
(2011) 03 DEL CK 0506

In the Delhi High Court

Case No : Writ Petition (C) No. 4860 of 1998

Ram Chander

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-03-2011

Acts Referred:

Border Security Force Act, 1968 — Section 117, 19, 46, 53, 55
Border Security Force Rules, 1969 — Rule 53
Penal Code, 1860 (IPC) — Section 354

Citation : (2011) 03 DEL CK 0506

Hon'ble Judges : J.R. Midha, J;Gita Mittal, J

Bench : Division Bench

Advocate : Shahid Azad, Kunal Rawat and Meenu, for the Appellant; Barkha Babbar, for the Respondent

Final Decision : Dismissed

Judgement

Gita Mittal, J.—The present Petitioners were jointly tried by the Summary Security Force Court ("SSFC? hereafter) constituted under the provisions of the Border Security Force Act, 1968 (hereafter referred to as the "BSF Act"). Identical findings of guilt and conviction were returned and the same punishments were imposed on them which have been separately assailed by the writ Petitioners. The writ petitions therefore raise identical issues of law and fact and as such they are taken up together for hearing and adjudication.

2. Before examination of the matter on merits, we may note that these writ petitions along with a bunch of similar writ petitions were allowed by a judgment dated 16th January, 2006. This Court had accepted the contention of the Petitioners that while disposing of their statutory petition u/s 117(ii) of the BSF Act, no reasons were given by the authority. The judgment dated 16th of January, 2006 had allowed the writ petitions on this sole ground. The Respondents assailed the judgment before the Supreme Court. Civil Appeal No. 1208/2010 before the Supreme Court was directed to be treated as the main

matter out of the bunch of appeals. The appeals were accepted and allowed by the Supreme Court by way of judgments dated 2nd February, 2010 and 16th February, 2010. The matters were remanded to this Court for consideration afresh.

3. So far as these Petitioners are concerned, Ram Chander, (Petitioner in W.P.(C) No. 4860/1998) and Manoj Kumar, (Petitioner in W.P.(C) No. 4959/1998) were employed as Constables with the Border Security Force. At the relevant time in the year 1997, they were posted with the 34th Battalion of the Border Security Force which was located at Radhabari in District Jalpaiguri, West Bengal. On 17th November, 1997 at 1.30 p.m. these two Constables with other company personnel were sent to the Dronacharya Stadium, BSF, Kadamtala, Siliguri under the command of Head Constable Bans Narayan to witness the inauguration ceremony of the Inter Frontier Sports Meet. While returning from the ceremony, the Petitioners took advantage of traffic congestion and disembarked from the official vehicle, mingling with the local crowd. The person in command was unable to detect the escape of the Petitioners which was discovered only at about 5.40 in the evening after the vehicle reached the battalion headquarters. HC Bans Narayan reported the matter to the Company Havaldar Major of the "D" Company as well as to other superior authorities.

4. It was subsequently revealed that these Petitioners had gone to the Village Nirmaljote which fell under the jurisdiction of PS Phansidewa in the District Darjeeling at around dusk. Having reached there, they had outraged the modesty of one Smt. Usha Rani after pushing aside a girl child of eight years who was accompanying her. Reacting to the alarm raised by this lady and the child, one Smt. Sobha Rani W/o Sh. Ch. Ram also a residing in a house which was adjacent to the site of the crime in the said village came out with a lantern. At this, the Petitioners are stated to have fled from the spot. In the resultant chase by other villagers, the Petitioners were overpowered and the matter is stated to have been informed to the local police station. The Petitioners were allegedly taken to the local primary health center for their medical examination.

5. It is on record that the Petitioners made false disclosures with regard to their identity. It was somehow learnt that the Petitioners were Border Security Force personnel. Sh. Roop Ram, Inspector In Charge of the Border Outpost of the BSF at Phansidewa was informed who brought the Petitioners to the BSF border outpost. Upon sustained interrogation at this outpost, the Petitioners revealed their correct identities. In this background, only on 18th November, 1997 the Petitioners could be brought back to the headquarters of the 34th battalion of the BSF.

6. The Petitioners were separately charged with the following offence u/s 19(a) of the BSF Act:

BSF Act -1968 COMMITTING A CIVIL OFFENCE THAT Section -46 IS TO SAY, USING CRIMINAL FORCE TO A WOMAN WITH INTENT TO OUTRAGE HER

MODESTY PUNISHABLE U/S 354 IPC. at Radhabari on 17.11.97 at 1330 hrs was sent to witness inauguration ceremony of XXII Ird Inter Ftr. Athletic Meet held at Dronacharya Stadium Ftr HQ NB Kadamtala on 17.11.97 alongwith party Comdr. No. 70001474 HC Bans Naryan failed to report back in the unit line on 17.11.97 at 1740 hrs and absented himself without leave from the unit lines until 1200 hrs on 18.11.97.

7. It is noteworthy that such offence report was initiated by the Commandant of the 34th Battalion, BSF. The Petitioners were found guilty of the offence by an order dated 22nd November, 1997 and a punishment of 28 days rigorous imprisonment in force custody was imposed upon him.

8. Mr. Shahid Azad, learned Counsel for the Petitioner has placed before this Court copy of a subsequent letter dated 26th November, 1997 addressed by the Joint Assistant Director, Operations from the headquarters of the Siliguri Sector of the Border Security Force to the Commandant of the 34th Battalion. The Commandant of the 34th Battalion was thereby informed by the BSF headquarters about the incident involving the Petitioners on 17th November, 1997 in the following terms:

It is learnt that on 17.11.97 at about 1930 hrs one woman namely Usha Rani Roy (28) yrs of Nirmaljote village PS Phansidewa Distt. Jalpaiguri (WB) alongwith her 7 years old daughter were coming to her house from nearby village. 3 person on civil dress later identified as BSF personnel of 34 Bn BSF caught hold of her with ulterior motive. On seeing this they (woman and daughter) shouted for help. Immediately all the residents locality reached the place occurrence and managed to apprehend two of the culprits but one of them managed to escape. The local informed to PS Phansidewa and both them were taken to Phansidewa PS by police around 2030 hrs initially both of them have wrong identity and disclose their name as 87433202 Const. Deepak Kumar and 89649723 CT Manoj Kumar of "D" Coy 151 Bn BSF. However they subsequently changed their presence and disclosed their original name as No. 89644532 CT Ram Chander and No. 9006732 CT Manoj Kumar of "D" Coy 34 Bn BSF. Both of the constables were subjected to medical examination at Phansidewa PHC as they were found under the influence of liquor. However, Sub sector of 108 Bn BSF on the same night and further to SI Ram Kishan of 34 Bn BSF.

2. It is further learnt that the said BSF personnel had come to Kadamtala on 17.11.97 for witnessing the BSF Interfrontier Athletic meet. They reportedly consumed liquor at Kadamtala and boarded a civil bus proceedings toward PS Phansidewa Radhabari road junction on Kadamtala Phansidewa road. Both the constables denied to disclose the name of 3rd BSF man.

A direction was issued to the said Commandant to inquire into the matter and to take action against the persons who were found at fault.

9. The Petitioner has placed reliance on an undated signal purportedly sent from the 34th Battalion to the Siliguri headquarters of the BSF informing it that two of

the BSF personnel were tried summarily and awarded 28 days RI in force custody on 22nd November, 1997.

10. The Respondents have urged that information with regard to the occurrence involving the Petitioners was brought to the notice of the Commandant of 34th Battalion by the letter dated 26th of November, 1997. It appears that the Commandant of the 34th battalion, BSF thereafter passed the order dated 18th March, 1998 appointing Sanjay Singh, a Deputy Commandant in the battalion to prepare a record of evidence against the Petitioners who were charged u/s 46 of the Border Security Force Act, 1968 for committing an offence which was punishable u/s 354 of the Indian Penal Code for committing a civil offence on 17th November, 1997 of using criminal force to Smt. Usha Rani W/o Sh. Biswa Nath Roy R/o Village Nirmaljote intending to outrage her modesty at 1930 hours.

11. The chargesheet dated 30th March, 1998 issued to the Petitioners under Rule 53(ii) of the BSF Rules laid the following charge against them:

BSF Act -1968 COMMITTING A CIVIL OFFENCE THAT Section -46 IS TO SAY, USING CRIMINAL FORCE TO A WOMAN WITH INTENT TO OUTRAGE HER MODESTY PUNISHABLE U/S 354 IPC. In that they at Nirmaljote village falling under district Darjeeling on 17.11.1997 at about 1930 hrs used criminal force to Smt. Usha Rani Roy W/o Shri Biswa Nath Roy resident of Village Nirmaljote, intending to outrage her modesty.

It was also directed that the Petitioners be tried by a Summary Security Force Court ("SSFC? thereafter). The SSFC was held against the Petitioners at the Battalion on 1st, 3rd and 4th April, 1998.

12. Eight witnesses were examined in the proceedings conducted by the SSFC whereupon the Petitioners were found guilty of the charge levelled against them and sentenced to dismissal from service. The Petitioners were accordingly dismissed from service and struck off from the strength of the 34th Battalion, BSF with effect from 4th April, 1998.

13. The Petitioner's statutory petitions assailing his conviction and sentence by the SSFC was rejected by two orders passed on 4th April, 1998 and 22nd August, 1998 respectively. The Petitioners have separately filed the present writ petitions assailing the aforementioned orders dated 4th April, 1998 and the order dated 22nd August, 1998 respectively.

14. Before this Court, challenge has been laid to the finding of guilt returned by the SSFC vide order dated 4th April, 1998. Learned Counsel for the Petitioners has challenged the conviction and sentence imposed upon them on the sole ground that the Petitioners having been charged and convicted on 22nd November, 1997 and sentenced to 28 days rigorous imprisonment, they could not have been subjected to another trial. The submission is that the orders dated 4th April, 1998 and 22nd August, 1998 are liable to be set aside and quashed on grounds of applicability of the principles of double jeopardy. It has been urged

that the Petitioners have been punished twice for the same offence which is legally impermissible.

15. Learned Counsel for the Respondents has placed reliance on the pronouncements reported at Jitendra Panchal Vs. Intelligence Officer, NCB and Another, .; State of Bihar Vs. Murad Ali Khan and Others, ; State of Haryana Vs. Balwant Singh, urge that the principles of double jeopardy are not attracted or applicable in the present case. 16. So far as the issue of double jeopardy is concerned, we find that Section 75 of the BSF Act, 1968 prohibits a second trial of a person subject to the statute. Section 75 of the Act deserves to be noticed and reads as follows:

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 u/s 53 or u/s 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 u/s 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.

Sub-section (i) of Section 75 of the BSF Act, 1968 unequivocally states that when any person subject to the act had been acquitted or convicted of an offence of a security force court or by a criminal court or has been dealt with u/s 53 or 55, he shall not be tried again for the same offence by a security force court or dealt with under said sections. Under sub -section (ii) , if a person subject to the act has been acquitted or convicted of an offence by a security force court or has been dealt with u/s 53 or 55, he shall not be liable to be tried again by criminal court for the same offence or on the same facts.

17. A bare perusal of the statutory provisions would show that there is a clear distinction between the prohibitions incorporated in Sub-section (i) and Sub-section (ii). So far as Sub-section (i) is concerned, the legislation has prohibited a second trial by a Security Force Court for the same offence for which he has been convicted or acquitted by a security force court or criminal court. The same makes no reference to two offences which may arise on the same facts. As against this prohibition, Sub-section (ii) of Section 75 clearly states that if a person subject to the BSF Act had been acquitted or convicted of an offence by a security force court or has been dealt with u/s 53 or 55, he shall not be liable to be tried again by a criminal court for the same offence or on the same facts.

18. In the instant case, the Petitioners were tried for an offence u/s 19(a) of the BSF Act on the allegation that he was unauthorisedly absent without leave for which he was punished on 22nd November, 1997. The Petitioners were charged by the charge sheets dated 30th March, 1998 for commission of offences u/s 46 read with Section 354 of the Indian Penal Code before the Summary Security

Force Court tried the Petitioners.

19. Section 354 of the Indian Penal Code relates to an offence of assault or criminal force to woman with intent to outrage her modesty. It cannot be contended or held that the offence u/s 19(a) of the BSF Act with regard to his unauthorized absence for which the Petitioner was summarily tried on 22nd November, 1997, was covered u/s 46 of the BSF Act, 1968 or Section 354 and was by no measure the same offence.

20. We have carefully considered the submissions of the Petitioners.

21. It is noteworthy that it is not the Petitioners' contention that any case was registered by the local police against them or that they were arrested by the local police. There is also no material before us to suggest that any case was registered against them by the civil police the Petitioners or that they were ever tried by any civil court. Upon apprehension, the Petitioners seem to have been simply handed over to the BSF Company at Phansidewa. The Petitioners have relied on the communication dated 26th November, 1997 from the joint Assistant Director of the BSF which has stated that the Petitioners had attempted to conceal their real identities as well as their postings.

22. Coming to the action which was taken by the Respondents against the Petitioners is concerned, the available record would show that the Petitioners had failed to report to the unit lines as directed on 17th November, 1997. Therefore, so far as the 34th Battalion was concerned, the Petitioners were unauthorisedly absent without leave from the unit till 18th November, 1997.

23. We are therefore unable to accept the submission on behalf of the Petitioners that the authorities were aware of the Petitioners' involvement in both the incidents when the offence report dated 22nd November, 1997 was prepared against the Petitioners. It is an admitted position that so far as the 34th Battalion was concerned, the Petitioner was brought back on 18th November, 1997 from the BSF border outpost at Phansidewa from the custody of the 108 battalion of the BSF. Ms. Barkha Babbar, learned Counsel for the Respondents has explained that the charge sheet could be issued only on 30th March, 1998 for the reason that the Petitioner(s) were on leave and could be tried only on return.

24. In this background, the trial by the summary security force court was not a de novo inquiry for an offence for which the Petitioners stood tried or punished earlier. There is also no similarity of the acts which were attributed to the Petitioners and were the subject matter of his trial and punishment.

The charge on which the Petitioners were summarily tried on 22nd November, 1997 was for an offence u/s 19(a) of the BSF Act relating to their unauthorized absent without leave and not for the serious offence which the Petitioners were alleged to have committed in the evening of 17th November, 1997. The bundle of facts and incidents which form the subject matter of the charges are also not the same.

25. The entire record laid before us has been scrutinized. Information with regard to the incident in the evening of 17th November, 1997 was revealed subsequent to the summary trial of the Petitioners on 22nd November, 1997 upon receipt of the letter dated 26th of November, 1997. Therefore, the response in this signal was clearly incorrect. We find that the reliance on behalf of the Petitioners on the undated signal sent from the Battalion is misconceived. This contention of the Respondents is also borne out from the statement of SI Ram Kishan. who was examined as PW-8 who stated that on 18th November, 1997, he was asked to collect two jawans from 108 Battalion, BSF at Phansidewa as they were kept there. He had submitted that he had gone to the Border Out Post Phansidewa of 108 Battalion, BSF and on 18th November, 1997 brought the Petitioners back to the Battalion headquarters.

26. The trials of the Petitioners pursuant to the charge sheet dated 30th March, 1998 and the orders dated 4th April, 1998 convicting and sentencing the Petitioners were not prohibited in law on grounds of double jeopardy. The same were clearly permissible even by virtue of Section 75 of the Border Security Force Act, 1968.

27. The challenges to the orders dated 22nd of August, 1998 dismissing the appeals on the same grounds, therefore, are also devoid of legal merits and is hereby rejected.

28. The Petitioners who were assigned the task of protection of lives, unauthorisedly left the battalion and have been found guilty of extremely grave and heinous charges of outraging the modesty of a woman in the village in an inebriated condition.

In this background, the sentence imposed upon the Petitioners also requires no reconsideration on grounds of proportionality.

For all these reasons, the writ petitions are held to be without merit and are hereby dismissed.