
(2014) 09 CAL CK 0050
In the Calcutta High Court
Case No : Writ Petition No. 21343 (W) of 2009

Kartick Chandra Mondal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-09-2014

Acts Referred:

Border Security Force Act, 1968 — Section 117(2) — Constitution of India, 1950 - Article 21

Citation : (2015) 1 CALLT 516

Hon'ble Judges : Sambuddha Chakrabarti, J.

Bench : Single Bench

Advocate : Rudra Jyoti Bhattacharyya and Debjani Ghosal, for the Appellant; Ranjan Sinha and Subhasree Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Dr. Sambuddha Chakrabarti, J. This writ petition is directed against an order dated October 20, 2009 by which the Director General of the Border Security Force (BSF for short) had rejected the petition filed by the writ petitioner against his trial by the Summary Security Force Court (S.S.F.C., for short). The petitioner is a dismissed constable of the B.S.F. who was charge-sheeted on April 11, 2009 by the Commandant of the concerned Battalion of BSF. The petitioner was charged with the offence that at ambush No. 4(a) of the border outpost at Kakmarichar he was performing his duties on the night of December 15/16, 2008 when he improperly omitted to take due care and caution as a result of which 10 to 12 smugglers along with 12 buffaloes and 6 calves crossed over towards Bangladesh. One of the smugglers was apprehended. Eight buffaloes and six calves were seized by the special ambush party of the concerned border outpost.

2. Upon a plea of not guilty taken the petitioner was tried by the Summary Security Force. The prosecution produced three witnesses who were cross-examined and the statements of the petitioner in defence of his case were also recorded after he had signified that he did not intend to produce any witness in

his defence.

3. The S.S.F.C. by an order dated April 13, 2009 sentenced the petitioner to be dismissed from service. The petitioner thereafter filed a petition under section 117(2) of the B.S.F. Act and the said had been rejected.

4. Mr. Bhattacharyya, the learned Advocate for the petitioner, has assailed the finding on various grounds and submitted that in the facts of the case an order of dismissal was not warranted. He has taken me through the evidence that was adduced by the witnesses and submitted that the cumulative effect of the evidence adduced, if taken in the true perspective, must be held to be inadequate for holding the petitioner guilty of the charges.

5. Mr. Sinha, the learned Advocate for the respondents submitted that the decision impugned in the writ petition suffers from no infirmity and has been passed by the respondents upon compliance of all the procedural formalities and appreciation of evidence on record. The company Commander submitted a report relating to the incident to the concerned Commandant and based on that the petitioner was called before the Summary Security Force Court. According to him, the petitioner was given due opportunity to cross-examine the witnesses but he declined.

6. Mr. Sinha further submitted that after compliance of all the requirements and after going through the record of evidence the Commandant found a prima facie case has been established against the petitioner and the order of dismissal from service was rightly passed against him as there was dereliction of duty on the part of the petitioner. He, therefore, prayed for dismissal of the writ petition.

7. It may be mentioned that Summary Security Force Court by a non-speaking order passed the sentence of dismissal of the petitioner from service. All that the order says is that the Court had taken all matters into consideration and was passing the sentence of dismissal from service.

8. Mr. Sinha justified it with reference to the provisions contained in Rule 149 of the BSF Rules 1969 which entitles the Court merely to record "guilty" or "not guilty" as a finding to any charge. According to Mr. Sinha, the BSF Rules never require an SSF Court to pass any speaking or a reasoned order. A mere finding of guilt followed by a sentence is sufficient for the purposes of the Act.

9. There is, however, no specific bar in the Act or in the Rules against the S.S.F.C.'s passing a reasoned order. A conjoint reading of Rule 148 and Rule 149 suggests that a reasoned order is not necessarily ruled out. Under Rule 148 it is the duty of the Court to give its opinion as to whether the accused is guilty or not guilty of the charge or charges against him. When it comes to giving opinion by an authority such opinion must be something more than a mere conclusion of guilty or not guilty.

10. A similar question cropped up for consideration before Delhi High Court in the case of Nirmal Lakra Vs. Union of India (UOI) and Others, . In that case also the

petitioner was tried by the SSF Court and the respondents had taken a point that in terms of Rule 149 of the BSF Rules reasons are not required to be assigned. It was submitted that there was a proforma under the BSF Rules and no reason was, therefore, required to be given at the same time. Negating the contention of the respondents the Division Bench had held that a person's right to life and liberty as guaranteed under Article 21 of the Constitution of India cannot be allowed to be torpedoed in a causal manner. It was held that the principles of natural justice had three pillars. Assigning reasons is one of them. The importance of assigning of reasons must be gauged from the situation as mentioned in the Judgment. After considering a large number of Judgments the Division Bench ultimately decided that in terms of Rule 148 of the BSF Rules an opinion is required to be given and such an opinion can be given only when reasons therefor are assigned. In SSF Court an accused is deprived of the benefit of service of a Law Officer in terms of Rule 83 of the BSF Rules read with Rule 149. But while dealing with a situation where the liberty of a person is involved Rule 148 must be construed liberally. Forming an opinion is a mental act and the same, where it is reduced to writing, should not be expressed in one word as guilty or not guilty. The Division Bench thus held that it was highly desirable that a Court constituted under the B.S.F. Act would assign reasons the correctness of which can be judged by the conforming authority as well as the Court exercising the power of judicial review.

11. This Court is keenly aware of the limitations of a Writ Court while exercising jurisdiction in respect of an enquiry or a trial held by any authority. The Writ Court as is widely known it is not sitting as a Court of appeal over the finding at an enquiry. It should not scan or reappreciate the evidence under normal circumstances and must not arrive at a contrary conclusion merely because an alternative view is possible.

12. But then that does not set the ultimate limits of a writ Court. If the findings of the authorities below are perverse i.e. based on no evidence or had resulted in ignoring the evidence adduced or the finding is such as no man of ordinary prudence would arrive at it on the basis of such evidence, the writ Court has power to intervene. Judged by that standard I find the impugned order warrants judicial intervention.

13. I find the order passed on the petition filed by the writ petitioner after sentence of dismissal passed against him is based on an improper appreciation of evidence. The Director General of BSF while disposing of the petitioner's petition had largely dealt with the facts of the prosecution case and relied on the oral statements of the petitioner as well as the statement of P.W. 1.

14. In the process of rejecting the petition, the Appellate Authority had overlooked that the evidence led at the S.S.F Court was not sufficient to link the petitioner with the conclusion of guilt. Even a very cursory glance at the evidence adduced at the trial should have led both the Court as well as the Director General to hold that the charge against the writ petitioner could not be said to

have been proved.

15. On the contrary, the adjudicating authorities should have held that the entire prosecution case rested on surmises and conjectures inasmuch as the prosecution could not show any evidence beyond the hoof marks of some buffaloes and foot prints of some persons.

16. From this the prosecution wanted to establish that the petitioner who was doing the ambush duty at point No. 4(a) must have committed the offence of allowing smugglers to smuggle cows and buffaloes from India to Bangladesh. There is no eye witness to the offence alleged. Even if one accepts that an eye witness in all criminal or quasi criminal acts is not always available or should not be insisted upon - I must say - in the facts of the present case - the prosecution had failed to establish the charge against the petitioner even by circumstantial evidence. All that it did was nothing more than projecting certain speculative probabilities which have been belied by the totality of the prosecution evidence.

17. If one reads the evidence as a whole there is no doubt that the case is entirely based on the presence of hoof marks near the ambush where the writ petitioner was not discharging his duties.

18. The Court and the Director General in a case like this ought to have looked for some corroboration before arriving at the finding of guilt of the petitioner based on the hoof marks alone. Presence of hoof marks at the most could raise some suspicion which cannot be a substitute of firm proof. A suspicion even of the highest degree must be substantiated by more positive evidence which the prosecution in the present case had not been able to produce.

19. A very major lacuna in the prosecution case has been rather improperly dealt with by the Director General of BSF by disposing of the petition under section 117(2) of the B.S.F. Act. Admittedly, one Ajbul Sk. who was apprehended as a cattle smuggler was released. Why he was released is not clear. The reason for releasing him does not emerge from the evidence led by the prosecution. Ajbul Sk. could have been the most vital and crucial witnesses as he was identified as a cattle smuggler. He was not produced as a witness.

20. The Director General of BSF observed that if Ajbul Sk and the Constable Anand Tailor were so important for the petitioner, he could have examined them as defence witnesses for which he was given due opportunities.

21. This statement is clearly against all canons of jurisprudence. In a case of this nature the initial and ultimate onus of proving the charge against an accused remains always with the prosecution and the Director General in making the observation was oblivious that this basic onus never shifts. He by making the observations, had indirectly laid the onus at the door of the defence which was entirely misplaced. The law on the point is very well settled that when without any specific reason, the prosecution withholds the best possible evidence the Court is bound to draw a presumption adverse to the prosecution case.

22. On the top of everything, the petitioner had produced two documents written by Ajbul Sk himself wherein he had specifically stated that he was mercilessly beaten by the BSF personnel and to save his life, he had given a false statement of bringing cows with the understanding of the BSF personnel. This statement was made in presence of a member of the concerned Gram Panchayat where Ajbul Sk used to reside. In the context of this very specific statement it was all the more necessary for the prosecution to have examined and to produce the same witness.

23. As has been stated before merely from hoof marks without any further corroboration, it is not proper to find a BSF personnel guilty of or an accomplice to an act of smuggling.

24. Thus, the only evidence that could be produced was the arrival of certain persons alleged to be a cattle smugglers and the existence of a certain hoof marks.

25. On the basis of this evidence, the writ petitioner should have been given the benefit of doubt. But I find that both the Court as well as the Appellate Authority had given the prosecution a benefit of doubt, which is clearly not permissible in law.

26. In the result, I find both the findings to be vitiated in law and the conclusion reached by the authorities below are such that calls for a judicial interference. The case being initiated on speculation and the conclusion being based on inadequate evidence, the finding must be held to be perverse.

27. For the reasons mentioned above, I am of the view that the order impugned in the writ petition as well as the order passed by the concerned Commandant cannot be sustained. Both of them are set aside.

28. The writ petition is, thus, allowed.

29. The respondents are directed to reinstate the petitioner in service within a period of eight weeks from the date of the communication of the order with full amount equivalent to the salaries which he would have earned had he been in service. The petitioner in the facts and circumstance of the case is entitled to costs which is quantified at Rs. 10,000/- to be paid by the respondents to him. Such amount is to be paid by the respondents to the petitioner within four weeks from the date of the communication of the order, failing which the petitioner will be at liberty to recover the same in accordance with law.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

Later

After the delivery of the judgment and order Mr. Sinha prays for stay of the operation of the order. Heard the submission of Mr. Sinha. In view of what have been stated above, I find no reason to stay the operation of my judgment and

order. The prayer for stay is heard, considered and rejected.