
(2010) 10 DEL CK 0094

In the Delhi High Court

Case No : Writ Petition (C) No. 14098 of 2009

Ex-Const Vijender Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 01-10-2010

Acts Referred:

Army Rules, 1954 — Rule 115, 115(2), 115(2A), 125
Border Security Force Act, 1968 — Section 117(2), 20, 41
Border Security Force Rules, 1969 — Rule 101, 101(3), 142, 142(2), 81
Constitution of India, 1950 — Article 14

Citation : (2011) 1 ILR Delhi 200

Hon'ble Judges : J.R. Midha, J;Gita Mittal, J

Bench : Division Bench

Advocate : Anil Gautam and D.S. Ahluwalia, for the Appellant; Anjum Javed and Bhupinder, Assistant Commandant BSF, for the Respondent

Judgement

Gita Mittal, J.—Rule D.B.

2. With the consent of both the parties, the petition is taken up for consideration and final disposal.

3. The Respondents have produced the record before us in terms of the order dated 22nd December, 2009. Learned Counsel for the parties have also been heard with regard to the issue raised by the Petitioner. Learned Counsel for the Respondents has relied upon the record of the case to make submissions.

4. It appears that so far as the factual matrix is concerned, there is really no dispute.

5. The Petitioner was enrolled as Constable with the Border Security Force ("BSF" hereafter) in the year 2000. The available record of Summary Security Force Court ("SSFC" hereafter) shows that the Petitioner had rendered satisfactory service of little over eight years before passing of the impugned order of dismissal on the 13th of October, 2008.

6. It appears that on the night intervening 30th June/1st July, 2008, there was an incident of firing and the Petitioner is stated to have suffered a bullet injury from his own rifle on his left shoulder. The question which has been raised by the Petitioner is that the same was on account of accidental firing for the reason that the Petitioner had slipped while returning from late night duty while crossing a ditch as a consequence of which, the trigger of his rifle which was slung over his left shoulder got pressed resulting in the rifle going off and the bullet piercing the flesh of his left shoulder. The Petitioner contends that he had reached the border outpost in such injured condition and informed the officers about the incident of firing where after the Petitioner was medically treated for the injury received by him.

7. The Respondents on the other hand have placed reliance on a record of evidence made under the provision of Border Security Force Act between 17th August, 2008 and 8th October, 2008 into the said incident. On a consideration thereof, the Commandant of the Petitioner's Battalion passed an order on 8th October, 2008 itself that the Petitioner be tried by the Summary Security Force Court ("SSFC" hereafter).

8. The original record of the proceedings of the SSFC have been placed before us.

9. The Petitioner was arraigned on the following charges:

CHARGE SHEET

The accused No. 00005142 Constable Vizender Singh of E Coy, 43

BN BSF is charged with: BSF Act 1968 Attempting To Commit u/s Ec-41(C) Suicide And In Such Attempt Doing An Act Towards The Commission of The Same. In that he,

A BOP Sowarwali on 01st July, 2008 at about 010020 hrs attempted to commit suicide by firing one round from his personal weapon 5.56 Insas Rifle bearing Butt No. 138, body No. 16609458.

10. The Respondents have contended that the Petitioner entered a plea of "guilty" to the charge before the SSFC on 13th October, 2008. As a result he was found guilty thereof and sentence to dismissal from service.

11. It is an admitted position that there was no witness to the incident of firing. We find that the only evidence which has been relied upon the Respondents to return a finding of conviction and guilt for the said charge is the said plea of guilt by the Petitioner. It is submitted that in view of this plea, no trial proceedings were required to be conducted and no evidence was recorded by the SSFC.

12. The primary challenge to the proceedings of the SSFC laid by the Petitioner rests on the contention that he had never pleaded guilty to the charge. It has been contended that for this reason, the proceedings of the court do not contain his signatures at any place. Perusal of the original record shows that the proceedings dated 13th October, 2008 of the SSFC do not contain the signatures

of the Petitioner.

Rule 142 of the BSF Rules, 1969 prescribes as to how a plea of guilty or not guilty should be recorded by a Security Force Court which reads as follows:

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 pleads guilty to the first two or more charges laid in the alternative, the Court may after Sub-rule (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 plead thereto, and a record to that effect shall be made in the proceedings of the Court.

13. In as much as, the Respondents rely on a plea of guilt of the Petitioner, it becomes necessary to consider the well settled principles laid down by the courts with regard to the manner in which such a plea is to be recorded. In this behalf, reference can be usefully made to the previous pronouncements of this Court including the judgment dated 3rd August, 2010 in W.P.(C) No. 2683/1992 entitled Shri Sukhbir Singh v. Union of India and Ors. and the judgment dated 31st May, 2010 in WP (C) No. 236/2000 entitled Vimal Kumar Singh v. Union of India and Ors. The several binding judicial on the issue were considered and had been held as follows:

59. If an accused person pleads guilty to the charges, the Security Force Court is required to comply with the requirements of Sub-rule 2 of Rule 142. Such plea is mandatorily to be recorded as the finding of the court but before it is so recorded, the court is required to ascertain that the accused understands the nature of the charge to which he has pleaded guilty. The court is required to inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty. The court is also required to inform the accused person of the difference in procedure which will be followed by the court upon the accused entering a 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.

Sub-rule 2 casts a duty on the court to ascertain from the accused, before

recording of the plea of guilt, as to whether he understands nature of the charge to which he has pleaded guilty and shall inform him of the general effect of his plea after ensuring that he has understood the nature of the charge. The court shall enter the plea only thereafter and proceed with the trial accordingly.

60. Rule 81 stipulates the procedure which is to be followed on a plea of guilty. When the court has so recorded a finding of guilty in respect of the charge, the prosecutor then is required to read the record or the abstract of evidence, as the case may be to the court or inform the court of the facts contained therein. Thereafter, under Sub-rule (3) of Rule 81, the accused person may (a) adduce evidence of character and in mitigation of punishment; (b) address the court in mitigation of punishment, (c) proceed under Rule 101 when Sub-rule (3) has been complied with. In accordance with Rule 101, the court shall take evidence of the general character, age, previous conviction and record of the conduct of accused person; decorations, reward, period spent in custody or confinement etc. The court would give an opportunity to the accused person to cross examine witnesses, to produce such record and address the court in mitigation of his punishment.

61. Similar statutory provisions governing army personnel are to be found in the Army Act and Rules thereunder. In the context of recording of pleas of guilt by court martials exercising jurisdiction thereunder, the courts have repeatedly emphasized that signatures of the accused especially on a plea of guilt, even though they are not statutorily required, ought to be taken as a matter of abundant caution.

62. The statutory scheme with regard to recording of a plea of guilt under the Border Security Force Act is similar to the scheme under the Army Act. The observations of the Jammu and Kashmir High Court on the manner in which a plea of guilt is to be recorded in 1984 (3) SLR 675 Prithpal Singh v. Union of India and Ors., which arose in the context of the Army Act, shed valuable light on the issue which has been argued before us. On this question, in para 9 of the judgment, the court held as follows:

10. The most important aspect of the case is as to whether the Petitioner had pleaded guilty to the charges as is suggested by Mr. Hussain or not. Plea of guilt recorded by Lt. Col. Mehta is dehors Rule 115 of the Army Rules. In the first place the alleged plea of guilt is unsigned by the authorities. Surprisingly the Petitioner also has not signed the alleged plea of guilt. At what stage word "guilty" was recorded against each charge is not known. If it was recorded in presence of the accused/Petitioner obviously his signatures would have been obtained on it. Then the minutes of the enquiry should have contained an advice to the Petitioner not to plead guilty as enjoined by Rule 115 of the Army Rules. This important mandate of the Rule has been flagrantly violated. Therefore the proceedings conducted by the Summary Court Martial which have affected the Petitioner's fundamental rights as he is deprived of his job are vitiated. The protection afforded by the procedure should not have been denied to the

Petitioner if it was intended to proceed against him under the Army Rules. As to whether charges were correct or not as already observed this Court cannot go into that aspect of the matter. But certainly this Court will set aside the punishment which is awarded to the Petitioner on the ground that the decision to punish the Petitioner was taken by contravening the mandate of Rules. Such a decision would be arbitrary and shall be violative of the guarantees contained in Article 14 of the Constitution. The argument of the learned Counsel for the Respondent that the Petitioner was not prejudiced in any manner during the Summary Court Martial proceedings is devoid of force. The Petitioner has suffered punishment of dismissal from service and the punishment is awarded by conducting proceedings in such a manner which were neither fair nor judicial. Could the Summary Court Martial observe the Rules governing the conduct of Summary Court Martial in breach. Answer to this question will be emphatic no in view of the glory of the Constitution and rights guaranteed by it.

The court had thus observed that if the statement was recorded in the presence of the accused/Petitioner, obviously, his signatures would have been obtained on it.

63. On this very issue, in *Sukanta Mitra Vs. Union of India (UOI) and Others*, , the court observed as follows:

9. This apart the fact remains that the Appellant has been convicted and sentenced on the basis of his plea of guilt. The plea of guilt recorded by the Court does not bear the signatures of the Appellant. The question arising for consideration, therefore, is whether obtaining of signatures was necessary. In a case *Union of India and Ors. v. Ex-Havildar Clerk Prithpal Singh and Ors.* 1991 KarLJ 513, a

Division Bench of this Court has observed:

The other point which has been made basis for quashing the sentence awarded to Respondent-accused 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 undertakes 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 case. Rule 125 provides that the court shall date and sign the sentence and such signatures shall authenticate of the same. We may take it that the signature of the accused are not required even after recording plea of guilt but as a matter of caution same should have been taken.

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11. Admittedly, in the present case signatures of the accused/Appellant have not

been obtained on the plea of guilt recorded by the BSF Court which as a matter of caution must have been obtained and nor it is revealed from the record that the Appellant was ever informed about the general effect of the plea of guilt.

64. Our attention has also been drawn to the judgment of this Court dated 17th January, 2008, passed in LPA No. 254/2001 entitled *The Chief of Army Staff and Ors. v. Ex. 14257873 K. Sigm Trilochan Behera*, wherein the court had occasion to consider the case where plea of guilt of the Respondent was recorded on a printed format. The court deprecated the non-recording of complete plea which was not signed by the Respondents as well. This case had also arisen in the context of recording of a plea of guilty by a court martial under the Army Act and in a similar situation, the court observed as under.

5. Secondly, the signatures of the Respondent were not obtained on any of these proceeding. The plea of the Respondent was recorded on a printed format. The column of arraignment reads as under:

By the Court-How say you No. 14257873K ULNK Trilochan Behera are you guilty or not guilty of the...charge preferred against you?

The answer is recorded as "Guilty". It does not mention what was the charge though a separate chargesheet has been placed on record which is dated 22nd March, 1994, which is not signed by the Respondent. The complete plea of guilt of the Respondent was not recorded.

No date was mentioned on the paper where this was recorded. The record did not bear the signatures of the judges as well. Certain other procedural guidelines had also not been complied. The court held that failure to comply with the prescribed procedure amounted to violation of the procedural safeguards provided in Army Rule 115(2) and were violative of the rights of the accused under Article 14 of the Constitution of India.

65. On the same issue, in 2003 II AD (Delhi) 103 *Lachhman (Ex. Rect.) v. Union of India and Ors.*, it was held:

13. The record of the proceedings shows that the plea of guilty has not been entered into by the accused nor has it been recorded as per Rule 115 inasmuch neither it has been recorded as finding of court nor was the accused informed about the general effect of plea of guilt nor about the difference in procedure which is involved in plea of guilt nor did he advise the Petitioner to withdraw the plea if it appeared from the summary of evidence that the accused ought to plead not guilty nor is the factum of compliance of Sub-rule (2) has been recorded by the Commanding Officer in the manner prescribed in Sub-rule 2(A). Thus the stand of the Respondents that the Petitioner had entered into the plea of guilt stands on highly feeble foundation.

66. In *Uma Shanker Pathak v. UOI and Ors.* 1989 (3) SLR 405 Allahabad High Court had occasion to deal with this question and held that:

10. The provision embodies a wholesome provision which is clearly designed to ensure that an accused person should be fully forewarned about the implications of the charge and the effect of pleading guilty. The procedure prescribed for the trial of cases where the accused pleads guilty is radically different from that prescribed for trial of cases where the accused pleads "not guilty". The procedure in cases where the plea is of "not guilty" is far more elaborate than in cases where the accused pleads "guilty". This is apparent from a comparison of the procedures laid down for these two classes of cases. It is in order to save a simple, unsuspecting and ignorant accused person from the effect of pleading guilty to the charge without being fully conscious of the nature thereof and the implications and general effect of that plea, that the framers of the rule have insisted that the court must ascertain that the accused fully understands the nature of the charge and the implications of pleading guilty to the same.

67. In the decision dated 8th September, 2008 in W.P.(C) No. 6036/2005 Ex. Naik Subhash Chander v. UOI and Ors. this Court had occasion to test the propriety and legality of a record of a summary security force court which is identical to that in the present case. Ex Naik Subhash Chander was tried for committing an offence u/s 20 of the BSF Act. The plea of guilt against the Petitioner had been recorded in identical terms. The observations of the court can also be usefully extracted and read as follows:

11. ...The possibility of its being manipulated cannot be ruled out. Such like certificates can be prepared at any time. This justifies the need for obtaining the signatures of the accused viz. to lend authenticity to such a record.

68. In the above background, compliance with the statutory mandate has to be real. No cosmetic satisfaction or compliance could meet the requirements of law and a bald certification by the Respondents that statutory provisions have been complied with is insufficient. Such certification certainly does not satisfy the legal requirements.

69. Our attention is drawn to the photocopy of these proceedings which has been placed on record by the Petitioner. The plea of guilt of the Petitioner has been recorded on a typed format, the columns whereof reads as follows:

Q-1. How say you No. 860014234 L/NK Vimal Kumar Singh, are you guilty or not guilty of the charge, which you have heard read?

Ans. GUILTY

Only the word "Guilty" is handwritten.

70. We find that the following had already been typed below the space for the above answer:

The accused having pleaded guilty to the charge, the court read and explained to the accused the meaning of the charge to which he has pleaded guilty and ascertains that the accused understands the nature of the charge to which he

has pleaded guilty. The court also informed the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The court satisfies itself that the accused understands the charge and the effect of that plea and the difference in procedure which will be followed consequent to the said plea. The court satisfy itself that the accused understands the charge particularly the difference in procedure.

The above indicates that the SSFC had at the outset assumed that the Petitioner would plead guilty and has proceeded on that basis.

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72. Perusal of this document does not show as to what was the charge to which was explained to the Petitioner to which he pleaded guilty and it is left to presumption that it was actually the contents of the charge sheet dated 28th December, 1998 which was put to the Petitioner and that he pleaded guilty to the same.

73. It is noteworthy that a separate charge sheet has been placed on record dated 17th February, 1999. This charge sheet also does not bear the signatures of the Petitioner.

74. Even if it was to be held that no illegality can be founded in the failure to obtain signatures by the court, it is clearly evident that there was no real trial of the Petitioner at all and that the Respondents had proceeded against the Petitioner in a premeditated manner after having predetermined the result of the proceedings.

14. In view of the legal position and principles laid down in the several judicial pronouncements noted hereinabove, so far as the alleged plea of guilt before the SSFC is concerned, the same does not inspire any confidence. The proceedings of the court do not contain the signatures of the Petitioner at any place at all in the SSFC which would militate against the Petitioner having so pleaded.

15. It is an admitted position that the Petitioner was admitted to Civil Hospital, Fazilka which had referred the Petitioner to Guru Gobind Singh Medical College, Faridkot for further treatment.

16. The Respondents have placed before this Court the record of the Petitioner's treatment both at the Civil Hospital, Fazilka as well as Guru Gobind Singh Medical College, Faridkot. When the Petitioner was produced before the Civil Hospital on the 1st of July, 2008, we find that the doctor noted that the Petitioner had suffered an "alleged accidental gun-shot injury". The Petitioner was referred and admitted to the Guru Gobind Singh Medical College also on the 1st of July, 2008 and discharged therefrom on 10th July, 2008. A final diagnosis was recorded by the hospital and mentioned in the discharge form issued to the Petitioner which also states the injuries suffered by the Petitioner were by "alleged accidental gun-shot injury".

17. It is noteworthy that during the course of inquiry into the matter, the Police Station, Sadar Fazilka had recorded a diary No. 24 on the 3rd of July, 2008. A true copy thereof has been placed by the Petitioner before us. In this daily diary, the police had recorded the statement of the Petitioner which is to the following effect:

I, Constable Vajinder Singh of BSF No. 00005142, "E" Company, 43 Battalion S/O Shri Dalip Singh resident of village Nidana Distt Jind, PS Julana, Haryana, was deployed at BSF BOP Sawarwali, PS Sadar Fazilka. On the intervening night of 30.06.08 and 01.07.08 I was coming back while performing my duty along with border fencing near out BSF BOP. Because of night my foot got slipped over some ditch and while I was falling on the ground the trigger of my INSAS Rifle, which was on my left shoulder, got pressed with the result the bullet pierced through the flesh on my left shoulder. I reached my BOP in the injured condition and informed my officers about the fire. They who got me admitted in Civil Hospital Fazilka they referred me to Guru Gobind Singh Medical College Faridkot for further treatment. This incident of accidental fire had taken place because of sudden slip of my foot over some ditch while I was coming back from my duty and for that accidental fire nobody else is to be blamed and also I do not want to take action against any person. The above statement heard, signed by the individual in English as Correct.

It appears that a complaint to this effect was lodged by the BSF with the civil police as well which after investigation had closed the case supporting the conclusion that the case of suicide was not made out.

18. We may notice that based on the investigation conducted by the police and the first statements of the Petitioner recorded by the doctor on the 1st of July, 2008 and the police on the 3rd of July, 2008, it is manifest that the Petitioner had consistently explained that he had suffered injury on account of an accidental firing. This stand has been accepted by the police.

In this background, all these circumstances taken together would support the plea set up by the Petitioner that he had not pleaded guilty to the charge levelled against him.

19. Learned Counsel for the Respondents has drawn our attention to the Petitioner's prayer for mitigation of the punishment which is stated to have been set up in a signed communication purportedly addressed by the Petitioner to the SSFC. Interestingly, the original document relied before us is a type written document which contains no date at all. This document sets up a plea of sickness of the Petitioner's wife and daughter, who were dependent upon the Petitioner's service, in support of his prayer for mitigation of the sentence.

20. Learned Counsel for the Petitioner has contended that despite the explanation given by the Petitioner and the fact that the police had found no substance or culpability for any penal offence of the Petitioner, the Respondents had found the Petitioner guilty of the charge. The plea set up by the Petitioner

after such finding had been returned by the court as a last resort to seek mitigation of sentence cannot be treated as an admission of guilt.

In any case, this Court is required to examine the material which was before the court in arriving at the conclusion of the Petitioner's guilt. Certainly the conclusion cannot be tested on the basis of any statement which is attributed to the Petitioner after the decision making.

21. Interestingly, the Respondents have placed reliance on this undated communication available in the record which has been purportedly received by them on 25th November, 2008. Perusal of this communication shows that a completely new story has been mentioned therein more than 16 months after the incident. Neither of these petitions inspires any confidence and are clearly desperate pleas of a person without means and resource seeking to protect his employment.

The Petitioner submitted a statutory petition u/s 117(2) of the Border Security Force Act assailing the finding and sentence of the SSFC which was addressed to the Director General of the BSF. The Petitioner has specifically challenged the plea of guilt attributed against him and reiterated that the incident arose out of accidental firing. The statutory petition was rejected by the authorities by the order dated 22nd April, 2009.

22. As noted hereinabove, this Court is required to test the legality and validity of the findings returned by the SSFC based on the material before the court and the conviction of the Petitioner cannot be premised on anything which may have come before them subsequently.

23. In any case, there are material contradictions between the contents of this undated communication received by the Respondents on 25th November, 2008 and the explanation rendered by the Petitioner in the statutory petition dated 7th March, 2009.

24. Mr. Anil Gautam, learned Counsel appearing for the Petitioner has further explained that after the Respondents found him guilty and convicted him for the charge of committing suicide, the Petitioner made a request for restoration of his service keeping in view the extreme sickness of his wife and daughter.

25. In any case, the independent record made by the hospital authority as well as police does not support the charge for which the Petitioner was arraigned.

26. For all these reasons, we find substance in the challenge laid by the Petitioner to his conviction by the SSFC by the order dated 13th October, 2008. For the same reasons, the punishment of dismissal imposed upon the Petitioner and the order dated 29th April, 2009 passed by the Respondents rejecting the petition u/s 117(2) of the Border Security Force Act are also not sustainable.

27. In view of the above discussion, the order of conviction and sentence dated 13th October, 2008 passed by the SSFC and the order dated 29th April, 2009 are

hereby set aside and quashed.

28. As a consequence, the Petitioner shall be entitled to reinstatement in service with all consequential benefits including back wages and restoration of seniority, etc. in accordance with the prescribed procedure.

29. The Respondents shall pass an appropriate order in terms of above directions within a period of twelve weeks from today which shall be communicated to the Petitioner.

30. For the reasons that we have awarded back wages, we are not inclined to award costs.

31. Dasti to the parties.