
(2011) 04 DEL CK 0048

In the Delhi High Court

Case No : Writ Petition (C) 1765 of 2010

Ex. Const. Santosh Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 26-04-2011

Acts Referred:

Border Security Force Rules, 1969 — Rule 145, 45, 51

Citation : (2011) 04 DEL CK 0048

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Anil Gautam, for the Appellant; Rajeev Saxena, Jayendra and D.K. Pradhan, for the Respondent

Final Decision : Dismissed

Judgement

1. The Petitioner was enrolled with the Border Security Force as a constable in the year 1994 and in the year 2008, he was attached to the "E" Coy of 172nd Bn. BSF which was deployed at Border Outpost Khutadah at the Indo-Bangladesh Border. In the month of May, a platoon of the "E" Coy, to which the Petitioner was attached, was deployed at BOP Taltoli. It was complained against the Petitioner that on 09.05.2008, while performing duties at BOP Taltoli the Petitioner gave safe passage to smugglers to carry 18 bags of Potash and 1 bag of Salt into Bangladesh and used insubordinate and abusive language against his superior officer, Asst. Comdt. Sunil Kumar. While the said complaint was being considered by the senior officers at the Head Quarters of 172nd Bn., another complaint was made against the Petitioner stating that on 25.05.2008 he became violent and used threatening language against Asst. Comdt. Sunil Kumar.

2. Taking cognizance of the two offence reports and proceeding to comply with Rule 45 of the BSF Rules, 1969 i.e. conduct a hearing of the charge, in the absence of the Commandant, the Officiating Commandant of the Unit conducted the said proceeding at Aradhpur, Malda and after examining SI Ramji Lal Raigar, Asst. Commdt. Chottu Ram, Asst. Commdt. Sunil Kumar, HC Bijender Prashad

and Ct. Gurupada Biswas and hearing the Petitioner ordered that "Record of Evidence to be prepared by Asst. Comdt. M.S. Khatana" and for the purposes of preparation of Record of Evidence drew up a charge sheet containing three charges as under:

CHARGE SHEET -I

Charge against No. 940025646 Const. SANTOSH KUMAR of E-Coy, 172 Bn. BSF.

BSF ACT 1968

U/S-40

Charge-I

AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE

in that he

on 09 May 2008 at about 1130 hrs, while performing duty at main gate of BOP Taltoli of ?E? Coy 172 Bn. BSF from 0600 hrs to 1200 hrs, gave safe

passage to smugglers, to smuggle from India to Bangladesh through Gate No.08 of BOP Taltoli 16 Nos sealed bags of Potash weighing 800 Kgs, 02 Nos opened bags of Potash weighing 40 Kgs & 01 bag of salt.

BSF ACT 1968

U/S-20(c)

Charge-II

USING INSUBORDINATE LANGUAGE TO HIS SUPERIOR OFFICER

in that he, at 1230 hrs on 09 May, 2008 used the following insubordinate language to Shri Sunil Kumar, AC by saying ?MAIRE KILAPH LIKHO? BSF MEN 89 DINO SE UPAR SAJA NAHI HEA, MEIN BHI LIKHUGA, MANAVADHIKAR AAYOG MEIN JAUNGA, ABHI MATRI KA PHONE AAEGA, AAP MERA KHUCH NAHI BIGAD PAOGE. ISHSE PAHLE BHI MENE KIYA HEY, MUJHE GOLE MAR DO, MUJHE NOUKARI SE NIKAR DO, TUMSE JO HO SAKTA HE MERA BIGAD LENA.? Or words to that effect.

BSF ACT 1968

U/S-20(b)

Charge-III

USING THREATENING LANGUAGE TO HIS SUPERIOR
OFFICER

in that he, at 1150 hrs on 25 May 2008 became violent and used threatening and abusive language near Jawans Barrack, BOP Khutadaha? ?E? Coy 172 Bn BSF,

against Shri Sunil Kumar, AC saying ?Sunil Kumar, AC ko kat dunga jaise Comdt ko kata hain. Maa Bahan thok dunga? or words to that effect.

3. Asst. Comdt. M.S. Khatana completed the proceedings pertaining to the Record of Evidence and after noting the testimony of the witnesses submitted the same to the Officiating Commandant who proceeded under Rule 51 and after considering the Record of Evidence decided to try the Petitioner by a Summary Security Force Court.

4. We note that there is a dispute regarding what happened after the Record of Evidence was prepared. Whereas the Petitioner alleges that no decision was taken by the Officiating Commandant thereby implying that the Petitioner was exonerated of the charges, the Respondents urge that the Officiating Commandant had decided to convene a SSFC but the trial could not commence on the date fixed due to the Unit being shifted from Aradhpur, Malda (West Bengal) to Rokhia, Tripura and that a further delay was caused in commencing the trial due to unavailability of various Prosecution Witnesses who were deployed at Jammu and Kashmir for maintaining public order at the assembly elections. Thus it was urged by the Respondents that for reasons beyond their control the trial got delayed, which should not mean to imply that the Petitioner was exonerated from the charges.

5. Meanwhile, another incident took place on 13.11.2008 when it was reported to the Commandant that the Petitioner had left the post where he was detailed to perform duties and was found drunk at a deserted building of a Panchayat School, Rokhia and when attempted to be brought back to the Unit the Petitioner assaulted the BSF personnel in respect of which incident the Petitioner claims that he was beaten by HC Dinesh Singh because of which he had to be hospitalized and the Respondents counter-urge that the Petitioner got himself admitted in TMC Agartala on 16.11.2008 till 25.11.2008 on the pretext of chest pain to avoid disciplinary action.

6. Pertaining to the incident dated 13.11.2008, taking cognizance of the offence report, the Officiating Commandant conducted proceedings under Rule 45 of the BSF Act i.e. proceedings relating to the hearing of the charge and examined Ct. K. Ramana, SI Karan Singh, HC K. Pradeep Kumar, L/Nk Vijay Singh and HC Dinesh Singh and recorded the Petitioner's statement, in verbatim as under:

STATEMENT OF No. 940025646 CONST.SANTOSH KUMAR "E" COY, 172, BN. BSF, THE ACCUSED IN DEFENCE

Sir, Maire Aurat Ghar Sai Bhag Gayihain. Main Salbhar sain chuthi nahi katan huin. Tension Main Mene Desi Sarab 09 Glass Pi Liyah. Pikar Mujhe Nasa Jada Ho Gyan aur Main Gali Dene Laga Ki sala Mujhko chuti Nahin Deta Hain, aisa HC K. Pradeep Kumar ko bolan aur bistar par saun gayan. Main Jyada Naishe Main Tha. BHM Nai Shirt Pakad kar Jhanjor kar uthaya. Phir Main BHM Major ko Gali Bolan. BHM Nai Bahar Jakar Ground Main Lita Kar Lat Sai Bahut Mara. 10 Din Hospital (TMC) Main Admit Raha Hoon.

7. Considering the statements of the witnesses and the defence statement made by the Petitioner the Officiating Commandant ordered for a Record of Evidence to be prepared by Deputy Commandant Rajesh Verma and drew up the charge sheet dated 26.11.2008 levying 4 charges upon the Petitioner as under:

CHARGE SHEET-2

BSF ACT 1968

U/S-20(a)

Ist Charge

USING CRIMINAL FORCE TO HIS SUPERIOR OFFICER

in that he

at about 2220 hrs on 13.11.08 used criminal force against No.85254486 HC/BHM Dinesh Singh enroute when being brought from Deserted Panchayat School, Rokhia to HQr, 172 Bn. BSF, Rokhia.

BSF ACT 1968

U/S-40

Charge-II

AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE

in that he,

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at 2230 hrs on 13.11.08 became violent and used abusive language in Deserted Panchayat School, Rokhia and near Quarter Guard Bn HQ Location against Senior Officers, Comdt., Offg. Comdr, and BHM of the Unit staying ?MADARCHOD, BHENCHOD, TUM MERA KUCH NEHEN KAR SAKTE, MEIN TUME BATAUANGA MERE TAKAT KEYA HAI. MERA MAMA SANSAD HAI, MAIN TUMHEN PATNA HIGH COURT TAK KEY JAUNGA? or the words to that effect.

BSF ACT 1968

U/S-26

Charge-IV

INTOXICATION

in that he

at Deserted Panchayat School Rokhia Tripura (W) (line area

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of Training Coy) on 13 Nov 2008 at 2215 hrs found in state of intoxication.

Place: Rokhia, TRA (W)

Dated: 26 Nov, 2008?

8. Dy. Comdt. Rajesh Verma prepared the Record of Evidence on 10.12.2008. 9 witnesses were examined in relation to the 4 charges. As per the record, Petitioner declined to cross-examine the witnesses or make a defence statement and even refused to sign the proceedings of the Record of Evidence.

9. Considering the Record of Evidence and proceeding under Rule 51 the Officiating Commandant ordered Petitioner's trial at a Summary Security Force Court.

10. Needless to state a joint trial pertaining to the charge sheet dated 2.6.2008 and 26.11.2008 was held. It may be amplified that though factually one, conceptually two trials were conducted evidenced by the fact that part B of the trial consists of evidence relating to the charge sheet dated 2.6.2008 and part B-1 relates to the charge sheet dated 26.11.2008.

11. Upon arraignment pertaining to the 1st charge sheet, the Petitioner pleaded "Not Guilty" to the 3 charges. Thus the court proceeded under Rule 145 and examined the prosecution witnesses being 10 in number all of whom were permitted to be cross-examined by the Petitioner and the Petitioner availed the said opportunity to cross-examine such witnesses as he desired to cross-examine.

12. SI Ramjee Lal Raigar PW-1, deposed that on 09.05.2008 Ct. S. Kumaresan, Ct. Mahesh Kadui and the Petitioner who was functioning as the Party Commander, were detailed to perform outpost duty at OP point No. 2, BOP Taltoli from 06:00 hours to 12:00 hours. He produced the Outpost Register, GD Register and OP Log Book of BOP Taltoli which contained entries of the afore-stated facts. He further deposed that OP point No. 2 is situated in front of IBBF Gate No. 8 and the entry and exit through the said Gate is regulated by personnel on duty at OP point No. 2. At about 11:30 hours he, being the Post Commander of BOP Taltoli, went to check the working of the parties performing duties at the various outpost points and when he approached OP point No. 2, he saw a local engine fitted Van (Burburi) and 2 bicycles loaded with bags moving to wards Bangladesh after crossing the IBBF Gate No. 8. He intercepted the Van and the bicycles at a distance of 50 yards from the IBBF Gate and on seeing him, 4-5 persons abandoned the van and the bicycles and fled to wards Bangladesh. He then called Ct. Kalyan Dolui who was passing by and with his help seized 16 sealed and 2 unsealed bags of Potash and 1 bag of salt along with the van and the 2 bicycles. Thereafter he went to the IBBF Gate No. 8 where he found Petitioner sitting at the OP point No. 2. On questioning/enquiring about the vehicles being allowed to pass through the gate, the Petitioner told him that the Petitioner had permitted the civilians to carry only 5 bags of Potash fertilizers and that the civilians had shown the Petitioner a permission slip on the basis of which he had permitted them to enter. He asked the Petitioner to produce the permission slip and show him the entries made in the in/out register of Gate No. 8 showing

permission given to the civilians to carry 5 bags of Potash and the Petitioner neither produced any permission slip nor showed any entries in the in/out register. He then summoned Ct. S. Kumaresan i.e. the other member of the OP Party who informed him that the Petitioner had told him to cover the AOR of a culvert beyond the bend of the IBB Road and told him that due to the same i.e. the bend he i.e. Ct. S. Kumaresan could not see the gate. He further deposed that after making enquiries he reported the matter to Asst. Comdt. Sunil Kumar who directed the Petitioner and Ct. S. Kumaresan to go to BOP Taltoli. At the BOP Asst. Comdt. Sunil Kumar enquired from the Petitioner why did he permit the items to pass through the IBBF gate and instead of replying to the questions the Petitioner started shouting at the top of his voice and said in an arrogant manner: "Aap mere khilaf likho , mein bhi aapke khilaf likhunga. Manav Adhikar Ayog mein jaunga. Abhim Mantriji ka phone ayega aur tum mera kutch nahin bigar paoge". The Petitioner became violent and threw his cap and belt to wards the fence and said: hmujhe naukri se nikaaldo, mujhe golli maar do, han maine pahele bhi kiya hai, aap mera kutchh nahin bigar sakte." The Petitioner was then asked to leave. He deposed that Ct. Gurupada Biswas had witnessed the incident since he was performing sentry duty near the office of the Asst. Comdt. Sunil Kumar.

13. On being cross-examined SI Ramji Lal Raigar stated that Petitioner had directed Ct. S. Kumaresan as told by Ct. S. Kumaresan to him to cover the other side of AOR beyond the bend on the IBB Road.

14. On being examined by the Court, SI Ramji Lal Raigar stated that the IBBF Gate No. 8 remained open from 06:00 hours to 18:00 hours to facilitate movement of villagers of village Taltoli which is located ahead of IBBF to wards Bangladesh and other civilians having their fields near the border. That an in/out register is maintained at every IBBF Gate to record entries of movement of civilians and details of items carried ahead of IBBF Gate. Civilians are not permitted to carry items in sealed bags without the permission of Post Commander and only the required quantity of items/potash which is necessary for their fields is allowed to be carried beyond the gates. He further stated that this procedure was incorporated to provide a check on the smuggling of Potash and other items into Bangladesh.

15. Ct. Kalyan Dolui PW-2 stated that on 09.05.2008 while he was proceeding to wards the local market at village Taltoli he saw a few civilians run to wards Bangladesh and that at the same time SI Ramjee Lal Raigar (PW-1) called out to him while standing near a local van. That from the spot, 16 sealed bags and 2 unsealed bags of Potash and 1 bag of Salt along with the van and 1 bicycle was seized and brought to BOP Taltoli. That thereafter the Asst. Comdt. Sunil Kumar took him and PW-1 to the IBBF Gate No. 8 where enquiries were made from the Petitioner who told the Asst. Comdt. that he i.e. the Petitioner had permitted only 5 bags of Potash to be carried beyond the gate.

16. Ct. S. Kumaresan PW-3 deposed that the Petitioner had directed him to cover

the area to wards the culvert which was beyond a bend on the IBB road, because of which he could not see the IBBF Gate No. 8 and had thus not witnessed the civilians being allowed to proceed through the gate. He deposed that the Petitioner had also directed Ct. Mahesh Kadui, the third member of the party to perform duty to wards IBBF Gate No. 9 which was about 1 km away from the OP point No. 2. That at about 11:30 hours while proceeding to wards IBBF Gate No. 8 he saw a local van loaded with items moving through the gate to wards the Indo-Bangladesh Border. That on reaching the OP point No. 2 he was informed by the Petitioner that the Petitioner had permitted the civilians to pass through the gate on the basis of a permission slip given by them. In meantime, SI Ramjee Lal Raigar (PW-1) intercepted the vehicle and seized the items. That the SI then came to the outpost and enquired from him and the Petitioner about the items being permitted to pass through the gate upon which the Petitioner reiterated that the Petitioner had given the civilians permission to pass on the basis of a permission slip given by them. He and the Petitioner were then directed to report at the BOP Taltoli where further inquiries were made and thereafter he was asked to go back to the barracks. On being cross-examined he stated that no scuffle had taken place between himself and the Petitioner.

17. Asst. Comdt.(Coy Comdr.) Sunil Kumar PW-4 deposed that on 09.05.2008 he was telephonically informed by SI Ramjee Lal Raigar (PW-1) that certain items had been seized from a place about 50 yards ahead of the IBBF Gate No. 8. That he immediately rushed to the post where he found 16 sealed and 2 unsealed bags of Potash and 1 bag of salt had been seized along with a local engine fitted van and 2 bicycles. Upon enquiry SI Ramjee Lal Raigar (PW-1) told him about the incident and informed him that the personnel detailed at OP point No. 2 were the Petitioner and Ct. S. Kumaresan (PW-3) who were then called and questioned by him. That Ct. S. Kumaresan (PW-3) told him that he was not present at the time the permission to pass through the gate was given as the Petitioner had directed him to cover the area to wards the culvert and that because of the bend in the road he could not see what was happening at the gate/OP point No. 2. Ct. S. Kumaresan further told him that on reaching the OP point when he inquired about the van moving ahead of the gate, the Petitioner said that the Petitioner had given the civilians permission to cross the gate. Thereafter he made enquiries from the Petitioner who confessed having given permission to carry the seized goods beyond the IBBF gate. That upon finding no entry made in the in/ out register of gate No. 8, he directed the Petitioner to meet him at the BOP Taltoli for further investigation. At the BOP when he put questions to the Petitioner, the Petitioner instead of answering said in a loud voice: "Mere khilaf likho, mein bhi likhungam manav adhikar ayog mein jaunga, abhi mantri ka phone ayega aap mera kuchh nahin bigar paoge, jo karna hei kar lo, mujhe naukari se nikal do, mujhe goli mar do" and after saying these words the Petitioner threw his belt and cap on the ground. The Petitioner was then shifted to BOP Khutadah for further duties and a detailed report of the incident was sent to the battalion Head Quarters. He further deposed that on 25.05.2008 at about

11:50 hours HC(CHM) Bijendra Prasad came to him and reported that the Petitioner on account of not being sanctioned leave was acting violently and was using abusive language against him in front of the barracks. The CHM further stated that despite having told the Petitioner that he will be granted leave after 26.05.2008 as a disciplinary case was pending against him, the Petitioner was not pacified and continued being violent. He i.e. PW-4 called for the Petitioner who in his presence and in front of Asst.Comdt.Chottu Ram said in an aggressive manner: "Sunil Saab ko kat dunga jaise CO Saab ko kata hei aur Sunil Kumar saab ki maa bahain thok dunga". Asst.Comdt.Chottu Ram directed HC Bijender Singh to place a guard on the Petitioner and call for a fall in and that after making further inquiry Asst.Comdt.Chottu Ram reported the matter to the battalion Head Quarter who directed to send the Petitioner to the Head Quarters the same day. On being cross-examined he stated that Asst.Comdt.Chottu Ram had heard the abuses hurled by the Petitioner.

18. On being examined by the Court he stated that the villagers were not allowed to carry sealed packets beyond the IBBF gate and that only required quantity of fertilizers were permitted. That a proper record of items carried by the villagers was maintained to keep a check on the smuggling racket prevalent in the area and the BSF personnel were regularly briefed about the procedures to be followed. He further stated that the quantity of item seized suggested that the items were carried ahead of the IBB fence in connivance with a BSF personnel.

19. Ct.Gurupada Biswas PW-5 deposed that he was the sentry on duty at the BOP Taltoli on 09.05.2008 when the Petitioner was called by Asst. Comdt. Sunil Kumar to make some inquiry. That the Petitioner started shouting at the top of his voice and said: "Mere khilaf likh kar do main bhi aapke khilaf likhunga, Samadeshta ke pass jaunga, abhi mantriji ka phone aa jayega" and threw his belt and cap on the ground and shouted: "mujhe goli mar do".

20. HC Bijendra Prasad Yadav PW-6 deposed in sync with Asst. Comdt. Sunil Kumar PW-4 in regards to the indecorous behavior of the Petitioner on 25.05.2008.

21. HC M.B. Powar PW-7 and Ct. K. Ramanna PW-9 corroborated PW-4, PW-5 and PW-6 to the extent that on 25.05.2008 at about 11:30 hours the Petitioner was shouting and using abusive language against the Asst. Comdt. Sunil Kumar. PW-9 further deposed that a fall in was ordered where the Asst.Comdt.Chottu Ram asked the coy personnel who had heard the Petitioner, to submit in writing whatever they had heard and that accordingly PW-9 had submitted an application.

22. Ct. Chanderpal Singh PW-8 deposed that on 25.05.2008 he heard a commotion near the jawans barracks and on enquiry he was told by the CHM that the Petitioner was using abusive language against Asst. Comdt. Sunil Kumar. On his way he met the Petitioner who told him that the Coy Commander Sunil Kumar was neither sending him to the Bn. Head Quarters nor granting him leave

and that is the reason why he said what he felt like.

23. Asst.Comdt.Chottu Ram PW-10 deposed in sync with Asst. Comdt. Sunil Kumar PW-4 in regards to the incident of 25.05.2008.

24. At the closing of the prosecution evidence, the Petitioner was called upon to make his defence statement, which the Petitioner declined to make and also refused to produce defence evidence.

25. In view of the evidence led at the trial the court returned a verdict of guilt qua the 3 charges in the 1st charge sheet dated 02.06.2008.

26. In the second part of the trial the Petitioner was read and explained the charges listed in the 2nd charge sheet dated 26.11.2008 and on its arraignment the Petitioner pleaded "Guilty" to all 4 charges therein.

27. The court, after satisfying itself that the accused understood the charge and the effect of plea of guilt and the difference in procedure to be followed in case of the said plea, proceeded under Rule 142(2) and returned a verdict of guilt qua all the charges listed in the 2nd charge sheet.

28. Relevant would it be to state that the Petitioner was given an opportunity to make a statement or produce defence witness(s) in reference to the charges or to mitigate the punishment but the Petitioner declined to avail the opportunity.

29. In view of the verdict at the trials and considering that the service record of the Petitioner evidenced 6 prior punishments, 2 for being intoxicated on duty and misbehaving and the others for striking or threatening superior officers, disobeying superior officers and absenting from duty without leave, the Commandant levied the penalty of dismissal from service vide order dated 1.1.2009 and forwarded the same to the confirming authority who approved the same.

30. Aggrieved by the sentence imposed, the Petitioner filed a statutory petition on 15.04.09 challenging the order dated 01.01.2009. The petition was rejected vide order dated 23.07.2009.

31. Needless to state the Petitioner filled the present writ petition challenging the order of sentence dated 01.01.2009 and order dated 23.07.2009.

32. The first submission urged was that pertaining to the incidents dated 9.5.2008 and 21.5.2008 no hearing of the charge was conducted and that the Officiating Commandant simply called the Petitioner and told him that he was ordering Record of Evidence to be prepared.

33. The said plea is contrary to the record and we have no reasons to hold that the Officiating Commandant fabricated the record.

34. The second plea urged was similar pertaining to the 2nd charge sheet and suffice would it be state that the being contrary to the record and we having no reasons to hold that the record was fabricated, negate the said plea.

35. The falsity of the pleas raised by the Petitioner is self-evident from the record wherein, pertaining to the 2nd charge sheet, at the stage of hearing of the charge we find that the Petitioner has cross-examined 3 witnesses and has made a statement in defence, contents whereof have been noted by us in para 6 above. It is apparent that a proper hearing of the charge was conducted.

36. Even otherwise since the Petitioner has been tried at a Summary Security Force Court where evidence has been led, assuming that there was a defect in the proceedings pertaining to the hearing of the charge, it hardly matters.

37. The third contention urged was that multiple charges were framed upon the same cause of action and the charges were vague.

38. The plea was hardly elaborated upon and indeed is incapable of being expanded upon. As regards multiple charges, suffice would it be to state that where the same set of acts constitutes more than one distinct offence, the same have to be specified and this is what we find having happened in the instant case. Charge 1 of the charge sheet pertained to the act of facilitating smuggling and charge 2 pertained to insubordination and improper language used before the Asst. Commandant and charge 3 pertained to the incident dated 25.5.2008 and use of abusive language. There are 3 distinct offences emerging and thus the department is right in listing 3 charges. As regards the charge being vague, suffice would it be to state that the date, the time and the place have been narrated. Articles facilitated to be smuggled have been detailed. Threatening, abusive and insubordinate language has been set out. Similarly qua the 2nd charge sheet, the time, the date and the place have been detailed. The person against whom criminal force was used has been named and the abusive language used has also been disclosed.

39. The next plea urged was that after considering the Record of Evidence pertaining to the 1st charge sheet the Commandant had dropped the matter and to make good the submission it was urged that if it was directed that a trial be conducted the same would have commenced immediately as per the practice and not after a few months. We have noted hereinabove in para 4 the reasons why delay took place and it is apparent that merely because the trial commenced a little late the Petitioner is trying to use the said delay to infer a point of fact, which cannot be inferred because of the delay.

40. It was then urged that two charge sheets could not form the subject matter of a single trial.

41. We have already noted hereinabove that conceptually two trials were conducted though the Court sat continuously. We have already noted hereinabove that separate proceedings in part B have been recorded pertaining to the 1st charge sheet and separate proceedings in part B-1 have been recorded pertaining to the 2nd charge sheet. The testimonies of witnesses pertaining to the two charge sheets have been recorded separately and the verdict of guilt is also separate. Thus, merely because as a matter of fact the Commandant acting

as the Court held one trial after the other does not render the proceedings tainted in any form whatsoever.

42. Lastly it was urged, pertaining to the 1st charge sheet that there were discrepancies in the testimony of Asst. Comdt. Sunil Kumar PW-4 vis-?-vis words recorded in the charge sheet as the ones spoken by the Petitioner to Sunil Kumar.

43. A perusal of charge 2 and charge 3 pertaining to the 1st charge sheet would show the words stated to have been used by the Petitioner to Asst. Comdt. Sunil Kumar and we find the testimony of SI Ramji Lal Raigar in complete harmony with the crux of the allegation against the Petitioner as regards Asst. Comdt. Sunil Kumar we find that he has substantially deposed the same language spoken of by the Petitioner. Let us contrast the two. The words alleged in the mouth of the Petitioner as per charge 2 and charge 3 are as follows:

MAIRE KILAPH LIKHO, BSF MEN 89 DINO SE UPAR SAJA NAHI HEA, MEIN BHI LIKHUGA, MANAVADHIKAR AAYOG MEIN JAUNGA, ABHI MATRI KA PHONE AAEGA, AAP MERA KHUCH NAHI BIGAD PAOGE. ISHSE PAHLE BHI MENE KIYA HEY, MUJHE GOLE MAR DO, MUJHE NOUKARI SE NIKAR DO, TUMSE JO HO SAKTA HE MERA BIGAD LENA....

Sunil Kumar, AC ko kat dunga jaise Comdt ko kata hain. Maa Bahan thok dunga

In his testimony Asst. Comdt. Sunil Kumar has said that the Petitioner used the words:

Mere khilaf likho, mein bhi likhungam manav adhikar ayog mein jaunga, abhi mantri ka phone ayega aap mera kuchh nahin bigar paoge, jo karna hei kar lo, mujhe naukari se nikal do, mujhe goli mar do

Sunil Saab ko kat dunga jaise CO Saab ko kata hei aur Sunil Kumar saab ki maa bahain thok dunga". We need not comment much save and except to write that witnesses are not to speak as tape-recorders and indeed if they do, the testimony would be suspect. Natural variations are proof of the truth.

44. The next contention urged was that neither were the smugglers examined nor was any proof of any benefit taken by the Petitioner or connivance by the Petitioner to facilitate smuggling and thus it was urged that there was insufficient evidence to indict the Petitioner qua charge 1 of the 1st charge sheet.

45. Suffice would it be to state that the smugglers ran away and thus could not be examined as they were not arrested. The fact of the matter remains that there is evidence of goods having crossed the BOP gate without an entry being made in the register and the Petitioner being on duty as the Party Commander of the outpost with the act of contrivance to depute Ct. Kumaresan to wards the culvert beyond the bend on the IBB Road and Ct. Mahesh Kadui, the third member of the team being dispatched to wards gate No. 9 i.e. the two constables being deputed at a point where gate No. 8 could not be visible to them and contemporaneously a van and two cycles with 16 sealed bags of

Potash, 2 unsealed bags of Potash and 1 bag of Salt being permitted to be crossed. The Petitioner did not dispute that in the register kept at the gate to record in/out movement, no entry was made. Thus, it is apparent that the Petitioner had facilitated smuggling and it hardly matters whether the department could prove Petitioner taking illegal gratification, proof whereof is always difficult to obtain even otherwise.

46. Pertaining to the 2nd charge sheet it was urged that the Petitioner never pleaded guilty and that the Commandant wrongly recorded the plea of guilt for all the charges. It was urged that the Petitioner pleaded guilty only to the charge of being intoxicated i.e. charge No. 4 of the 2nd charge sheet and not the first three.

47. We are not impressed with the argument for the reason we have no reason to doubt that the Commandant incorrectly recorded what had happened. The same Commandant recorded the plea of not guilty and proceeded thereafter to record evidence pertaining to the 1st charge sheet and we see no reason why he would not have done so even for the 2nd charge sheet if the Petitioner had pleaded not guilty. In this connection it assumes importance to note that pertaining to the Record of Evidence qua the 2nd charge sheet, the Petitioner refused to even cross-examine the witnesses and even had refused to sign the said proceedings and there are traces of Petitioner contriving a strategy from the very beginning to try and create a ground to question, on technical grounds, the verdict against him qua the 2nd charge sheet.

48. No other plea being urged we terminate by finding no fault with the penalty levied and for which we take into account the previous service record of the Petitioner which is not healthy.

49. The writ petition is dismissed.

50. No costs.