

(1997) 05 DEL CK 0093

In the Delhi High Court

Case No : Criminal Writ Appeal No. 841 of 1996

Gajender Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 27-05-1997

Acts Referred:

Border Security Force Rules, 1969 — Rule 101
Penal Code, 1860 (IPC) — Section 307

Citation : (1997) 4 AD 582 : (1997) CriLJ 4167 : (1997) 68 DLT 546 : (1997) 42 DRJ 532

Hon'ble Judges : J.K. Mehra, J

Bench : Single Bench

Advocate : C.M. Khanna, Sashi Kiran and B. Babbar, for the Appellant;

Judgement

J.K. Mehra, J.

(1) By this petition, the petitioner has impugned his conviction and sentence by General Security Force Court u/s 307 Indian Penal Code and confirmation thereof by the Confirming Officer.

(2) The only reason raised by counsel for the respondent in support of her contention that the order of conviction and confirmation was a well considered order is that the summing up supplied by the prosecutor was considered by them and it should be treated as the reasons for passing the order of conviction and sentence by the General Security Force Court, Bsf who were trying the offence u/s 307 Indian Penal Code and confirmation thereof by the Confirming Officer.

(3) I have seen the order of conviction. Counsel for the respondent has relied on Rule 106 of the Bsf Rules, which reads as under :-

106. Confirmation and promulgation :

(1) When a confirming authority receives the record of the proceedings of a Court, it shall record its decision thereon and on any sentence and any order

which the Court may have made u/s 105 on the record of the proceedings in the appropriate form set out in Appendix VIII and such record of his decision shall form part of the record of the proceedings.

(2) When a Court has accepted the plea of guilty made under rule 79 the confirming authority may confirm its finding notwithstanding that the Court has accepted the plea without the concurrence of the convening officer, if, in the opinion of the confirming authority it is in the interest of justice to do so.

(3)(a) When a Court has rejected a plea to the jurisdiction of the Court or a plea in bar of trial or has over-ruled an objection to a charge, it shall not be necessary for the confirming authority to approve specifically the decision of the Court, but its approval shall be implied from its confirming the finding on the charge to which the plea or objection relates.

(B) Where it disapproves the decision of the Court to reject the plea or to over-rule the objection it shall withhold confirmation of the finding on the charge to which the plea or objection relates.

(4) A confirming authority may state its reasons for withholding confirmation in any case, but if it withholds confirmation where a Court has rejected a plea to the jurisdiction or plea in bar of trial or has over-ruled an objection to the charges because it disapproves this decision of the Court, it shall when recording its decision under sub-rule (1) state that it has withheld confirmation for this reason.

(5) Where the sentence of a Court is improperly expressed, the confirming authority may in confirming the sentence vary the form thereof so that it shall be properly expressed.

(6) Whenever it appears that there is sufficient evidence or a plea of guilty under either sub-rule (1) or sub-rule (2) or rule 77 to justify the finding of the Court, such finding and any lawful sentence consequent thereon may be confirmed, and if confirmed shall be valid, notwithstanding any deviation from these rules, if the accused has not been prejudiced by such deviation.

(7) While confirming the finding the confirming authority may either unconditionally or subject to conditions which the accused accepts, reduce or remit a portion of the sentence or commute the punishment to one given lower in the scale of punishment in Section 48.

(8)(a) When a confirming authority has confirmed a finding and a sentence of a Court or has withheld confirmation thereof, it shall send the record of the proceedings to the Commandant of the accused for promulgation to the accused of the finding and sentence or the fact that the confirmation has been withheld as the case may be.

(B) The fact of promulgation shall be recorded on the record of the proceedings in the form set out in Appendix IX.

(C)Where confirmation has been withheld because the confirming authority disapproves the Court's decision to reject a plea to the jurisdiction or a plea in bar of trial or to over-rule an objection to the charge, the accused shall be so informed.

Though the Rule requires each and every member to give reasons for his conclusions one way or the other by word of mouth. There is no such provision that such verdict of such member is not to be recorded. Atleast the minutes of such verdict or conclusion reached by each member should have been recorded. That has also not been recorded. The senior most officer is in a position to influence the rest of the members and the possibility of his having done so cannot be ruled out in the absence of any record of the reasons and conclusions given by each member. The junior most officer according to this Rule is required to give his reasons for his conclusions first. There is no indication on the records of the Department whether such safeguards were observed. The order of conviction and confirmation order read as under :-

"ANNOUNCEMENT of Sentence

THE Court being re-opened the accused is brought before it, the sentence is announced in the open Court as being subject to confirmation.

SIGNED at Stc Bsf, Jodhpur this 24th day of January, 1996.

sd/- sd/- Vijay Yadav Rjr Naidu (Law Officer) (Presiding Officer)

I confirm the finding and sentence of the Const. I direct that the sentence of the rigorous imprisonment shall be carried out by confinement of the accused in civil prison."

sd/- 10.4.96 (Shantanu Kumar) Ips Ig, Bsf Confirming Officer

From the order of conviction or confirmation order both of which appear on the same page no such impression can be gained that any consideration had taken place except that the convicting officer or the confirming officer both wrote on the same sheet about the sentence alone without giving any reasons or any indication therein of any member having expressed his opinion. My attention is drawn to Rule 101 of the Rules which reads as under :-

10-1.Procedure on Conviction :

(1)If the finding on any charge is "Guilty" then, for the guidance of the Court in determining its sentence, and of the confirming authority in considering the sentence, the Court before deliberating on the sentence, shall, whenever possible, take evidence of an record the general character, age, service, rank, any recognised acts of gallantry or distinguished conduct of the accused, any previous convictions of the accused either by Security Force Court or a criminal Court, any previous punishments awarded to him by an officer exercising authority u/s 53 or 55 as the case may be; the length of time he has been in arrest or in confinement on any previous sentence, and any decoration, or

reward, of which he may be in possession or to which he is entitled.

(2) Evidence on the above matters may be given by a witness verifying a statement which contains a summary of the entries in the service books respecting the accused and identifying the accused as the person referred to in that summary.

(3) The accused may cross-examine any such witness and may call witnesses to rebut such evidence, and if the accused so, requests, the service books or a duly certified copy of the material entries therein, shall be produced and if the accused alleges that the summary is in any respect in accordance with the service books or such certified copy, as the case may be, the Court shall compare the summary with those books or copy and if it finds that it is not in accordance therewith, shall cause summary to be corrected or the objection of the accused to be recorded.

(4) When all the evidence on the above matters has been given, the accused may address the Court thereon and in mitigation of punishment.

From the aforesaid rule pronouncement of sentence or the confirmation of the sentence, there is absolutely no indication that, the safeguards and also the requirements of Rule 101 had been complied with. Justice should not only be done but should appear to have been done. That is the principle on which the Courts operate. It is all the more important that such safeguards must be strictly adhered to when it is a criminal offence which involves the personal liberty of an individual. Those safeguards have clearly been not observed in the present case. The petitioner has already undergone imprisonment for about two years. In the light of the above facts, I allow this petition and set aside the impugned order of conviction and sentence and the order of confirmation of sentence. The petitioner shall be reinstated in service but without any back wages. This will, however, be without prejudice to the rights of Bsf regarding disciplinary action or any other action. The petitioner be set free unless he is required to be detained in any other case. Dasti.