

(2011) 02 DEL CK 0087

In the Delhi High Court

Case No : Writ Petition (C) 8212 of 2010

Ex. Constable Gurdeep Singh

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 22-02-2011

Acts Referred:

Border Security Force Act, 1968 — Section 19, 20, 26, 40

Citation : (2011) 02 DEL CK 0087

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

Bench : Division Bench

Advocate : V.V. Rao, for the Appellant; Jyoti Singh and Anuj Aggarwal, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Vide order dated 8.12.2008 penalty of dismissal from service has been inflicted upon the Petitioner against which appeal filed has been rejected vide order dated 30.11.2009, both of which have been challenged in the instant writ petition. It be noted that the Petitioner was tried at a Summary Security Force Court for offences stated to have been committed u/s 20(a), 26 and 19(a) of the BSF Act 1968. The charges against the Petitioner which were framed at the trial read as under:

First Charge Assaulting a Superior Officer BSF ACT ? 1968 In that he, Section?20 (A) At BOP Narukhaki on 01/06/08 at about 2120 hrs attempted to assault SI Shyam Deo of 105 Bn BSF with his Rifle.

Second Intoxication Charge In that he, BSF ACT ? 1968 on 01/06/2008 at 2115 hrs at BOP Section-26 Narukhaki, was found in a state of intoxication.

Third Charge Absenting Himself Without BSF ACT-1968 Permission Section-19(A) In that he, on 03/06/08 at about 0730 hrs absented himself without leave from BN HQ 105 BN BSF till 2000 hrs on 25/06/08 when he voluntarily rejoined the unit. (Total period of absence ? 23 days)

2. It is apparent that evidence pertaining to the first and second charge would flow out of the same stated incident which allegedly took place at 21:15 hours on 1.6.2008 and the second charge pertains to Petitioner absenting without leave from 17:30 hours on 3.6.2008 till 20:00 hours on 25.6.2008.

3. At the trial 8 prosecution witnesses were examined to prove the charge. Pertinent would it be to note that the testimony of PW-1 to PW-6 is relevant for the first 2 charges and that of PW-7 and PW-8 is relevant for the third charge. Thus, we proceed to note the testimony of the said 8 prosecution witnesses.

4. HC Mahavir Prasad PW-1 deposed that on 1.6.2008 at 16:00 hours he and SI Shyam Deo (PW-2) were on patrol duty when Ct. Amar Singh (PW-3) who was returning from OP No. 1 informed them of having seen Bangladesh nationals proceeding towards the house of Nizamuddin the Gram Pradhan. SI Shyam Deo told Ct. Amar Singh to return to the BOP and send an ambush party and decided that he i.e. SI Shyam Deo and HC Mahavir Prasad should stay put till ambush party arrived and on learning that the ambush party was not at BOP they returned to the BOP at around 20:00 hours when Ct. Amar Singh told SI Shyam Deo that the Petitioner alongwith Ct. Rishi Pal Singh and Ct. Manohar Lal were requesting for permission to return to BOP and that they were members of a special ambush upon which SI Shyam Deo told Ct. Amar Singh to inform them that they should remain stationed till 21:00 hours and when they returned for dinner at 21:15 hours, SI Shyam Deo briefed them and left the post accompanied by Ct. Amar Singh and Ct. Arun Kumar. When he i.e. HC Mahavir Prasad was in the company of Ct. Amarjeet at the sentry post he heard commotion at the cook house and told Ct. Amarjeet to find out what the matter was and on returning Ct. Amarjeet told him that the Petitioner had cocked his rifle at which he i.e. Ct. Amarjeet statedly told the Petitioner not to do such things. He i.e. HC Mahavir Prasad went towards the barrack and saw Petitioner going towards the room of SI Shyam Deo and on not finding SI Shyam Deo in his room went outside the camp. He i.e. HC Mahavir Prasad tried to contact SI Shyam Deo to give information about the incident and met him outside and told him not to go to the camp till dawn broke. They returned to the camp at 04:00 hours and learnt that Petitioner had not returned till then. In late afternoon he learnt that the Petitioner had returned to the camp at 04:45 hours. Relevant would it be to note that the Petitioner asked only one question to the witness when opportunity of cross-examining the witness was afforded to him being the query whether the Petitioner had his weapon with him while taking dinner to which the answer was that not at that time but afterward the Petitioner had his weapon with him.

5. Ct. Amarjeet, the person referred to by HC Mahavir Prasad, as the one who was sent to investigate when commotion was heard from the cook house deposed as PW-4 and corroborated what was deposed to by PW-1, but with an omission, in that while deposing that he saw the Petitioner with a weapon in his hand, did not state that the Petitioner had cocked the weapon. The witness was

cross-examined by the Petitioner on the point whether he used to see the Petitioner go out of the BOP to which he replied that the Petitioner did not immediately go out of the BOP. The second question put to the witness was whether Petitioner told him where he was, when the witness contacted him over the phone in the morning, to which the witness replied that he had told the Petitioner to return from wherever he was.

6. SI Shyam Deo Singh PW-2 deposed in harmony with the testimony of PW-1 with respect to what PW-1 stated to have told him about the conduct of the Petitioner and on said count he i.e. SI Shyam Deo not returning to the camp till dawn broke. Ct. Amar Singh PW-3 also deposed in complete harmony with what was deposed to by PW-1 and PW-2. Relevant would it be to note that neither PW-2 nor PW-3 was cross-examined.

7. Ct.P.C. Barik PW-5 deposed that on 1st June 2008 at about 18:00 hours he returned from OP duty and at about 21:30 hours heard someone quarrelling in high pitch and using abusive language and saw the Petitioner Ct. Gurdeep Singh with his weapon and hence avoided him because Petitioner was not in his senses and was looking for somebody. Ct. Manohar Lal PW-6 deposed that on 1st June 2008 at about 21:00 hours he along with Petitioner Ct. Gurdeep Singh, Ct./Dvr. Rishipal Singh went to the cook house to have dinner. Then Ct./Dvr Rishipal Singh took out a bottle of liquor and along with the Petitioner consumed liquor. A little while later Ct. Amar Singh came there and asked Petitioner to hand over to him his rifle as he was to go on patrolling duty and the Petitioner refused to hand over his weapon. After some time Ct. Gurdeep Singh and Ct. Rishi Pal started quarrelling and the Petitioner cocked his rifle and went towards the room of the Post Commander uttering abuses and on not finding him in the room went outside the BOP.

8. SI Kaushal Kumar PW-7 deposed that on 2nd June 2008, Ct. Gurdeep Singh had arrived at Battalion HQ for a disciplinary case and on 3rd June, at about 07:30 hours when BHM HCS.K. Bhandari (PW-8) had made the HQ Coy and Coy personnel present to fall in, he found that Ct. Gurdeep Singh was absent from the unit lines information whereof was given to him by HCS.K. Bhandari at which he ordered that Petitioner should be searched in the nearby areas and since Petitioner could not be located he sent information thereof to the Commandant. HCS.K. Bhandari corroborated the testimony of PW-7.

9. After prosecution witnesses were examined, the Petitioner pleaded "Guilty" to the 3 charges and made a statement as under:

I alongwith No. 90004707 Ct./Dvr Richpal Singh and No. 01005142 Ct. Manohar Lal went for Naka on 1st Jun 08 at BOP Narukhakhi when told by No. 97105002 Ct. Amar Singh. While I carried my weapon, the other two persons were without weapon and were improperly dressed. After about two homes, I asked from No. 97105002 Ct. Amar Singh on telephone whether we should return or not since we had not taken dinner. I was told to return at 2100 hrs. We returned at the

given time and during that time No. 05001344 SI Shyam Dev at BOP Narukhakhi pointed out that No. 90004707 Ct./Dvr Richpal Singh and No. 01005142 Ct. Manohar Lal were improperly dressed and had gone for duty without weapon which was against the orders. We were then directed to take our dinner. The prepared food had already exhausted in the mess. I prepared chapatti myself. We, all the three, consumed liquor in the cook house and had dinner together. I then went to ambush No. 03 after the dinner. Since there was no food in the cook house for us to eat, I have gone to the room of SI Shyam Dev, the Post Comdr to ask him as to why the food is not prepared for us while we keep performing the duties regularly at different places. I returned to the post in the morning on 02 June 08 at about 0430 hrs.

10. It is apparent that the Petitioner admitted having consumed alcohol and also admitted going to the room of SI Shyam Deo, but furnished a justification for doing so; the justification being to ask him as to why food was not cooked for them. It is also relevant to note that pertaining to the third charge, having pleaded "Guilty", Petitioner gave no justification for not informing anybody at the unit line and leaving the unit line on 3.6.2008.

11. SI S.K. Bhandari was thereafter examined as a character witness and he produced the service record of the Petitioner to bring on record evidence pertaining to the penalties which were levied upon the Petitioner, and suffice would it be to state that in the 13 years service rendered by the Petitioner he had been inflicted 8 penalties, 3 of which were in the preceding 12 months. The penalties were for offences under Sections 19(a), 26 and 40 of the BSF Act i.e. being found in the unit lines in an intoxicated condition and creating a nuisance; breaching discipline and disobeying commands as also for unauthorized absence without prior intimation.

12. Noting that the Petitioner was a habitual offender and taking a serious view of the Petitioner in an intoxicated condition and uttering threatening language going to the room of a superior officer with a cocked weapon, the penalty of dismissal from service has been levied and the Appellate Authority has concurred. On the issue of the quantum of the penalty levied, the Appellate Authority has taken note of the past 8 penalties levied, 3 of which were in the preceding 12 months.

13. During arguments, learned Counsel for the Petitioner brought out that Ct. Amarjeet PW-4 did not state that the weapon in the hand of the Petitioner was cocked. Counsel highlighted that as per Ct. Amarjeet, the Petitioner simply had a weapon in his hand. Thus, counsel urges that the gravity of the conduct of the Petitioner in the context of the weapon in his hand being cocked was missing. Counsel urges that it is apparent that the authorities concerned took a serious view on a non-existing serious fact.

14. We do not agree. HC Mahavir Prasad has categorically deposed that when Ct. Amarjeet returned he told him that the Petitioner was moving with his weapon

cocked and searching for SI Shyam Deo. It may be noted that no suggestion has been put to HC Mahavir Prasad that Ct. Amarjeet did not tell him so. We further note that Ct. Manohar Lal PW-6 has also deposed of having seen the Petitioner proceed towards the room of the Post Commander with his rifle cocked. Ct. Manohar Lal was not cross-examined on this point. It is apparent that while deposing, Ct. Amarjeet has inadvertently omitted to describe the preparedness of the rifle in the hand of the Petitioner and simply deposed that he saw the Petitioner with a rifle in his hand, omitting to state that the rifle was cocked.

15. Let us explain here. To cock a rifle means to affix the magazine containing the bullets i.e. making the rifle in a state of preparedness to fire.

16. It is true that the charge of attempting to assault SI Shyam Deo has not been proved for the reason an act is treated as an attempt when the same is the penultimate act preceding the commission of the actual offence; but the evidence establishes that the Petitioner moved about with threatening postures to assault SI Shyam Deo. The utterances and the acts of the Petitioner are indeed grave.

17. It was then urged that the authorities have ignored the defence statement of the Petitioner by way of justification for his conduct. Counsel highlights that after an assiduous day's duty the Petitioner felt annoyed when no food was available in the mess and that it had to be kept in mind that as the Head of the BOP SI Shyam Deo was duty-bound to ensure that food was available for the jawans and since he omitted to discharge his duties, in a fit of anger, Petitioner abused him in absentia and proceeded to make a complaint to him. Counsel urges that the possibility of the Petitioner cocking his rifle and then proceeding to the room of SI Shyam Deo could well be an expression of anguish and no more.

18. Instances of armed jawans killing their superior officers are not unknown. It is difficult for this Court to infer, one way or the other, what was intended to be done by the Petitioner. But, evidence establishes that the Petitioner was drunk. He had cocked his rifle. He was abusing SI Shyam Deo. He not only went to the room of SI Shyam Deo using abusive language, but on not finding him in the room, went outside the camp to search for SI Shyam Deo. God only knows the result of the two coming face to face. But, the alarm caused by the conduct of the Petitioner is evidenced by the fact that SI Shyam Deo thought it well advised to hide himself and not return to the camp till dawn broke. This is good evidence of the conclusion which can safely be drawn that so threatening were the overtures of the Petitioner that his encounter with SI Shyam Deo would have been a catastrophe.

19. Now, the Petitioner had no business to abandon the unit line and run away on 3.6.2008. It may be noted that in his defence statement, the Petitioner has not even attempted to justify his act. We may highlight that it is not a case of a jawan overstaying leave. It is a case of a jawan running away from active duty. The former may be less grave. The latter is indeed a serious matter.

20. It was then highlighted that the Petitioner has earned 19 cash awards, but it has to be kept in mind that inclusive of the instant penalty, the Petitioner has earned 9 penalties during his 13 years? service tenure.

21. It is within the domain of the Disciplinary Authority to take a call on the penalty to be levied and unless shown to be shockingly disproportionate to the gravity of the offence, Courts cannot substitute the penalty imposed. It is settled law that in relation to service jurisprudence, while evaluating the quantum of the penalty with reference to the gravity of the offence, past service record can be considered. The reason is obvious. Persistent deviant behaviour is a sign of the person being incorrigible; it is proof that lighter penalties are not having the desired deterrent effect. After all, discipline has to be maintained in every organization and with the utmost integrity in para-military forces. We do not find the penalty levied as disproportionate and for which finding we keep in view the past negative service record of the Petitioner.

22. The writ petition is dismissed but without any orders as to costs.