

(2014) 02 DEL CK 0082

In the Delhi High Court

Case No : Writ Petition (C) 7630 of 2002

Vijay Rajan P. and Others

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 17-02-2014

Acts Referred:

Border Security Force Act, 1968 — Section 115 116 128 48

Citation : (2014) 02 DEL CK 0082

Hon'ble Judges : Pradeep Nandrajog, J; Jayant Nath, J

Bench : Division Bench

Advocate : Anil Gautam, for the Appellant; Anjana Gosain, Advocate and Mr. Pradeep Desodhya, Advocate and Mr. Bhupinder Sharma, Dy. Comdt./BSF, for the Respondent

Judgement

Pradeep Nandrajog, J.—Heard learned counsel for the parties. Section 115 and Section 116 of the BSF Act read as under:-

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 his 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.

116. Alteration of findings or sentence in certain cases-(1) Where a finding of guilty by a Security Force Court, which has been confirmed or which does not require confirmation, is found for any reason to be invalid or cannot be supported by the evidence, the authority which would have had power u/s 128 to commute the punishment awarded by the sentence, if the finding had been valid, may substitute a new finding and pass a sentence for the offence specified or involved

in such finding:

Provided that no such substitution shall be made unless such finding could have been validly made by the Security Force Court on the charge and unless it appears that the Security Force Court must have been satisfied of the facts establishing the said offence.

(2) Where a sentence passed by a Security Force Court which has been confirmed, or which does not require confirmation, not being a sentence passed in pursuance of a new finding substituted under sub-section (1), is found for any reason to be invalid, the authority referred to in sub-section (1) may pass a valid sentence.

(3) The punishment awarded by a sentence passed under sub-section (1) or sub-section (2) shall not be higher in the scale of punishments than, or in excess of, the punishment awarded by, the sentence for which a new sentence is substituted under this section.

(4) Any finding substituted, or any sentence passed, under this section shall, for the purposes of this Act and the rules, have effect as if it were a finding or sentence, as the case may be, of a Security Force Court.

2. Rule 160 and Rule 161 of the BSF Rules, 1969 read as under:-

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.

3. It is apparent that as per the statute read with the rules proceedings of every Summary Security Force Court have to be forwarded to an officer not below the

rank of a Deputy Inspector General within whose command the trial was held. The authority concerned is charged with the duty to see whether there is any act which invalidates the trial or whether the finding returned cannot be supported by the evidence. The additional power is to commute the punishment awarded by the sentence and substitute the same with a new finding on sentence.

4. It hardly need any emphasis that a valuable right is vested in a force personnel subjected to a Summary Security Force Court trial under the aforementioned statutory provisions and thus the same officer who presided over the Court cannot discharge the powers u/s 115 read with Section 116 and Rule 160 and Rule 161. The reason is that no one can be a judge in his own cause. The other reason could be that no appeal shall lie from caesar to caesar.

5. It is in this context we have to note the fact that the Commandant of the Battalion to which petitioners were attached, namely Mohinder Lal presided over the Summary Security Force Court trial. He held petitioners guilty. He punished them with a sentence of dismissal from service

6. In paragraph 28 of the writ petition the petitioners have pleaded as under:-

28. That the SSFC trial proceedings are also vitiated on account of biased, prejudiced and malafide action on the part of Shri Mohinder Lal, who had dismissed the petitioners from service as Commandant and subsequently officiating as DIG, Malda he himself confirmed and countersigned the SSFC trial proceedings.

7. In response the respondents pleaded as under:-

I state that the contents of para 28 are wrong and denied. I state that it was just incidental that Sh. Mohinder Lal, Commandant had to perform the duties of DIG BSF Malda Sector on officiating basis when the SSFC proceedings against the petitioners were taken up with the Sector Comdr. i.e. DIG for counter signature. I further state that it was a routine official duty done by the Commandant of the petitioners on merits but without having prejudice in his mind and based on the evidence on the trial proceedings.

8. It is apparent that the respondents admit that Commandant Mohinder Lal presided over the Court at which petitioners were subjected to a Summary Security Force Court trial. The respondents admit that acting as the officiating DIG, Mohinder Lal dealt with the Summary Security Force Court proceedings sent to him u/s 115 and passed the necessary order as per Section 116.

9. Thus, the confirmation proceedings are liable to be quashed.

10. Ordered accordingly.

11. The question which would now arise would be: Should we remit the matter for reconsideration by the Confirming Authority or should we proceed to pass such appropriate orders as interest of justice would warrant keeping in view the fact that aforesaid writ petition filed in the year 2002 has remained pending in

the record room of this Court till today. Its turn for hearing has matured today.

12. We note that the petitioners, employed as constables in BSF in the year 1990, were performing OP duty near border pillar 268 on the intervening night of 11th and 12th April, 1998. The border pillar is on the Indo-Bangladesh Border.

13. Assistant Commandant Vijay Singh Ghamoria submitted an offence report that he had seen petitioners overlooking goods being transported from India to Bangladesh on bicycles. The petitioners faced a trail for said offence i.e. permitting smuggling at the Indo-Bangladesh Border.

14. Before the trial, during Recording of Evidence proceedings, initiated under Rule 45 of the BSF Rules, 1969, 7 witnesses were examined. One more was examined at the additional ROE. Save and except 3 witnesses at the ROE who supported at the indictment, the others did not do so. They deposed favourably to the petitioners. It is apparent that at the trial only 3 witnesses were examined.

15. Assistant Commandant Vijay Singh Ghamoria appeared as PW-1 and deposed that on the intervening night, in fact it being early dawn the time being 00:45 hours, as he reached pillar No. 268 he observed a large gathering of people on the border. He saw them carrying loaded cycles from India to Bangladesh. Since the culvert was broken he has to leave his motorcycle. He ran towards the place. He saw petitioners standing at a distance of 50 yards from each other. The two were overlooking the smuggling activity. On seeing him the two were taken up back and prayed for forgiveness. On further inquiry they told him that they had permitted 21 cycles loaded with rice and sugar to cross over Indo-Bangladesh for which they charged Rs. 30/- per cycle. He asked them to acknowledge their guilt in writing but they refused. He deposed that he reached BOP Saligram and called the Post Commander HC Sudarsan Roy. Both of them returned to the place of the occurrence, where in the presence of HC Sudarsan Roy the petitioners kept quiet when questioned as to why they were permitting smuggling.

16. Relevant would it be to note that Vijay Singh Ghamoria has not deposed that he seized any money from the person of either petitioner.

17. HC Sudarsan Roy PW-2, deposed that at around 07:00 hours on April 12, 1988 Vijay Singh Ghamoria came to his BOP and told him that he had seized 26 cycles near the BOP where petitioners were on guard duty. On reaching the place he could not find any seized cycles. He asked Vijay Singh Ghamoria as to where were the cycles to which Vijay Singh Ghamoria replied that he had seen them inside Bangladesh.

18. Ct./Driver Harbans Lal PW-3 deposed that he was ordered by Assistant Commandant Vijay Singh Ghamoria to be ready for patrolling duty. When they neared pillar No. 268 the motor cycle could not cross a broken culvert. They left the motorcycle and went on foot, as they neared Sobra BOP Assistant Commandant Vijay Singh Ghamoria ordered him to go towards the last pillar, after a few minutes he called him to bring the motorcycle. When he reached near

Vijay Singh Ghamoria he told him that smuggled goods had passed from the point. He proceeded to BOP Saligram where they met HC Sudarsan Rai.

19. A perusal of the testimony of HC Sudarsan Rai would reveal that far from supporting the case of the prosecution he has deposed facts which are destructive of the testimony of Assistant Commandant Vijay Singh Ghamoria, in that, as per him Vijay Singh Ghamoria had told HC Sudarsan Rai that he had seized 26 cycles, but at the spot none were found seized. The testimony of Ct./ Driver Harbans Lal would bring out that he witnessed nothing. He simply deposed facts which were told to him by Vijay Singh Ghamoria.

20. As per the petitioners, a stand which they took during recording of evidence and at the trial, Assistant Commandant Vijay Singh Ghamoria was demanding bribe from them under threat of false allegation.

21. We have noted aforesaid facts to bring out two points. Firstly that Vijay Singh Ghamoria who claims that petitioners confessed having permitted 21 cycles loaded with rice and sugar to cross over the border by charging Rs. 30/- from each cycle has not even bothered to effect any recovery of the alleged illegal money. The second point which need to highlight is that at the recording of evidence all witnesses turned hostile save and except 3. We have analyzed the testimony of 3 witnesses hereinabove and find that one speaks in a language which is destructive of the testimony of Assistant Commandant Vijay Singh Ghamoria. The second witness (being 3rd in the series) deposed facts which are hearsay evidence.

22. Under the circumstances testimony of Assistant Commandant Vijay Singh Ghamoria requires to be re-appreciated and reconsidered with a pinch of salt. It is not an open and shut case. It is not a case of a kind where but for the technical infirmity in the confirmation proceedings the gravity of the offence is of a kind which warrants 12 years delay in deciding the writ petition to be overlooked.

23. These are our reasons to hold that we are not to transmit the matter for confirmation proceedings to take place again. 12 years have passed by. The petitioners have been without a job for 12 years. We dispose of the petition quashing the sentence of dismissal from service imposed upon the petitioners. They would be reinstated in service with all consequential benefits except back wages.

24. We are denying back wages influenced by the fundamental rules which empower the Appellate Authority, which include the Court, which sets aside a punishment of dismissal from service due to technical defaults and does not order fresh proceedings to be drawn up. We clarify. Save and except back wages, petitioners would be entitled to all consequential benefits which would include notional increments to be granted to them; continuous length of service rendered and pension etc. Seniority shall be retained.

25. Upon petitioners reporting to the DG BSF along with the certified copy of the present decision the DG BSF shall issue a posting order requiring the petitioners to join duty.

26. No costs. DASTI.