and the trial shall take place as if they had never been withdrawn.

(5) If a plea of "Guilty" is recorded on some charges and the trial proceeds with respect to other charges in the same chargesheet, the proceedings

under subrules (2) and (3) shall take place after the finding on the other charges in the same chargesheet are recorded.

(6) When the accused states anything in mitigation of punishment which in the opinion of the Court requires to be proved, and would, if proved,

affect the amount of punishment, the Court may permit the accused to call witnesses to prove the same.

Rule 152. Sentence. The Court shall award one sentence in respect of all the offences of which the accused is found guilty.

Rule 153. Signing of proceedings. The Court shall affix its signature and the date to the sentence and such signature shall authenticate the whole of

the proceedings.

7. The Scheme of the Act and the Rules governing the conduct of trial by the Summary Security Force Court leaves no manner of doubt that the

principles of natural justice have been codified therein. Generally speaking, the Rules provide that :

(i) the person, whose rights are to be affected, must be given notice of the case or the charges, which he is to meet;

(ii) he must be given an opportunity to explain the allegations or the charges made against him and to have a say in the matter; and

(iii) the authority conducting the proceedings must not be biased and should act in good faith.

8. It is now to be seen whether there has been infraction of rules or principles of natural justice in recording the plea of guilt or giving proper notice

of the charge, under which the appellant was to be tried and due opportunity to defend himself.

9. As already noticed, at 2330 hours, on 22.8.1994, the appellant was found with his rifle cocked and going towards ORs line in a drunken state,

saying ""Main BHM Ko Goli Mardoonga"" and words to that effect. Initially an offence report was prepared under Section 20(b) of the Act, which

provides using of threatening language to an officer by any person subject to the provisions of the Act. Vide order dated 21.9.1994 Commandant

directed the recording of evidence, asked the appellant whether he has received copy of the chargesheet and, if so, on which date ? Appellant

replied that he received it on 29.9.1994. He was then asked whether he has prepared his defence ? The answer of the appellant was yes.

Thereafter the statements of five witnesses, namely, Head Constables Pati Ram, Hira Lal, Shivdharam Singh and Naik Constables Dinesh Rai and

Satbir Singh were recorded. Appellant was given opportunity to cross-examine the witnesses, but he declined to cross-examine them. From the

perusal of record of recording of evidence, we find that statements of the witnesses were read over to the appellant in the language he understands

and he signed on the statements as being correct. After the aforementioned witnesses were examined, the officer recording the evidence asked the

appellant whether he wished to produce any witness in his defence ? The appellant stated that he does not want to produce any witness in defence.

On the conclusion of the recording of evidence, the officer preparing the record of evidence certified that the record of evidence, ordered by the

Commandant, has been made in the presence and hearing of the appellant. It appears that after perusal of the evidence, Commandant decided to

hold Summary Security Force Court against the appellant for the offence under Section 40 of the Act, and, in this regard, appellant was informed

in writing. Copy of the charge sheet and the statements of witnesses, recorded earlier in presence of the appellant, were furnished to him. The

appellant was also asked to intimate :

(a) name of friend; and

(b) name of defence witness, if any.

In reply to this, appellant, under his signature, stated that he has no witness to produce and that he is agreeable to holding of the trial as soon as

possible. He further stated that he is not to make any comment from his side. On receipt of the reply from the appellant, the Commandant directed

that the trial by the Summary Security Force Court would be held on 12.5.1995 at Battalion Headquarters. The record shows that the

Commandant himself decided to act as an interpreter and A.S. Rathore, Assistant Commandant, was appointed as friend of the accused.

Witnesses were directed to attend the hearing. At the commencement of the trial, Commandant, J.P. Sinha, duly affirmed to act as an interpreter

for the appellant and witnesses present were directed to withdraw from the Court. Thereafter chargesheet, which was under Section 40 of the Act,

was explained to the appellant and he was asked whether he pleads guilt to the charge. Appellant pleaded guilty. On having pleaded guilty,

Summary Security Force Court explained to the appellant the meaning of the charge to which he has pleaded guilty and ascertained from him

whether he understands the nature of charge to which he has pleaded guilty. He was also informed the general effect of that plea and difference in

procedure which would follow consequent upon the said plea. Having satisfied itself that the appellant understands the charge and the effect of his

plea of guilt, the Summary Security Force Court accepted the same and, accordingly, recorded it, on considering the evidence and the fact that the

appellant willingly pleaded guilty, appellant was convicted and sentenced and was accordingly ordered to be dismissed from service. Thereafter,

appellant made a statutory petition as provided under Section 117 of the Act to the Central Government against conviction by Summary Security

Force Court. The Central Government, after considering all the points raised by the appellant in the petition and also the proceedings and

circumstances of the case, rejected the petition and appellant was informed accordingly.

10. It is true that initially the appellant was charged under Section 20(b) of the Act but, later on, after recording of the evidence, charge was

amended to be one Section 40 of the Act. Learned counsel for the appellant is not right in submitting that, before the charge came to be amended,

the appellant was not given notice of the same. We have already noticed that before the trial took place, the appellant was served with a

chargesheet, clearly mentioning therein that he is being tried for an offence under Section 40 of the Act. He was also supplied with the copies of

proceedings and the statements of witnesses recorded in his presence. It is also true that signatures of the appellant in token of plea of guilt were

not obtained, but on reading of Rules 142 & 143, we find that rules do not provide that whenever an accused pleads guilty, his signature must be

obtained in token of plea of guilt. The Rules only provide that after the accused person pleads 'guilt', the plea shall be recorded as finding of the court, but before it is recorded, the Court shall ascertain that the accused understands the nature of charge to which he has pleaded guilty and shall inform him of the general effect of that plea and in particular, the meaning of the charge to which he has pleaded guilty. The Court is also to advise him to withdraw the plea if it appears from the record or abstract of evidence or otherwise that the accused ought to plead not guilty. In this case the Court has not only complied with the Rules but also has certified in the minutes of the proceedings of trial that compliance of rules has been made. In this view of the matter we find that the procedure provided in Rules 142 & 143 was followed.

11. It will not be fair to the learned counsel for the appellant if we do not notice the judgments cited by her :

In 1989(3) SLR 405, *Uma Shanker Pathak v. Union of India*, a Division Bench of Allahabad High Court, in the context of Army Rule 115(2), set

aside the conviction of accused, as the plea of guilt was not recorded in accordance with the provisions of the rules. Likewise in 2003(2) SCT 332

(SC) : 2003 AIR SCW 1863, *Union of India v. B.N. Jha* , the Supreme Court set aside the order of dismissal of delinquent, as no material was

supplied to the delinquent as mandatorily required under Section 45B of the Act.

AIR 1987 SC 2386, *Ranjit Thakur v. Union of India*, is an authority for the proposition that judicial review is not directed against a decision, but is

directed against the ""decision making process"". Their Lordships of the Supreme Court held that the question of charge and the quantum of

punishment is within the jurisdiction of Court Martial, but the sentence has to suit the offence and the offender. The sentence should not be

vindictive or unduly harsh nor it should 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 CourtMartial, 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 and perversity are recognized grounds of judicial review.

In 1991 KLJ 513, Union of India v. ExHavilder Prithpal Singh, the Division Bench of this Court in the context of Rule 115 of the Army Rules set

aside the order of dismissal of the delinquent on finding that the procedure provided for recording the plea of guilt was not followed. The Division

Bench did observe that signature of the accused ""in token of plea of guilt"" should be obtained, which will show that the accused has ""willingly pleaded guilt.

Judgments in 1991(1) SCT 111 (SC) : AIR 1991 SC 471, Union of India v. Mohd. Ramzan Khan , 1993(4) SCC 728, Managing Director,

ECIL v. R. Karunakar, 1998(4) SCT 162 (SC) : 1998(6) Supreme Today 587, State of U.P. v. Shatrughan Lal and 1999(4) SCT 740 (SC) :

1999(6) SCALE 642, Hardwari Lal v. State of U.P. , relied upon by learned counsel for the appellant, deal with the procedure required to be

followed in departmental proceedings.

12. The aforementioned judgments cited by the learned counsel for the appellant do not apply to the facts of present case. In the instant case, the

statements of witnesses were recorded in presence of the appellant, and before the commencement of trial, the same were furnished to him along

with copy of the chargesheet. The plea of guilt was recorded in accordance with law. The appellant was also informed the consequences which

may follow on acceptance of the plea of guilt. Considering the offence committed by the appellant, the punishment of dismissal from service

awarded cannot be said to be disproportionate so as to call for and justify interference. The procedure adopted in conducting the trial too does not

point out that any prejudice whatsoever has been caused to the appellant. As regard the submission that the signatures of the appellant were not

obtained in token of plea of guilt, we are also of the view that it is always desirable to obtain signatures of the accused in token of plea of guilt, so

as to obviate any objection that the plea of guilt was not voluntary, but the facts and circumstances of this case do not point out that recording of

the plea of guilt was under coercion or undue influence.

13. In view of the above, we do not find any merit in this appeal and the same is, accordingly, dismissed with no order as to costs.