

(1994) 04 DEL CK 0046

In the Delhi High Court

Case No : Civil Writ Petition No. 2435 of 1991

O.P. Bishoni

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 11-04-1994

Acts Referred:

Border Security Force Rules, 1969 — Rule 126, 45, 46(2)

Citation : (1994) 29 DRJ 338

Hon'ble Judges : K. Shivshankar Bhat, J

Bench : Single Bench

Advocate : R.P. Sharma and B. Babbar, for the Appellant;

Judgement

K. Shivashankar Bhat, J.

(1) The petitioner questions his dismissal order in pursuance of Court Martial proceedings.

(2) The petitioner joined the Border Security Force as direct entry Sub-Inspector in December 1987. He completed his basic training and thereafter he was posted on Bengal border for undertaking practical training. This was in December, 1988. According to the petitioner in February, 1989 he was sent to border outpost for doing practical training under the guidance of the Naik Sheo Prasad. Within 2 days of his reaching this post petitioner apprehended a Bangladesh national by name - Nurul Islam who was attempting to crossover to India. The said Bangladesh national was brought to the post in the presence of other Border Security Force Personnel and local villagers and he was physically searched, According to the petitioner nothing was found. However, the said foreigner was pushed back by the petitioner at the instance of Naik Sheo Prasad (P.W. 6). The allegation against the petitioner is that he extorted a sum of 4,000 in Bangladesh currency and distributed the same amongst the colleagues and subsequently collected the amount back.

(3) The Commandant of the Battalion conducted the investigation and later the

matter was referred to the higher authorities for convening Court Martial. Several witnesses were examined by the prosecution as well as by the defense. Ultimately as usual without any speaking order the Court Martial concluded the proceedings by dismissing the petitioner. The petitioner approached the higher authorities without any success. Hence the writ petition.

(4) The learned counsel for the petitioner raised several contentions. However, for the purpose of the disposal of this writ petition, I am of the view that two grounds are sufficient.

(5) P.W.11 was the Commandant. He conducted the investigation including the enquiry under Rule 45 of the Border Security Force Rules (hereinafter referred as the Rules). Learned counsel for the petitioner submits that the proceedings under Rule 45 is not an enquiry but quasi-judicial proceedings. (For the sake of convenience I refer to the proceedings as enquiry). This enquiry led the Commandants to refer the matter to the higher authorities resulting in the convening of Court Martial.

(6) Before the Court Martial the Commandant was examined as Public Witness .11. Public Witness . 11 stated that he came to know that 4000 Bangladesh Takes were returned to the said foreigner and remaining 4000 Bangladesh Takes were got converted into Indian Currency through some Home Guard personnel. This information was elicited by the witness at the time of the enquiry. After collecting the information he confronted the petitioner with the said information and according to the witness the petitioner accepted the guilt. One S.C.Sarkar was also present at that time. According to this witness petitioner requested him that he was anew recruit and the mistake committed by him may be excused and he would not repeat the same, and that the petitioner gave in writing to that effect in Hindi. The witness also states that the petitioner did not sign the statement though he had given his name. The writing of the petitioner was identified by the witness. The Court Martial had noted in the proceedings that according to the contents of this letter the Petrol Party apprehended Nurul Hassan on 14.2.1989 and recovered 8,000 Bangladesh Taka and thereafter having taken 4000 Bangladesh Takes the foreign national was pushed back. Thereafter the foreign currency was converted into Indian currency through one Ashok Ghosh and was distributed to the personnel. There is also a statement that in future he would not commit the mistake.

(7) I have quoted the substance of the letter as stated by the Court Martial because nowhere this summary refers to admission of guilt by petitioner as such. The collection seems to be by the entire petrol party even according to this letter.

(8) P.W.I also stated thereafter that according to the petitioner 4000 Bangladesh Takes were converted into Indian currency and that Rs. 1980.00 Indian currency was lying with the petitioner. Public Witness .11 also stated that after the preliminary enquiry he sent a report on the matter addressed to the Dig Calcutta Sector. Copy of the report was produced by him. The witness also stated that the

petitioner was having very little experience of service and that newly recruited SAs from the Academy were put under training for few months and only thereafter they were given the duties of the rank. The witness could not remember whether the petitioner had completed his unit training or not. The witness again stated in answer to the question by court that petitioner was called for hearing under Rule 45 and he pleaded guilty and that this Act was done by him by ignorance etc.

(9) The learned counsel for the petitioner referred to Rule 46 (2), according to which a Commandant shall not deal with any case where the Commandant himself is a witness in the case against the accused. The learned counsel for the petitioner pointed out that Public Witness . 11 who was the Commandant became a witness in the case and Therefore the entire proceedings got vitiated.

(10) The learned Standing Counsel for the respondent on the other hand contended that the Commandant, P.W. 11 was not a witness to the incident and he was also not a witness to the case enquired under Rule 45 and in the circumstances Rule 46(2) was not attracted.

(11) A reading of Rule 46 shows that there is a bar against the Commandant when it says that "the Commandant shall not deal with any case" where he is himself a witness in the case against the accused. The term "dealing" is a term of wide import. Dealing with the case referred in Rule 46 is not limited to any particular stage of the proceedings. There is a bar against the Commandant from dealing with the case in any manner if he is to be a witness in the case. Similarly the term "case" is also of wide import. Normally wide meaning should be attributed to the word. There is no dispute that proceedings under Rule 45 is anterior to the enquiry by the Court Martial. In other words proceedings under Rule 45 is a stage leading to a trial before the Court Martial (the term Court Martial is loosely used here in place of "Security Force Court trial" for the sake of convenience). The learned counsel for the respondent then pointed out that at the most this court may ignore the disposition of Public Witness .11 and even then the finding recorded by the Court Martial could be sustained.

(12) If Public Witness .11 could not have been a witness or because he was a witness he could not have dealt with the case, the question is whether this court can sustain the ultimate conclusion of the Court Martial by reference to other material on record. The Court Martial nowhere gives any reasons. It has recorded the evidence and there after straight away proceeded to pronounce its judgment/ order. The basis of his conclusion is not forthcoming. It is not possible to analyze the order of the Court Martial and then hold that which part of the evidence must have influenced the mind of the Court Martial. When relevant and irrelevant materials are considered together and a decision is given without assigning any reason, it is impossible to hold that a particular relevant material alone must have influenced the mind of the Court Martial. In the circumstances I am constrained to hold that the entire proceedings get vitiated by the examination of the Commandant as Public Witness . 11.

(13) It is also necessary to note here that Public Witness .11 speaks to the so-called extra.judicial confession made by the petitioner. Certainly this would have a great bearing on the process of consideration of the case by the Court Martial. If Public Witness .11 could not have been examined by the prosecution, the so called extra judicial confession would not have been before the Court Martial and in such a situation it is not possible to conclude that Court Martial would have decided to dismiss the petitioner by holding him guilty of the charges.

(14) The learned counsel for the petitioner also pointed out that the Law Officer participated in the proceedings and his participation went beyond the role he was expected to play under the Rules. The learned counsel referred to Rule 126 which enumerates the powers and duties of the Law Officer. Nowhere under Rule 126 the Law Officer can give any opinion regarding a question of fact. He is expected to give his opinion on any question of law relating to the charge of trial. He may also inform the court on any irregularity or other infirmity in the proceedings. He may also sum up the evidence, give his opinion on any question of law before the court proceedings to deliberate upon its findings. It is quite clear that expression of an opinion on a question of fact by the Law Officer is beyond his province. The learned counsel for the petitioner referred to the writ petition and the proceedings recorded by the Court Martial. While summing up, the Law Officer had stated that the witness Public Witness .11 corroborated the statement of P.W.7 & 8. Whether there is a corroboration or not is a question of fact and in the instant case the corroboration referred here pertains to the extortion of money by the petitioner. In fact a reading of the disposition of Public Witness .7 & 8 nowhere supports the charge that the petitioner himself extorted the money. I may refer to the statements of a few of the prosecution witnesses in this regard. Public Witness . 6 is Naik Sheo Prasad. He was in charge of the post in which the petitioner was posted. All that he says is that petitioner carried personal search.

(15) P.W.1, Brindavan Singh stated that the petitioner was his Platoon Commander of the post and on 14th February, 1989, he had gone to Patrolling duty with the petitioner and one Dhaneshwar Ram. They returned from duty at about 11 A.M. and while coming back, they caught hold of a Bangladesh National and brought him to Bop Barunhat. There after the witness went to deposit the arms and then came back and saw a few civilians also; petitioner was standing there; after some time the Bangladesh National was let off. Later the witness was given some money for sweets. Next day petitioner asked this witness whether he received any money or not and on replying in the affirmative, he was asked to return the money as it was illegal money. The witness returned the money to Naik Shiv Prasad.

(16) The entire examination-in-chief of this witness, fails to bring home any ingredient of the charge against the petitioner. This is quite clear. Nowhere this witness states or suggests even thereafter that any money seems to have been extracted from the Captured Bangladesh National.

(17) Dhaneshwaram is the second witness for the prosecution, who accompanied

the petitioner and Public Witness .1 on the date of the alleged incident. He speaks to the fact that the foreigner was apprehended. He states that nothing was found in the possession of the foreigner even after a search. After the search the witness went to deposit his personal Arms and uniform and then went for routine work of the BOP. He saw the petitioner and Naik Shiv Prasad talking to a few civilians who had followed the patrolling party. Witness says that after the civilians left, the foreigner was pushed back to Bangladesh; but does not know who pushed back the foreigner. After two days Chunnu Ram gave Rs. 70.00 to the witness and on the next day after this Brindavan Singh told the witness that the money received by him was an illegal money. Chunnu Ram told the witness that money was given to him by the petitioner. Petitioner returned the money. Nothing further is elicited, and in answer to a question from the Court, the witness replied that "when Ct Chunnu Ram gave money to me, he simply stated that this money is for sweets. But inspire of my asking, he did not clarify from where the money has come and why being distributed.

(18) The relevancy of Public Witness .3, Ashok Ghosh lies in his statement that the petitioner and Shiv Prasad asked the witness to get Bangladesh Taka 4000 exchanged into Indian currency. But, nothing is forthcoming in this disposition to indicate that petitioner had extracted the money from the Bangladesh national.

(19) P.W.4, Chunnu Ram states that Shiv Prasad asked him to distribute the money which was laying on the table in front of him. When asked about the money, the witness was told by Shiv Prasad that it was paid by the relative of the Bangladesh National.

(20) P.W.5 Jai Singh was examined to prove the contents of the General Diary and also states that he was offered Rs. 70.00 by Chunnu Ram and subsequently the witness returned it.

(21) P.W.6, Shiv Prasad speaks to the personal search of the captured foreigner and states that nothing was found. But he says that on 16th February 1989 (two days after the search and pushing back the foreigner) petitioner handed over 4000 Bangladesh Takes seeking its exchange into Indian currency. Here again, the charge of extraction of the money from the foreigner was not proved.

(22) Through Public Witness .7, Kukri Hazong, it was elicited that petitioner told this witness that on 14.2.1989, 4000 Bangladesh Taka was extracted from the Bangladesh National. In the cross-examination he stated that, "I have heard Si Om Prakash admitting his guilt to the Battalion Commandant." A purely hear-say evidence.

(23) P.W.8, S.C.Sarkar was examined to prove the alleged confession of guilt by the petitioner as per Ex. "Q" which, as already noted by me, takes the case of the prosecution nowhere. The charge was not proved legally by any other witness.

(24) The crucial witnesses, who are supposedly present at the relevant time did

not speak to the charge. Actually their dispositions cast some doubt as to the role played by Naik Shiv Prasad. Even assuming that 4000 Bangladesh Taka was exchanged from Indian currency, it does not follow that it was extracted from the foreigner by the petitioner. The court could not have reasonably concluded that the charge against the petitioner was proved. None can be punished on the basis of a mere suspicion.

(25) In the circumstances, I have no hesitation to set aside the verdict of the Court and its affirmation by the appellate authority. The order dispraising the petitioner is, accordingly set aside; as a consequence he shall be reinstated in service With all consequential benefits. Rule made absolute. No costs.