
(2008) 11 DEL CK 0127
In the Delhi High Court
Case No : LPA No. 409 of 2004

Ex. Ct. Raj Kumar

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 21-11-2008

Acts Referred:

Border Security Force Act, 1968 — Section 114, 40, 64, 70, 74(2)
Border Security Force Rules, 1969 — Rule 148, 149, 53(2)
Constitution of India, 1950 — Article 226

Citation : (2008) ILR Delhi 148 Supp

Hon'ble Judges : A.P. Shah, C.J; Dr. S. Muralidhar, J

Bench : Division Bench

Advocate : Bikram Singh and Vikrant Yadav, for the Appellant; A.K. Bhardwaj, for the Respondent

Final Decision : Allowed

Judgement

S.Muralidhar, J.—This appeal is directed against the impugned order dated 18th January 2002 passed by the learned Single Judge dismissing the Appellant's Civil Writ Petition No. 410 of 2002.

2. The Appellant was enrolled with the Border Security Force ("BSF") as a Constable on 8th January 1989. In July 2000 he was posted on the Indo-Bangladesh Border. On 29th July 2000 he was on duty at No. 2 BOP Kanchantar along with Constable Narendra Prasad from 7 am in the morning. There are two versions of what happened on that day. According to the Adjutant Mange Ram he along with Constable/Driver Bharat Singh were coming from BOP Alipur towards BOP Kanchantar. At about 8.15 am when he reached OP No. 1 of BOP Alipur he noticed 25 to 30 cattle heads going from the Indian side to the Bangladesh by the side of OP No. 2 of Kanchantar BOP along the bandh. According to the Adjutant when he reached OP No. 2 of BOP Kanchantar he observed that the Appellant Constable Raj Kumar was on the OP Tower and the Constable Narendra Kumar was sitting in the OP hut. On questioning them as to how cattle were

found going from India to Bangladesh in their presence, they failed to give any reply. He then summoned the BOP Commandant Kanchantar SI C.K. Muddappa to the site showing him the fresh hoof marks of cattle heads going towards Bangladesh side and fresh cow dung. He directed the SI to change the personnel at the OPs.

3. The Appellant's version is different. According to him at about 8 am 20 to 25 cattle heads came from the Bangladesh side and started crossing near the Indian border. He then told Constable Narendra Prasad that the Bangladeshi cattle should be pushed back. Some cattle from the Indian side were also crossing from the area which was a routine occurrence. The Appellant admits that the Adjutant Mange Ram came from the BOP Alipur side on a motor cycle and enquired about the cattle and that Constable Narendra Prasad replied that cattle were from the Bangladesh and crossing near the Indian border and were just being pushed back. The Adjutant Mange Ram then showed them the foot marks, the cow dung and dirty water and the Appellant and Narendra Prasad replied that these were of the Indian cattle which were crossing there. However, upon questioning by SI C.K. Muddappa they replied that they had not caused any cattle to cross from India to Bangladesh.

4. It appears that on 29th July 2000 a report was prepared against the Appellant that he had while on duty at OP No. 2 BOP Kanchantar "improperly and without authority allowed to cross approximately 20 to 30 cattle heads towards Bangladesh" and thereby committed an act "prejudicial to the good order of the Force" in terms of Section 40 of the Border Security Force Act, 1968 ("BSF Act"). Two days thereafter on 31st July 2000 the hearing of the charge and recording of evidence commenced. On the side of the prosecution Mange Ram, the Adjutant of 102 Battalion was examined as PW-1, SI C.K. Muddappa as PW-2, Constable Bharat Singh as PW-3, Constable Santan Singh as PW-4, Constable Ramesh Chand as PW-5 and Inspector Mohan Singh as PW-6. The examination of these witnesses concluded on 4th August 2000 itself. Thereafter the statement of the Appellant was recorded on the next date i.e. 5th August 2000. Additional evidence was recorded on 10th September 2000 of all these witnesses and a further statement of the accused was recorded.

5. At the end of the proceedings on 27th September, 2000 a charge sheet was issued to the Appellant in terms of Rule 53(2) of the BSF Rules, 1969 ("BSF Rules") to the effect that while on duty at OP No. 2 of Kanchantar BOP, the Appellant had shown negligence in the discharge of his duties and had "improperly and without authority allowed to cross approximately 25 to 30 cattle heads towards Bangladesh." On the very next date i.e. 28th September 2000 the Commandant passed an order finding the Appellant guilty of the charge and sentenced him to be dismissed from service.

6. The appeal filed by the Appellant was rejected and this was conveyed to him by a letter dated 19th July 2001. His further representation was rejected on 17th October 2001. Thereafter the Appellant filed Writ Petition (C) No. 410 of 2002 in

this Court. By the impugned order, the learned Single Judge rejected the petition holding that "the matter having been duly considered by the concerned authorities, it is not a fit case where any such infirmity is shown calling for interference under Article 226 of the Constitution of India."

7. We have heard the submissions of Mr. Rana Mukherjee, learned Counsel for the Appellant and Mr. A.K. Bhardwaj, learned Counsel appearing for the Respondent. The charge against the accused was that he had "without authority allowed to cross" approximately 25 to 30 cattle heads "towards Bangladesh". The Appellant has been charged with violating good order and discipline "in terms of Section 40 of the BSF Act." In order to appreciate the severity of this charge, reference may be made to Section 40 which reads as under:

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.

8. It is clear that the punishment for the offence u/s 40 of the BSF Act is imprisonment for a term which may extend to seven years. The provision is widely worded to include any act "prejudicial to good order of the Force" and the trial is to be held by a Summary Security Force Court constituted in terms of Section 64 of the BSF Act. In the instant case the trial was in fact by the Summary Security Force Court presided over by the Commandant. Section 74(2) indicates that a Summary Security Force Court is usually convened where there is some grave reason for the immediate action to be taken. The procedure to be adopted by the Security Force Court is contained in Chapter VII of the Act. Section 87 clearly mentions that "the Indian Evidence Act, 1872 shall subject to the provisions of this Act, apply to all proceedings before a Security Force Court." u/s 98, evidence of previous convictions and general character can also be taken by the Security Force Court. u/s 114 the findings and sentence of a Summary Security Force Court shall not require to be confirmed, but may be carried out forthwith except where it is held by an Officer equivalent to the rank of Superintendent of Police. It is clear therefore that Section 40 talks of a criminal offence which is punishable with imprisonment and that, except to the extent indicated to the contrary elsewhere in the BSF Act the Indian Evidence Act applies to all such trials.

9. In Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, while considering the provisions of Army Act, 1950, which has inspired the BSF Act, 1968, the Supreme Court observed that "A person by enlisting in or entering Armed Forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution." It was further observed: "A marked difference in the procedure for trial of an offence by the criminal court and the court martial is apt to generate dissatisfaction arising out of this differential treatment." While reiterating these observations in Union of India and Another

Vs. Charanjit S. Gill and Others, , the Supreme Court emphasized that "Judicial approach by people well-versed in objective analysis of evidence trained by experience to look at facts and law objectively, fair play and justice cannot always be scarified at the altar of military discipline. Unjust decision would be subversive of discipline." In Ram Paul v. Union of India 2005 (83) DRJ 718, a Division Bench of this Court emphasized, the need for the Summary Security Force Court under the BSF Act, 1968 to strictly adhere to the procedure mandated by the BSF Act. Reference may also be made to Ex.-Const. Driver Bhagirath Singh Vs. Union of India (UOI), , where the importance of proportionality of the sentence was emphasised.

10. Keeping the above provisions in mind we proceed to examine the evidence adduced by the prosecution in support of the charge brought against the Appellant. The specific charge is that without any authority, the Appellant allowed 25 to 30 cattle heads to cross from the Indian side of the border towards Bangladesh. Although an argument was advanced by the learned Counsel for the Respondent that the Appellant had permitted the smuggling of cattle by certain persons from the Indian side to the Bangladesh, it is clear that there was no such charge framed against the Appellant.

11. The evidence must show that it was the Appellant who in fact allowed the crossing of 25 to 30 cattle from the Indian side to the Bangladesh side. Mange Ram PW-1 in his evidence states that he "noticed 25 to 30 cattle heads going from Indian side to Bangladesh by the side of OP No. 2 of Kanchantar BOP along the Bandh." He further states that he enquired from both the Appellant and Constable Narendra Prasad "that what duty you are performing that the cattle heads are going from India to Bangladesh in front of you. They failed to give any reply." There is nothing to show that this witnesses in fact saw the Appellant allowing the cattle to cross the border from the Indian side. Even according to him, by the time he reached the spot the cattle were already on the Bangladesh side. Mange Ram then refers to a conversation he had with Constable Santan Singh and Constable Ramesh Chand who were on OP duty at BOP Alipur. The relevant portion of Mange Ram's deposition reads:

I asked from them what they had seen in the general area of OP No. 2 of BOP Kanchantar. They replied that they have seen 25/30 cattle heads going from India towards Bangladesh side by the site of OP point No. 2. On enquiry they told that when they noticed the cattle heads going from India to Bangladesh, the distance will be between OP point and the cattle were approx 70 to 75 yds. They also informed that on seeing my motor cycle, the cattle smugglers who were carrying the cattle heads started beating the cattle for making them move fast. Thereafter, I went to BOP Kanchantar and endorsed an entry to this effect in BOP GD register. I also told BOP Comdr SI C.K.Muddappa to report the incident to his Coy Comdr. There after I came back to Bn HQ and submitted a detailed report of the incident in writing.

12. The statement by the Adjutant Mange Ram about cattle smugglers appears

to have been made for the first time during his examination. Clearly this did not constitute the charge against the Appellant. Moreover, Mange Ram's entire evidence appears to be based on hearsay. Even Santan Singh and Ramesh Chand do not say, in their respective depositions, that they saw the Appellant allowing cattle to cross from the Indian side to the Bangladesh side. Much less, do they make any reference to any smugglers. Santan Singh has been examined as PW-3 and Ramesh Chand as PW-4. There is nothing in their deposition that even remotely supports the case of the prosecution that the Appellant allowed the cattle to cross from the Indian side to the Bangladesh side. When re-examined, Santan Singh stated as under:

I joined 102 Bn BSF during April 2K and posted to "C" Coy. On 29th July 2K I was deployed at BOP Alipur and my duty was at OP No. 1 of BOP Alipur from 0600 hrs to 1800 hrs alongwith No. 90254090 Const Ramesh Chand. I have not seen any cattle heads going from India towards Bangladesh. However I have seen cattle heads about 20/25 going from Tubewell in front of OP No. 2 of BOP Kanchantar towards Bangladesh side."

Likewise Ramesh Chand stated as under:

I joined 102 Bn BSF during Jan'95 and posted to "C" Coy. On 29 July 2K I was deployed at BOP Alipur from 0600 hrs to 1800 hrs alongwith Const Santan Singh. I have not seen any cattle heads going from India towards Bangladesh. I have seen about 25/30 cattle heads going from Tubewell (in front of OP No. 2 of BOP Kanchantar) towards Bangladesh. These cattle heads were not grazing but going towards Bangladesh.

Even SI Mohan Singh did not support the charge against the Appellant. When examined, he stated as under:

When I visited the spot (i.e. Location of OP No. 2 of BOP Kanchantar) in General area of BP No. 197/MP, saw the hoof marks, cow dungs and muddy water. I have not seen any cattle heads while crossing from India to Bangladesh. However, I have seen about 20/22 cattle heads grazing in Bangladesh about 800/900 mtr from IB.

13. This Court fails to appreciate how the above evidence could be held to be sufficient, even on a preponderance of probabilities, to bring home the charge against the Appellant.

14. There is another aspect of the matter. The Summary Security Force Court in the instant case has given no reasons at all for its conclusion that it finds the appellant guilty of the charge. It does not analyse the evidence. This is contrary to the settled law as explained both by this Court as well as the Supreme Court. In *Nirmal Lakra Vs. Union of India (UOI) and Others*, , this Court discussed in detail the provisions of the BSF Act and Rules and held that it was necessary for the Security Force Court to give reasons for the decision. The Court held:

Rule 148 reads thus:

148. Verdict.- The Court shall after the evidence for prosecution and defense has been heard give its opinion as to whether the accused is guilty or not guilty of the charge or charges.

In terms of Rule 148, therefore, an opinion is required to be given. Such an opinion can be given only when reasons therefore are assigned. In Summary Security Force Court, an accused is deprived of benefit of the service of a Law Officer in terms of Section 83 of the BSF Act.

Section 70 of the BSF Act provides that a Summary Security Force Court may be held by a Commandant of a unit and he alone would constitute the Court. He may, therefore, discharge several functions. Duties to assign reasons in a case of this nature would be much more. It may be that Rule 148 of the BSF Rules may have to be read with Rule 149 of the BSF Rules, but while dealing with a situation of this nature where the liberty of a person is involved, in our opinion, Rule 148 thereof must be construed liberally. Forming an opinion although is a mental act, the same, when reduced in writing, should not be expressed in one word of "Guilty" or "Not Guilty". In the Army Act and the Rules framed there under, i.e., the Army Rules, there is no provision like Rule 148 of the BSF Rules.

45. We, therefore, are of the opinion that it is highly desirable that the Court constituted under the said Act assign reasons, correctness whereof can be judged by the confirming authority as also the Court exercising the power of judicial review.

15. Learned Counsel for the Respondent suggested that the standard of proof for a Summary Security Force Court trying an offence u/s 40 of the Act need not be the same as in a criminal trial. We are afraid that such an argument cannot be countenanced in view of the clear language of Section 87 of the Act, in terms of which the provisions of the Evidence Act shall apply to all trials under the Act. We have not been shown any provision of the BSF Act which dispenses with the requirement of standard of proof applicable to criminal trials particularly when offence u/s 40 of the BSF Act is punishable with imprisonment up to seven years. The decisions of the Supreme Court and this Court noticed earlier also reinforce this position in law.

16. In the circumstances, we have no hesitation in holding that the conclusion of the Summary Security Force Court that the Appellant was guilty of the charge was perverse and wholly unsustainable in law. We accordingly set aside the conviction of the Appellant for the offence u/s 40 of the BSF Act.

17. In view of the above conclusion, there is no need for this Court to consider the submission of the Appellant as regards the illegality in the procedure adopted by the Summary Security Force Court in awarding the punishment or about the disproportionality of the sentence awarded.

18. The impugned order of the learned Single Judge as well as the order of the Summary Security Force Court are hereby set aside. The appeal is allowed. The

Appellant will be reinstated in service with all consequential benefits within a period of four weeks from today. The appeal is accordingly allowed with costs of Rs. 10,000/- which will be paid by the Respondents to the Appellant within a period of four weeks.