
(2011) 01 DEL CK 0178
In the Delhi High Court
Case No : Writ Petition (C) 3952 of 2010

Rakesh Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-01-2011

Acts Referred:

Citation : (2011) 01 DEL CK 0178

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : R. Archana, for the Appellant; Alpana Pandey, for Richa Kapoor, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—The Petitioner, Rakesh Kumar was employed as a Constable in the Border Security Force and was attached to the 46th Bn. which was stationed at Cooch Behar, West Bengal in June 2007. On 20th December 2007, the Petitioner was deployed at the Border Outpost (BOP) at Nauhati, which was a platoon post, when at about 18:15 hours, along with Head Constable Y.N. Dwivedi the Petitioner went outside the precincts of the camp without taking permission from any superior officer and proceeded to a village nearby where the Petitioner got into a difficult situation with the civilians and was detained by them. Information reached the senior officers at the camp which was passed on to the Commandant Shri R.C. Sharma who proceeded to the village and rescued the Petitioner who was confined in a house with agitated villagers around the house. As per the villagers the Petitioner had trespassed into the house of one Affazuddin Mia and had outraged the modesty of his daughter-in-law Mst. Amina Biwi.

2. It is apparent that the incident was serious and required a probe. The Commandant required the Deputy Commandant to prepare a record of evidence in relation to a charge framed against the Petitioner as under:

Charge I WITHOUT ORDERS FROM HIS SUPERIOR BSF ACT OFFICER LEAVES HIS POST. 1968 U/S - 16(d) In that he, When deployed at BOP Nauhati on 20 Dec. 2007 at about 18:30 Hours left BOP Nauhati without orders from his superior officers and went in village Nauhati.

Charge II COMMITTING A CIVIL OFFENCE THAT IS TO BSF ACT SAY USING CRIMINAL FORCE TO ANY WOMAN 1968 INTENDING TO OUTRAGE OR KNOWING IT TO U/S- 46 LIKELY THAT HE WILL THEREBY OUTRAGE HER MODESTY PUNISHABLE U/S 354 IPC

In that he, At village Nauhati on 20 Dec. 2007 at about 18:45 hours used criminal force against Smt Amina Biwi (Age 25 years) w/o Sri. Fazal Mia to outrage her modesty.

Charge III COMMITTING A CIVIL OFFENCE THAT IS TO BSF ACT SAY COMMITTING HOUSE TRESPASS 1968 PUNISHABLE U/S 448 IPC. U/S- 46 In that he,

At village Nauhati on 20 Dec. 2007 at about 18:45 hours trespassed in the house of Sri. Affazuddin Mia father in law of Smt. Amina Biri w/o Sri Fazul Mia.

3. After the record of evidence was prepared and was put to the Petitioner, he pleaded guilty to the first charge and not guilty to the second and third requiring the matter to be further considered by the appropriate authority i.e. the Commandant of the Battalion and since the Commandant was on leave, the officiating commandant considered the summary of evidence and opined that the Court be convened. A Summary Security Force Court was convened to record evidence.

4. 10 witnesses were examined by the prosecution to prove the charges, and in defence, the Petitioner examined 1 defence witness.

5. For facility of appreciation of the evidence we may record that the testimony of PW-1, PW-2, and DW-1 would be relevant for the First Charge; and that of PW-3, PW-4, PW-5, PW-6 and PW-7 is relevant for the Second Charge; and that of PW-3, PW-4, PW-5 and DW-1 is relevant for the Third Charge. Thus, we note their testimony in brief.

6. PW-1, Ct. Raju Nayak deposed that he was on Sentry Duty at BOP Nauhati on 20th December 2007 and at about 18:15 hours saw the Petitioner along with HCY.N. Dwivedi i.e. DW-1 go out of the gate of the post without taking permission from him i.e. PW-1. The Petitioner and HCY.N. Dwivedi walked away in the direction of a shop 100 meters away from the post. That after a while HCY.N. Dwivedi came rushing back and informed that the Petitioner had been detained by the civilians and that he had to see the Post Commander SI I.D. Prasad urgently.

7. PW-2, SII.D. Prasad, deposed that he was the Post Commander of BOP Nauhati on the date of the incident i.e. 20th December 2007. That at about

18:45 hours HCY.N. Dwivedi came to him in his room at the post and informed him that the Petitioner was detained by the villagers. That on reaching the spot he witnessed an agitated crowd of about 20-25 villagers standing outside the house of Affazuddin Mia and inside the house he saw Petitioner surrounded by several ladies of the village blocking his way. On Inquiry he was told that the Petitioner had entered the house of Affazuddin Mia without permission and had molested and outraged the modesty of Mst. Amina Biwi, the daughter-in-law of Affazuddin Mia. The villagers refused to release the Petitioner until the Police and the members of Panchayat arrived. He informed the Coy Commander S.N. Sharma PW-9 telephonically about the incident. That after a lot of persuasion and efforts by the Officiating Commandant and also a promise to punish the Petitioner for his act they could manage to secure the release of the Petitioner.

8. PW-3 Amina Biwi the stated victim, deposed that on 20-12-2007 at about 18:30 hours when she was standing in the veranda of her house and was about to wear a sweater the Petitioner came and held her hand from behind and tried to drag her inside the courtyard. She raised a cry as a result of which her mother-in-law came out and tried to free her from the Petitioner but failed as the Petitioner pushed her away. Hearing their cries of help, her brother-in-law Mahasim Mia PW-5 came to their rescue and successfully released her from the Petitioner. Thereafter the Petitioner tried to escape but Mahasim Mia, with the help of other villagers who had gathered in the meanwhile, caught the Petitioner and detained him in the house.

9. PW-4 Fatima Biwi the mother-in-law of Amina Biwi deposed in sync with PW-3. PW-5 Hahasin Mian the brother-in-law of Amina Biwi also deposed in sync with her testimony and corroborated PW-3 of what she deposed qua his role after he had responded to the cries of rescue raised by PW-3 and PW-4.

10. PW-6 Martujtul Mian the other brother-in-law of Amina Biwi deposed that he was on his way back from the market when he heard noises from the house and on reaching the house he was informed about the incident by Amina Biwi and he called Monin Ali PW-7 and requested him to call the police. Monin Ali PW-7 corroborated the testimony of PW-6 qua his i.e. Monin Ali being summoned and he being asked to inform the police with further deposition that at his complaint the police reached the place of occurrence.

11. PW-8 Shri Sumanti Kumar Barman deposed that returning from the market he heard that a tiff had taken place between the villagers and a BSF Jawan at the house of Affazuddin Mia. On reaching the spot he met an angry crowd of villagers who had detained the Petitioner and refused to release him. He also met PW-3 and narrated the incident to him. That after the police and Coy Commander BSF along with the Officiating Commandant BSF came and persuaded the villagers, they release the Petitioner.

12. PW-9 Insp. S.N. Sharma deposed that on 20.12.2007 at about 19:00 hours, the Post Commander SII.D. Prasad, PW-2 called him on his mobile and informed

him about the incident i.e. that the Petitioner having illegally entered the house of a civilian and tried to outrage the modesty of the daughter-in-law of the civilian. That on reaching the spot he saw that the house was surrounded by an angry crowd of villagers and that the Petitioner was detained inside the house. The local police and village panchayat members were present. He tried to pacify the infuriated villager and asked them to release the Petitioner but they refused. To control the situation, Officiating Commander R.C. Sharma was informed about the incident who reached the spot at about 22:00 hours and after a lot of persuasion and a promise to punish the Petitioner, the villagers agreed to release the Petitioner.

13. PW-10 ASI Naripendra Nath Sarkar deposed that on 20.12.2007 information was received at the Police Station about an incident having taken place between BSF Jawan in the village. On reaching the place of incident he saw that an angry crowd of villagers had detained a BSF Jawan i.e. the Petitioner. He was informed that the Petitioner had tried to misbehave with a woman in the house. The Jawan was handed over to the BSF Officers.

14. DW-1 HCY.N. Dwivedi corroborated PW-1 and PW-2 in so far they deposed of the Petitioner and he i.e. HCY.N. Dwivedi leaving the post without permission and proceeding towards the village. He admitted that both left without taking permission. He further deposed that while he was waiting at a shop for a shopkeeper to come, the Petitioner was standing a few steps behind with a few village boys and there was a sudden commotion and as he turned back, he saw the Petitioner in the courtyard of the adjoining house. He i.e. HCY.N. Dwivedi ran to the post to get help.

15. In his defence statement, the Petitioner stated as under:

On 20.12.2007 at about 18:00 hours I came back after taking water. HCY.N. Diwedi was at the gate who asked me do you have Tambacu I said No. So both of us went to get Tambacu from shop. Near the shop there were 7-8 persons. Those persons one/two shook hands with me. They said why do you catch Goru of people and detain few which illegally enter to see camp I said I do not do it is done by orders. In the meantime one put hand on my mouth and dragged me inside the house and shouted how you have entered in the house. I could not run away because of many people being there. I could not run away. It was bright night. To avoid stones by public I went inside the house.

16. It is pertinent to mention here that even though the case of the Petitioner finally projected by him and to some extent which finds support from the testimony of DW-1 was that a few villagers had pushed him inside the house and had framed him, during cross-examination of PW-3, PW-4, PW-5, PW-6, PW-7 and PW-8 he did not cross examine them on this line of defence.

17. The Summary Security Force Court returned the verdict of "Guilt" pertaining to the second and third Charge and maintained the plea of "Guilt" for the first charge, to which the Petitioner had pleaded "Guilty".

18. Based on the verdict of the Summary Security Force Court, the Officiating Commandant, after hearing the Petitioner directed that Petitioner be dismissed from service. While passing the order, as recorded under the caption "Proceedings before sentence", the Officiating Commandant noted the Petitioner being convicted for offences under the BSF Act in the year 1993, 1994, 1996, 2000 and 2005. Pertaining to the last conviction, the Petitioner was awarded dismissal from service but the sentence was commuted to 89 days RI in force custody. In other words it was noted that the previous conduct and service record of the Petitioner was far from satisfactory.

19. Challenging the punishment imposed, at the hearing of the writ petition it was urged:

(i) That the proceedings were in violation of Rule 46 of the BSF Rules 1969 inasmuch as the Officiating Commandant was a witness and thus the Petitioner had to be attached to another battalion for trial.

(ii) That the Petitioner should have been given an opportunity to object to be tried by a particular officer at the Summary Security Force Court and for which purpose the decision of the Supreme Court reported as Ranjit Thakur Vs. Union of India (UOI) and Others, was cited.

(iii) That the evidence clearly establish the Petitioner being falsely implicated and for which reliance was placed upon testimony of HCY.N. Dwivedi DW-1 and to some extent on the testimony of Ct. Raju Nayak PW-1 but pointing out that the testimony of DW-1 established that the Petitioner was pushed inside the house and implicated falsely and with reference to the testimony of PW-1 it was pointed out that being 100 meters away from the shop where Petitioner and DW-1 had proceeded to buy Tobacco, the witness would have certainly heard the utterances of the villagers as to what happened and that PW-1 never deposed of having heard the villagers speak contemporaneously of the Petitioner attempting to molest PW-3.

(iv) Lastly, it was urged that the penalty of dismissal from service is disproportionate to the gravity of the offence keeping in view that the Petitioner had rendered 19 years and 8 months" service and was only 4 months away to earn pension. Learned Counsel urged that penalty of compulsory retirement, at the most, was sufficient penalty and if levied would have earned the Petitioner, at least, some pension.

20. The first plea requires this Court to consider Rule 46 of the BSF Rules 1969. It reads as under:

46. Attachment to another unit.- The Commandant shall not deal with any case -

(i) where the offence with which the accused is charged is against the Commandant himself, or

(ii) where the Commandant is himself a witness in the case against the accused,

or

(iii) where the Commandant is otherwise personally interested in the case and the accused shall be attached to another battalion or unit for disposal of the case under the order of the Deputy Inspector-General:

Provided that a Commandant shall not be disqualified from hearing a charge merely because the offence was committed against the property of a Force Mess, band or institution of which the Commandant is a member or trustee or because the offence is one of disobedience of such Commandant's orders.

21. It is apparent that under the Rule a Commandant cannot deal with a case where he himself is a witness in the case.

22. The expression "is himself a witness in the case" needs to be expanded. It simply means that the Commandant has to be a witness in a case if Rule 46 is to be attracted. Being a witness to a case and having knowledge about an incident are two totally different things.

23. From the testimony of the prosecution witnesses, it is apparent that the Officiating Commandant had witnessed nothing and his role was limited to rescuing the Petitioner who was confined inside a house which was surrounded by angry villagers. The Officiating Commandant had no knowledge of what had actually happened and in this connection it would be important to note that the Petitioner admits being rescued from the house in the village, but alleges false entrapment and the case of the prosecution is as per the charge. Thus, it cannot be said that the Officiating Commandant was a witness in the case and it is for this reason we find that he was not cited as a witness of the prosecution.

24. The second plea has to be noted and rejected for the reason no provision of law was cited which required the officer functioning as the Court to ask the Petitioner whether he had any objection to the constitution of the Court or it being manned by a particular officer. In Ranjit Thakur's case (supra) Rule 130 of the Army Rules required that as soon the Court assembles the names of the Presiding Officer and members shall be read over to the accused who shall thereupon be asked whether he objects to being tried by any officer sitting on the Court. In the absence of any such Rule under the BSF Rules 1969 or a Section under the BSF Act 1968, no reliance can be placed upon the decision referred to herein before.

25. As regards the third plea, it assumes importance to note that the line of defence projected in the statement made by the Petitioner after prosecution examined its witnesses was never adopted to cross-examine the witnesses of the prosecution. As regards the testimony of Ct. Raju Nayak and the submissions made pertaining thereto and as noted while penning the substance of the third submission, it would be enough for us to state that Ct. Raju Nayak was stationed at the gate of the post and as deposed to by him he saw the Petitioner and HCY.N. Dwivedi walk away in the direction of a shop which was 100 meters away.

Now, it is quite possible that utterances made by people 100 meters away may not be heard by a person. It is also relevant to note that the time of the incident is 18:45 hours. The date is 20.12.2007 and the place is in the eastern part of the country. By said time on the date in question and particularly in that part of the country it gets fairly dark and thus Ct. Raju Nayak could have seen nothing. It does happen that when one sees nothing, talks by persons is not heard, but when one sees a crowd gather, curiosity compels one to try and hear better and thereby one is able to strain one's ear and catch some sounds. Be that as it may, that Ct. Raju Nayak did not depose of having heard anything does not mean that an inference could be drawn that nothing happened. As regards the testimony of HCY.N. Dwivedi, whatever he deposed has to be considered with reference to the fact that even he had committed a wrong by leaving the post without proper authorization. The possibility of HCY.N. Dwivedi trying to underplay the incident cannot be ruled out. Be that as it may, in the teeth of the overwhelming testimony of PW-3 to PW-7 and in particular the testimony of PW-3 and PW-4 the weight of the evidence is against the Petitioner.

26. It is settled law that a Writ Court is not required to weigh or to re-appreciate the evidence. As long as there is evidence to support an indictment at a Summary Security Force Court trial, the verdict has to be upheld.

27. As regards the last plea of the sentence being disproportionate, it may be true that Petitioner had rendered service for 19 years and 8 months, but it cannot be ignored that the instant misdemeanor was not the solitary instance. There were 5 previous convictions and the 5th one was fairly severe and at the first instance penalty of dismissal from service was passed, but the DIG took a lenient view and commuted the same to RI for 89 days in Force Custody. It may be highlighted that the penalty was for an offence punishable u/s 24(a) of the BSF Act pertaining to disgraceful conduct of indecent or unnatural behaviour.

28. The past conduct of the Petitioner does not entitle him to any mercy on the issue of reduction in the rigor of the penalty. That apart, we find that under the BSF Act the penalty of compulsory retirement is not even provided and thus we cannot substitute the penalty as sought to be substituted.

29. The writ petition is dismissed.

30. No costs.