

- IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: March 23, 2011
Judgment Delivered on: March 25, 2011

+ W.P.(C) 8973/2007

CONST.TANVEER AHMED KHAN
 & ANR. Petitioners
 Through: Mr.D.S.Kauntae, Advocate

versus

UOI & ORS. Respondents
 Through: Ms.Sonia Mathur, Advocate with
 Mr.Rajat Soni, Advocate and
 Mr.Bhupinder Singh, Assistant
 Commandant (Litigation) 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. Pertaining to an incident of cattle crossing from the territory of India to Bangladesh at BOP Lal Bazaar the Commandant of the 46th Bn. BSF took cognizance of the offence report and reduced the allegation to writing in the form set out in Appendix VI of the BSF Rules 1969 i.e. drew out a charge sheet against the petitioners and on 29.7.2007, Rakesh Chauhan 2-IC functioning as the

Commandant in the absence of the Commandant 46th Bn BSF ordered Pawan Kumar Asst. Commandant 46th Bn. BSF to prepare the Record of Evidence. In pursuance of the said order, Record of Evidence was prepared by Pawan Kumar and 4 prosecution witnesses were examined in the presence of the petitioners who were given an opportunity to cross-examine the witnesses, which opportunity they declined to avail and thus no witness was cross-examined.

2. Insp.Gopal Ram PW-1 deposed that he had been informed through his source/contacts that smuggling was facilitated in some areas falling under BOP Lal Bazaar on the days when the weather was bad i.e. rainy/cloudy. He was keeping surveillance in that area. On 28th July 2007, he informed Abhimanyu Jha (DC), Coy Commander that as the weather was bad on that day there were chances of smuggling taking place in that area and thus the need to be vigilant. At about 19:00 hours, he along with Ct.Ram Sagar left from Bara Mircha Bazaar on cycles through a katcha (jagged) track which leads to Gitaldah Barah Mircha Fence Gate No.1 of BOP Lal Bazaar. On reaching Border Track near Gate No.1 of BOP Lal Bazaar approx.100 meters away from culvert No.75/93 near BP No. 903/105, he heard sounds as if something was moving in the water. He shouted and immediately ran towards the culvert side. Halfway, he saw Ct.Ajay Kumar i.e. petitioner No.2. He told him to check as to what was happening on the culvert side. On reaching at the culvert he saw that 8-10 civilians with 15-20 calves were going towards the village Gitaldah Bara Mircha. He heard sounds indicative of something moving through the water

towards Border side but due to bamboo bushes and Nala (drain) he could not see anything. After 4-5 minutes Ct.Tanveer Ahmed petitioner No.1 who was standing approx.150 meter away from the culvert towards BOP Bara Mircha on border track reached at the spot. He questioned Ct.Tanveer Ahmed and Ct.Ajay kumar as to who was Patrol Commander and who was on duty at this location. Both of them told him that they were on duty in that area. Then with help of torch light he conducted search in that area and had found that one bamboo made phhata (plank) was inserted between the fences ahead the culvert to facilitate the smuggling. He noticed that one calf was trapped between the fences. He told Ct.Tanveer Ahmed and Ct.Ajay Kumar to pull the calf out. He then asked both the constables for an explanation. They told him that they were not involved, and took the plea that villagers take advantage of bad weather and heavy rain to do smuggling. But both of them accepted that they acted negligently while on duty. Then he asked Ct.Tanveer Ahmed to call the Post Commander of BOP Lal Bazaar at this location. In the mean time A.JHA (DC), Coy Commander reached at the place of incident. He reported the whole incident to Coy Commander. After some time SI Inder Mohan Singh, Post commander of BOP Lal Bazaar also reached there. Coy Commander gave the report about the incident to Commandant on mobile. At about 22:00 hours both the constables were brought to Coy HQ at BOP Bara Mircha by Coy Commander. A.Jha (DC), Coy Commander enquired from both the constables about the

incident and they both confessed about conniving with smugglers and giving them safe passage for smuggling.

3. Ct.Ram Sagar PW-2 corroborated the testimony of PW-1.

4. SI Inder Mohan Singh PW-3 deposed and that on 28.7.2007 at about 20:00 hours, Ct.Tanveer informed him on the wireless that he should immediately reach at ACP No.3. He reached there at about 20:15 hours with Ct.Sajeev Kumar and saw that A.Jha, Coy Commander and Insp.Gopal Ram were already present there i.e at culvert No.75/93 near BP No. 903/105. He also saw one seized calf and bamboo made phatta(plank) near the culvert. He enquired from Ct.Tanveer Ahmed and Ct.Ajay Kumar about the incident. Both of them confessed to him that they gave safe passage to smugglers to smuggle calves into Bangladesh. Thereafter both the accused were taken to Bara Mircha and at about 00:15 hours, he along with Ct.Sanjeev Kumar came back to BOP Lal Bazaar.

5. Abhimanyu Jha DC PW-4 deposed that the area of responsibility of 'B'Coy is from BOP Nauhati to BOP Lal Bazaar with BOP Bara Mircha as Coy HQ. He stated that although the Coy was effectively guarding the border, recently some report were coming about smuggling activities in the areas falling under BOP Lal Bazaar during bad rainy weather. Due to which he along with "G" staff of Bara Mircha was keeping a track in general area. On 28.7.2007, Insp.Gopal Ram (PW-1) told him that smuggling may took place in the night as the weather was bad on that day. At about 19:00 hours he moved towards BOP Nauhati

area and after a brief halt, he headed towards BOP Lal Bazaar Area. At about 20:00 hours he reached at culvert No.75/93 which falls in area of responsibility of BOP Lal Bazaar, Naka Patrol Pt. No.3 near BP No.903/105. Ct. Tanveer Ahmed and Ct.Ajay kumar were on duty in that area from 18:00 hours to 24:00 hours. Both of them looked as if they had been caught red handed. Insp.Gopal Ram was standing near the culvert. He saw a phatta (plank) made of bamboo was inserted between the fences and a seized calf with minor scratches. He enquired about the incident and Insp.Gopal Ram told him that he reached there about 5-10 minutes earlier and told him i.e. Abimanyu Jha, DC about the whole incident as he deposed in his testimony as PW-1. In the mean time SI Inder Mohan Singh Post Commander BOP Lal Bazaar also reached at the place of incident. Then he brought both accused persons to BOP Bara Mircha. Their physical search was conducted but no money had been recovered. He again questioned them and both of them pleaded that they were innocent and do not know anything in this regard. But after continuous questioning they confessed about their connivance with the smugglers and for giving them safe passage for carrying out smuggling. They confessed that 5 pair of calves at the rate of ₹300/- per pair were to be smuggled. Also, both of them gave in writing about the incident. The said letters are attached with the ROE proceedings as Exhibit 'A' and 'B'. After that he had reported the whole incident to Commandant 46th Bn BSF.

6. Complying with BSF Rule 48(3), the petitioners were asked whether they wish to make any statement, to which they refused.

7. On perusal of Record of Evidence the Commandant framed a charge under Section 40 of the BSF Act which reads as under:-

"BSF ACT 1968
U/S 40

AN ACT PREJUDICIAL TO
GOOD ORDER AND
DISCIPLINE OF THE FORCE

In that they,
at Naka/Patrolling Point No.3
(AOR from BP No.903/10 S
to 904/M) or BOP Lal Bazar
on 28 Jul 2007 in 1800 hr to
2400 hr shift entered into a
deal with smugglers for
allowing five pair of calves
@ ₹300/- per pair to be
crossed over to Bangladesh
by placing planks over IBB
fence near BP No.903/10 S
but were caught by
No.730017626 Inspr. (G)
Gopal Ram at about 2000
hrs while one calf was in the
process of being smuggled,
which was seized."

8. With respect to the charge the petitioner was tried at a Summary Security Force Court presided over by the Commandant and when the Court convened on 1.8.2007, on the charge being read out to him, the petitioners pleaded 'Guilty'.

9. Relevant would it be to note that the original record produced before us, the plea of guilt has not been signed by the petitioners.

10. It may be noted that in view of the evidence led during Record of Inquiry and the plea of guilt statedly entered by the petitioners, both have been visited with the penalty of dismissal from service.

11. It needs to be highlighted that as per the record produced, it has been noted by the Commandant that he had explained to the accused the seriousness of the charge and that the plea of guilt would have consequences to follow. The record also shows that when the accused were told whether they intend to make any statement in reference to charge or in mitigation of punishment, both responded of accepting the mistake and expressing regret with a prayer not to be dismissed from service.

12. Record shows that said question and answer has not been signed by the petitioners.

13. It is relevant to note that the procedure to be followed at a Security Force Court as per Rule 65 to Rule 93, does not provide that a plea of guilt needs to be signed by the accused, but it would always be advisable to obtain the signatures, lest the accused takes a stand before a Court of law that he never pleaded guilty for the reason in the absence of any such signatures, the Court would be confronted with a situation of a word of mouth of the accused that he never pleaded guilty and the word of mouth of the department that the accused pleaded guilty and needless to state in such a situation, where the penalty

imposed is of dismissal from service, a Court would be compelled to lean in favour of the accused.

14. But, in the instant case, we find that in the statutory appeal filed by the petitioners they never pleaded that at the Security Force Trial the plea of guilt was not made by them. In the appeal filed it is stated that inadmissible evidence i.e. the written confessional statements obtained from the petitioners soon after the alleged incident were inadmissible evidence and thus they could not be held guilty on the basis thereof. They took the plea that they were granted less than 24 hours to prepare their defence at the Summary Security Force Court. They took the plea that Insp.Gopal Ram was an interested witness. They took various other pleas, which we do not note for the reason, during arguments in the writ petition the only pleas urged were that: (i) petitioners never pleaded guilty at the trial; (ii) the written confessional statements obtained after the alleged incident were inadmissible in evidence; (iii) they were granted less than 24 hours to prepare their defence; and (iv) Insp.Gopal Ram was an interested witness.

15. We negate the first plea for the reason it was never taken up in the appeal filed against the sentence of guilt and the punishment imposed. It is apparent that the petitioners are trying to take an advantage of a procedural mistake. As regards the plea that they were granted less than 24 hours to prepare the defence, they were informed of the trial commencing at around 9:00 PM on 30.7.2007 and the trial commenced at 10:00 AM on 1.8.2007. The petitioners forgot that the month of July has 31 days. The

mandate of law as per Rule 63(6) of granting 24 hours time to prepare the defence is obviously complied with.

16. As regard the twin plea of their confessional statements being inadmissible in evidence and the testimony of Insp.Gopal Ram being tainted on account of his stated animosity towards the petitioners, it would be enough for us to hold that the evidence against the petitioners, apart from their confessional statements is the testimony of PW-1 to PW-3; the former two have proved cattle smuggling taking place right under the nose of the petitioners and the recovery of one calf which was entangled in the fence. Their testimony brings out that some human beings had tampered with the fence by inserting a wooden plank between the barbed wires, which we all know have sufficient ductility due to the malleable characteristic of iron, and thus if a wooden plank is inserted between barbed wires, the space immediate next to the wooden plank becomes more and this space can be misused to breach the barbed wire fence.

17. Assuming Inps.Gopal Ram was an interested witness, we would still have the testimony of PW-2 and PW-3, against whom no malice is alleged.

18. But, we deal with the malice alleged against Insp.Gopal Ram. The pleadings relatable thereto are to be found in para 19 of the writ petition which reads as under:-

“19. That it is most respectfully submitted that on 28.07.2007, before mounting on (my) duty; Constable Tanveer Ahmed was called and summoned by Inspector Gopal Ram in a lonely place at about 1600 hrs and Inspector Gopal instructed me to allow few pairs of Cattle to cross

the fencing into Bangladesh in exchange of a pre-decided rate of ₹300/- in Cash which would be paid to him by some person during his duty hours and hand over the entire cash to Inspector Gopal Ram after his duty is "off". Constable Tanveer Ahmed Khan was further instructed to be present at a distance of 150 yards at a pre-selected place and the other sentry with him must be briefed accordingly. This has been sanctioned from the "Top" as stated by Inspector Gopal Ram for which Constable Tanveer Ahmed Khan denied and expressed his inability and that was only the reason why Inspector Gopal Ram became annoyed and decided to take revenge from both of us though Constable Tanveer Ahmed Khan was having 17 years of service hence was aware of the general habits of Inspector Gopal Ram (PW-1) who has himself admitted in his statement that "..... like something might may be happened like crossing of cattles" That is why Inspector Gopal Ram used a cycle perhaps to hatch a conspiracy with so-called smugglers to whom he might have been knowing well and might have instructed to act in a desired fashion to implicate both the petitioners and to create a terror amongst others to either obey his orders or else face the dire consequence in a similar manner."

19. Suffice would it be to state that the plea on which malice is predicated is preposterous. The petitioners want us to believe that Insp. Gopal Ram had wanted them to facilitate smuggling of cattle and charged ₹300/- per pair of cattle and hand over the money to him and since the petitioners did not do so, Insp. Gopal Ram has contrived against the two. The petitioners, while raising the said plea, are blissfully ignorant of the fact that a calf was admittedly seized from the spot in a position which clearly indicates that the calf was being smuggled across. The scene at the

place of the offence suggested accomplicity of those on guard duty at the spot. Thus, within the confines of the quality of evidence which is required to be brought on record at a departmental action, we are satisfied that there is sufficient evidence to indict the petitioners. It may be true that apart from the confessions there is no evidence that petitioners were to receive illegal gratification in sum of ₹300/- for each pair of cattle permitted to be smuggled across, but surely, petitioners were not innocent bystanders.

20. The last plea urged that the penalty imposed was disproportionate, we may note that the fact that petitioners were found actively involved in cattle smuggling on 28.7.2007 does not mean that this was their first attempt to do so. Thus, the plea that past service record of the petitioners is spotless is neither here nor there. The adequacy or inadequacy of the penalty is within the jurisdiction of the Disciplinary Authority and unless manifestly disproportionate cannot be interfered by a Court.

21. We find no merits in the writ petition which is dismissed.

22. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

MARCH 25, 2011
mm