

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

% *Judgment Reserved on : February 26, 2014*
Judgment Delivered on : March 21, 2014

+ **W.P.(C) 2402/2003**

DHARAMBIR SINGH Petitioner

Represented by: Mr. Bhawani Shankar Sharma,
Advocate

versus

UNION OF INDIA & ORS. Respondents

Represented by: Ms. Anjana Gosain, CGSC with
Mr. Pradeep Desodhya, Advocate for
the respondents.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE JAYANT NATH

PRADEEP NANDRAJOG, J.

1. Writ petitioner challenges the order dated May 14, 2000, holding the petitioner guilty of the charges framed against him and inflicting punishment of dismissal from service. Statutory appeal and thereafter the revision filed were rejected vide orders dated February 06, 2002 and May 21, 2002 respectively. The same have also been challenged.
2. The petitioner was enrolled as a Lance Naik in the BSF and was attached to the 192nd Battalion. On February 19, 2000 the petitioner was detailed at Naka Point No.1, near BOP Gadra.
3. An offence report was put up before the Commandant listing three allegations against the petitioner : (i) of leaving the Naka Point without

permission; (ii) unauthorizedly entering the house of a civilian; and (iii) being in a state of intoxication. After hearing the petitioner with respect to the offence report the Commandant directed preparation of Record of Evidence.

4. At the Record of Evidence, five witnesses were examined by the prosecution viz. Ct.Ahibaran Singh PW-1, Ct.Rajesh Sharma PW-2, SI Vivek Dhiman PW-3, Sh.Dukhia Marki Munda PW-4 and Sh.Kiran Chandra Biswas PW-5.

5. Ct.Ahibaran Singh PW-1, deposed that on the day of the incident, i.e. February 19, 2000, he was detailed for naka (ambush) duty at Naka Point No. 1 near BP 735/3-S from 18:00 hours in the evening to 06:00 hours of the next morning. Ct.Rajesh Sharma (PW-2) was deployed with him and they were under the command of the petitioner. At around 18:30 hours, Ct.Rajesh Sharma and he were directed by the petitioner to check the border fencing and patrol the naka point. Accordingly, they left the naka point to do so. On their return at around 20:00 hours they saw the petitioner sitting at the naka point with a civilian who they identified to be Dukhia (PW-4) from the nearby village of Nawagram. Both were consuming alcohol. Petitioner told Ct.Rajesh Sharma and him that he was going to Nawagram village to drop Dukhia. Ct.Rajesh Sharma and he requested the petitioner not to leave the naka point since he i.e. petitioner was drunk and was unable to walk. Petitioner did not listen to them and left the naka point at around 20:45 hours, leaving behind his carbine unattended. He took the carbine in his possession. Thereafter, he heard noise of some commotion from Nawagram Village which was approximately 500 yards from the naka point. He asked Ct.Rajesh Sharma to go to the village and find out what

was the matter. Ct.Rajesh Sharma returned after ten minutes and told him that some villagers had encircled the petitioner over what appeared to be some sort of altercation. He immediately asked Ct.Rajesh Sharma to rush to BOP Gadra and apprise the Post Commander SI Vivek Dhiman about the situation. SI Vivek Dhiman reached the spot along with Ct.Indrajit and L.NK K.P.Sharma and rescued the petitioner from the agitated villagers. Petitioner was taken back to BOP Gadra. Later on he handed over the petitioner's carbine to SI Vivek Dhiman.

6. Petitioner refused to cross-examine the witness despite opportunity being granted.

7. Ct.Rajesh Sharma PW-2, deposed in sync with Ct.Ahibaran Singh PW-1.

8. SI Vivek Dhiman PW-3, deposed that on the day of the incident, Ct. Rajesh Sharma (PW-2) reported at BOP Gadra at around 21:30 hours and told him that petitioner had been encircled by a group of angry villagers at Nawagram village. He immediately left for Nawagram village with L.NK K.P.Sharma and Ct.Inderjeet. They reached Naka Point No.1 where they met Ct.Ahibaran Singh (PW-1). Ct.Ahibaran Singh handed over the petitioner's carbine to him. Thereafter, he left for Nawagram village along with the other officers. On reaching Nawagram village he saw the petitioner was encircled/*gheraoed* by around 15-20 villagers. He spoke to Sh.Kiran Biswas, a member of the Panchayat and after great deliberation managed to bring the petitioner back to Naka Point No.1. He ordered Ct.Indrajit to take the place of the petitioner at the naka point and brought the petitioner to BOP Gadru. He notified his superior, Insp.Mahan Singh about the incident.

9. Petitioner refused to cross-examine the witness despite opportunity being granted.

10. Sh.Dukhia Marki Munda PW-4, deposed that on the day of the incident at around 18:45 hours the petitioner visited his house. One Ct.Harpal Singh attached to 'A' Coy was already present at his house. All of them consumed country liquor. Thereafter, the petitioner and Ct.Harpal Singh left for Narayanjot OP. Petitioner returned to his house after fifteen minutes and took him to Naka Point No.1 where petitioner had kept another bottle of country liquor, which they consumed. At around 20:45 hours petitioner returned to Nawagram village along with him and they consumed more alcohol at his house. Petitioner who was very drunk became uncontrollable. At this his wife informed his uncle about the situation and asked him to remove petitioner from his house. His uncle along with some villagers came to his house and tried to remove the petitioner from his house but the petitioner started resisting them. An altercation started, and the villagers hit the petitioner on his face. They took the petitioner to the house of Sh.Kiran Biswas, a member of the village Panchayat. At around 22:15 hours the Post Commander, BOP Gardra reached the spot along with other personnel and rescued the petitioner from the villagers. The Post Commander spoke to the villagers and the matter was amicably resolved.

11. Petitioner refused to cross-examine the witness despite opportunity being granted.

12. Sh.Kiran Chandra Biswas PW-5, deposed that on the day of the incident, at around 21:30 hours some villagers brought the petitioner to his house. The petitioner was in a drunken state. Petitioner had been beaten by the villagers and he could see injuries on petitioner's face. On enquiring

from the villagers he was told that petitioner had consumed alcohol at the residence of Sh.Dukhia (PW-4). Thereafter a Sub-Inspector, BSF reached the spot and the matter was amicably settled.

13. Petitioner refused to cross-examine the witness despite opportunity being granted.

14. The record would evidence that after the statements of the witnesses were recorded the same were signed by the witness, the petitioner as also the officer who conducted the Recording of Evidence. Thereafter, it stands recorded that the petitioner was granted an opportunity to cross-examine the witnesses but he declined to do so. Thereafter, the signatures of the petitioner and the officer conducting the Recording of Evidence were appended.

15. Considering the Record of Evidence the Commandant opined that the petitioner should be tried at a Summary Security Force Court and for which he drew up a charge-sheet on May 09, 2000 and served the same upon the petitioner on the same day. The charge-sheet reads as under:-

“

I. BSF ACT – 1968
SECTION – 16 (d)

LEAVING HIS PIQUET
WITHOUT ORDERS FROM
HIS SUPERIOR OFFICE

In that he,

at Naka duty on 19.02.2000
left his Naka point at about
18:35 hrs without orders
from his superior officer.

II. BSF ACT – 1968
SECTION – 40

AN ACT PREJUDICIAL TO
GOOD ORDER AND

DISCIPLINE OF THE
FORCE

*In that he,
at about 18:45 hrs and
subsequently around 20:45
hrs on 19.02.2000, while on
Naka duty unauthorizedly
visited twice the house of one
Dukhiya resident of
NAWGRAM and consumed
country liquor.*

III.BSF ACT – 1968
SECTION -26

INTOXICATION

*In that he,
at about 20:00 hrs on
19.02.2000 was found in a
state of intoxication.”*

16. The record would reveal that the trial commenced on May 12, 2000 but was adjourned for the next day i.e. May 13, 2000 when at the arraignment the petitioner pleaded ‘Guilty’ to the first charge and pleaded ‘Not Guilty’ to the second and the third charge.

17. The record would evidence that since petitioner pleaded ‘Not Guilty’ to the second and the third charge the trial commenced with respect to said charges and the same five witnesses who were examined during Record of Evidence proceedings were examined; but in a different order. The order of the witnesses examined by the prosecution at the trial is as follows:- Ct.Ahibaran Singh PW-1, Sh. Dukhia PW-2, Sh.Kiran Chandra Biswas, PW-3, SI Vivek Dhiman PW-4, Ct.Rajesh Sharma PW-5.

18. The record would evidence that the petitioner cross-examined three of them viz. Ct.Ahibaran Singh PW-1, Sh. Dukhia PW-2 and Ct.Rajesh Sharma PW-5.

19. We note that the testimony of the three witnesses is the same as per their statements during Record of Evidence and since we have already noted the contents thereof we need not burden our opinion by re-reproducing the same. The petitioner cross-examined the three. The deposition of the other two witnesses at the trial is also the same as per their statements during Record of Evidence and thus we need not re-reproduce the same. The petitioner did not cross-examine Kiran Chandra Biswas and SI Vivek Dhiman.

20. Record would evidence that petitioner made a statement of defence during the trial. The petitioner stated that on the day of the incident he consumed alcohol at BOP Gadra before reaching the naka point. On reaching the naka point he directed Ct.Ahibaran Singh and Ct.Rajesh Sharma to check the border fencing and patrol the naka point. Thereafter he went towards BP 735/2-S to check the fencing. While crossing Sh.Dukhia's residence he heard the voice of BSF personnel emanating from Dukhia's house. He went inside and saw Ct.Harpal Singh sitting with Dukhia and consuming country made liquor. Ct.Harpal Singh asked him to join them and poured him a glass of alcohol. He took the glass and threw away the alcohol when the two of them were not watching. He took Ct.Harpal Singh outside the house and told him that he should not consume alcohol with a civilian. He told Ct.Harpal Singh that they can drink at their own location and took him to the naka point of 'A' Coy. He dropped Ct.Harpal Singh at 'A' Coy naka point and proceeded towards Naka Point No.1 where he was detailed.

He saw Dukhia on the way, who was drunk and he told him that he was going to the tea garden. He brought Dukhia to Naka Point No.1 with him. When Ct.Ahibaran Singh and Ct.Rajesh Sharma returned to the naka point he told them that he would drop Dukhia till Nawagram village and left. He left his carbine at the naka point. When they reached Nawagram village Dukhia insisted that he be dropped till his house. When they reached his house a group of villagers encircled them and attacked them. He was hit by a lathi on his face. Thereafter, a villager focused torchlight on his face and said, “*Ye aadmi nahin hai*”. He asked the villagers to take him to the *Pradhan* of the village. He met a member of the village Panchayat and told him about the incident. He asked the Panchayat member to give him in writing a report of the incident. Thereafter, SI Vivek Dhiman reached the spot, and took him back to the naka point. He insisted that he should resume his duty at the naka point, but SI Vivek Dhiman ordered him to return to BOP Gadra with him for his own safety. Thereafter, he returned to BOP Gadra with SI Vivek Dhiman. He visited Nawagram village the next day and collected written statements from a member of the village Panchayat which along with their English translation were Exhibits L-1, L-2, L-3 and L-4.

21. The record would evidence that signatures of the petitioner were not obtained when the witnesses were examined at the trial. The record would evidence that since petitioner pleaded guilty to the first charge, in compliance with Rule 142 of the BSF Rules, 1969 the Court recorded that it had ascertained that the petitioner understand the nature of the charge to which he had pleaded guilty and was informed of the general effect of the plea. The record would evidence that thereafter the record of evidence was annexed and exhibited as Exhibit-K of the trial record.

22. As noted above the petitioner was held guilty of the three charges and was punished with dismissal from service.

23. Laying a challenge to the punishment inflicted the contentions urged during hearing of the writ petition were :-

(i) That no trial whatsoever was conducted. On May 14, 2000 the petitioner was coerced to sign some papers.

(ii) The proceeding at the trial were vitiated because the Presiding Officer of the Court acted as the Interpreter.

(iii) The petitioner was not granted adequate time to prepare his defence.

(iv) At the trial the Court did not verify the veracity of the statement made by the witnesses at the Record of Evidence stage.

(v) The Record of Evidence was in violation of principle of natural justice because petitioner was denied the opportunity to cross-examine the witnesses and the officer conducting Record of Evidence falsely recorded that the petitioner had declined to make a statement in defence.

(vi) The witnesses were junior level officers and were under the influence of the Commandant to depose against the petitioner. Dukhia, the civilian was also likewise coerced deposed against the petitioner.

(vii) Rule 116 of the BSF Rules was violated because opinion of every member of the Court was not recorded.

(viii) Petitioner was not subjected to any medical examination and thus no opinion could be formed that the petitioner was under the influence of alcohol.

24. Now, the first contention urged is in direct conflict with the second and the fourth contention urged. The first contention is that no trial

whatsoever was conducted and on May 14, 2000 the petitioner was coerced to sign some papers. The second contention is that the trial was vitiated because the Presiding Officer of the Court acted as an Interpreter and the fourth is that the Court did not verify the veracity of the statements made by the witnesses at the Record of Evidence stage. If no trial was held as alleged by the petitioner, where would be the occasion for points No.(ii) and (iv) to even arise.

25. We have seen the original record. It records petitioner's presence. It records that the petitioner had pleaded guilty to the first charge and not guilty to the other two. As per the record Assistant Commandant G.John has acted as the friend of the accused. As noted above, the record would evidence that at the trial the petitioner cross-examined Ct.Ahibran Singh PW-1, Sh.Dukhia PW-2 and Ct.Rajesh Sharma PW-5. To the first witness the cross-examination is directed to elicit that the petitioner was in control of his senses in that did not use any derogatory language or misbehave with anybody. It is apparent that the petitioner was wanting to establish that he was not under the influence of alcohol. The line of cross-examination of Sh.Dukhia PW-2, the civilian is also directed to bring home that the petitioner was not intoxicated with alcohol. The first question put to the witness is as to when he and the petitioner reached the house of the witness how much alcohol was with him. The second question is that when the witness reached the naka point and petitioner offered him country liquor could he tell whether the bottle was sealed. Similarly the line of cross-examination directed towards Ct.Rajesh Sharma PW-5 is to elicit a response pertaining to the language and the behaviour of the petitioner i.e. to bring home that the petitioner, may have consumed alcohol, but was not under the

influence thereof. Further, as noted hereinabove four Exhibits L-1 to L-4 being two reports favourable to the petitioner which he claims he took from the villagers with their English translation are a part of the record of the trial and the four exhibits are referable to the statement made by the petitioner in his defence at the trial. Thus, there is enough clinching evidence to prove that the petitioner was present at the trial.

26. We have lamented in over thirty decisions till date that officers of BSF presiding at the Security Force Court Trials are lax, in that, they do not bother to obtain the signatures of the accused when witnesses are examined and regrettably not even when a plea of guilt, if made, is recorded. This gives birth to an argument, as in the instant case, that the petitioner was never brought before any court and that no trial took place.

27. The second plea that the trial was vitiated because the Presiding Officer of the Court acted as an Interpreter is neither here nor there because Rule 134(2) of the BSF Rules, 1969 requires the Court to either appoint an interpreter or to act as the interpreter at a Summary Security Force Court but after taking the oath or affirmation prescribed for the interpreter. The record records the Court having taken the affirmation prescribed for the interpreter.

28. The third contention that the petitioner was not granted adequate time to prepare his defence is contrary to the record.

29. Sub-Rule (5) of Rule 63 of the BSF Rules, 1969 requires that at a Summary Security Force Court Trial the charge-sheet has to be served at least 24 hours before the trial. As noted above, in the instant case the charge-sheet was served upon the petitioner on May 09, 2000. Trial commenced on May 12, 2000. It was adjourned to May 13, 2000. Thus, the

petitioner was afforded adequate time to prepare for his defence as required by law.

30. The fourth plea that the Court did not verify the veracity of the statements made by the witnesses at the Record of Evidence stage, is a little confusing argument as made. What learned counsel for the petitioner intended to urge was that the Court did not ensure to see whether the witnesses deposed in line with what they had stated during Record of Evidence.

31. It is not the job of any Court to note any discrepancy, inconsistency or improvement made by a witness vis-à-vis a previous statement made by the witness while noting the testimony of a witness. After a witness has deposed, it is for the defence to confront the witness with respect to a previous statement made by him and bring out a discrepancy, inconsistency or improvement. This would be the requirement of law because the witness may have something to explain. Thereafter, during arguments it could be pointed out that there is a discrepancy, inconsistency or improvement made by a witness. Besides, in this case the question of any such argument being advanced does not arise because having perused the deposition of the witnesses at the trial and their statements during Record of Evidence we find neither a discrepancy nor inconsistency nor improvement.

32. The fifth contention that during record of evidence the petitioner was denied opportunity to cross-examine the witness and the officer conducting Record of Evidence falsely recorded that the petitioner had declined to make a statement in defence is belied from the fact, as noted by us hereinabove, that after the statement of the five witnesses examined at Record of Evidence were recorded, the witness, the petitioner and the officer drawing

up record of proceedings signed the same. Thereafter, it was recorded that petitioner has been granted an opportunity to cross-examine the witnesses which he declined. Thereafter, signatures of the petitioner are appended as also those of the officers conducting record of evidence proceedings.

33. The sixth argument that the witnesses were junior level officers and were under the influence of the Commandant and so was the civilian witness Sh.Dukhia. Why would the Commandant coerce people to depose against the petitioner? The petitioner has not alleged any malice against the Commandant. Besides, the line of cross-examination adopted by the petitioner while cross-examining three of the five prosecution witnesses itself suggests that the petitioner admitted that he first consumed alcohol at the naka point and then at the house of Dukhia. The statement made by the petitioner in defence also admits the said fact, albeit with a twist that it was actually Ct.Harpal Singh who consumed alcohol with Dukhia and the two offered him alcohol; he took the glass but threw away the alcohol. Petitioner admitted being at the naka point with Dukhia. He claims to have taken alcohol before going to the naka point. Explaining how his carbine was deposited in the couth after Ct.Ahibaran Singh took in possession and handed over the same to SI Vivek Dhiman, the petitioner conveniently stated that because Dukhia was drunk at the naka point he dropped Dukhia to his house and left the carbine at the naka point. Now, the petitioner had no business to leave his carbine. The petitioner has admitted that he was beaten.

34. We find sufficient evidence emerging at the trial against the petitioner.

35. The seventh argument that Rule 116 of the BSF Rule, 1969 was violated is once again a point urged for the sake of urging one. The Rule reads as under:-

“116.Taking of opinions of members of Court –

- (1) Every member of a Court must give his opinion by word of mouth on every question which the Court has to decide, and must give his opinion as to the sentence notwithstanding that he has given his opinion in favour of acquittal.*
- (2) The opinions of the members of the Court shall be taken in succession, beginning with the member lowest in rank.”*

36. It is apparent that the Rule would apply if a Court is comprised of more than one officers. In the instant case only one officer : the Commandant of the Battalion preside, and was the Court.

37. The last contention that being not subjected to medical examination, there is no evidence that the petitioner was under the influence of alcohol was premised on the distinction between a person consuming alcohol but in control of himself and a person consuming alcohol losing control of self i.e. in a state of intoxication.

38. The ocular evidence of Ct.Ahibaran Singh corroborated by Ct.Rajesh Sharma and Dukhia Murki Munda establishes that firstly alcohol was consumed by the petitioner at the naka point. Secondly in the house of Dukhia Murki Munda. Their testimony establishes that so heavily drunk was the petitioner that he became uncontrollable, requiring Dukhia's wife to summon help from villagers. The testimony of Ct.Ahibaran Singh, Ct.Rajesh Sharma, SI Vivek Dhiman, Dukhia Murki Munda and Kiran Chandra Biswas establishes that since, under the influence of alcohol,

petitioner created a nuisance of himself he was beaten by the villagers and had to be rescued by senior officers. It is settled law that where ocular evidence is of an unimpeachable character, merely because there is lack of medical evidence, would not warrant the ocular evidence to be brushed aside.

39. No other point was urged.

40. The petition is dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(JAYANT NATH)
JUDGE

MARCH 21, 2014
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