

(2023) 09 J&K CK 0017
In the Jammu And Kashmir High Court
Case No : LPASW No.22 Of 2017

Mohd. Mahibur Rahman

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 12-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 20, 20(2)
Border Security Force Rules, 1969 — Rule 51, 160, 161
Border Security Force Act, 1968 — Section 14, 16(c), 17, 20(a), 20(c), 29(c), 40, 46, 48, 53, 55, 64, 66, 70, 74, 74(2), 75, 115, 117, 161
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 307

Citation : (2023) 09 J&K CK 0017

Hon'ble Judges : Sanjeev Kumar, J;Rahul Bharti, J

Bench : Division Bench

Advocate : Navneet K. Dubey, Irfana Ashraf, Vishal Sharma

Final Decision : Disposed Of

Judgement

Sanjeev Kumar, J

1. The appellant was enrolled in the Border Security Force ["BSF"] as Constable (GD) on 16.04.1987 and was assigned to 93 Bn BSF on 04.06.1994. After his joining 93rd Bn BSF, the appellant was further posted to "F Coy" of the Unit. In the year 2000, the appellant was deployed at Forward Defence Location ["FDL"]-430 on the Line of Control in Poonch District of Jammu & Kashmir under operational control of 4 Grenadiers (Army Staff). On 25.09.2000, the appellant was deputed for night sentry duty at FDL-431 from 6 p.m. to 9 p.m., in buddy-pair, along with another Jawan of 4 Grenadiers (Army), namely, Sepoy Manoj Kumar.

2. It is alleged that the appellant left the place of duty with an excuse for having dinner but started consuming illegitimately procured liquor in violation of the standing instructions. When the appellant did not return for his duty till 9 p.m., Grenadier Manoj Kumar went to the bunker to call him for resuming his duties,

he found the appellant in a state of intoxication who started abusing him. It is, however, alleged that, after some time, the appellant came out of his bunker without wearing belt, helmet and bullet proof jacket and asked the Grenadier Manoj Kumar to stand at the view point. When the Grenadier Manoj Kumar told the appellant that he would report against him for his conduct, the appellant got infuriated and fired 05 gun shots from his service weapon towards Grenadier Manoj Kumar. The bullets did not hit Grenadier Manoj Kumar but after hearing the sound of gun shots, troops of 4 Grenadier and their Commanding Officer came out of their bunkers. They disarmed the appellant and placed him under arrest. Officiating Coy Commander of appellant was telephonically informed about the happening, who himself reached FDL-431 on 26th September, 2000 and took over the appellant from the army authorities.

3. Having found the appellant having committed serious offences, he was heard by the Commandant, 93 Bn BSF on 09.10.2000 under the provisions of the Border Security Force Rules, 1969 [“the BSF Rules”] on two charges. The first charge was under Section 16(c) of the Border Security Force Act, 1968 [“the BSF Act”] for ‘being intoxicated while on active duty’ and the second charge was under Section 40 of the BSF Act for ‘commission of an act prejudicial to good order and discipline of the Force’.

4. After hearing the appellant on the charges, Record of Evidence (ROE) was ordered by the Commandant to be prepared on the said charges against the appellant. On completion of ROE, the Commandant, after having examined the evidence adduced in ROE, found a prima facie case under Sections 16(c) and 40 of the BSF Act made out against the appellant. Accordingly, in the exercise of power under Rule 51 of the BSF Rules, the Commandant decided to try the appellant by a Summary Security Force Court [“SSFC”]. The SSFC trial was held by the Commandant, 93 Bn BSF wherein the appellant pleaded guilty to both the charges. The SSFC, after evaluating the evidence on record and having regard to overall facts and circumstances, held the appellant guilty of both the charges and awarded him a sentence of 89 days rigorous imprisonment in Force custody.

5. It seems that the proceedings of SSFC, which were required to be sent to the DIG, SHQ BSF, Rajouri for countersigning, were first sent to the Law Officer Grade-1 of Frontier HQrs BSF, Jammu. It was during examination of the trial proceedings, the Law Officer found that the SSFC trial proceedings were not in accordance with law. He was of the opinion that the appellant should have been charged under Section 46 of the BSF Act read with Section 307 RPC for committing a civil offence of attempt to murder. He was of the opinion that since the offence committed by the appellant was covered under Section 46 of the BSF Act, as such, as per Section 74(2) of the BSF Act, reference ought to have been made to the DIG concerned by the Commandant before holding the trial. The Commandant, however, conducted the SSFC trial without following the aforesaid procedure which rendered the entire trial without any jurisdiction.

6. Acting upon the advice of the Law officer, the Competent Authority i.e. DIG,

SHQ, BSF, Rajouri set aside the SSFC trial proceedings due to lack of jurisdiction for conducting the trial and directed the Commandant, 93 Bn BSF to institute disciplinary action against the appellant afresh right from the stage of hearing on the charge.

7. The appellant was, accordingly, heard afresh by the Commandant on the twin charges of being, 'on sentry duty in the state of intoxication' and for committing a 'civil offence of attempt to murder' punishable under Section 307 RPC. It is alleged by the respondents that the appellant again pleaded guilty to both the charges. The Commandant, however, ordered for preparation of ROE.

8. After completion of the ROE, the evidence adduced therein was examined by the Commandant and it was found that the appellant had prima facie committed the offence under Sections 16(c) and 46 of the BSF Act and accordingly, the Commandant in the exercise of powers under Rule 51 of the BSF Rules, recommended trial of the appellant by a

General Security Force Court ["GSFC"].

9. The appellant was tried by the GSFC. The competent authority i.e. Inspector General, Frontier HQR, BSF, Jammu accepted the recommendations of the Commandant 93 Bn for trial of the appellant by GSFC but only with respect to second charge i.e. charge under Section 46 of the BSF Act i.e. attempt to murder punishable under Section 307 RPC. The first charge was, however, dropped.

10. There is further allegation of the respondents that with a view to subject the appellant to trial before GSFC, the appellant was placed under open arrest. On 10th July, 2001, when the appellant was under open arrest, he picked up a quarrel with the Guard Commander and scuffled with Lance Naik Kailash Chandra Singh at Bn HQR 93 Bn, Achhad (J&K). On account of this incident, the appellant was charged for committing two more offences i.e. Sections 20(a) of the BSF Act for using criminal force to his superior officer and Section 20(c) of the BSF Act for using insubordinate language to his superior officer. The competent authority i.e. Inspector General, BSF Jammu Frontier directed both the cases to be tried together by the GSFC.

11. The GSFC, after conducting the trial, found the appellant "guilty" of charge under Section 46 of the BSF Act and "not guilty" of the charges under Sections 20(a) and 20(c) of the BSF Act due to lack of evidence. For having committed offence under Section 46 of the BSF Act, the appellant was awarded sentence "to be dismissed from service" and "to suffer imprisonment for six months".

12. Proceedings of the GSFC were confirmed by the competent authority. While confirming the GSFC trial proceedings, the competent authority also directed the Commandant 93 Bn BSF to set off the period of six months imprisonment awarded to the appellant against the period spent by him in open arrest. Since the appellant had already undergone that sentence, therefore, he was not made to undergo any sentence after promulgation of sentence.

13. Feeling aggrieved of the findings and sentence awarded by the GSFC, the appellant filed statutory appeal under Section 117 of the BSF Act. The same was rejected by the appellate authority being devoid of merit. It seems that the appellant took his grievance by way of a writ petition bearing SWP No.3304/2004 before the High Court of Gauhati but the same was dismissed for want of jurisdiction. This is how the appellant filed SWP No.1672/2008 before this Court.

14. The Writ petition i.e. SWP No.1672/2008 was contested by the respondents. The Writ Court, after hearing learned counsel for the parties and having gone through the record, came to the conclusion that the second trial of the appellant by the GSFC was valid and in consonance with law. There was enough evidence led before the GSFC to establish the charge under Section 46 of the BSF Act against the appellant. The Writ petition was, accordingly, dismissed by the Writ Court vide its judgment dated 29th November, 2016. It is this judgment of the Writ Court, which is called in question before us.

15. Having heard learned counsel for the parties and perused the material on record, we find that the following questions of seminal importance arise for consideration:-

a) Whether a person subject to the BSF Act, who has been convicted of an offence by Security Force Court, is liable to be tried and convicted again for the same offence by General Security Force Court or a Criminal Court ?

b) Whether the Director General, BSF, in term of Section 115 of the BSF Act read with Rule 161 of the BSF Rules, is competent in law to upset and set aside the proceedings of the Summary Security Force Court forwarded to him under Rule 160 of the BSF Rules immediately on promulgation of sentence and direct a retrial by General Security Force Court on any ground whatsoever?

16. With a view to examine these two questions, we need to briefly understand the scheme of the BSF Act. Under Section 64 of the BSF Act, three types of Security Force Courts can be convened to try delinquent member of Force i.e. (i) General Security Force Court (GSFC); (b) Petty Security Force Court; and (c) Summary Security Force Court (SSFC). The General Security Force Court can be convened by the Central Government or the Director General or any officer empowered in this behalf by warrant of Director General. In terms of Section 66, Petty Security Force Court may be convened by an officer having power to convene a General Security Force Court or by an officer empowered in this behalf by warrant or any such officer. So far as Summary Security Force Court is concerned, under Section 70 of the BSF Act, it is the Commandant of the Unit concerned, who is competent to convene such Court. A Commandant alone shall constitute the Court, though, the proceedings shall be attended throughout by two other persons, who shall be officers or subordinate officers or one of either.

17. The powers of a Summary Security Force Court are enumerated in Section 74 of the BSF Act. The provisions of Section 74 are of some relevant for our purpose and, therefore, are set out below:-

"74. Powers of a Summary Security Force Court.----- (1) Subject to the provisions of sub-section (2), a Summary Security Force Court may try any offence punishable under this Act.

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a Petty Security Force Court for the trial of the alleged offender, an officer holding a Summary Security Force Court shall not try without such reference any offence punishable under any of the sections 14, 17 and 46 of this Act, or any offence against the officer holding the court.

(3) A Summary Security Force Court may try any person subject to this Act and under the command of the officer holding the court, except an officer, or a subordinate officer.

(4) A Summary Security Force Court may pass any sentence which may be passed under this Act except the sentence of death or of imprisonment for a term exceeding the limit specified in sub-section (5).

(5) The limit referred to in sub-section (4) shall be,—

(a) one year, if the officer holding the Security Force Court has held either the post of Superintendent of Police or a post declared by the Central Government by notification to be equivalent thereto, for a period of not less than three years or holds a post of higher rank than either of the said post; and

(b) three months, in any other case."

18. From a reading of Section 74 of the BSF Act, it clearly transpires that the SSFC is competent to try any offence punishable under the BSF Act subject of course to the provisions of Sub Section (2) i.e. where there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a Petty Security Force Court for the trial of the alleged offender. In such case an officer holding a Summary Security Force Court shall not try, without such reference, any offence punishable under any of the Sections 14, 17 and 46 of the Act, or any offence against the officer holding the Court.

19. Indisputably, as per the narration of events and the manner in which the appellant had fired five rounds of bullets allegedly on Sepoy Manoj Kumar standing at a distance of five yards but without hitting him anywhere, the Commandant had charged the appellant for commission of offence under Section 16(c) and Section 40 of the BSF Act. That being the position, Sub Section (2) of Section 74 was not attracted and, therefore, the Commandant rightly convened the Summary Security Force Court and tried the appellant for the aforesaid charges.

20. A full-fledged trial was conducted and on pleading guilty to the charges, the appellant was sentenced to undergo 89 days rigorous imprisonment in Force

custody. The appellant accepted the punishment and had even undergone more than half of the sentence imposed upon him. As is mandated by Section 115 of the BSF Act read with Rule 161 of the BSF Rules, Summary Security Force Court was obliged to send the proceedings of the trial without any delay to the officer not below the rank of Deputy Inspector General within whose command the trial was held, or to the prescribed officer.

21. Before we proceed further, it would be relevant, at this stage, to reproduce Section 115 of the BSF Act for better understanding of the issue, which reads thus:-

"115. Transmission of proceedings of Summary Security Force Courts.--- The proceedings of every Summary Security Force Court shall, without delay, be forwarded to the officer not below the rank of Deputy Inspector-General within whose command the trial was held, or to the prescribed officer, and such officer, or the Director-General or any officer empowered by him in this behalf may, for reasons based on the merits of the case, but not on merely technical grounds, set aside the proceedings, or reduce the sentence to any other sentence which the court might have passed."

22. A bare look at Section 115 would indicate that the provisions of Section 115 have been incorporated for ensuring that no injustice is done to the member of the Force tried and held guilty of charges by the SSFC. We cannot forget the fact that the SSFC is constituted by a single individual that, too, of the rank of a Commandant of the Unit.

23. With a view to ensure that trial is just, fair and in accordance with law, the legislature by virtue of the provisions of Section 115 has provided that such proceedings of the SSFC must be scrutinized and reviewed by a senior officer not below the rank of Deputy Inspector General, BSF within whose command the trial was held. The DIG, BSF concerned as also the Director General or any officer empowered by him in this behalf is mandated to examine the proceedings of SSFC purely on merits and take a call as to whether the proceedings are required to be set aside or sentence imposed on the member of the Force is to be reduced to any other sentence which SSFC could have passed.

24. Rules 160 and 161 of the BSF Rules lay down procedure for exercise of power by the officer named in Section 115 of the BSF Act. For facility of reference, Rules 160 and 161 of the BSF Rules are also set out below:-

"160. Review of Proceedings.- The proceedings of a Summary Security Force Court shall, immediately on promulgation be forwarded through the Chief Law Officer, or a Law Officer to the Deputy Inspector General under whom the accused may have been serving.

161. Action by the Deputy Inspector-General - (1) Where the Deputy Inspector-General to whom the proceedings of a Summary Security Force Court have been forwarded under rule 160, is satisfied that injustice has been done to the accused

by reason of any grave irregularity in the proceedings or otherwise, he may,---

(a) set aside the proceedings of the Court; or

(b) reduce the sentence or commute the punishment awarded to one lower in the scale of punishment given in Section 48 and return it to the unit of the accused for promulgation.

(2) Where no action under sub-rule (1) has been taken he shall countersign the proceedings.

(3) The proceedings shall, after its promulgation under sub-rule (1) or counter signature under sub-rule (2) be forwarded to the Chief Law Officer for custody."

25. A bare glance on Rule 160 would indicate that the proceedings of SSFC shall immediately, on promulgation, are to be forwarded to the DIG under whom the accused may have been serving through the Chief Law Officer or a Law Officer. The scrutiny by the law officer is, thus, restricted to find out as to whether the trial against the accused conducted by the SSFC has been in accordance with law and that no injustice has been done to him by reason of any grave irregularity in the proceedings or otherwise. It is, however, satisfaction of the DIG, to whom the proceedings of SSFC have been forwarded under Rule 160, that would determine as to whether the SSFC proceedings are required to be set aside or the sentence awarded is to be reduced or commuted to one lower in the scale of punishment, by reason of any grave irregularity in proceedings or otherwise.

26. From a conjoint reading of Section 115 and Rules 160 and 161, it becomes abundantly clear that Section 115 read with Rules 160 and 161 is completely loaded in favour of the convict of Summary Security Force Court. The DIG to whom the proceedings are forwarded by the SSFC is empowered only to satisfy that there is no injustice done to the accused by reason of any grave irregularity in the proceedings or otherwise. Scrutiny of the DIG would be based on merits of the case and not on any technicalities of law. It is only, if the DIG is satisfied that injustice has been done to the accused by reason of any grave irregularity in the proceedings or otherwise, he may either set aside the entire proceedings of the SSFC or reduce/commute the sentence to a lower sentence. However, if he finds that no action is warranted, he will simply countersign the proceedings.

27. It may also be pertinent to note that so far as proceedings of the SSFC are concerned, these do not require any confirmation by a higher authority and the only obligation on the SSFC is to convey the entire record of the proceedings to the officer not below the rank of DIG, BSF or prescribed officer only to enable the later to examine the record of proceedings and record his satisfaction with regard to the fairness and correctness of the proceedings so that no injustice is caused to the accused. The DIG, BSF or for that matter Director General, BSF or any officer empowered by him in this behalf may, for reasons based on the merits of the case, set aside the proceedings or reduce the sentence/commute the punishment but cannot direct retrial, as has been done in the instant case.

28. That apart, Section 75 of the BSF Act prohibits second trial by any Security Force Court or by a Criminal Court for the same offence. The provisions of Section 75 of the BSF Act, which embody principle of double jeopardy contained in Article 20(2) of the Constitution of India reads thus:-

"75. Prohibition of second trial.—(1) When any person subject to this Act has been acquitted or convicted of an offence by a Security Force Court or by a criminal court or has been dealt with under section 53 or under section 55, he shall not be liable to be tried again for the same offence by a Security Force Court or dealt with under the said sections.

(2) When any person, subject to this Act, has been acquitted or convicted of an offence by a Security Force Court or has been dealt with under section 53 or section 55, he shall not be liable to be tried again by a criminal court for the same offence or on the same facts."

29. It is apparent from a reading of Section 75 that no authority can direct retrial of a person subject to the Act, who has been acquitted or convicted for an offence by the Security Force Court or by a Criminal Court for the same offence by the Security Force Court or Criminal Court, as the case may be. In the instant case, the DIG BSF without any lawful authority set aside the proceedings of the SSFC trial and directed retrial after altering the charge. The view we have taken is fortified by a Division Bench judgment of the Delhi High Court in the case of *Banwari Lal Yadav v. Union of India and another*, 2006(4) S.C.T. 638.

30. Mr. Vishal Sharma, learned DSGI, appearing for the respondents, could not point out any provision conferring any such power on the DIG, BSF to alter the charge framed by the SSFC after the conclusion of the trial having ended in conviction or acquittal of the accused. It is true that second trial of the accused for a different offence based on different set of facts may not be prohibited under Article 20(2) of the Constitution of India or even under Section 75 of the BSF Act, but the fact remains that in the instant case, such power has been exercised by the authority not empowered by the Act or the Rules framed thereunder.

31. As explained above, DIG BSF has limited jurisdiction to scrutinize and analyze the proceedings of the SSFC to find out as to whether any injustice has been done to the accused by reason of any grave irregularity in the proceedings or otherwise. There is no power conferred upon the DIG to order retrial or alter the charge, which had already been tried by the SSFC and on the basis whereof, accused has been convicted.

32. The Writ Court has not clearly appreciated the legal position. The Writ Court did not advert to the question of competence and jurisdiction of the DIG, BSF to alter the charge and direct retrial of the accused in the exercise of powers under Section 115 of the Act. The Writ Court also failed to appreciate that the appellant had already faced the trial and convicted by the SSFC by sentencing him to 89 days rigorous imprisonment, even, part of which stood implemented.

33. It is true that when the appellant was subjected to retrial by the GSFC, two more offences were added which the appellant had allegedly committed while being under open arrest. Accordingly, charges under Section 29(a) and 20(c) of the BSF Act were also framed. As is seen from the record of the respondents, both the charges could not be proved during trial. Ultimately, the appellant was convicted for the altered charge i.e. charge under Section 46 of the BSF Act for having attempted to commit murder of Sepoy Manoj Kumar.

34. Aside the legal nuances deliberated upon herein above, we are also convinced that there was no substantial material on record to alter the charge and to charge the appellant for commission of offence under Section 46 of the BSF Act for having committed attempt to murder punishable under Section 307 RPC. From the sequence of events narrated by the respondents and the evidence led, it clearly comes out that Sepoy Manoj Kumar was standing at a distance of five yards from the appellant. Had the appellant intended to kill Sepoy Manoj Kumar, he would not have missed the target even after firing five rounds of bullets. There is no evidence that Sepoy Manoj Kumar was even superficially injured in the incident. The manner in which the allegation of making attempt to murder Sepoy Manoj Kumar, by the appellant, is depicted in the charge-sheet and the attending circumstances obtaining in the case clearly speak for themselves about lacking the foothold.

35. Even on facts, we do not find that the charge under Section 46 of the BSF Act was prima facie made out against the appellant necessitating his trial yet again. The Commandant of the Unit, under whose command the appellant was working at the time of incident, had the first hand information about the incident and had visited the site immediately thereafter. He having been apprised of the facts and circumstances leading to the incident had framed the charge under Section 40 of the BSF Act for which the appellant was tried and was even convicted. There was, thus, no warrant to revisit the charge that, too, by the law officer, whose duty was only to scrutinize the record of the SSFC and render his opinion in respect of injustice, if any, done to the appellant by reason of any grave irregularity in the proceedings or otherwise.

36. Neither the Law Officer under Rule 160 nor the DIG under Rule 161 was competent in law to pass an order adverse to the interests of the appellant.

37. There is yet another aspect, which cannot be lost sight of by this Court. Even if, we were to concede to the power of the DIG to alter the charge and direct retrial of the appellant, yet the same could not have been done to the prejudice of the appellant without affording him an opportunity of being heard. Compliance with the principle of audi alteram partem is inherent in exercise of such power by the authority.

38. Indisputably, the appellant had been convicted and sentenced for a lesser offence under Section 40 of the BSF Act and DIG, BSF in the exercise of power under Section 115 read with Section 161 directed alteration of charge to a more

serious offence inviting higher punishment, besides ordering retrial of the appellant. Such action of the DIG was undoubtedly prejudicial to the interests of the appellant. That being the clear position, order for alteration of charge and retrial of the appellant could not been ordered by the DIG, BSF without affording an opportunity of being heard to the appellant.

39. The Writ Court has, with respect, missed all these points and was persuaded by the fact that the appellant had been tried by the GSFC for a different charge and, therefore, neither Article 20 of the Constitution of India nor Section 75 of the BSF Act was attracted.

40. For the reasons we have explained above, such view was not available to be taken in the matter. We, therefore, are of the considered view that the judgment passed by the Writ Court is not in consonance with law and, therefore, deserves to be set aside.

41. Since much water has flown after the dismissal of the appellant from service, as such, it remains to be seen what relief in the given facts and circumstances could be granted to the appellant. We have no doubt in mind that the proceedings of the GSFC, which culminated into imposition of sentence of "dismissal from service" upon the appellant are vitiated in law and deserve to be quashed and the appellant entitled to be reinstated forthwith. However, while directing reinstatement of the appellant in service, we cannot hold him entitled to all the consequential monetary benefits attending the service having regard to the fact that after his dismissal from service, the appellant has not performed any duty or rendered any service to the BSF. In all probabilities the appellant must have been employed somewhere gainfully to earn his livelihood. Having regard to all these facts, we also cannot shut our eyes to the fact that because of an illegal and arbitrary decision taken by the DIG, BSF to put the appellant to retrial, the appellant was prevented from doing his duties and rendering his services to the nation through BSF.

42. Having regard to all these factors, we are of the considered opinion that complete justice would be done to the appellant, if he is held entitled to 50% of the monetary benefits that would accrue to him by his reinstatement with effect from the date he was dismissed from service.

43. As a result, this appeal is allowed. The judgment passed by the Writ Court dated 29.11.2016 is set aside. As a consequence, the writ petition of the appellant is allowed and by a writ of certiorari the entire proceedings of retrial by the GSFC including the sentence of "dismissal from service", imposed upon the appellant is quashed. The appellant is held entitled to be reinstated in service with effect from the date he was dismissed from service with all consequential benefits. We, however, make it clear that insofar as back wages are concerned, the appellant shall be entitled to only 50% of the wages for the period with effect from the date of his dismissal till his actual reinstatement in compliance with this judgment, which, in any case, shall be done with within two months from today.

The appellant shall serve the remainder of sentence, if any, imposed by the Summary Security Force Court on the basis of his conviction by said Court.

44. With the aforesaid observations and the directions, appeal is disposed of.