

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

% *Date of Decision: 25th January, 2011*

+ **W.P.(C) 14184/2009**

NARESH KUMAR Petitioner
Through: Mr.Anil Singal, Advocate

versus

UNION OF INDIA & ORS. Respondents
Through: Mr.Abhishek Goyal, Advocate with
Mr.Bhupender Sharma

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.(Oral)

1. The petitioner, Naresh Kumar was holding the post of a Constable in the Border Security Force when on 8.10.2007 at the Border outpost Asmeralga he allegedly picked up an unnecessary quarrel with HC Onkar Chand and assaulted him.

2. The Commandant Vineet Kumar of the Unit, to which the petitioner was attached directed a Record of Evidence to be prepared by the 2nd-In-Command, Bhagwan Singh 2-IC, who after putting the petitioner to notice of the two charges i.e. of assaulting HC Onkar Chand (first charge) and using threatening language against his superiors (second charge) completed the proceedings pertaining to Record of Evidence and during said period recorded the statements of various witnesses which, learned counsel for the petitioner concedes establishes that as per the charge on 8.10.2007 at

around 5:00 PM the petitioner sought permission from HC Onkar Chand to leave the Unit lines and fetch milk from outside to which HC Onkar Chand told him to go after some time since a roll call had to be recorded. Petitioner insisted and HC Onkar Chand relented. Petitioner left and returned with milk and after the roll call was taken he questioned HC Onkar Chand as to why he initially did not allow petitioner to leave the Unit line to which HC Onkar Chand responded by saying that whatever be the reason, it hardly mattered since petitioner was permitted to leave to fetch milk, which he did and returned by the time the roll call was taken and at that point of time petitioner directed a blow towards the face of HC Onkar Chand and since HC Onkar Chand took defensive and protective action to receive the blow on his arm the petitioner used threatening language against his superior i.e. HC Onkar Chand saying that what he did was nothing and he would finish him off with a single blow.

3. As per the BSF Act 1968 and the Rules of 1969 the Record of Evidence has to be considered by the Commandant of the Unit and depending upon the Record of Evidence the Commandant can either drop further proceedings or proceed in a summary fashion to dispose of the charge or alternatively to convene the Summary Security Force Court.

4. By the time the Record of Evidence was prepared it was the end of the month of October 2007, by which time the Commandant was on leave and Bhagwan Singh 2-IC, holding the substantive rank of Deputy Commandant was officiating as the Commandant of the Battalion. Thus, he himself considered the Record of Evidence and opined that a Summary Security Force be convened. It not being in dispute that the Commandant of the Unit is to act as the Court, Bhagwan Singh

acted as the Court and on 6th May, 2008 informed the petitioner that the Court would convene on 7th May, 2008. Petitioner was directed to attend. His attention was drawn that he could nominate any person to act as the Friend of the Accused. Petitioner nominated Deputy Commandant Gajender Singh to act as his Friend. The Court convened on 7th May, 2008. In the presence of Deputy Commandant Gajender Singh, petitioner was marched before the Court. The charge sheet was read and explained to the petitioner, as recorded in the proceedings of 7.5.2008. Petitioner pleaded guilty to both charges, which was duly recorded and thereafter petitioner signed the plea of guilt. Thereafter, the Court recorded that the petitioner pleaded guilty after being explained the charge as also the consequence of plea of guilt. The said recording in writing was got signed from the petitioner and thereafter considering that this was the 7th misdemeanour and earlier on for offences punishable under Section 19(a), 18(i), 19(a), 20(c), 19(b) and 40 of the BSF Act punishments of RI ranging between 5 days to 28 days were inflicted upon the petitioner the Officiating Commandant levied the penalty of dismissal from service, which has been maintained by the Appellate Authority.

5. At the forefront of the submission urged by learned counsel for the petitioner is that only the Commandant could have acted as the Court and since the Summary Security Force Court proceedings were conducted by the Officiating Commandant, the same are void.

6. Vide sub-clause (f) of Sub-Section 1 of Section 2 of the BSF Act 1968 Commandant is defined: *'Commandant', when used in any provision of this Act with reference to any Unit of the Force, means the officer whose duty it is under the*

Rules to discharge with respect to that Unit, the functions of a 'Commandant' in regards to matters of the description referred to in that provision.

7. It is thus apparent that any person who is charged with the duty to discharge with respect to a Unit the functions of a Commandant is deemed to be a Commandant and thus we reject the argument advanced. Suffice would it be to state that in the absence of the Commandant of the Unit the 2nd-In-Command was discharging the duties with respect to the Unit and hence was the Commandant of the Unit.

8. The second plea urged is that when Record of Evidence was drawn up, all witnesses were examined in the presence of each other and thus the Record of Evidence was vitiated.

9. The said plea is rejected by us, being an afterthought evidenced by the fact that the Record of Evidence was completed by 26.10.2007 and the Commandant directed Summary Security Force Court proceedings to be conducted on 5.5.2008 and at no point of time, for nearly 6 months the petitioner raised any issue pertaining to the proceedings of Record of Evidence.

10. Secondly, statements recorded during Record of Evidence have no value for the prosecution, but can be used by the defence when the witnesses appear before the Court for purposes of contradicting the witnesses. As noted hereinabove, the petitioner pleaded guilty before the Court. Therefore, the stage of recording evidence before the Court did not reach.

11. It is then urged that the petitioner was forced to sign the plea of guilt. Learned counsel urges that being a jawan the petitioner would not be expected to muster courage

against the Officiating Commandant who was acting as the Court.

12. The plea is rejected for the reason the petitioner had nominated a Deputy Commandant to act as the Friend of the Accused and the plea of guilt was recorded in the presence of the Friend of the Accused i.e. of the petitioner. It is difficult to accept the stand taken by the petitioner.

13. It is lastly urged that the penalty imposed is disproportionate.

14. Suffice would it be to state that the instant misdemeanour is the 7th in succession and it is settled law that past conduct can be considered and if it is to be found that a person is incorrigible, said propensity can be considered.

15. The petitioner is a member of an Armed Paramilitary Force and record shows that every 2 to 3 years he indulges in something or the other which constitutes an offence under the Act.

16. Under the circumstances it cannot be said that the penalty levied shocks the conscience of the Court.

17. The writ petition is dismissed in limine.

18. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

January 25, 2011
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