

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: February 03, 2011
Judgment Delivered on: February 22, 2011

+ **W.P.(C) 2432/2010**

SATNAM SINGH Petitioner
Through: Mr.Anil Gautam, Advocate.

versus

UOI & ORS. Respondents
Through: Mr.P.S.Panwar, Advocate with
Asstt.Cmdt.Bhupinder Sharma, BSF

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. The petitioner was charged as under :-

“The accused No.92009110 Constable MALLE BOINA RAJ KUMAR (Accused No.1) and No.926000304 Constable SATNAM SINGH (Accused No.2) of ‘C’ Coy, 105 Bn BSF are charged with:-

BSF ACT
1968
SECTION
- 40

AN OMISSION PREJUDICIAL TO
GOOD ORDER AND DISCIPLINE OF
THE FORCE

In that he,
on the night intervening 25/26
Nov, 2008 while performing Naka
duty at Naka No.05 & 06
(Combined Naka) of BOP

Kanapara 'C' Coy 105 Bn BSF, alongwith No.05254084 Harish Singh, were so negligent that resulted in crossing over of Appx 40-50 Nos. cattle heads from their AOR from India to Bangladesh."

2. At the trial held at the Summary Security Force Court, the petitioner was held guilty and the Commandant of the battalion to which the petitioner was attached, considering the past service record of the petitioner levied the penalty of dismissal from service vide order dated 20.3.2009 against which the statutory petition filed by the petitioner was rejected vide order dated 13.11.2009. The petitioner questions the said two orders.

3. We commence our journey by noting that the petitioner did not dispute being on Naka duty at the time and the place alleged in the charge, but clarifies that he was stationed at Naka No.5 and not Naka No. 6 i.e. disputes that the duty was joint on the two Nakas i.e. Naka No.5 and Naka No.6. The petitioner does not dispute that approximately 40 to 50 cattle had crossed over the border from the territory of India to that of Bangladesh. The petitioner, however, explains that the trespass took place from a point approximately 30 yards from Naka No.6, but concedes that the said point was within the area covered by Naka No.5 and Naka No.6. It is not in dispute that the distance between the spot wherefrom trespass took place is at a distance of approximately 150 yards from Naka No.5.

4. With the aforesaid admitted and disputed position between the parties, we think we would be justified, while

noting the evidence, in bringing out the relevant evidence with greater clarity and compressing the remainder. But before that, we must note that before convening the Summary Security Force Court, the Commandant of the unit had ordered a Record of Evidence to be recorded and at which evidence surfaced that the trespass of cattle as alleged had taken place and based on the said Record of Evidence, the Commandant had directed the framing of a charge and trial of the petitioner, and thus we reject the first contention which was urged that there was no evidence to even convene a Summary Security Force Court.

5. Statements of four witnesses were recorded at the stage of Record of Evidence, out of whom only three were examined at the summary trial. The three witnesses are SI Dayanand PW-1, Ct. Harish Singh PW-2 and Insp. Sultan Singh PW-3.

6. Insp. Sultan Singh PW-3 deposed that on 25.11.2008, at about 22:00 hours he had been tipped off by Insp. G.Murgesham that cattle would be smuggled into Bangladesh from a point somewhere near Naka No.5 and Naka No.6 and thus he had required SI Dayanand to be alert. At dawn on 26.11.2008 SI Abhay Kumar informed him that at the night cattle had been smuggled from Naka No.5 and Naka No.6 and he went to the spot and on inspection found several fresh hoofmarks and fresh cow dung and from the same he could estimate that 40-50 cattle had been smuggled across. That being the Officiating Company Commander he questioned the petitioner, Ct. Harish Singh and Ct. M.B.Rajkumar, the three constables on duty at Naka No.5 and Naka No.6 as to what had happened. Ct. M.B.Rajkumar confessed that 28-30 cattle had

crossed over into Bangladesh around midnight. Ct. Harish Singh statedly informed him that as per practice, by turn, one jawan used to take rest at the Naka post and the remaining two would be stationed, one each at the Naka post, and that around midnight was his turn to be taking rest. Thus, Ct. Harish Singh disclaimed any knowledge. He deposed that the petitioner told him that around midnight, petitioner was at Naka No.5 and Ct.M.B.Rajkumar was at Naka No.6. Relevant would it be to note that on being cross-examined, Insp.Sultan Singh stated that he was not sure whether any Radio Set was issued at the Naka, but clarified that as per orders, every Naka ought to have had a Radio Set, and if one was not provided, the Post Commander should have been approached before proceeding on duty to the Naka.

7. SI Dayanand PW-1 deposed that he was the Post Commander and the Officiating Company Commander had telephonically informed him at 22:00 hours on 25.11.2008 of cattle being likely to be smuggled from India to Bangladesh from Naka No.5 and 6 of BOP Kanarpara and thus he informed all troops to remain on alert, except the troops at Naka No.5 & 6, to whom information was given by SI Abhay Kumar. He deposed to further events which took place in the morning of 26.11.2008 and suffice would it be to record that he corroborated PW-3 in relation thereto.

8. Relevant would it be to note that on being cross-examined, SI Dayanand admitted: *If the cattle cross in small numbers or smaller groups, there is a likelihood that the persons deployed at Naka No.5 may not detect their movement but crossing of 40-50 number cattle would*

constitute 25-50 such smaller groups which shall entail quite a long time spent for crossing of these many cattle. The detection of cattle crossing in such a case by Naka persons deployed in adjoining areas must be there.

9. It is apparent that the answer of SI Dayanand is a little inchoate, but at least brings out one facet. That of a possibility of the person deployed at Naka No.5 not detecting the cattle movement if the number of cattle crossing was small or if the number was large, the crossing over was spaced in point of time by the cattle crossing over in smaller lots. It is also further relevant to note that he admitted that the point wherefrom the cattle had crossed was 30 yards from Naka Point No.6 and about 150 yards away from Naka Point No.5 i.e. the Naka Point where petitioner was carrying out duty at midnight.

10. Ct.Harish Singh PW-2 deposed that he along with Ct.M.B.Raj Kumar and the petitioner were detailed for Naka duties at combined Naka No.5 and 6 and he was on rest from 22:00 hours to 01:00 hours when Ct.M.B.Raj Kumar woke him to take over duty from him and told him to check the area properly as a few cattle had crossed over and that the Officiating Company Commander had questioned him on 26.11.2008 morning as also the other 2 constables.

11. This then is the entirety of the evidence led at the trial, and we may safely note that petitioner's defence that the Naka duty at Naka No.5 and Naka No.6 was not joint is demolished. The evidence establishes that, as per procedures, 3 jawans were allocated to 2 Naka points, with 1 jawan to be taking rest at any point of time and his relieving 1 out of the 2

remaining jawans on duty and so on. It is apparent that at any given point of time, only 1 jawan would be at 1 Naka point and since 2 Naka points were under a joint Naka, 2 jawans would be on vigil and 1 would take rest.

12. The evidence further establishes that the point where from the cattle trespassed was near Naka Point No.6 and that at the relevant time the petitioner was at Naka Point No.5. There is further evidence that if a small number of cattle crossed over the border from the point in question, or if the number was large, but the crossing over was in small lots spaced over time, there was a likelihood of the jawan at Naka Point No.5 not noticing the cattle crossing over.

13. In his defence statement the petitioner stated that at the alleged time when the cattle had crossed, he was at Naka Point No.5 and could not and did not notice any cattle crossing over, but admitted that around 23:30 hours heard noise as if lot of villagers were coming. He shouted to Ct.M.B.Raj Kumar and enquired what was happening to which Ct.M.B.Raj Kumar replied that nothing had happened. Suspecting something amiss, he rushed to Naka No.4 and told Ct.Shyam Lal with a request to inform the Post Commander since Naka No.4 was equipped with a Radio Set, but unfortunately, no Radio contact could be made. Relevant would it be to note that Ct.M.B.Raj Kumar, the co-accused at the trial stated that it was a foggy night and being cold he went into slumber and hence did not notice anything amiss.

14. It is apparent that Ct.M.B.Raj Kumar admitted being negligent i.e. sleeping on duty. As regards the petitioner, his statement is exculpatory of the guilt and in this context it

assumes importance to highlight the testimony of SI Dayanand PW-1, which as noted herein above, certainly admits of the fact that if a small number of cattle had crossed over or if the number was large, but the crossing over was in small lots, it was possible for the petitioner not to have detected the cattle crossing over.

15. Now, there is no evidence that 40-50 cows had crossed over. The evidence is the estimate stated by SI Dayanand and for which the basis for the estimate is his formation of opinion with respect to the several hoofmarks and fresh cow dung which he and Insp.Sultan Singh saw in the wee hours of the morning.

16. It may be possible to predict, with some amount of accuracy, if the number of cattle is between 4 to 8, to give a figure that the number was between 4 to 8 and our reason for so stating is the less intensity of hoof marks on the path on which the cattle had treaded. But as the number increases, the intensity of the hoof marks increases and beyond a point it may become impossible to state the figure with some amount of approximation. Beyond 15 or 20 in number, it would become virtually impossible to state a number with a fair degree of exactitude.

17. It is in the context of the afore-noted evidence and circumstances, it needs to be further factored that Ct.M.B.Raj Kumar admitted to his guilt of being asleep while on duty.

18. Unfortunately, the decisions at the Summary Security Force Court Trials are not required to be reasoned verdicts and thus we do not have the benefit of understanding the logic and the reasoning adopted by the Court. Similarly, even the order

rejecting the petitioner's Statutory Petition is without any reasons.

19. Before tying up the various loose ends, which we have allowed to float for the time being, we may note that the 4 penalties levied in the past upon the petitioner pertain to stated acts of negligence resulting in cattle crossing over (1 indictment); and indictment for using force against a civilian while on duty at Amarnath Yatra (1 indictment); absence without leave (1 indictment); and leaving duty post without intimation (1 indictment).

20. Admittedly, the petitioner joined as a Constable on 23.5.1992 and as of 20.3.2009 i.e. the date of his dismissal from service, had rendered 16 years, 7 months and 9 days service.

21. Let us now tie all the loose ends and see what fabric is weaved. Pertaining to the stated incidents, we have the weight of the evidence favourable to the petitioner, with a very minor weighted evidence leaning against the petitioner. But, the minor weighted evidence leaning against the petitioner loses its weighted value in view of the admission of guilt by Ct.M.B.Raj Kumar. The fabric woven by the evidence is that there is no certainty in the number of the cattle which had crossed over and if the number was small, there was every possibility of the petitioner not being in a position to detect the same. Even if the number was large, but the crossing over was in small lots, there was possibility of the petitioner not being able to detect the trespass. As per PW-1 he admittedly did not inform Naka Point No.5 and 6 that a tip off had been received that cattle would be smuggled across and his

statement that said information was conveyed to Naka Point No.5 and 6 by SI Abhay Kumar is without a proof of SI Abhay Kumar actually conveying as aforesaid. It assumes importance to note that SI Abhay Kumar was examined during recording of evidence wherein he had stated that he never passed on any information to the personnel at Naka Point No.5 and 6 and had merely informed the personnel at Naka Point No.4 to do the needful. This corroborates the defence of the petitioner that at Naka Point No.5 and 6 Radio Set was not available, for if one was available at said 2 Naka points, direct information could have been conveyed to the jawans at Naka Point No.5 and 6. The overwhelming evidence weaves the fabric favourable to the petitioner and in this context it assumes importance that according to the petitioner at around midnight a huge noise as if the entire village was on the move was heard by him coming from the side of Naka Point No.6 and therefrom it can be gathered that there is every possibility of the villagers making a noise to drown the moos of the cattle thereby making it difficult for a person at Naka Point No.5 to detect anything being amiss.

22. We had asked learned counsel for the respondents that what should a jawan do when he sees or detects a herd of cattle tread along a path and probably cantering across due to human noises from the rear guiding them to move in the opposite direction. Counsel replied that except for shooting the cattle, nothing more can be done by a jawan. When questioned whether it would be justified to kill innocent animals, who are unmindful of their fate across the border,

learned counsel, very fairly conceded that it would be a catch 22 situation for the jawan.

23. Conscious as we are of not only human but cattle trafficking at the Indo-Bangladesh Border, but we cannot lose sight of the fact that this racket cannot be run and managed by the constables of BSF, who are at the bottom rung of the ladder. The connivance has to be, if at all, at the top.

24. There being no proof of the fact that the tip off pertaining to cattle being smuggled was conveyed to Naka Point No.5 and 6; there being evidence of a possibility of petitioner not noticing the cattle crossing over; there being no determinative evidence that 50-60 cattle crossed over; there being evidence that there was no radio contact at Naka Point No.5 and Naka Point No.6; there being admission of Guilt by Ct.M.B.Raj Kumar; there being no evidence that the petitioner made a gain by permitting illegal trafficking of cattle and finally noting that the charge was one of being negligent on duty, we are of the considered opinion that the sketchy incriminating evidence against the petitioner is too tenuous even within the confines of standard to be achieved at a domestic inquiry to return a verdict of Guilt against the petitioner; certainly not of a quality and standard to hold that the petitioner should lose his job even factoring in the past 4 penalties inflicted upon the petitioner in his 16 years and 7 months service, the 4 penalties being of having committed fairly minor wrongs.

25. We dispose of the writ petition quashing the order dated 20.03.2009 as also the order dated 13.11.2009 and direct petitioner to be reinstated in service with all consequential benefits save and except no wages to be paid to him for the

period post 13.11.2009 till he is reinstated in service and for which we fix the upper time limit to be six weeks from date of receipt of a certified copy of this order by the Competent Authority.

26. No costs.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**FEBRUARY 22, 2011
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