

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

Decided on: 11.09.2015

+ **W.P.(C) 8709/2015 and CM No. 19135/2015 and CM No.19136/2015**

NAVIN CHANDRA

..... Petitioner

Through: Mr Ravindra S. Garia and Mr Vikram S.
Mawari, Advs.

versus

UNION OF INDIA

..... Respondent

Through: Mr Vishal Mahajan, Senior Panel
Counsel and Mr Rohan Gupta, Adv. with
Mr Arvind Sharma, DC-Law, and Mr R.P. Singh,
Inspector for BSF

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MS. JUSTICE DEEPA SHARMA (OPEN COURT)

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1. The petitioner has invoked the jurisdiction of this Court under Article 226 of the Constitution for setting aside his conviction under Section 16(d) of BSF Act, 1968 and the sentence of dismissal from service.

2. The brief facts of the case are that the petitioner was on duty from 0200 hours to 0500 hours on 20.07.2012 and on checking by duty NCO, he was found missing at about 0340 hours from his duty post and when a search was made for him, he was found sleeping in 'F' Coy stores shed at about 0540 hours along with his weapon and ammunition. The proceeding of recording of evidence was held and during which statements of six witnesses were recorded. All the six witnesses were duly cross-examined by the petitioner. After completion of the recording of evidence of the

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By:AMULYA

witnesses of the prosecution, the statement of the petitioner was recorded, after issuing caution under Rule 48(3) of BSF Rules Act, 1969. Thereafter, on the basis of the record of evidence, the following chargesheet under Section 16(d) was issued:-

"While on Sentry Duty at Unit Store-Magazine Guard, at 0340 HRS on 20.07.2012 during checking by duty NCO you were found absent from guard duty"

3. A Summary Security Force Court (SSFC) was constituted, which conducted a trial. A friend of the accused Shri V.D. Gangwar attended the SSFC trial along with the petitioner. The Commandant Shri Nanak Chand, who conducted the trial, also acted as an interpreter. The petitioner had pleaded not guilty of the charges. The prosecution examined six witnesses. All the witnesses were duly cross-examined by the petitioner. In defence, he examined one witness Constable Brij Kishore, and, thereafter, he made his statement and closed his defence. Based on the SSFC trial, the petitioner was dismissed from service. He presented statutory petitions which were also dismissed.

4. The petitioner challenges his dismissal on the grounds that the conviction is based on materials which is insufficient to prove his guilt and therefore there is a grave error of fact and law. It is also submitted that the entire proceedings were mala fide and tainted with bias and the charge itself was false. It is submitted that the petitioner was on Store Guard Duty and not on Unit Store-Magazine Guard duty and that the prosecution witness H.C. Anil Kumar has supported the petitioner when he deposed that the petitioner was on "Store Guard Duty". It is further stated that the proceedings were conducted with undue haste and the petitioner was not given proper time and opportunity to prepare his defence and to analyze the

evidence or the documents relied upon against him by prosecution. Denial of proper legal assistance as envisaged under Rule 157 of BSF Rules, is also urged as an infirmity. The friend of the accused, Shri V.D. Gangwar, was appointed on the day when the trial commenced and no document, evidence or record sought to be used against the petitioner, were supplied to him as a result of which he could not render any assistance to the petitioner. It is further contended that the Commandant himself had acted as an interpreter and that the entire proceedings were in English which the petitioner did not understand and, therefore, he did not get proper opportunity to defend himself. It is contended that charges were amended in violation of Section 57 and 58, i.e., without issuance of notice to the petitioner. It is submitted that in the memo of charge, it was stated that he was on "sentry duty at Unit Magazine Guard at 0340 hrs". While after record of evidence, the charge-sheet given to him stated that "he was on sentry duty at unit store-magazine guard, at 0340 hrs"

5. It is further submitted that the petitioner was charged for not being found on duty and, therefore, change in description of duty was a major amendment in charge and since the same was in violation of the process under Section 57 and 58 of the BSF Rules, the trial stands vitiated. It is further contended that the disciplinary proceedings was based on a report dated 20.07.2012 by the Assistant Commandant Akhilesh Bisht, where he reported that the petitioner was on rear guard duty in the magazine (Gola Barood Bhandar) and was absent from the place of his responsibility. It was argued that PW-1, during record of evidence clearly stated that he had found the magazine front and rear guard in position. It is submitted that it was for this reason, that subsequently a different charge-sheet was issued to him. It

is further submitted that Appellate Authority ignored the evidence of the Guard Commander of Store Guard near Magazine who clearly stated that he had checked the guards at 0030 hours and found them alert. It is further pointed out that when the petitioner was allegedly sleeping, the time was about 5.30 hours and by that time his duty was over. It is further contended that his explanation of being absent from duty on the ground that he had gone to drink water and while returning slipped and fallen unconscious, was ignored by the Appellate Authority. Thus, his defence was not considered either by the SSFC or by the Appellate Authority. It is thus submitted that the findings into his guilt are erroneous and contrary to the law and the evidences on record, and has to be set aside.

6. It is argued on behalf of the respondents that the petitioner has cooked up new grounds of challenge and that he had never disputed, during the recording of evidence or before SSFC that he was on sentry duty between 2.00 to 5.00 hours on 20.07.2012 at Magazine Store. It is submitted that the petitioner himself had stated in his statement on 28.07.2012 in the proceedings of recording of evidence that *"on 20th July, 2012 I was assigned duty of magazine-store guard from 200200 to 200500 hrs. I took over charge as sentry at 0200 hrs. on 20.07.2012 and also in SSFC trial when he has stated in his statement that "I was detailed for Guard Duty at Store Magazine Guard from 200200 hrs to 200500 hrs." It is further contended that even the defence witness—who had replaced the petitioner when he was found absent on the directions of the Guard Commandant HC J.D. Mishra—clearly stated that "On 20th July, 2012 I was detailed as guard for store magazine guard and my duty was to be started at 200500 hrs, at about 200440 hrs I was directed by the Guard Commander HC J.D. Mishra, to*

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immediately go to Morcha at Store Magazine Guard for duty as CT Navin Chandra is absent from Store Magazine Guard. When I came to Store Magazine Guard I didn't find CT Navin Chandra in his Morcha." It is further argued that the prosecution examined six witnesses in the recording of evidence proceedings and the petitioner did not suggest in the cross-examination to any of the witnesses that he was not on Magazine Store Guard duty and that he was on 'Store Guard Duty'. Even no such suggestion was made to any prosecution witness during SSFC. It is further argued that petitioner is blowing hot and cold at the same time. While he has contended that he was never missing from his duty and the charge that he was missing from duty, is a ploy to dismiss him from service, in his petition under Section 117 BSF Act, 1968 and in his statutory appeal to DG, he had taken up the plea that he had gone to drink water and slipped, fell and became unconscious due to weakness caused by dysentery and his plea was not taken into consideration by the Disciplinary Authority. In this way, he has also admitted that he was on duty on that day and had left his duty post to drink water. It is submitted that the evidence recorded during the proceedings of record of evidence and subsequently in SSFC clearly establishes that the petitioner was on duty on 20.7.2012 from 2.00 hours to 5.00 hours and was found missing during patrolling at about 3.40 hours. All the witnesses were duly cross-examined by the petitioner. He also admits the assistance of Shri V.D. Gangwar and that the entire proceedings were explained to him—moreover—he never explained inability to understand the proceedings or inability to prove his defence, etc. during SSFC.

7. We have heard the learned counsel for the parties. There is no dispute that the petitioner was on duty from 2.00 hours to 5.00 hours on 20.07.2012.

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While the contention of the petitioner is that he was on Store Guard Duty and the store contains the bedding and other articles of the personnel on leave and some article of persons on duty and does not have any arms and ammunitions and military equipment, the contention of the respondent is that he was on sentry duty at Unit Store Magazine Guard. It is apparent that it is for the first time before this Court that the petitioner has taken the plea that he was on Store Guard Duty at the store which contained bedding and other articles. Neither during proceedings of record of evidence nor in SSFC did he raise this plea. No suggestion was given to any of the witnesses that he was not on duty at Unit Store Magazine Guard as a sentry. Even in his statement recorded during recording of evidence and made before SSFC, he had not taken the plea that he was not on duty at Unit Store Magazine Guard, but at a store containing the bedding, etc. of personnel on leave or on duty. He rather admitted in his defence statement that *"he was assigned duty on Magazine Store Guard from 2.00 hours to 5.00 hours"* and took charge as sentry at 2.00 hours on 20.07.2012 and in SSFC also he had stated that *"I was detailed for Guard Duty at Store Magazine Guard from 200200 hrs to 200500 hrs"*. His defence witness has also stated the same facts. In view of these evidences, the findings of the Disciplinary Authority that the petitioner was on sentry duty at Store Magazine Guard cannot be found fault with.

8. As per Rule 157 of BSF Act, the petitioner was provided a friend to help him during SSFC trial and Mr V.D. Gangwar had participated in trial.

9. At no stage, Mr Gangwar or the petitioner had requested the Court for supply of any deficient documents or proceedings to them. They also did not express any lack of understanding of the proceedings conducted by the SSFC. If the petitioner or his friend, were unable to understand the

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proceedings or they needed any document or further assistance of any sort, ought to have expressed their desire to the Court and in the absence of any such objection being raised during the trial, the plea raised before us lacks genuineness. Besides that, the trial before the SSFC clearly shows that the petitioner had fully understood the proceedings, including the statements of the witnesses and that is why he could cross-examine them. The way the questions were being put to the witnesses in their cross-examination by the petitioner shows that the petitioner had fully understood the testimonies of the witnesses and could formulate his questions intelligently. There is nothing on the record to show that he was unable to understand the proceedings before SSFC. He has also examined his defence witness, therefore, it cannot be said that he was not afforded full opportunity by the Court. Merely because the Court had taken upon himself the responsibilities of an interpreter, does not per se vitiate the entire proceedings unless the petitioner shows that a prejudice has been caused to him. The petitioner has failed to point out anything on record which remotely suggest that he either had been deprived of proper opportunities to defend himself or was unable to prepare his defence or put up his defence effectively or suffered with inability to cross-examine the witness in a proper manner. The proceedings, therefore, do not suffer with any infirmity.

10. The contention of the petitioner is that the findings of guilt remain unsupported, in view of deposition of the Guard Commander who had stated that he found the Guards on checking, alert at 0030 hours, and thus proves that the petitioner was on duty and not missing from duty, is devoid of any merit for the reason that the charge against him was that he was found missing by PW-1 while patrolling at about 3.40 hours, while the statement

of the Guard Commander relates to the time 0030 hours, when he was not put on duty, as his duty hours started from 2.00 hours. Not only this, the petitioner explained that while on duty he had gone to drink water when he slipped and fell unconscious due to his weak condition, owing to the dysentery with which he was suffering. So the fact that he was missing from his duty is admitted. The petitioner's plea is also that his absence from duty was not deliberate or intentional but he actually fell somewhere while drinking water as he was suffering from vomiting and dysentery of such severe nature which so weakened him to render movement difficult. The contention of the petitioner is controverted by the respondent. If it is true, it was reasonable that the petitioner would have reported to the MI Room of the Coy for treatment. In such case it was his duty to produce the medical prescription to substantiate his plea, but no such document was produced by the petitioner either during record of evidence proceedings or in SSFC or before us. Moreover, his plea is improbable in the light of certain facts which emerge from testimony of witnesses. HC Anil Kumar categorically stated that petitioner was found sleeping in the Store of 'F' Coy. ASI Mithlesh Kumar, PW-4, has also stated that when he was looking for the petitioner, he saw HC J.D. Mishra bringing out Constable Naveen Chandra from the "Coy Store Room" Even before SSFC, HC Anil Kumar categorically stated that at about 5.30 hours, the accused was found sleeping in the store of 'F' Coy. PW-3 HC J.D. Mishra has also clearly stand that *"we found Ct. Naven Chandra sleeping in coy store"*. PW-4 has also stated that *"by the time I came to the front and I saw that HC J.D. Mishra was bringing out Ct. Navin Chandra from the Coy store room."* In their cross-examination, no suggestion was given by the petitioner that they did not find

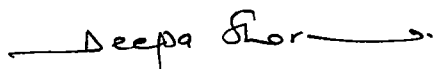
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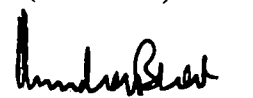
him sleeping in the Coy store room, but that he was found unconscious near the water point near MI Room. If we believe the explanation of the petitioner that he due to the weakness had fallen down and become unconscious, when he had gone to drink water near the water point near MI Room, the question he reached to the Coy store room where he was discovered sleeping, is a mystery.

11. The petitioner's plea is false and unsubstantiated by any evidence (oral/documentary on record) while on the other hand, the testimonies of the prosecution witnesses that he was found sleeping in the Store Room during his duty hours stands corroborated. In the light of the testimonies of the prosecution witnesses, the plea taken by the petitioner does not inspire confidence.

12. From the above discussion, it follows that the finding of the petitioner's guilt is based on the evidence on record and that there are no mitigating circumstances on record in favour of the petitioner. In the light of the above, there is nothing to warrant us to interfere with the impugned order.

13. The writ petition, therefore, fails and the same along with the pending applications is accordingly dismissed. No order as to costs.


DEEPA SHARMA
(JUDGE)


S. RAVINDRA BHAT
(JUDGE)

SEPTEMBER 11, 2015/BG