

(2012) 08 DEL CK 0095
In the Delhi High Court
Case No : Writ Petition (C) 6920 of 1999

Subhash Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-08-2012

Acts Referred:

Citation : (2012) 08 DEL CK 0095

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : Ankur Chhibber, for the Appellant; Archana Gaur, for the Respondent

Judgement

Pradeep Nandrajog, J.—At a Summary Security Force Court Trial the petitioner was tried for two offences:-

(a) At 09:30 hours on 13.09.1998 while working as OP No. 1 at BOP Nakochi the petitioner acted in a cowardice manner before armed miscreants against whom it was petitioner duty to take action by not opening fire.

(b) Did not inform the BOP Commander when miscreants fired i.e. did not report the firing to the BOP Commander.

Two other constables named Ct.Yashpal and Ct.Paras Singh were also similarly tried for the same charges.

2. Pertaining to the petitioner, it is the case of the respondents that he pleaded guilty at the trial.

3. At the outset, learned counsel for the respondents states that the record pertaining to the Court of Inquiry and Record of Evidence is not available.

4. Surprisingly, in the counter affidavit filed, narrating the brief facts of the case, it is pleaded as under:-

1. On 13th Sep" 98 while the unit was deployed on Indo-BD Border at Tura, No. 92403730 Const.Yashpal and No. 93002533 Const.Subhash Singh were detailed

as OP No. 1 and No. 89455507 Const. Pradeep Phukan and No. 86003230 Const. Paras Singh were detailed as OP No. 2 from 0600 hrs to 1200 hrs. The task of OP No. 1 was observation of border from BP No. 1104 to BP No. 1105/3-5 and OP No. 2 was required to do patrolling from BP No. 1105/3-5 to BP No. 1107 as there was no tower in that area.

2. Following items were issued to those persons:-

- i) No. 92403730 Ct. Yashpal - SLR Butt No. 262 - Body No. 15025736.
- ii) No. 93002533 Ct. Subhash Singh - SLR Butt No. 260 - Body No. 15023126
- iii) No. 89455507 Ct. Pradeep Phukan - SLR Butt No. 290 - Body No. DD-8703.
- (iv) No. 86003230 Ct. Paras Singh - SLR Butt No. 296 - Body No. 15413429.

All the above persons were also issued with 03 Magazine and 50 Rounds each. In addition to that Ct. Subhash Singh was issued with a telephone. Const. Yashpal and Const. Pradeep Phukan with Binocular and Ct. Paras Singh with a Wireless set.

3. OP No. 2 performed its duty in their area of responsibility till 0840 hrs and decided to go to OP No. 1. They reached OP No. 1 at about 0845 hours and decided to go to Nokchi Village of Bangladesh with intention for womanizing. The distance between the boundary of OP No. 2 and OP Tower of OP No. 1 is approximately 02 kms. All the 04 personnel left their telephone/wireless set and other equipments at OP No. 1 and went towards BP No. 1104/6-9 and 7-5 via border Road. They went near BP No. 1104/6-5 and decided to split into two parties i.e. No. 89455507 Const. Pradeep Phukan and No. 92403730 Const. Yashpal in one group and No. 93002533 Const. Subhash Singh and No. 86003230 Const. Paras Singh in another group. No. 89455507 Const. Pradeep Phukan and No. 92403730 Const. Yashpal wanted to go first to the Bangladesh village Nokchi. After that No. 93002533 Const. Subhash Singh and No. 86003230 Const. Paras Singh were to go. Const. Yashpal and Const. Pradeep Phukan entered BD via BP No. 1104/6-5 while Const. Subhash Singh and No. 86003230 Const. Paras Singh waited near BP No. 1104/7-5.

4. Const. Pradeep Phukan crossed International Border and went to a particular house inside Bangladesh Village with his personal weapon. Const. Yashpal accompanied him for some distance but did not enter the house. Const. Paras Singh and Subhash Singh remained inside Indian territory and kept watching.

5. Meanwhile Bangladesh Rifle people got information about this and came near the house. Const. Yashpal having seen the Bangladesh Rifle shouted to Const. Pradeep Phukan and ran back to Indian territory. Const. Pradeep Phukan after noticing Bangladesh Rifle personnel fired towards them and ran towards Indian territory whereas Const. Yashpal managed to come back to Indian territory. Const. Pradeep Phukan who was running towards Indian territory got trapped by Bangladesh Rifle and during exchange of fire he sustained a bullet injury and

died. Bangladesh Rifle personnel took the dead body of Const. Pradeep Phukan to their Post and informed to their Hqr. who further conveyed the matter directly to DG BSF on telephone.

6. Const. Yashpal, Const. Subhash Singh and Const. Paras Singh ran towards border and did not do anything to save Const. Pradeep Phukan. After hearing the sound of firing, officiating Platoon Commander HC Guman Singh along with 04 other Ors left BOP (Nokchi) for place of incident. After waiting for some time all 03 personnel went to OP Tower No. 1 again where they had kept wireless set and telephone. When they reached OP Tower No. 1, officiating platoon Commander HC Guman Singh and 04 other ORs had also arrived there.

7. A SCOI was ordered vide SHQ BSF, Shillong order No. DIG/LAW/1031/10(5)/98/02/326/33 dated 14 Sep" 98. The Court had blamed No. 92403730 Const. Yashpal No. 93002533 Const. Subhash Singh and No. 86003230 Const. Paras Singh and recommended disciplinary action against them which was further approved by DIG BSF, Shillong and IG BSF AMM&N Ftr Shillong. Accordingly Record of Evidence was conducted by Shri Pankaj Goomar, Second-in-Command 81 Bn BSF vide 81 Bn BSF Order No. 81/Estt/Nokchi/Disc(10)/98/11347-50 dated 05/10/98 and subsequently tried by Summary Security Force Court by Commandant 81 Bn BSF and dismissed all the above persons from service with effect from 15/06/99. At the trial all the three persons had pleaded guilty.

8. The SSFC along with Record of Evidence has been forwarded to Chief Law Officer FHQ vide DIG BSF, Shillong L/No.DIG/LAW/1024/99/2420- 22 dated 17th Nov"99.

5. Now, it is apparent that there is a complete mismatch in the charge and the version pleaded in the counter affidavit.

6. Learned counsel for the respondents concedes that Ct. Yashpal, Ct. Paras Singh, deceased Ct. Pradeep Phukan and the petitioner Ct. Subhash Singh were on operational duty at the Border Out Post with Ct. Yashpal and petitioner forming Operational Party No. 1 and Ct. Paras Singh and Ct. Pradeep Phukan as Operational Party No. 2. Learned counsel for the respondents further concedes that Operational Party No. 1 had to secure the pole area 1104 to 1105 and Operational Party No. 2 had to secure the pole area 1105 to 1107. Learned counsel also concedes that on said date Ct. Pradeep Phukan died inside Bangladesh territory and it is apparent that Ct. Pradeep Phukan had crossed over into Bangladesh.

7. As per the petitioner, and for which the petitioner relies upon statements made by the witnesses of the prosecution at the trial, notwithstanding it being recorded that the petitioner and the two co-accused pleaded guilty at the trial: in respect of which plea of guilt we find signatures of the accused not having been obtained; a sound emanated from the bushes at the border fencing which led Ct. Pradeep Phukan, Ct. Paras Singh, Ct. Yashpal and the petitioner to assemble

together so that the four could jointly investigate the cause of the sound. They moved in a formation with Ct.Pradeep Phukan in the front, Ct.Yashpal behind followed by the petitioner and the last in the formation being Ct.Paras Singh. They saw a track leading towards BP No. 1104 - S/7. As they reached the track, there was sound of fire. All four took cover. They scattered. Probably Ct.Pradeep Phukan had moved into Bangladesh territory, and whether he received gunshot wounds upon being fired by personnel of Bangladesh Rifles or miscreants is not clear. He died.

8. Learned counsel for the respondent states that it appears to be a case of total non-application of mind by the Commandant of the Unit who initially framed the charge at the stage of recording of evidence as was finally framed at the trial, ignoring the fact that in all probability, during Recording of Evidence what probably surfaced was that Ct.Pradeep Phukan as also the petitioner had entered Bangladesh to womanize and entered a house. Personnel of Bangladesh Rifle got information and came near the house; whereas petitioner ran back to Indian territory, Ct.Pradeep Phukan fired at the personnel of Bangladesh Rifles and started running back to India. Personnel of Bangladesh Rifles fired back. Ct.Pradeep Phukan died and the petitioner as also Ct.Yashpal and Ct.Paras Singh did not give cover fire and this was the act of cowardice. But, learned counsel has no explanation to render as to why then the charge in question: which is that the petitioner showed cowardice by not firing at the miscreants?

9. As per the petitioner, neither he nor Ct. Yashpal and Ct. Paras Singh could fire when miscreants fired at Ct. Pradeep Phukan because it was dark and the four jawans were not in sight of each other and any retaliatory firing by them could have endangered the life of the other. It has to be remembered that the incident took place when it was pitch dark i.e. 09:30 PM.

10. The absence of the Record of Evidence is a handicap for us to find out as to what happened, but highlighting that the justification given in the counter affidavit is a complete mismatch with the charge laid, we dispose of the writ petition quashing the verdict of guilt returned against the petitioner for the reason there is no evidence recorded at the trial which supports the verdict of guilt. We highlight that as per the counter affidavit filed there is no justification pleaded with reference to evidence to sustain the verdict of guilt. A completely different version of the incident is sought to be projected in the counter affidavit.

11. The petitioner would be reinstated in service with all consequential benefits. No costs.